# 1AC Platforms

### 1AC – Plan

#### The United States federal government should remove plaintiffs’ heightened burden of proof for antitrust cases in platform markets.

### 1AC – Platform Adv

#### Platform companies facilitate transactions between two sets of users – the *Amex* decision made it extremely difficult to challenge anticompetitive conduct in those markets

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(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

A. Against Platform Exceptionalism

In *Amex*, the Supreme Court disregarded a basic principle about markets, which is that they consist of close substitutes.212 Instead, it lumped production complements into the same market, and in the process, it stymied coherent economic analysis of the problem. To be sure, power in one side of a two-sided market cannot be assessed without determining what is occurring on the other side. But one does not need to group the two sides into the same “market.” Rather, a relevant market should be determined by reference to the side where anticompetitive effects are feared. Then, assessing power requires the fact finder to consider offsetting effects, some of which may occur on the other side.213

Second, the Court ignored an important distinction between fact and law. Disputes about market boundaries involve questions of fact. Nevertheless, the majority wrote—as a matter of law—that two-sided platforms compete exclusively with other two-sided platforms. These dicta have already produced mischief in lower-court decisions. For example, it led one court to conclude that a merger between a two-sided online flight-reservation system and a more traditional system could not be a merger of competitors.214

Third, without argument or evidence, the Court required litigants to show market power indirectly in vertical restraints cases by reference to a relevant market, even though superior techniques are available. Direct measures are particularly useful in digital markets, where the necessary data are easy to obtain and product differentiation makes traditional market definition unreliable.215 This was another breach of the boundary between fact and law.

Fourth, the Court misunderstood the economics of free riding, ignoring the fact that when a firm is able to recover the value of its investments through its own transactions, free riding is not a problem.

Fifth, the Court failed to perform the kind of transaction-specific factual analysis that has become critical to economically responsible antitrust law. Rather, it simply assumed, without examining the actual transactions before it, that losses on one side of a two-sided market are inherently offset by gains on the other side.216 Amex’s antisteering rule produced immediate losses for both the affected cardholder and the affected merchant. The only beneficiary was Amex, the operator of a platform able to shelter itself from competition. That competition, in turn, would have benefitted both cardholders and merchants.

Markets differ from one another.217 This is why we apply mainly antitrust law to some markets, regulation to others, and some mixture of the two to yet others. It is also why antitrust is so fact intensive, particularly on issues pertaining to market power or competitive effects. Indeed, the biggest advantage that antitrust has over legislative regulation is its fact-driven methodology. Antitrust courts do and should avoid speaking categorically about market situations that are not immediately before them and avoid making cursory conclusions based on inadequate facts. Within the antitrust framework, there is no reason to think that digital platforms are unicorns whose rules as a class differ from those governing other firms. Every market has its distinct features, but the ordinary rules of antitrust analysis are adequate to consider them. The *Amex* decision is a cautionary tale about what can happen when a court is so overwhelmed by a market’s idiosyncrasies that it makes grand pronouncements, abandoning well-established rules for analyzing markets in the process.

#### Specifically, *Amex* set super high burdens for Plaintiffs – forcing them to prove harm to users on both sides of the platform

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(John, “Antitrust and Two-Sided Platforms: The Failure of *American Express*,” Cardozo L. Rev. Vol. 41)

In sum, the Court's most fundamental error in *American Express* was its ruling that in a two-sided platform case, the plaintiff must show, in the first step of the rule of reason, that the defendant's conduct caused net harm to customers on both sides of its platform combined. This requirement, unprecedented in the Court's decisions, is not only substantively wrong, it will force plaintiffs in two-sided platform cases to address market power, anticompetitive effects, and justification all at once, at the beginning of their cases. This is inefficient and will result in more false negatives.75 To take advantage of this new framework, moreover, numerous defendants are likely to claim that they operate twosided platforms, further inhibiting antitrust enforcement.76

[Begin fn76]

76 See Hovenkamp, supra note 9, at 48 ("[U]nder the AmEx standard, we can expect an

outpouring of defendants emphatically claiming to be two-sided .... ).

[End fn76]

The Court overlooked all of these problems. 77

#### Amex’s platform rule is theoretical nonsense—that spills over to stymie enforcement in numerous sectors

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(Kaj, “Antitrust After American Express: Down a Competitive Effects Rabbit Hole,” September 21, <https://techlawdecoded.com/antitrust-after-american-express-down-the-competitive-effects-rabbit-hole/>)

What does make American Express unique, and the reason it has pushed the trajectory of antitrust even further into a competitive effects abyss, are the implications on the modern tech-based economy of the Supreme Court’s views on the proof that is required in cases involving two-sided markets.

Two-sided platforms are at the core of wide swaths of the online ecosystem, including retail (Amazon’s marketplace), social media (Facebook), online advertising (Google Ads), the internet of things (Apple’s HomePod), search (Microsoft’s Bing), and the gig economy (Uber), to name a few examples. The American Express decision has significantly raised the evidentiary bar for proving up an antitrust case in such markets. It will no longer be enough to show that a platform harmed competition on one side of the market—as difficult and burdensome as that task already is. Now “substantial anticompetitive effects” must be shown across both sides of the market, accounting for all the participants and users of a multi-sided platform in something akin to the “credit card transactions” market proposed in American Express.

But the logic underlying the American Express decision does not stop at multi-sided platforms. It is not difficult to imagine how creative defendants and laissez faire-inclined judges could spin a web of ever-increasing complexity in any case about a sprawling market with interconnections and interrelationships among different users, partners, and participants. This is a natural consequence of falling down the competitive effects rabbit hole. If it is not reined in, the competitive effects machinery tends towards entropy, especially in complex digital markets where a single player can be interacting with various segments of a broader digital ecosystem.

#### Inability to effectively contest platform conduct kills innovation

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(Rebecca, “Antitrust’s High-Tech Exceptionalism,” 130 Yale L.J. 588)

American competition policy has a big problem. Actually, it has four big problems: Amazon, Apple, Facebook, and Google. What was once a dynamic pool of smaller start-ups, the high-tech sector has now coalesced around just four companies that together reported over $773 billion of revenue in 2019.1 Each reigns over its own segment of the high-tech marketplace: Amazon controls the retail sector, Apple dominates devices and apps, Facebook owns social media, and Google virtually governs the internet itself. To the extent Silicon Valley still churns out a steady stream of startups, it is more to feed these beasts by acquisition than to produce meaningful rivals to their empires.2

Of course, not everyone agrees that this state of affairs is a problem at all. To some, the size of these firms is merely a symptom of their success. Relentless innovation, a customer-is-king mentality, network effects that benefit consumers, and economies of scale have made these firms ever larger and their products ever better for American consumers. Some even contest the idea that they are large at all by arguing that in a properly defined market, each firm faces significant rivalry and thus lacks market power. Some think that American antitrust law should pat itself on the back for fostering the competitive conditions that let these innovative companies thrive.3

However, this view is increasingly unpopular, and for good reason. Each of these companies, in its own way, holds the keys to competitive entry in many important online markets. To bring an app to market, a developer must deal with Apple; to reach online shoppers, retailers must use Amazon, and so on. Without a meaningful choice between platforms, independent sellers, developers, and websites must pass through a privately maintained bottleneck often on unfavorable terms. These restrictions on competition harm consumers by reducing the output and raising prices for goods that must pass through the bottleneck, and by reducing firms’ incentives to innovate—if they know a large portion of their profits will be appropriated by the platform, they have less incentive to bring new products to market. And by controlling the throttle of technological innovation, each dominant firm can stave off the possibility that one of these nascent companies will build a rival network—a platform that can break the bottleneck itself.4 Long-term, stable platform dominance means consumers likely will not see the kind of Schumpterian innovation associated with great technological leaps forward.5 Rather, consumer welfare depends on these platforms’ internal incentives to innovate, which are weakened in the absence of true rivalry.6 In short, there is a growing recognition that as much as these companies have innovation to thank for their success, their current tactics are making it hard for the next generation of disruptive innovators to take over. If antitrust law continues to stand by, consumers will pay the price.

#### Fintech’s disruptive startups have been squashed by large financial institutions

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

Fintechs can be of any size. Four of the ten largest U.S. companies, Google, Apple, Amazon, and Facebook, all have built payment systems and made other inroads into finance.36 Despite the participation of large technology companies, the main drivers of fintech innovation have been the thousands of startups attracting billions of dollars in investment each year. Startup business models are novel, diverse, and shifting. One of the earliest fintech areas was peer-topeer lending, in which companies link individuals who have money to those who want it.37 Most of the original peer-to-peer companies have already grown beyond their origins and now engage in more familiar "marketplace lending."38 They receive money from banks to lend to individuals, and their innovations have spread to other areas, such as sophisticated analytic tools for estimating borrowers' creditworthiness.39

Unlike the other categories of consumer fintechs, advisory fintechs do not need to directly receive any money from consumers to offer their basic product. The goal of Credit Karma, NerdWallet, Mint, and other advisory fintechs is to help people make all of their financial decisions through a single app.4" These companies learn about users-with permission-by accessing personal bank accounts, credit scores, credit card records, tax returns, and other similar sources of financial information. Users then receive recommendations about credit cards or mortgages with lower fees, savings accounts that pay higher rates, and other products that better meet their needs.41

While the term "fintech" is used here to exclude traditional banks, all major financial institutions have become highly technological. The leading banks are each purchasing fintech startups, forming strategic partnerships, or internally building whiz teams to design new products.42 JP Morgan Chase's Intelligent Solutions Group has over 200 analysts and data scientists and produced about fifty technologies in 2015 alone.43 Goldman Sachs, which has more engineers than Facebook or Twitter, is launching an online lender.44 In light of Wall Street's increasing launch of digital products and adoption of artificial intelligence,45 regulating fintech amounts to regulating the future of finance.

B. Private Sector Institutional Dynamics

Fintechs could in theory pose a threat to traditional banks. Almost threequarters of millennials say they would prefer to receive their financial services from technology companies such as Google and Amazon, rather than big banks.46 Convenience, trust, and price all could play important roles in driving customer switching. Individual users, including small businesses, increasingly find dealing with big banks to be time-consuming and frustrating compared to the ease of tailored startup apps.47 In recent years, consumers have grown distrustful of large financial institutions, whose reputations have been battered by subprime mortgage lending, the financial crisis, the LIBOR scandal, and Wells Fargo opening millions of fake accounts in customers' names. 48

Innovation helps explain why publicly traded companies are disappearing at a faster rate today than ever before-six times as fast as forty years ago.49 Online startups have even thrived in other heavily regulated industries, such as transportation and gambling." Convenience and lower costs have driven some of this success, and many fintechs offer similar advantages.51 Furthermore, unlike some industries that Silicon Valley has invaded, finance lacks a meaningful physical component. This makes the base products inherently vulnerable to digital competition. Traditional banks' infrastructures-including their legacy information systems and physical branches-inhibit their ability to rapidly respond to disruption.

Since Dimon's 2015 warning, however, the dynamics between fintech and traditional firms appear to have shifted. Entrepreneurs who started out wanting to do to banks what Amazon did to retail have wound up licensing their technology to banks.52 As one industry observer puts it: "What was once perhaps an adversarial relationship has warmed .... Many no longer see an existential threat in fintech. Instead, they believe that "[i]t is most likely that the small fintech companies will be subsumed" by large financial institutions. 4

Ii. The Competition Shortcomings

A given fintech's decision of whether to challenge or join banks will depend in part on whether regulations and market dynamics give it a real chance to compete. Competition is extremely difficult to measure, and economic models inadequately consider important factors, such as innovation.5 To assess the hypothesis that a lack of competition inhibits fintech, this Part surveys the evidence related to entry barriers, customer switching, anticompetitive prices, and the relative pace of U.S. innovation.

A. Entry Barriers

When firms face excessive barriers to entering a market, competition can stagnate, raising prices and lowering innovation. 6 Although part of the problem is simply the large amount of regulation, 7 fintech has faced two further entry barriers: traditional firms' ability to block market access and the difficulty in obtaining a federal bank license.

Legacy financial institutions can limit some fintechs' operations through control of data. Most notably, advisory fintechs rely on access to both personal and general product data. 8 Some banks' response has been to block or limit fintechs' access to customer accounts, thereby making it harder for fintechs to provide tailored advice. 9 Legacy institutions can also block fintechs from collecting online product information by using laws never intended for such a purpose, including trespass to chattel, the Digital Millennium Copyright Act,6 " and the Computer Fraud and Abuse Act.61 As a result, advisory fintechs cannot on their own provide comprehensive financial advice to their users. In order to access crucial data, fintechs may need to prioritize big banks' interests over helping consumers switch.

Some legacy firms can also limit market access through their dominant market positions. Over 99 percent of all credit card transactions run through the Visa, American Express, Mastercard, and Discover networks.62 Many commentators have documented credit card companies' ability to engage in exclusionary conduct, such as vertical restraint clauses that prevent merchants from using other payment methods.63 Although credit card companies may not be able to use those same tactics against payment fintechs, their strong market positions could enable them to deploy other tactics. They have, for instance, instituted "Honor All Cards" rules requiring merchants to accept their contactless payments as a condition of accepting plastic cards. These rules arguably "foreclose entry to those digital wallets that.., do not use the credit card networks for payments. 64

#### That means US fintech will lose to international competitors.

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C. International Competitiveness

Less efficient and innovative U.S. financial services are problematic not only in isolation, but also from an international perspective. Scholars and regulators have inconclusively debated whether banks need to be big to maintain their international competitiveness. 12' Less well-recognized is how a lack of domestic competition may undermine U.S. financial firms' global competitiveness. Foreign financial firms may gain an edge by being subject to greater competition in their home markets, thereby being forced to innovate more and operate leanly. This creates two potential problems. First, reduced domestic competitiveness may make the United States less able to enter foreign markets. The U.S. economy has benefited in recent years from billions of dollars in revenues earned abroad by Google and other leading digital companies. 126 Given the growing portion of the global economy taken up by finance, the fintech lag could constitute a large-scale missed opportunity for U.S. firms to strengthen the economy by bringing in revenues earned abroad.

Second, in the long term, American financial firms may become more vulnerable to international competition even in domestic markets. Although U.S. licenses can shield banks from foreign fintech challengers today, distributed ledger technologies may change this. Americans are already increasingly using Bitcoin, Ethereum, and other unregulated virtual currencies based on blockchain technology.127 Much is unknown about how such technologies will develop, and the trust offered by a governmentally overseen financial system may prove difficult to replicate. 128 If, however, an era of wide-open global finance arrives, U.S. financial institutions could find themselves suddenly exposed to international competition as never before. Without U.S. regulators to insulate them, U.S. financial institutions made soft by lesser competition would be more prone to lose significant market share to foreign financial institutions than they would be if domestic markets were more competitive.

#### Fintech innovation is key to the effectiveness of U.S. economic sanctions

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Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 25-26, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

Developments in financial technology also have the potential to affect the availability and strength of coercive economic measures over the longer term. The movement to develop blockchain-based, decentralized payments platforms and new digital currencies or tokenized assets that feature anonymity can undermine the strength of coercive economic measures. However, financial technology developments, such as the development of artificial intelligence/machine learning (AI/ML) compliance technologies, also present potential means to better detect and stop evaders and avoiders of U.S. economic coercion throughout global chains of financial interconnectivity.

Financial technologies are not themselves the drivers of potential future changes to the sources of coercive economic leverage. However, they may enable foreign governments to develop better tools to insulate transactions from U.S. jurisdiction. And, regardless of the actions of foreign governments as they spread commercially, they may help evaders duck U.S. coercive economic power in limited but meaningful ways. Conversely, new AI/ML or other technologies may help U.S. policymakers implementing economic coercion to better do their job.

Financial technology can be a facilitator of rapid transformation in the financial services sector. Importantly, financial technology developments will not happen just in the United States; a number of other countries, from China to Singapore to Switzerland, are promoting themselves as financial technology leaders. There is no guarantee that financial technology innovators and investors will be centered in the United States in the future—which represents a vulnerability to U.S. economic prominence.

Maintaining U.S. Leverage

The extent to which the United States will maintain coercive economic leverage in a world where financial technology disrupts aspects of the traditional financial architecture will depend to a significant degree on the extent to which U.S. firms, and large global firms, continue to play a dominant role in the development of the technology. To put it bluntly, a blockchain-based clearing mechanism that enables trade between foreign countries without financial transactions touching the dollar would likely undermine U.S. leverage if the technology were developed and operated by a foreign company that had no need to adhere to U.S. law. The United States would maintain at least some leverage if the technology were developed or operated by a U.S. company obliged to adhere to U.S. sanctions, technology-export restrictions, and other relevant laws, or a foreign company with significant U.S. exposure.

#### Specifically, North Korea

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Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 14-15, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

Technology

Technological developments have also played an important role in strengthening U.S. coercive economic leverage. New analytic computer technologies have increased the capacity of both U.S. government agencies and private-sector companies to detect and stop suspected sanctions evasion. Surveillance technologies have also improved in recent years, providing government agencies, reporters, and activists with new tools to track evasion. For example, the recent deployment of sophisticated, low-cost global imaging satellites has improved the tracking of North Korean and Iranian ships involved in sanctions evasion.41 The importance of, and—at least to date and in the short term—the relative lack of alternatives for U.S. technologies, particularly for telecommunications or computing, in global supply chains has also increased U.S. coercive economic leverage, as the ZTE case illustrates.

Other technological developments, however, have had an adverse, if limited, impact on U.S. coercive economic measures. A prominent development has been the rise of cryptocurrencies, such as Bitcoin, which many have used to skirt sanctions. North Korea, for example, has used multiple avenues to obtain cryptocurrencies, including cryptocurrency mining, using ransomware attacks and demanding payment in cryptocurrency, and stealing cryptocurrency by hacking into cryptocurrency exchanges.42 Iranian groups have also relied on cryptocurrencies as a way of facilitating illicit activities. This prompted the U.S. Treasury Department in November 2018 for the first time to publicly issue identifying information for specific digital currency addresses (unique strings of alphanumeric digits identified/associated with specific digital currency wallets) in an effort to freeze Iranian cryptocurrency accounts subject to U.S. jurisdiction and to persuade foreign cryptocurrency exchanges to cease dealing with Iran.43 In October 2018, the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN) also warned about potential Iranian use of cryptocurrencies in an advisory highlighting a range of illicit Iranian financial activities and sanctions evasion tactics.44 To date, however, the adverse impact of these technological developments on U.S. coercive economic measures has been comparatively small. Furthermore, it has generally been on par with those of other types of criminal activity by sanctions evaders, rather than representing a major new threat. For example, North Korea’s cryptocurrency efforts appear to be significantly smaller in value than many other North Korean revenue-raising activities conducted in violation of sanctions, including selling labor overseas and traditional criminal smuggling. The value of Iranian cryptocurrency schemes is estimated to be in the millions, not billions, of dollars.45 Cryptocurrencies are not widely enough accepted by companies around the world for sanctioned actors to use to them to engage in significant commercial trade, such as selling oil or other commodities on global markets, or to make large-scale purchases of key economic inputs. In addition, U.S. authorities have already demonstrated that they can restrict sanctioned actors’ ability to use cryptocurrencies. Following the November 2018 U.S. Treasury action identifying Iran-linked digital currency addresses, several major cryptocurrency exchanges, including non-U.S. exchanges such as Binance, appear to have decided to withdraw from offering services in Iran.46

Technological developments may have the potential to enable meaningful impacts on U.S. coercive economic measures over the longer term, however. Financial technology developments—new digital ways to demarcate, raise, store, and move monetary value—as a factor in the continuing utility of U.S. coercive economic measures will be discussed later in this paper.

#### Sanctions evasion causes missile development

Elizabeth Rosenberg, Elizabeth Rosenberg Former Senior Fellow and Director, Energy, Economics and Security Program, CNAS, and ​Neil Bhatiya Former Adjunct Fellow, Energy, Economics, and Security Program, CNAS, March 4, 2020, Busting North Korea’s Sanctions Evasion, https://www.cnas.org/publications/commentary/busting-north-koreas-sanctions-evasion

The Problem is Growing

North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity.

The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector.

North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity.

North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers.

All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector.

As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies.

Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities.

Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state?

As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are:

real, high-level political will, and

greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities.

The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect.

What’s the Plan?

We know that the challenges are large. So, what’s the plan?

First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand.

But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats.

A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators.

Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators.

Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

#### Continued North Korean missile development will result in attempts at forced reunification

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North Korean Nuclear and Missile Capabilities

Pyongyang’s evolving nuclear and missile forces increasingly provide the regime with the ability to conduct a surprise preemptive first-strike, retaliatory second-strike, and battlefield counter-force attacks. Pyongyang has:

• Produced 30–60 warheads,11 can create fissile material for 7–12 warheads per year,12 and successfully tested a hydrogen (thermonuclear) weapon at least 10 times as powerful as the Hiroshima and Nagasaki bombs;

• Expanded and refined manufacturing facilities for fissile material, nuclear weapons, missiles, mobile missile launchers, and reentry vehicles;13

• Created a new generation of more advanced, accurate, and survivable missiles for all ranges that escalates the nuclear threat against South Korea, Japan, US bases in Okinawa and Guam, and the continental United States;

• Developed mobile land-based and sea-based missile systems that are harder to detect and target;

• Produced several different solid-fueled missiles that reduce the time necessary for launch, thereby constraining warning time for the US and its allies; and

• Practiced missile launches under wartime conditions by firing multiple missiles from numerous locations throughout the country, simulated nuclear airburst attacks over South Korea and Japan, and conducted salvo launches of several missiles simultaneously.

Pyongyang has an extensive and diversified missile force to attack targets in South Korea, Japan, US bases in the Pacific, and the continental United States.

South Korean Ports and Airfields

To prevent the US from augmenting forces in South Korea during a conflict, North Korea would use nuclear weapons on South Korean ports and airfields. In 2016, Kim Jong-un oversaw several successful surface-to-surface (SCUD) and Hwasong-7 (No Dong) mobile missile launching exercises that simulated preemptive nuclear airburst strikes against South Korean ports and airfields to be used by the US military.14

South Korean Leadership and Military Targets

Pyongyang vowed to initiate a preemptive nuclear attack against the South Korean leadership, including the presidential Blue House, if the regime perceived even a “slight sign” of US or South Korean preparations for a decapitation strike on the North Korean leadership.15 North Korea warned that it could turn South Korea into a “sea of flames” with its long-range artillery force and “reduce all bases and strongholds of the US and South Korean warmongers…into ashes.”16 The regime has deployed SCUD missiles, Pukguksong-2 (KN-15), and Hwasong-7 (No Dong) medium-range missiles. North Korea achieved breakthrough successes with several short-range missile systems in development that emphasized survivability, accuracy, and ability to defeat allied missile defenses.

Defeating Ballistic Missile Defenses (BMD)

North Korea is developing several systems and tactics that would be more effective in degrading or defeating allied missile defenses. Pyongyang has launched missiles to a higher altitude and shorter range which could allow a warhead to arrive at a steeper angle of attack and faster speed which could exceed BMD interception capabilities. The KN-18 and KN-21 SCUD variants have maneuverable reentry vehicles and the KN-23 has a flight profile that showed evasive characteristics instead of a typical ballistic parabola. The KN-23 was flown at depressed trajectories, potentially between the upper reach of Patriot missiles and below the minimum intercept altitude for Terminal High Altitude Area Defense (THAAD), with a final pull-up maneuver that provides a steep terminal descent.17 The KN-23 could also be used in a first strike against leadership, hardened command and control, or high-value military targets. North Korea demonstrated the ability to fire several missiles at once which could enable salvo attacks by less accurate SCUD missiles to overwhelm BMD systems.18

SLBM Threat

North Korea has successfully tested the Pukguksong-1 (KN-11) and Pukguksong-3 (KN-26) submarine-launched ballistic missiles (SLBM) which could target South Korea and Japan, potentially with a nuclear warhead. South Korea does not currently have defenses against SLBMs. The THAAD BMD system radar is limited to a 120-degree view that is directed toward North Korea, precluding it from protecting against SLBMs arriving from either the East or West Seas.19 The SM-2 missile currently deployed on South Korean destroyers only provides protection against anti-ship missiles.

Establishing North Korean Area Denial

Pyongyang could use theater nuclear strikes against US bases in Japan and Guam to prevent the flow of forces and logistics to the peninsula that are planned in the time phased force deployment data (TPFDD) plan. Pyongyang has repeatedly threatened US bases throughout the Pacific, often citing Guam.20 The regime has developed the Hwasong-10 (Musudan) and Hwasong-12 (KN-17) intermediate-range missiles to hit US bases on Okinawa and Guam.

Threatening the US Mainland

Pyongyang has threatened to “reduce the US mainland to ashes and darkness.”21 Kim was photographed in front of a map labelled “US Mainland Strike Plan,” with missile trajectories aimed at Washington, DC, Indo-Pacific Command in Hawaii, San Diego (a principal homeport of the Pacific Fleet), and Air Force Global Strike Command at Barksdale Air Force Base in Louisiana.22

In 2017, North Korea conducted three successful tests of

the Hwasong-14 (KN-20) and Hwasong-15 (KN-22) ICBMs to replace the earlier, less capable KN-08 and KN-14 ICBMs. General Terrence O’Shaughnessy, commander of North American Aerospace Defense Command (NORAD), testified that North Korea demonstrated the capability to threaten the US homeland with thermonuclear-armed ICBMs capable of ranging most, or all, of North America.23 US Forces Korea assessed that the Hwasong-15 ICBM has a range of 8,000 miles and is capable of reaching anywhere on the US mainland.24

New War Plan

After assuming power, Kim Jong-un directed the North Korean military to develop a new strategy to invade and occupy Seoul within three days and all of South Korea within seven days. North Korea had studied US operations in Afghanistan and Iraq and concluded it must prevail quickly before US reinforcements arrived. This would necessitate early use of nuclear weapons.25

The Korean People’s Army General Staff declared that

“the first combined task units stationed in the eastern, central, and western sectors of the front will [carry] out the preemptive retaliatory strike at the enemy groups with ‘an ultra-precision blitzkrieg strike of the Korean style.’ ”26 North Korea has warned that “any military conflict on the Korean Peninsula is bound to lead to an all-out [nuclear] war, an ultra-harsh war of reaction targeting the entire US mainland.”27

Future Capabilities Open Dangerous Doors

North Korea’s continually advancing proficiencies suggest additional and more worrisome evolutions in its nuclear doctrine. Pyongyang may be on the path to developing capabilities that go beyond deterrence to a viable offensive warfighting strategy.

In a few years, North Korea could have 100–200 nuclear warheads, dozens of mobile ICBMs, and hundreds of improved, survivable short-, medium-, and intermediaterange missiles, as well as submarine-launched missiles. North Korea possessing a more formidable military threat would put allied forces at greater risk, augment the danger to the continental United States, and degrade military responses to North Korean actions.

Greater nuclear capabilities could undermine the effectiveness of existing war plans. For example, rather than fully implementing all phases of OPLAN 5015 after a North Korean attack, the allies may strive only for returning to the status quo ante rather than fully liberating North Korea. North Korea’s ability to target American cities with thermonuclear weapons could inhibit US responses or exacerbate growing allied concerns about the viability of the US extended deterrence guarantee. South Korea and Japan have already questioned US willingness to risk its cities for theirs.

The defense of the continental US is currently provided by 44 ground-based interceptors in Alaska and California. Several interceptors would likely be fired at each incoming North Korean missile since the current North Korean ICBM arsenal is small. However, continued North Korean ICBM production could overwhelm US missile defenses.

A more survivable North Korea nuclear force could create first-strike uncertainty for the United States of not being able to get all of Pyongyang’s North Korea’s nuclear weapons. Coupled with the risk of numerous American cities attacked by hydrogen bombs, Washington might be perceived as being hesitant to respond to North Korean actions. As the fictional nuclear strategist Dr. Strangelove opined, “Deterrence is the art of producing in the mind of the enemy, the fear to attack.”

If North Korea believes the US is unwilling to risk catastrophic civilian losses, the regime could feel emboldened to act more belligerently in pursuing its strategic objectives. A former North Korean official testified before Congress in 1997 that “Kim Jong-il believes that if North Korea creates more than 20,000 American casualties in the region, the US will roll back and that North Korea will win the war.”28

Pyongyang may even conclude that nuclear weapons provide the ability to fulfill its oft-stated goal of reunifying the Korean Peninsula on regime terms. Kim Jong-un declared that North Korea “should not allow the national split to persist any longer but reunify the country in our generation without fail.”29 The regime has repeatedly pledged to achieve the “final victory in a great war for national reunification.”30

Deterrence and Diplomacy:

Two Sides of the Same Coin

The arms control community argues that deterrence maintains the nuclear problem but does not solve it. They suggest that there is a need for the US to engage with North Korea to reach a diplomatic resolution to the long-standing nuclear problem.

The international community, including the United States, has repeatedly attempted to do so, having concluded eight denuclearization agreements with North Korea. All failed due to Pyongyang’s cheating or leaving obligations unfulfilled. During these and subsequent negotiations, Washington offered economic benefits, developmental assistance, humanitarian assistance, diplomatic recognition, declarations of non-hostility, turning a blind eye to violations, not enforcing US laws, and reducing allied defenses. Despite these concessions, North Korea still has an insatiable list of security, diplomatic, and economic demands. These include the conclusion of allied military exercises, withdrawal of all US troops from South Korea, abrogation of the US–South Korea defense treaty, ending the US extended deterrence guaranty, signing a peace treaty to end the Korean War, a security guarantee, non-criticism of the regime, and removal of all US and United Nations (UN) sanctions.

Currently, North Korea rejects all working-level diplomats as well as summit meetings with the United States. It is impossible to negotiate with a nation that will not pick up the phone. Until Pyongyang is willing to comply with 11 UN resolutions that require it to abandon its nuclear and missile programs, the US must maintain a comprehensive strategy of diplomacy, upholding UN resolutions, US law, and deterrence. Washington and its allies must keep their eyes open, their shields up, and their swords sharp.

Airmen must remain ever vigilant to maintain the decades long deterrence that has kept the peace on the Korean Peninsula. As George Orwell reportedly opined, “People sleep peacefully in their beds at night only because rough men stand ready to do violence on their behalf.”

#### Causes global draw-in and goes nuclear— even if the U.S. doesn’t respond

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David S. Maxwell, “The ROK-US Alliance: One American’s Perspective Now and for the Future,” Pathways to Peace: Achieving the Stable Transformation of the Korean Peninsula, The Hudson Institute, April 2020, <https://www.hudson.org/research/15845-pathways-to-peace-achieving-the-stable-transformation-of-the-korean-peninsula>, pp. 62-63

The Value of the Alliance to the ROK and United States

It is imperative to understand the long-standing North Korean strategy. As a revolutionary nation, as described in its constitution, North Korea seeks to complete the revolution by ridding the peninsula of foreign military forces and unifying it under the domination of the “guerrilla dynasty and gulag state.” which is used to describe the idea the regime rests on the myth of anti-Japanese partisan warfare and incarcerates some 120,000 political prisoners in multiple prison camps or gulags. 210 In the calculus of the Kim family regime, unification on its terms is the only way to ensure its survival. The regime’s strategy is built on subverting the ROK to create political instability, using coercion and blackmail diplomacy to gain political and economic concessions, and, when conditions are right, using force to execute a campaign plan to occupy the entire Korean Peninsula.

To successfully execute its strategy and accomplish its goals, the North requires is a split in the ROK-US alliance. Specifically, it needs to drive US forces off the Korean Peninsula and end extended deterrence and the nuclear umbrella over the ROK and Japan. The regime has been pursuing this strategy for seven decades, and there is no evidence that it has abandoned it. Coincidently, this is also how it views the end of the US “hostile policy.” As long as there is a ROK-US alliance, the regime believes, the United States poses a threat.211

Due to this strategy, the ROK faces an existential threat from North Korea. The North Korean People’s Army (NKPA) has an active force of some 1.2 million personnel, 70 percent of whom are deployed between the Demilitarized Zone (DMZ) and Pyongyang. These forces are postured for offensive operations. The NPKA annual winter training cycle runs from December through March, with forces conducting echeloned training designed to achieve the highest state of readiness by its conclusion. March is the optimal attack time because the ground is still frozen, and the rice fields in the South would not obstruct a mechanized armored attack. The NKPA possesses not only nuclear weapons, but also chemical and biological weapons of mass destruction (WMD). In a war, North Korea would likely use all of its weapons, including these oft-ignored WMD.212 Therefore, the ROK depends on the alliance for combined defensive capabilities for its survival.

The United States has a vital national interest to deter war on the Korean Peninsula. If hostilities resume, Korea’s geostrategic location ensures that the economic effects would not be confined to the peninsula. China and Japan are the second- and third-largest economies in the world, respectively, and the ROK is around the eleventh. A war involving these powers will have a direct impact on the US homeland. Furthermore, conflict is likely to escalate because of the proximity of two nuclear powers, China and Russia, and one of the highest concentrations of military forces anywhere in the world. The size and proximity of the forces, from North Korea, South Korea, China, Russia, and Japan, will likely cause miscalculations and responses with significant global repercussions. Even if the United States chooses not to support its Korean and Japanese allies, it might not be able to avoid conflict, and it certainly will not avoid the economic effects of war in Northeast Asia.

Therefore, deterrence is a vital interest. The question is what deters North Korea from attack. In 1997, Hwang Jong Yop, North Korea’s highest-ranking defector and the father of its juche ideology, told interrogators from the South and the United States that it is the presence of US forces that deters the Kim family regime. Kim Jong-il and his father Kim Il-sung before him knew the NKPA could not win a war against the South if the United States fought on its ally’s side. Kim Jong-un likely knows this as well. In addition, Hwang said that Kim Jong-il believed the United States would use nuclear weapons if North Korea attacked the South.213 This helps explain why the regime has been pursuing nuclear weapons since the 1950s. It is also an indication that US declaratory policy works. On the other hand, the regime believes that if it possesses nuclear weapons, the United States will be deterred from using its nuclear weapons because a nuclear power will not attack another nuclear-armed country.

#### The aff solves – it enables tailored remedies that promote competition but maintain efficiency

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(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

More Creative Alternatives

Frequently, neither simple injunctions nor simple breakups will be good solutions for platform monopoly. Injunctions may be inadequate to restore competition, and breakups may impair efficient operation and harm consumers in the process.

The case for a breakup is strongest when noncompetitive performance or conduct seems to be inherent in a firm’s current structure. Even then, however, there is no guarantee that the firm, once dismantled, will perform any better than before. For example, how do we break up Facebook without harming the constituencies that it serves?

The approaches discussed briefly in this Section do not require the breakup of assets or the spinoff of divisions or subsidiaries other than some that have been acquired by merger. Rather, they alter the nature of ownership, managerial decision making, contracts, intellectual-property licenses, or information management. Instead of attempting to force greater competition between a dominant platform and its rivals, we might do better to leave the firm intact but encourage more competition within it. Alternatively, we might increase interoperability by requiring more extensive sharing of information or other inputs. While the current antitrust statutes grant the courts equitable power sufficient to accomplish these remedies,299 the proposals are novel and could provoke resistance.

These remedies can be applied to entities other than structural monopolies, and for offenses under both section 1 and section 2 of the Sherman Act. While less intrusive than asset breakups, however, they can be more intrusive than simple conduct injunctions. As a result, they should be limited to situations where prohibitory injunctions alone are unlikely to be adequate. Occasional uses of unlawful exclusive dealing, most-favored-nation agreements,300 or other anticompetitive contract practices deserve an injunction, but ordinarily would not merit a breakup of the entire firm or fundamental alteration of its management structure.

The traditional way that antitrust law applies structural relief is to break up firms’ various physical assets, through such devices as forcing selloffs (divestiture) of plants, products, or subsidiaries.301 To the extent these breakups interfere with a firm’s production and distribution, they can produce harmful results such as increased costs or loss of coordination. This is particularly true of integrated production units, such as single digital platforms. The D.C. Circuit noted this concern in Microsoft when it refused the government’s request for a breakup.302

a. Enabling Competition Within the Platform

One alternative to divestiture is to leave a platform’s physical assets and range of participants intact but change the structure of ownership or management so as to make it more competitive internally. A platform or other organization can itself be a “market” within which competition can occur. In that case, antitrust law can be applied to its internal decisions, improving competition without limiting the extent of scale economies or beneficial network effects.

Ordinarily, agreements among subsidiaries or other agents within a firm are counted as unilateral and so are attributed to the firm itself.303 That rule is a direct consequence of the separation of ownership and control. The all-important premise, however, is that the firm’s central management is the only relevant economic decisionmaker. When that is not the case, even agreements among the various constituents within the firm can be treated as cartels.

There is plenty of precedent on this issue. The history of antitrust law is replete with examples of incorporated firms that are owned or managed by distinct and often competing entities. The courts have treated these firms as cartels or joint ventures, even for practices that, from a corporate law perspective, appeared to be those of a single firm. If properly managed, the result can be to force entities within the same incorporated organization to behave competitively vis-à-vis one another.

Firms whose ownership is reorganized in this fashion can still be very large and retain most of the attributes of large firms. On the one hand, this will satisfy those concerned that the breakup of large firms can result in the loss of economies of scale or scope, or of other synergies that generally lead to high output and lower prices. On the other hand, it will not satisfy those who believe that “big is bad” for its own sake.304

Joint management of unified productive assets has a storied history that goes back to the Middle Ages. Farmers, ranchers, and fishermen produced cattle, sheep, and fish on various “commons,” or facilities that were shared among a large number of owners and subjected to management rules.305 Many of these operated on a mixed model that involved individual production for stationary products such as crops, but a commons for grazing cattle or other livestock. For mobile products such as cattle or fish, the costs of shared management were lower than the costs of creating or maintaining boundaries. That was not the case for radishes or wheat. So rather than cutting a large pasture or bay into 100 fenced-off plots, participating property owners operated it as a single economic unit, substituting management costs for fencing costs. Just as for any firm, size and shape are determined by comparing the costs and payoffs of alternative forms of organization.306

So while a commons can be a very large firm, it can be operated by a collaboration of competing entities rather than a single one. Output reductions and price setting by a single firm are almost always out of reach of the federal antitrust laws. On the other hand, if a market is operated by a joint venture of

active business participants, their pricing is subject to the laws against collusion. Their exclusions also operate under the more aggressive standards that antitrust applies to concerted, as opposed to unilateral, refusals to deal.307 The fact that this joint venture is a corporation organized under state law, as many ventures are, does not make any difference. It is still a collaboration as far as antitrust law is concerned.

The theory of the firm precludes claims of an antitrust conspiracy between a corporation and its various subsidiaries, officers, shareholders, or employees. This preclusion is an essential corollary to the proposition that a corporation is a single entity for most legal purposes and not simply a cartel of its shareholders or other constituent parts. This is how corporate law preserves the boundary between firms and markets.308

But important exceptions exist. While a corporation is a single entity for most antitrust purposes, if it is operated by its shareholders for the benefit of their own separate businesses, its conduct is reachable under section 1 of the Sherman Act. A cartel is still a cartel even if it organizes itself into a corporation.

The classic antitrust example of such a collaborative structure is in the 1918 Chicago Board of Trade case, which first articulated the modern rule of reason for antitrust cases.309 As Justice Holmes had described the Board thirteen years previously, 310 it was an Illinois state-chartered corporation whose 1600 members were themselves traders for their own individual accounts, and with individual exclusive rights to do business on the Board’s trading floor.311 The “call rule,” which prevented collaborative price making among the members except during exchange hours, could not have been challenged under the antitrust laws as unilateral conduct. A single firm may set any nonpredatory price it wishes. Further, all of the relevant participants were inside the firm. Nevertheless, they were regarded as independent actors for the purpose of trading among themselves.

Thus the United States challenged the call rule as price fixing among competitors. 312 Not only is the substantive law against such collaborative activity more aggressive than that against unilateral actions, but the remedial problems are less formidable. If a firm acting unilaterally should set an unlawful price, the court must order it to charge a different price, placing it in the awkward position of a utility regulator. By contrast, price fixing by multiple independent actors operating in concert is remedied by a simple order against price fixing, requiring each participant to set its price individually without dictating what the price must be. The Supreme Court ultimately found the Chicago Board’s call rule to be lawful. If it had not, however, the remedy would have been an injunction against enforcement of the rule, leaving the members free to set their own prices. In fact, the United States’ requested relief was precisely that.313

The same thing applies to refusals to deal. If a firm is acting unilaterally, its refusal to deal is governed by a strict standard under which liability is unlikely, particularly if there has not been an established history of dealing.314 Further, in many circumstances a court can enforce a dealing order only by setting the price and other terms. By contrast, if the entity that refuses to deal is operated by a group of active business participants, its collective refusal to deal is governed by section 1 of the Sherman Act. A court usually need do no more than issue an injunction against the agreement not to deal. This is true even if the actors have incorporated themselves into a single business entity, as in the Associated Press case, which involved a New York corporation whose members were 1200 newspapers. 315 The government charged the Association with “combining cooperatively” to prohibit news sales to nonmembers or making it more difficult for a newspaper to enter competition with an existing newspaper.316 The Court upheld an injunction against the restrictive rules under the Sherman Act.317

The modern business world provides many analogies to this structural situation. For example, each of the NCAA’s 1200 member schools operates as a single entity in the management of education, student housing and discipline, and financing of its own operations, including athletic departments. By contrast, the rules for recruiting and maintaining athletic teams, their compensation, as well as the scheduling, operation, and playing rules of games, are controlled through rulemaking by the collective group.318 While the schools compete with one another in recruiting athletes and coaches, in obtaining both live and television audiences, and in the licensing of intellectual property, all of these things fall within NCAA rulemaking and are reachable by antitrust law. Specifically, decisions to restrict the number of televised games;319 to limit the compensation of coaches320 or players;321 or to limit licensing of students’ names, images, and likenesses322 all fall within section 1 of the Sherman Act. When a violation is found, the antitrust remedy is an injunction permitting each team to determine its choices individually.

The same analysis drove the American Needle litigation, a refusal-to-deal case that involved the National Football League (NFL).323 The NFL is an unincorporated association controlled by thirty-two individual football teams, each of which is separately owned. NFL Properties (NFLP) is a separate, incorporated LLC in New York, controlled by the NFL. The individual teams are members, and they also collectively control the licensing of the teams’ substantial and individually owned intellectual-property rights. In this case, the team members voted to authorize NFLP to grant an exclusive license to Reebok to sell NFLlogoed headwear (i.e., helmets and caps) for all thirty-two teams.324 The plaintiff, American Needle, was a competing manufacturer that the agreement excluded.325

The issue for the Supreme Court was whether NFLP’s grant of an exclusive license should be addressed as a “unilateral” act of NFLP or as a concerted act by the thirty-two teams acting together, and the Court unanimously decided the latter.326 As a matter of corporate law, the refusal to deal appeared to be unilateral. NFLP, the licensing party, was an incorporated single entity. The lower court had relied on earlier Seventh Circuit decisions holding that professional sports leagues should be treated as single entities under these circumstances.327

The Supreme Court’s decision to the contrary was consistent with its earlier cases Sealy328 and Topco.329 In both of those cases, the Court held that even if an entity is incorporated, it can be addressed as a collaboration of its competing and actively participating shareholders. In Sealy, each member was a shareholder, and collectively the members owned all of Sealy’s stock.330 In Topco, each of the twenty-five members owned an equal share of the common stock, which had voting rights. They also owned all of the preferred stock, which was nonvoting, in proportion to their sales.331

Agreements among the active members or shareholders on incorporated real-estate boards are treated in the same way. Acting as a single entity, the board organizes the listing of properties for sale, formulates listing rules, promulgates standardized listing forms and sales agreements, and controls much of the conduct of individual brokers. Acting individually, the shareholder-brokers show properties to clients and obtain commissions from sales. Each real-estate office acts as not only a shareholder or partner in the overall organization, but also a competitor for individual real-estate sales.

Without discussing single-entity status, in 1950 the Supreme Court held that price fixing among real-estate agents who were members of an incorporated board was an unlawful conspiracy.332 A leading subsequent decision involved Realty Multi-List, a Georgia corporation organized and owned by individual real-estate brokers.333 Under the corporation’s arrangement, one shareholder member could show properties listed by a different shareholder member.334 The Fifth Circuit concluded that both the agreements among the members fixing commission rates and setting exclusionary and disciplinary rules for brokers who deviated from these rates were unlawful under section 1 of the Sherman Act.335

In the 2000s, the government and private plaintiffs sued several multiplelisting services, challenging their decisions to exclude real-estate sellers.336 The Fourth Circuit eventually applied American Needle, rejecting the contention that concerted action was lacking because the parties making the decision were acting as “agents of a single corporation.”337 Several other decisions have arrived at similar results reaching both price fixing and concerted exclusion.338

Hospital-staff-privileges boards also provide an analogy. Hospitals regularly use such boards to decide which physicians can be authorized to practice at the hospital. If physician-board members with independent practices deny staff privileges to someone, they may be treated as a conspiracy rather than a single actor.339

Even an incorporated natural monopoly can be subject to section 1 of the Sherman Act if it is controlled by its shareholders for their separate business interests. That issue arose in the 1912 Terminal Railroad decision.340 The railroadbridge infrastructure across the Mississippi was very likely a natural monopoly, given it operated as a bottleneck through which all traffic across the river had to pass.341 However, the facility was incorporated, and its shareholders were a group of thirty-eight firms and natural persons organized by railroad financier Jay Gould.342 The venture constituted a single corporation under Missouri law, but it was actively managed by its shareholder participants, all of whom had separate businesses. They were mainly individual railroads, a ferry company, bridges, a “system of terminals,” and several individuals.343 The venture thus controlled an extensive collection of railroad transportation, transfer, and storage facilities at a point at which all east-west traffic in that part of the country had to cross the Mississippi River.344

The Court’s order is both interesting and pertinent to platforms. It rejected the government’s request for dissolution. It noted that dissolving the corporation would do nothing to eliminate the bottleneck.345 Rather, it ordered the district court to fashion a “plan of reorganization” that permitted all shippers, whether or not they were members of the organization, to have access on fair and reasonable terms, with the goal of “plac[ing] every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.”346 Dissolution would be mandated only if the parties failed to agree on these terms.347

The *Terminal Railroad* decree suggests a way to remedy anticompetitive behavior by large digital platforms representing several sellers without sacrificing operational efficiencies. Rather than requiring divestiture of productive assets, which almost always leads to higher prices, we could restructure ownership and management. A large firm such as Amazon can attain economies of scale and scope that rivals cannot match. Further, Amazon benefits consumers, most suppliers, and labor, by selling its own house brands and the brands of third-party merchants on the same website. This is how a seller of house brands can break down the power of large name-brand sellers.348

The problem is not that Amazon sells too much, but rather that Amazon’s ownership and management make it profitable for Amazon to discriminate in favor of its own products and against those of third-party sellers, or to enter other anticompetitive agreements with independent sellers. Breaking up Amazon or forcing a physical separation of own-product and third-party sales would mean giving up a great deal of brand rivalry that benefits consumers.

Suppose a court required Amazon to turn important commercial decisions over to a board of active Amazon participants who made their own sales on the platform, purchased from Amazon, or dealt with it for ancillary services. Acting collaboratively, they could control product selection, distribution and customer agreements, advertising, internal product development, and pricing of Amazon’s own products. Their decisions would be subject to antitrust scrutiny under section 1 of the Sherman Act.

Such an approach could be particularly useful in situations involving refusals to deal. To illustrate, an important focus of the EU’s November 2020 Statement of Objections Against Amazon is on claims that Amazon “artificially favour[s] its own retail offers” in product areas where it sells both its own and third-party merchandise.349 Under current United States antitrust law, a firm acting unilaterally would not be prevented from discriminating between its own and thirdparty sales. That was the very issue in Trinko—namely, that monopolist Verizon discriminated against third-party carriers and favored its own.350

If decision making in this area were entrusted to a board of active sellers, including both Amazon itself and third parties, the section 1 standard would reach the conduct. Justice Scalia’s Trinko opinion, citing Terminal Railroad, observed that the Supreme Court had imposed nondiscrimination obligations under similar circumstances, but only when the government was attacking concerted rather than unilateral conduct.351 Further, when such conduct is concerted, it is “amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.”352 The number and diversity of participants could vary, but they should be sufficiently numerous and diverse to make anticompetitive collusion unlikely. That could include individual merchants who sell on Amazon, principal shareholders, and perhaps customers and others. The Board should be subject to rules setting objective standards for product selection.

Numerosity should not interfere with effective operation. The Chicago Board of Trade had 1800 trading members and decisionmakers in 1918, when organizational rules and procedures were still being managed with pencil and paper.353 The NCAA has more than 1200 member schools,354 and the Associated Press had more than 1200 member newspapers in 1945.355 The Terminal Railroad Association had 38 shareholder members, but the decree contemplated nondiscriminatory sharing with any non-shareholder who wished to participate. 356 One large real-estate board, the Chicago Association of Realtors, has

over 15,500 members.357

The designated decisionmakers need not be Amazon shareholders, as long as they have independent business interests and operate on Amazon. In fact, the details of state corporate law or organization would not ordinarily affect the federal antitrust issue. For example, in some of these cases—such as Terminal Railroad, 358 Sealy,359 and Topco360—the relevant decisionmakers owned shares in the corporation. In American Needle, the organization in question was NFL Properties, an LLC,361 which does not have shareholders but rather owner-members similar to a partnership. Similarly, in Associated Press, the Court probed a cooperative association incorporated under the Membership Corporation Laws of New York.362

Whether the court applies the per se rule or the rule of reason in such cases would depend on the offense. In NCAA, the Supreme Court concluded that the rule of reason should apply to all restraints undertaken by the association because cooperation was necessary to the creation of the product: intercollegiate sports.363 That is not the case with product sales on Amazon. Rather, the traditional distinction between naked and ancillary restraints would work well. Price fixing or unjustified limitations on output would be strongly suspect.364 On the other hand, rules establishing uniform practices governing distribution and resolution of customer complaints could certainly be reasonable and thus lawful. Concerted refusals to deal can cover a range of practices from naked boycotts motivated by price (per se unlawful)365 to reasonable standard setting (rule of reason),366 and should be addressed accordingly.

Such an approach would notably not aim at size *per se*. An Amazon with competitively restructured management could be just as large as it is now. Indeed, it could be even larger. Cartels and monopolies function by restricting output, and facilitating internal competition could serve to increase it. Amazon would likely retain the efficiencies that flow from its size and scope. We would have effectively turned the internal workings of its platform into a market. It still might be in a position to undersell other businesses or to exclude products that its members and rules disapprove. If it did so in an anticompetitive manner, however, section 1 of the Sherman Act could be applied.

### 1AC – Conduct Adv

Advantage 2 is conduct

#### The full scope of *Amex* is unclear – companies will exploit it to misuse their platforms – that’s effectively impossible to police

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(Lina, “The Supreme Court just quietly gutted antitrust law,” July 3, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>)

Last Monday, a 5-4 majority on the Supreme Court upheld that approach. Not only does the decision show stunning disregard for core elements of antitrust law, it carelessly mangles long-accepted legal rules along the way to establishing its position. Perhaps most strikingly, it overrides or ignores facts established by the district court.

For example, the Supreme Court states that AmEx’s increased merchant fees reflect “increases in the value of its services,” even though the lower court expressly found that AmEx’s price hikes exceeded the value of the cardholder rewards.

In practice, the Court has shielded from effective antitrust scrutiny a huge swath of firms that provide services on more than one side of a transaction — and, in today’s digital economy, there are many (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns).

Worse yet, the Court left unclear what kinds of businesses actually qualify for this new rule. As the Open Markets Institute, for which I work, explained in an amicus brief, deciding an antitrust case using the amorphous concept of a “two-sided” market will incentivize all sorts of companies to seek protection under this bad new theory.

What kinds of companies might have more freedom to exert pressure on customers, as a result of this decision? Not newspapers, the Court said: Readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. So someone suing a newspaper on antitrust grounds (say, for prohibiting advertisers from doing business with other newspapers) would not have to prove that a newspaper’s conduct harmed both readers and advertisers.

On the surface, the Court’s language suggests that the special rule would apply to Amazon’s marketplace for third-party merchants, to eBay, and to Uber — but not to Google search or Facebook. Indeed, the Justice Department’s antitrust division chief, Makan Delrahim, has also come to this conclusion about the scope of the decision. But the Court’s opinion hardly delivers a clear and workable standard for judges to go by.

One can imagine the reams of studies Google would commission to show that targeting users with advertising did indeed amount to a “transaction” with users that users highly valued — a showing that, if successful, would likely qualify it for the shield of the special rule. If so, Google might be able to impose exclusionary contracts on advertisers and significantly boost the prices it charges them. Amazon, meanwhile, can continue to squeeze the suppliers and retailers reliant on its platform with little worry about being charged with the abuse of monopsony power.

Federal judges generally lack the expertise needed to independently assess the hyper-complex economic studies that this new rule will spur. Rather than focusing on the conduct between a company and one set of its customers, the new rule requires a much more involved showing.

#### This trend is accelerating—two Circuit decisions doubled down and extended Amex to new sectors, and to mergers

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(Kaj, “Antitrust After American Express: Down a Competitive Effects Rabbit Hole,” September 21, <https://techlawdecoded.com/antitrust-after-american-express-down-the-competitive-effects-rabbit-hole/>)

These are no longer just predictions, but lived realities. Since American Express came down, parties opposing government antitrust enforcement actions have taken that decision and run with it.

Antitrust in tech markets after American Express

In the two years since the American Express decision, courts have already relied on it to toss out two more major antitrust cases brought by the government, both involving tech markets.

Sabre/Farelogix

The first of these cases involved the DOJ’s effort to block a merger. Sabre was seeking to acquire Farelogix, its competitor in offering booking services to airlines. Sabre operates a two-sided transaction platform that connects airlines to travel agencies (or travelers) for the sale of tickets and other services. Farelogix provides IT solutions to airlines that are used to sell tickets to travel agencies (or travelers).

The DOJ concluded that the deal would harm competition. It believed that Farelogix acted as a competitive constraint on Sabre to the extent that it provided an alternative for airlines that rely on such third-party services to sell tickets to travel agencies and end customers. The evidence at trial—including company documents and testimony from airlines—showed that the two viewed each other as competitors and that some airlines were able to use this to seek lower commission fees from Sabre. The court hearing the case found that “it is logical to conclude that part of Sabre’s interest in acquiring Farelogix is to mitigate the risk” resulting from the fact that its technology enables airlines to bypass Sabre’s transaction platform.4

Nevertheless, the court ruled that the DOJ failed to meet its burden of proof to “show that this purchase will harm competition on both sides of the two-sided market” for travel services provided to airlines and travel agencies. Citing the American Express decision, the court said: “As a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre’s platform.” Therefore, it was not enough to prove that the merger would harm competition on only the one side of the two-sided market that Farelogix is active on.

And so despite the extensive evidence of competition between the companies, the court had to conclude that, as a matter of law, “Sabre and Farelogix do not compete in a relevant market.” To succeed in blocking the merger, the DOJ would have had to “produce evidence that the anticompetitive impact of the merger on the airline side of the [transaction] platform would be so substantial that it would sufficiently reverberate throughout the [platform] to such an extent as to make the two-sided [transaction] platform market, overall, less competitive.”

Qualcomm

The second case that shows how American Express left its mark on antitrust is a monopolization (abuse of a dominant position) case brought by the Federal Trade Commission against Qualcomm. The case involved modem chips used in smart phones. Qualcomm made the chips, but it also held important patents for the technology. Rival chip makers licensed that technology from Qualcomm to produce their own competing chips.

The FTC alleged that Qualcomm had abused a dominant market position when it refused to sell its chips to smartphone manufacturers unless they also entered into a patent license (which required making a royalty payment) for any chips that they acquired from not only Qualcomm but also any of its rival chip makers. This practice, the FTC argued, imposed an anti-competitive surcharge on rivals’ chips which raised the barriers for competing with Qualcomm. This, in turn, hurt the phone manufacturers by inflating the price they paid for chips.

The court hearing the case in the first instance agreed, and ruled for the FTC. But an appeals court overturned the decision. On the main antitrust theory of the case, the appeals court reasoned that the FTC had failed to prove that Qualcomm’s “no license, no chip” policy harmed the “area of effective competition.”5 Although its evidence had shown how the policy could have increased costs for Qualcomm customers (phone makers) who buy the chips, it had not shown how the policy harmed competition by directly impacting Qualcomm competitors (rival chip makers). It pointed to the ruling in American Express that the DOJ in that case had failed to meet its burden of proof because it did not show how restrictions imposed on merchants “have anticompetitive effects that harm consumers” (italics my own).

The analogy to the Qualcomm case seems to have been that the FTC needed to connect all the dots—customers and competitors alike—in proving anticompetitive effects. Showing that the “all-in” (royalty plus sales) price charged to customers might have been inflated by Qualcomm’s licensing practices was not enough because it “falls outside the relevant antitrust markets” at issue.

Down the competitive effects rabbit hole

The *American Express*, *Sabre/Farelogix* and *Qualcomm* cases share three traits in common that show how the half-century transformation of antitrust into an Economism-driven, predictive framework is undermining enforcement, especially in tech markets.

First, the cases show how the government agencies bringing an antitrust case and the courts rendering the decisions in them must undertake a massive burden. They have to dissect the inner workings of a market and then make predictions or conjectures about actual competitive effects in the market that result from the conduct at issue. In American Express and Sabre/Farelogix, it was proving lower output and higher overall “net” (or “two-sided”) prices on multi-sided transaction platforms. In *Qualcomm*, it meant proving “an anticompetitive surcharge on rivals’ modem chip sales” by directly linking up proof of harm to customers with proof of hindering competitors.

In all three instances, the burden imposed by the courts for proving these so-called “actual anticompetitive effects” was simply too high for the government to meet. *Qualcomm* arguably went even further in raising the evidentiary bar for tech cases. The influential appeals court issuing that decision went so far as to declare that “novel business practices—especially in technology markets—should not be ‘conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use’” (italics my own). Requiring “elaborate” and “precise” proof would seem to doom all but the slam-dunk government actions against tech.

Second, the trio of cases shows how proof of actual anticompetitive effects depends heavily on economic theory and models. The Supreme Court sets the pace in American Express by relying entirely on a string of academic articles by economists—citing nothing from the fact record of the case before it—to construct its “two-sided transaction platform” market and reach the critical conclusion that “[e]valuating both sides of a two-sided transaction platform is [] necessary to accurately assess competition.”

Sabre/Farelogix picks up the baton and runs with it, relying on that theory-based legal holding in American Express to ignore an exhaustive factual record of company documents, executive testimony, and third-party complaints showing close competition between the merging companies. Qualcomm then carries the baton across the finish line when it frames the case with a skepticism of “novel” theories of competitive harm by citing blanket assertions in two academic article about how antitrust cases of technology markets skew towards over-enforcement.6 When it comes to economic theory and a predictive antitrust that requires proof of actual anticompetitive effects, the tail wags the dog.

Third, these three cases rest on a critical assumption—arguably bordering on a blind faith—that economics is up to the task of proving actual competitive effects. Baked into the courts’ reasoning is that economics can be used to understand and predict complex market environments that change in real-time in often unexpected ways. Yet, as discussed in my recent article, it has yet to be empirically proven—or seriously tested—that economics can perform the sort of analyses and predictions that would justify its having become the foundational underpinning of the enforcement of the antitrust laws. If anything, real-world experience in competition law practice combined with general research on uncertainty and decision-making suggest that expert judgments are poor predictors in complex environments like those at issue in antitrust cases.

And as they push antitrust further down an Economism-driven path, the courts provide little guidance on how plaintiffs are to meet their super-sized burden for proving actual anticompetitive effects. In American Express and Sabre/Farelogix, the government’s case is thrown out because it failed to prove an increase in the “net” or “two-sided” prices on a multi-sided transaction platform. But such a thing exists only as a figment of a court’s imagination. It does not exist in the real world. No one pays it, and no one charges it. And it’s unclear how an antitrust plaintiff is to go about the precarious exercise of weighing benefits to one side of a market against the harms to another. In American Express, for example, would it mean weighing the swipe fees charged to merchants against the rewards points earned by shoppers? In the absence of any guidance, it can safely be assumed that economic theories and models are expected to conjure such “net” prices into existence.

The trio of cases, therefore, reflects and even propels a broader trend that has eviscerated antitrust enforcement—especially in tech—by erecting high barriers for plaintiffs to prove actual anticompetitive effects using dubious economic tools.

A modern antitrust in peril

With the Sabre/Farelogix and Qualcomm cases, the American Express decision has rounded out its influence on the three main pillars of US antitrust law: mergers, monopolization, and contracts in restraint of trade.

None of the three cases sets out groundbreaking new law. Their significance lies rather in accelerating a trend, half of a century in the making, among policymakers, academics, and judges to require antitrust plaintiffs to take on an ever-increasing burden of proof in using economic tools to show how market conduct harms competition. Each such case is an individual brick in a rising wall—reaching its tallest heights in tech markets that are especially difficult to understand and predict—that plaintiffs must scale to bring a successful antitrust case.

The consequence is not just an intellectual failing about humankind’s ability to make accurate predictions in unpredictable markets. It also means lax antitrust enforcement and the mass-consolidation of economic power across the economy.

#### First, mergers – Amex undermines enforcement against nascent acquisitions

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(Steven, “Dominant Digital Platforms: Is Antitrust Up to the Task?” yalelawjournal.org/pdf/SalopEssay\_rnon2ejq.pdf)

This most recent agency loss involved an acquisition by a dominant digital platform. Sabre is a digital platform that permits airlines to post schedules, fares and seat availability and allows travel agents to access this information, make travel bookings and pay for them. Sabre proposed to acquire Farelogix, which provides technology to airlines. This technology allows an airline to disintermediate Sabre by allowing the airline to connect directly to travel agencies and provide travel agencies with information and ticket-booking services itself. Thus, this acquisition was analytically like a vertical merger, where Farelogix sells a critical input (i.e., its technology) to airlines, which they use to compete with Sabre for the business of travel agents. The competitive concern is that Sabre would foreclose airlines’ ability to acquire the Farelogix technology input.

Perhaps attempting to exploit the horizontal-merger structural presumption and avoid the difficulties they faced in AT&T/Time Warner, the DOJ did not litigate the case as a vertical merger. Instead, the complaint alleged that Sabre and Farelogix competed in the provision of booking services for airline tickets sold through travel agencies. This competition is indirect, resulting from Farelogix working with the individual airlines to disintermediate Sabre. However, the trial court did not miss the point. It observed that “Sabre and Farelogix view each other as competitors” and found that “the record reflects competition between Sabre’s and Farelogix’s direct connection solutions for airlines.”94

Having concluded that competition was reduced by the merger, the trial court nonetheless rejected the DOJ’s complaint on the grounds that Farelogix and Sabre do not compete in the two-sided platform market.95 While Sabre provides services to customers on both sides (i.e., to both airlines and travel agencies), Farelogix provides services to only one side (i.e., to airlines, but not to travel agencies). The travel agency services are provided by the airlines themselves, using the Farelogix technology.

This approach was both defective and unnecessary because Sabre competed with the combination of Farelogix and the airlines.96 Yet the court thought that American Express compelled the opposite result, despite its own fact-finding and the vertical nature of the transaction. If other U.S. courts similarly follow this same defective approach, the result will be underdeterrence of anticompetitive acquisitions by digital platforms.97 Indeed, this approach would lead to ludicrous results. Under this reasoning, Microsoft could have legally ended the competitive threat from Netscape and Java simply by acquiring them instead of trying to destroy them.

#### Causes platform misuse – that undermines cyber security

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(Maurice, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>)

So, the divergence in antitrust enforcement may reflect differences over these data-opolies’ perceived harms. Ordinarily the harm from monopolies are higher prices, less output, or reduced quality. It superficially appears that data-opolies pose little, if any risk, of these harms. Unlike some pharmaceuticals, data-opolies do not charge consumers exorbitant prices. Most of Google’s and Facebook’s consumer products are ostensibly “free.” The data-opolies’ scale can also mean higher quality products. The more people use a particular search engine, the more the search engine’s algorithm can learn users’ preferences, the more relevant the search results will likely be, which in turn will likely attract others to the search engine, and the positive feedback continues.

As Robert Bork argued, there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.”

How Data-opolies Harm

But higher prices are not the only way for powerful companies to harm their consumers or the rest of society. Upon closer examination, data-opolies can pose at least eight potential harms.

Lower-quality products with less privacy. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, data-opolies face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price.

Data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are no viable competitive alternatives and the bargaining power is so unequal.

Surveillance and security risks. In a monopolized market, personal data is concentrated in a few firms. Consumers have limited outside options that offer better privacy protection. This raises additional risks, including:

Government capture. The fewer the number of firms controlling the personal data, the greater the potential risk that a government will “capture” the firm. Companies need things from government; governments often want access to data. When there are only a few firms, this can increase the likelihood of companies secretly cooperating with the government to provide access to data. China, for example, relies on its data-opolies to better monitor its population.

Covert surveillance. Even if the government cannot capture a data-opoly, its rich data-trove increases a government’s incentive to circumvent the data-opoly’s privacy protections to tap into the personal data. Even if the government can’t strike a deal to access the data directly, it may be able to do so covertly.

Implications of a data policy violation/security breach. Data-opolies have greater incentives to prevent a breach than do typical firms. But with more personal data concentrated in fewer companies, hackers, marketers, political consultants, among others, have even greater incentives to find ways to circumvent or breach the dominant firm’s security measures. The concentration of data means that if one of them is breached, the harm done could be orders of magnitude greater than with a normal company. While consumers may be outraged, a dominant firm has less reason to worry of consumers’ switching to rivals.

Wealth transfer to data-opolies. Even when their products and services are ostensibly “free,” data-opolies can extract significant wealth in several ways that they otherwise couldn’t in a competitive

#### Platform monopoly allows attackers to zap critical infrastructure in one hit—competition key

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(Daniel, Rebecca Bace, Peter Gutmann, Perry Metzger, Charles P. Pfleeger, John S. Quarterman, Bruce Schneier, CyberInsecurity: The Cost of Monopoly, <https://cryptome.org/cyberinsecurity.htm>)

Computing is crucial to the infrastructure of advanced countries. Yet, as fast as the world's computing infrastructure is growing, security vulnerabilities within it are growing faster still. The security situation is deteriorating, and that deterioration compounds when nearly all computers in the hands of end users rely on a single operating system subject to the same vulnerabilities the world over.

Most of the world’s computers run Microsoft’s operating systems, thus most of the world’s computers are vulnerable to the same viruses and worms at the same time. The only way to stop this is to avoid monoculture in computer operating systems, and for reasons just as reasonable and obvious as avoiding monoculture in farming. Microsoft exacerbates this problem via a wide range of practices that lock users to its platform.

The impact on security of this lock-in is real and endangers society. Because Microsoft's near-monopoly status itself magnifies security risk, it is essential that society become less dependent on a single operating system from a single vendor if our critical infrastructure is not to be disrupted in a single blow. The goal must be to break the monoculture. Efforts by Microsoft to improve security will fail if their side effect is to increase user-level lock-in. Microsoft must not be allowed to impose new restrictions on its customers – imposed in the way only a monopoly can do – and then claim that such exercise of monopoly power is somehow a solution to the security problems inherent in its products. The prevalence of security flaw in Microsoft’s products is an effect of monopoly power; it must not be allowed to become a reinforcer.

Governments must set an example with their own internal policies and with the regulations they impose on industries critical to their societies. They must confront the security effects of monopoly and acknowledge that competition policy is entangled with security policy from this point forward.

#### Ensures cyberattacks go nuclear

Sagan and Weiner ’21 – Stanford Professors [Scott D.; Caroline S.G. Monroe professor of political science and senior fellow at the Center for International Security and the Freeman Spogli Institute at Stanford University; Allen S.; senior lecturer in law and director of the program in international and comparative law at Stanford Law School; 7-9-2021; "The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy."; The Washington Post; https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/; accessed 8-15-2021]

Over the July 4 weekend, the Russian-based cybercriminal organization REvil claimed credit for hacking into as many as 1,500 companies in what has been called the largest ransomware attack to date. In May, another cybercriminal group, DarkSide, also apparently located mainly in Russia, shut down most of the operations of Colonial Pipeline, which supplies nearly half the diesel, gasoline and other fuels used on the East Coast — setting off a round of panic buying that ended only when the company handed over a ransom. These incidents were bad enough. But imagine a much worse cyberattack, one that not only disabled pipelines but turned off the power at hundreds of U.S. hospitals, wreaked havoc on air-traffic-control systems and shut down the electrical grid in major cities in the dead of winter. The grisly cost might be counted not just in lost dollars but in the deaths of many thousands of people.

Under current U.S. nuclear doctrine, developed during the Trump administration, the president would be given the military option to launch nuclear weapons at Russia, China or North Korea if that country was determined to be behind such an attack.

That’s because in 2018, the Trump administration expanded the role of nuclear weapons by declaring for the first time that the United States would consider nuclear retaliation in the case of “significant non-nuclear strategic attacks,” including “attacks on the U.S., allied, or partner civilian population or infrastructure.” The same principle could also be used to justify a nuclear response to a devastating biological weapons strike.

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up committing a president to a nuclear attack if deterrence fails. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

The Biden administration is now conducting its own review of the U.S. nuclear posture. The 2018 Trump change is an urgent candidate for reevaluation, but people have generally ignored it up to now. As officials work on this process, they have the chance to take full account of what could be called the “nuclear law revolution” — a growing recognition that international-law restrictions on warfare, and especially those that protect civilians, apply even to nuclear war.

#### Aff solves – the squo prior to Amex evaluated conduct on a case-by-case basis and created clear, enforceable guidelines

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(Kaj, “How tech forces a reckoning with prediction-based antitrust enforcement,” August 31, <https://techlawdecoded.com/how-tech-forces-a-reckoning-with-prediction-based-antitrust-enforcement/>)

Such a framework for monopolization claims could also draw from case law experience with “unreasonable restraints of trade”, which are collusive agreements among competitors that are subject to another subset of the antitrust laws. Certain such agreements are treated as so pernicious as to render them strictly “per se” illegal (unlawful without any regard for their actual competitive effects), and others as so benign as to subject them to a highly permissive “rule of reason” (usually lawful under a full-blown competitive effects analysis). But a “truncated” rule of reason lying in a Goldilocks middle between these two extremes causes certain agreements to be presumed unlawful without delving into its actual competitive effects, while still allowing the parties to the agreement to rebut that presumption with adequate proof. This framework could be roughly imported into a presumption-based structuralist approach to monopolization cases.

One major hurdle for monopolization cases under the new framework would be in determining whether, in a particular case, the monopolist has engaged in a preset category of problematic conduct. This would not always be obvious (a lesson learned from courts grappling with when to apply the truncated rule of reason in restraints of trade cases). But in keeping with the goal of a simple, formulaic approach that avoids slipping into the competitive effects quagmire, an objective screen could be used. This screen would look at certain nonpredictive indicators—market conditions or circumstances present and not present—which would function as a checklist or be summed up to formulaically determine whether the monopolist’s conduct falls within the pre-determined list of presumptively unlawful activities.

Fine-tuning the proper aims of a nonpredictive antitrust

Although the proposed frameworks for monopolization and merger cases differ in some ways, both rely on an objectively-determined presumption of unlawfulness on the front-end which pushes any Economism-based, predictive analysis of actual competitive effects to the back-end, where the opposing party faces a high evidentiary burden for rebuttal.

This approach, while seeking to minimize the role of subjective judgment in antitrust decisions, does not eliminate it, which means still having to grapple with the issue of what the proper aim of antitrust ought to be. In either the merger or monopolization context, the presumption (whether facing the party bringing the case or the one defending it) can be rebutted with sufficient proof regarding actual competitive effects. Naturally, a question therefore arises about what types of effects are fair game for argument.

As discussed above, the current consumer welfare approach which focuses entirely on prices and output ignores various harmful effects from the concentration of economic power that would seem otherwise within the reach of antitrust laws. But how much broader ought the goals of antitrust be under the new proposed enforcement frameworks? Harm to competitors (exclusion), laborers (wage suppression), and suppliers (price squeezes) might be the low hanging fruit for inclusion in a broader welfare standard. The same might be said of loss of redundancies in the supply chain, or consolidation of control over user data. Harm to the environment and concentration of political power may be tougher to incorporate. While hate speech and the polarization of public discourse would almost certainly fall outside of the proper purview of antitrust.

Wherever the line is ultimately drawn by policymakers, it need not be inclusive to an extreme. After all, broader societal concerns about concentration of private markets can be left to the protection of a very strong presumption on the front-end of the new enforcement framework. But other than to say that it is intended to be the rare case where a competitive effects analysis is performed on the back-end, it must be acknowledged that more work would need to be done to figure out its proper boundaries.

Questions surrounding how to define the proper aims of antitrust would also seep into the judgment calls that need to be made about what triggers the presumptions of illegality on the front-end. That is because the threshold levels of concentration and additional objective factors triggering the structural presumption in merger cases, as well as the categories of conduct deemed presumptively unlawful in monopolization cases, would be determined according to their tendencies to result in market conditions conducive to bad competitive outcomes. But what is a “competitive outcome” is in the eye of the beholder, and so difficult questions would arise in formulating the front-end presumptions in both merger and monopolization cases.

Difficult as that task may be, there is much benefit to working out those difficulties at a policy level. Those who in the last half-century have—through their influence over academia, the courts, and government officials—reined in merger and monopolization enforcement by shifting its focus to price-output effects have done so with little say from lawmakers. A reset of the antitrust enforcement framework would be an opportune moment to refocus competition policy on the broader detrimental effects of allowing markets to persist in conditions of concentrated economic power.

Where the lines are drawn would have a huge impact on the reach of antitrust laws under the new enforcement regime. The debate would be especially fraught and consequential in the digital context, where existing enforcement of the merger and monopolization laws has been particularly controversial and prone to disappointing results (the latter discussed here and here in the context of investigations of Google). Difficult cuts would have to be made, and the results would ultimately reflect not only ideology about the proper role of antitrust, but also pragmatic factors such as the likelihood and ability of other regulations to fill the gaps (covered here).

Nonpredictive antitrust enforcement in practice

The formulaic, nonpredictive approaches outlined above are guided by a simple principle: that antitrust enforcement ought to be put on a sounder intellectual footing that acknowledges the limits of the human mind in making predictions amidst complexity.

The practical effects of the proposed changes would be to improve clarity and certainty for everyone involved—companies, government agencies, courts—in distinguishing lawful from unlawful market activities. They would also ease the burden for bringing such cases, and in the process free up resources for more enforcement of the antitrust laws. At the same time, some of the changes—such as adding new objective factors to the structural presumption in merger cases, employing a clear-cut list of presumptively unlawful monopolistic conduct, and subjecting enforcers to reverse presumptions of lawfulness—would probably tip the balance the other way, scaling back certain types of enforcement.

Still, it seems self-evident that the net result of the proposed changes would be more active enforcement of the merger and monopolization laws. The specific make-up of the resulting cases—which types would increase versus decrease, which industries or players would see the biggest changes, etc.—is less clear. But the aim in reforming competition policy should be more accurate enforcement, targeting the right mergers and monopolistic conduct, for its own sake. Then let the chips fall where they may.

As for the day-to-day enforcement of the antitrust laws, the major implications could be summarized as follows.

First, there would be the lowering of the barrier currently put in front of enforcers and courts that requires the lawfulness of market activities to be determined by performing the difficult task of predicting and conjecturing about actual competitive effects.

Second, the simple, formulaic framework put in its place would de-emphasize the role of predictions in the decision-making process, streamlining antitrust enforcement for those activities which are empirically known to perpetuate the structural market conditions associated with bad competitive outcomes.

Third, at the same time, it would leave some wiggle room for nuanced expert judgments to soften the blunt force of a trial-by-formula in those rare instances when unique circumstances justify diving back into the lion’s den of analyzing actual competitive effects.

Fourth, by relying on objective criteria about market structure or conduct instead of subjective judgments about market effects, the new framework would empower antitrust to reach various other important kinds of harm—beyond just price and output effects—that can flow from the concentration of economic power. That is, by targeting the roots of harmful concentration instead of just cutting off a few branches that have grown out of its trunk, antitrust would protect various interests in society other than just the consumer who wants to buy more for less.

### 1AC – Solvency

#### The aff removes *Amex*’s increased burdens for platform challenges – that solves because well-plead cases go forward and courts will reject anticompetitive conduct

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(Erik, “Platform Antitrust,” 44 J. Corp. L. 713)

That is no longer the case, however, as the Supreme Court recently confronted platform commerce head-on in AmEx 111.13 In June of 2018, the Court issued its first decision on how antitrust's rule of reason 14 is to be applied in cases involving platform defendants. 15 It was superficially a question of how to define the "relevant market" for purposes of an antitrust adjudication. 1 6 In particular, the question was whether the market definition must include both groups of users, which would require a plaintiff to prove a net injury to competition across both user groups-not just to win on the merits, but simply to carry its initial burden. The Supreme Court held that it does. 17

Most of the important complexities arising under two-sided competition center on the juxtaposition of countervailing effects-that is, pro and anticompetitive effects-arising within the separate sides of the market. In fact, even outside the platform context, such a juxtaposition of plausible effects is very common in antitrust disputes. And the rule of reason ordinarily divides the burdens of establishing them; it bifurcates them into separate stages, delaying the need for potential balancing or "netting out" of the effects (which is notoriously difficult) until the final stage of the adjudication. By evaluating the effects carefully and independently, a court is better equipped to determine whether such balancing is genuinely necessary; and, if so, the court is at least in a better position to compare the relevant effects. However, the Court's AmEx III decision largely abandoned this burdenshifting framework, effectively collapsing the entire rule of reason analysis-and all of its intermediate inquiries-into the plaintiffs initial burden.

Whether or not one agrees with its holding, the AmEx III decision is inarguably a watershed moment for platform antitrust. Against this backdrop, this Article considers how antitrust ought to accommodate the distinctive features of platforms and platform competition. It focuses principally on conduct evaluated under the rule of reason, 18 with emphasis on vertical restraints and unilateral conduct. 19 The analysis is organized as follows: I begin by providing an overview of the distinctive features of platforms and platform competition, as reflected within the platform economics literature. Part III then explains how such factors may bear on the analysis of various restrictive practices that are already familiar within antitrust, but whose effects may become more or less concerning when undertaken by two-sided defendants. In Part IV, I address the economic effects of an important category of restraints that are unique to platform markets. Finally, Part V turns to the broad question of law that was at issue in AmEx III.

One of the important competitive dynamics arising in platform markets is known as "steering." 21 This refers to any efforts aimed at inducing users to opt for one platform over another. The restraint at issue in AmEx IIIwas an example of this: it prohibits its merchants from offering AmEx cardholders a better price at checkout if they agree to switch to an alternative card (e.g. Visa), since competing cards generally charge lower network usage fees to merchants. 22 But, more generally, steering restraints take many different forms, and arise in many platform markets. 3 In general, steering strategies are usually procompetitive, as they typically act as a vehicle for price competition among rival platforms. Restraints on steering should therefore be regarded as a potential source of serious antitrust concerns. However, as discussed in detail in Part III, many research articles suggest that such restraints may be necessary to maintain adequate participation, and thus regard their welfare effects as highly ambiguous. 24 The AmEx III opinion cites these commentaries copiously. Importantly, however, these arguments stem primarily from economic models involving a platform monopolist, with the operative restraint merely precluding efforts to steer users toward a nonpla'fform alternative (e.g. toward cash rather than using a monopolist's payment card platform). 25 But this is not a good representation of how such restraints usually operate in real-world commerce. In practice, most of the relevant restraints seek to prevent steering toward competing platforms, rather than a nonplatform alternative that lacks the same transactional efficiencies.

As I argue below, when a restraint merely prevents steering toward competing platforms, there is substantially less reason to presume that it might be justified for reasons relating to the market's two-sidedness. Instead, the more likely result is simply that it prevents users from switching to rival platforms that would provide them with better jointvalue. That would suggest the restraint does not enhance the market-wide volume of trade. Rather, at best, it merely reallocates transactions among platforms, albeit in a way that leaves transacting parties with diminished welfare on average. At worst, it affirmatively reduces the overall volume of trade by undermining price competition generally. This can occur for two reasons. First, the restraint may extinguish rival platforms' incentive to make competitive price offerings, as it may prevent transacting parties from switching to the competitor's platform in response to its price cut. Second, the restraint may induce sellers who transact over the platform to set higher retail prices for their own wares, which injures all consumers, whether or not they take advantage of the platform's transaction service.

The question of law addressed in AmEx III is extremely broad in scope, as it bears on the application of antitrust law to all kinds of restrictive practices that might be undertaken by transaction platforms. As noted above, while facially a holding about market definition, the Supreme Court's decision is in fact a major alteration of the rule of reason's burden shifting framework. The Court's analysis was guided principally by a number of antitrust academics that focus most of their attention on a simple point-in effect that "both sides matter," and that it would be inappropriate to focus on one side myopically. 26 While correct, this point was actually never in dispute. Even the district court, whose market definition was formally limited to the merchant side of the market, 27 expressly emphasized the importance of accounting for the market's two-sidedness. 28 Indeed, its analysis gives substantial attention to cardholders, and it even concluded that they were likely injured in addition to merchants. 2 9 Despite this, the AmEx III majority chastised the district court's approach as "looking at only one side of the platform in isolation."' 30

It is indeed true that a platform's conduct may have countervailing effects within the two sides, and that this requires courts to take the market's two-sidedness into account. 31 But it does not follow that the appropriate way to deal with this is to require a plaintiff to "net out" all such considerations merely in order to support its prima facie case-before the defendant has substantiated its asserted efficiency defense. This approach is also a substantial deviation from precedent. Most difficult cases evaluated under the rule of reason involve potential countervailing pro- and anticompetitive effects. 32 And the courts developed a multi-stage burden shifting framework precisely to deal with this difficulty. By construction, this framework contemplates that a plaintiff can carry its initial burden without having shown that the defendant's conduct is definitively anticompetitive on the whole; that is why it is merely the first stage among several.

Far from providing any necessary reform, the AmEx III decision merely developed a "law of the horse": a needless construction of new legal principles when the old ones would do just fine (and likely much better).33 It is true that platform economics has important implications for antitrust policy and practice; this Article gives substantial attention to that fact. But such considerations can already be accounted for-both more practicably and more reliably-within the rule of reason's existing structure. To that end, a much better approach would be to maintain careful consideration of platform economics throughout the established burden shifting framework, which is designed to work through complex cases in incremental steps and to cast light on countervailing effects through an efficient allocation of burdens.

#### The aff is a tailored defense of competition policy—it is compatible with broader anti-neoliberalism while maintain the benefits of competition in platform markets

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(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal

Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59

Santa Clara L. Rev. 703)

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy-whether it be in the form of communism from below or fascism from above should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal status quo with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound-let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealthmaximization, empiricism, and the rest.129 This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative. 30 It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.' 3 ' However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

Consider the charge that neoliberal policies have increased wealth inequality in the United States. Some commentators attempt to link this increased inequality with a decline in competition'3 2 and, by implication, consumer welfare competition policy. Notwithstanding the interest such theories appeared to have garnered from highly distinguished economists and policymakers, such as Nobel Laureate Joe Stiglitz,133 one might alternatively consider whether increasing wealth inequality and the resultant social strife are far more a result of policies in other areas, such as monetary policy. 134 At the same time as Chicago School antitrust policy took root, the American economy began to undergo sustained expansions in the money supply and reductions in interest rates that, at least in theory, disproportionately reward the owners of financial assets, who are more likely to be wealthy. 135

Indeed, after the financial crisis, monetary policy engaged in a truly unprecedented expansion, with the Federal Reserve lowering interest rates to zero and increasing its balance sheet from approximately $900 billion before the crisis to $4.5 trillion after, most of which constituted either troublesome mortgage-backed securities or treasury bonds. 36 The share of wealth of the world's richest people roughly doubled. 37 At the same time, however, one would seem to look in vain for any shift toward an increased laissez faire competition policy during the Obama administration. Indeed, antitrust enforcement under the Obama administration arguably increased relative to the George W. Bush administration, even if only at the margins and not in the area of monopolization. 3

#### Markets are a computational necessity – we should make them more equitable instead of rejecting them

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Eric A. Posner and E. Glen Weyl, “Epilogue: After Markets?” *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Princeton University Press 2018, Epub (email [arg5180@gmail.com](mailto:arg5180@gmail.com) for relevant text).

Markets as Miracles

As we saw in chapter 1, many economists who were committed to the market economy also considered themselves “socialists.” Yet in the early twentieth century, socialism became identified with central planning, thanks to the role of Marxism and the French Revolution in inspiring and justifying the economic policies of the Soviet Union. Central planning also received a boost from World War I, where national control of the economy for the purpose of war production was more successful than advocates of laissez-faire could ever have imagined. This led to a heated debate about whether central planning should be used in peacetime as well.

In the popular imagination, central planning could not succeed because it provided individuals with no incentives to work. People needed the prospect of riches, or at least wages, to get them out of bed in the morning. Yet incentives were quite strong in the Soviet Union, stronger, in many ways, than they are in capitalist countries. While there was less chance under Communism to grow rich, any prisoner of the Gulag knew the fate of those who “malingered.”

Another popular argument against central planning was advanced by Nobel Laureate Friedrich Hayek in 1945. Hayek argued that no central planner could obtain information about people’s tastes and productivity necessary to allocate resources efficiently.1 The genius of the market was the way that the price system could, in disaggregated fashion, collect this information from everyone and supply it to those who needed to know it, without the involvement of a government planning board.

A related version of this argument, less well-known than Hayek’s but actually more compelling, was made a few decades earlier. The brilliant economist Ludwig von Mises argued that the fundamental problem facing socialism was not incentives or knowledge in the abstract but communication and computation.2 To see what Mises meant, consider an illustrative parable proposed by Leonard Read in his 1958 essay, “I, Pencil.” 3

Read tells the “life story” of a pencil. Such a simple thing, one would at first think. And yet as you begin to reflect, you realize the enormously complex layers of thought and planning it would require to make a pencil from scratch. The wood must be chopped, cut, shaped, polished, and honed. The graphite must be mined, chiseled, and shaped. The ferrule—the collar that connects the wood shaft and the eraser—is an alloy of dozens of metals, each of which must be mined, melted, combined, and reformed. And so forth.

Yet what is most remarkable about the pencil is not its complexity but the complete lack of understanding that anyone involved in the manufacture of the eventual pencil has about any of these steps in the process. The lumberjack knows only that there is a market for his wood and some price that induces her to buy the needed tools, cut down trees, and sell lumber down the line of production. The lumberjack may never even know that the wood is used for a pencil. The pencil factory owner knows only where to purchase the needed intermediate materials and how to run a line assembling them. The knowledge and planning of the pencil’s creation emerge organically from the process of market relations.

Now suppose that we were to try to replicate the market relationships with a central planning board. The board would determine how much wood to chop and when, the number of workers to employ at each stage of production, the correct places and times to produce, ship, and build. Yet, to do this effectively the board would have to understand a great many things. It would have to learn from each of these specialized producers the unique knowledge of her domain of expertise that allows her to earn a living—for example, whether the lumber would have a more valuable use elsewhere in the economy (to build houses or ships or children’s toys) than as an input for pencils. Absorbing all this information and constantly receiving and processing the necessary updates to keep abreast of evolving conditions in each of these steps of the process, would overwhelm the capacity of even the most skilled managers.

And even if the board somehow had an unlimited capacity to absorb this information, it would still have the unmanageable problem of trying to act on this sea of data. Prices, supply and demand, and production relations in markets arise through a complex interplay of individuals each helping to optimize a tiny part of a broad social process. If, instead, a single board had to plan this entire dance, it would force a small number of individuals to contemplate an endless sequence of choices and plans. Such elaborate calculations are beyond the capacity of even the most brilliant group of engineers.

Mises wrote decades before the rise of the fields of computer science and information theory and lacked any way to formalize these intuitive ideas. Many of Mises’s arguments were dismissed by mainstream economists, whose increasingly narrow mathematical approach to the field Mises disdained. Mises’s critics, including Oskar Lange, Fred Taylor, and Abba Lerner, argued that the market mechanism was but one of many ways (and far from the most efficient way) to organize an economy. They viewed the economy purely mathematically, rather than computationally, and saw no difficulty in principle with solving a (very large) system of equations relating the supply and demand of various goods, resources, and services.

In a simplified picture of the economy, ordinary people perform dual functions as producers (workers, suppliers of capital, etc.) and consumers. As consumers, people have preferences regarding different goods and services. Some people like chocolate, others like vanilla. As producers, they have different talents and capacities. Some people are good at doing math, others at mollifying angry customers. In principle, all we need to do is figure out people’s preferences and their talents, and assign jobs to people who do them best, while distributing the value created by production in the form of goods and services that people really want. Rewards and penalties need to be determined to give people incentives to reveal their preferences and talents, and to ensure that they actually do what they are supposed to do. All of this can be represented mathematically and solved. That’s why socialist economists viewed the economy as a math problem the solution of which only required a computer.

Yet the later development of the theory of computational and communication complexity vindicated Mises’s insights. What computational scientists later realized is that even if managing the economy were “merely” a problem of solving a large system of equations, finding such solutions is far from the easy task that socialist economists believed. In an incisive computational analysis of central planning, statistician and computer scientist Cosma Shalizi illustrates how utterly impossible “solving” a modern economy would be for a central planning board. As Shalizi notes in his essay, “In the Soviet Union, Optimization Problem Solves You,” the computer power it takes to solve an economic allocation problem increases more than proportionately in the number of commodities in the economy.4 In practical terms, this means that in any large economy, central planning by a single computer is impossible.

To make these abstract mathematical relationships concrete, Shalizi considers an estimate by Soviet planners that, at the height of Soviet economic power in the 1950s, there were about 12 million commodities tracked in Soviet economic plans. To make matters worse, this figure does not even account for the fact that a ripe banana in Moscow is not the same as a ripe banana in Leningrad, and moving it from one place to the other must also be part of the plan. But even were there “merely” 12 million commodities, the most efficient known algorithms for optimization, running on the most efficient computers available today, would take roughly a thousand years to solve such a problem exactly once. It can even be proven that a modern computer could not achieve even a reasonably “approximate” solution—and, of course, today there are far more goods, services, transport choices, and other factors that would go into the problem than there were in the Soviet Union in the 1950s. Yet somehow the market miraculously cuts through this computational nightmare.

Markets as Parallel Processors

But all of this raises a question. If the problem is so hard to solve, how is it possible for the market to solve it? Consider Lange’s quote from our epigraph.5 The market is just a set of rules enforced by the government—not much different from a computer algorithm, although a very complex one. It’s true that no single person invented the market. Yet the rules of the market are well understood, and economists are constantly telling people to implement them. Imagine that a new country is created, and its leaders ask a western economist how best to create an economy. The economist will tell them how to set up a market—the rules of contract and property law, for example. (Indeed, economists have been running around the halls of government of developing countries and the floors of start-ups for decades doing just this.) Aren’t the economists just supplying a kind of computer program to the leaders, who by implementing it are engaging in a style of centralized planning?

To understand how the market solves the “very large system of equations,” you need to know the key ideas of distributed computing and parallel processing. In these systems, complicated calculations that no one computer could perform are divided into small parts that can be performed in parallel by a large number of computers distributed across different geographic locations. Distributed computing and parallel processing are best known for their role in the development of “cloud computing,” but their greatest application has gone unnoticed: the market economy itself.

While the human brain is wired differently from a computer, computational scientists estimate that a single human mind has a computational capacity roughly ten times greater than the most powerful single supercomputer at the time of this writing.6 The combined capacity of all human minds is therefore tens of billions of times greater than this most powerful present-day computer. The “market” is then in some sense a giant computer composed of these smaller but still very powerful computers. If it allocates resources efficiently, it does so by harnessing and combining their separate capacities.

Adopting this perspective, we must ask how the market is “programmed” to achieve this outcome. The economy consists of a variety of resources and human capacities at a range of locations, along with a system for transmitting data about these resources among individual human beings. A standard approach in parallel processing is to take information local to one location in, say, a picture or puzzle and assign this to one processor, integrating these inputs on still other processors in a hierarchical fashion. Now apply this image to the economy. In every place, we take one of the computers (humans) available to us and assign it to collect information about that location’s needs and resources and report some parsimonious “compressed” summary of all that data to other computers. For example, there might be a hierarchical arrangement of computers, with those responsible for particular locations on the ground reporting to a higher “layer” that integrates local areas and then upward from there.

Consider the following example. A person works on a farm and is in charge of ensuring that the farm is productive and that her family is happy. This person sends information about the farm and her family, not in its full richness and complexity, but in broad strokes, to district managers. One manager specializes in understanding the resources that farms need to operate—seeds, fertilizer— while another understands the resources that people living on farms need in order to be happy, including food and clothing. These managers would then aggregate these data and convey them to the next layer, perhaps a national wheat distributor or a regional supplier of products for use on farms. At every level of this chain, some information would need to be lost for the parallel processing to remain parallel and tractable: the farm manager could not detail every way in which a slightly better paved road would help in conveying goods to market or how slightly cleaner water would protect her crops. But at least she could report the largest and most important needs and hope that the loss of information only slightly reduces the efficiency of the resulting solution.

This arrangement has a flavor of central planning but also resembles a market economy. People specialize in different parts of the production chain and operate under limited information, yet are able to coordinate their behavior because the information takes a certain form. While people are experts on local conditions, they know little about economic conditions elsewhere. They know that grain prices are high and tractor prices are low, but not why this is the case. When they buy a tractor or sell grain, they don’t tell the vendor or purchaser their life story, all the conditions on their farm, and so forth. They just place an order or offer so much grain at the going price.

This “price system” thus greatly simplifies communication between different parts of the economy. In fact, economists have shown that prices are the minimum information that a farmer needs to plan her operations effectively. So long as every important way that the farm could benefit or draw down resources from the outside world has a price attached to it, this is all the information the farmer needs to make economic decisions. Any greater information would be a waste, from a purely economic efficiency perspective, though it might be interesting from time to time to develop personal relationships. Conversely, if these prices were not available, there would be no way for a farmer to know whether it pays to use new tractors or rely instead on more labor, nor would she know how many seeds to plant for next season. The farmer without such prices could easily produce too little or waste resources on a tractor that could be better used for more labor, seed, or even consumption.

In this sense, prices are the “minimum” information necessary for rational economic decision-making.7 No other system of distributed computing can be equally productive and yet require less communication.

Markets elegantly exploit distributed human computational capacity. In doing so they allocate resources in ways that no present computer could match. Von Mises was right that central planning by a group of experts cannot replace the market system. But his argument was mistakenly taken as implying that the market is “natural” rather than a human-created program for managing economic resources. In fact, there is nothing natural about market institutions. Human beings create markets—in their capacity as judges, legislators, administrators, and even private business people who frequently set up organizations that create and manage markets.

Markets are powerful computers, but whether they produce the greatest good or not depends on how they are programmed. We advocate “Radical Markets” because we believe that in the present stage of technological and economic development, when cooperation has grown too large to be managed by moral economies, the market is the appropriate computer to achieve the greatest good for the greatest number. If we see it as such, we can fix the bugs in the market’s code and enable it to generate more wealth that is distributed more fairly.

By sharpening our understanding of the role and value of markets, the computational analogy clarifies our claim that the solutions we propose are based on extending the reach of markets. The COST on wealth radicalizes markets as it puts greater responsibility on individuals to articulate their values and gives them greater ability to claim things they value highly. QV does the same in the political sphere. Our ideas on migration give individuals more scope for determining the best path for where they live and work. Our proposals on antitrust and data valuation break up centralized power and place greater responsibility on individuals and small firms to compete, innovate, and make rational economic choices to allow for the distributed computation of optimal economic allocations. But all these proposals raise the question: if the market is just a computer program that harnesses the power of individual human intellects, will it still be necessary as computer power increases?

#### Antitrust markets are fragile and need to be carefully tailored – alternative visions of industrial organization are meaningless and reproduce status quo market failures

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(Herbert, “Whatever Did Happen to the Antitrust Movement?” Faculty Scholarship at

Penn Law. 1964)

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output, and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.17

Nevertheless, mantras such as “industrial concentration” or “big business” have great political force. These terms provide almost nothing in the way of administrable rules while yet evoking an image of something big, bad, and powerful that government must bring under control. For example, here is the plank of the 2016 Democratic Party’s platform on antitrust:

Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction.

We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama’s recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.18

The antitrust plank never references low consumer prices, or anything having to do with product quality. That is not because Democrats are not interested in low consumer prices.19 Rather, they apparently believe that antitrust has little to do with it. The references to prices occur in other sections of the platform, devoted to such subjects as health and safety and the high price of pharmaceutical drugs. Those sections make no reference to antitrust law.20 The only references to “consumers” occur in planks pertaining to unionization, affordable housing, Wall Street, banks and Dodd-Frank, and clean energy.21 So according to the platform, while legal policy generally is concerned with high consumer prices, antitrust policy apparently is not. By contrast, the 2016 Republican platform never references antitrust, although it does contain a plank promoting a “competitive America,” but focused entirely on lowering tax rates.22

The antitrust plank in the 2016 Democrat platform is actually one of the most detailed to appear in any platform by a major political party.23 The catchphrases that it uses, however—“corporate concentration,” “unfairly limiting competition,” or “abusive behavior by dominant companies”—can mean practically anything depending on assumptions. The platform is peppered with references to “fair” or “fairness,” including the antitrust plank, but with no reference point indicating how fairness should be assessed. Is it “fair” that consumers be asked to pay high prices in order to accommodate the shortcomings of some businesses; or conversely, is it “fair” that small businesses suffer simply because they are not able to compete with larger firms on price or quality; or is it “fair” that firms heavily invested in old brick-andmortar distribution lose out to more technologically entrepreneurial firms? “Fairness” as an antitrust concern means nothing without a reference point or set of measurement tools.

As for specific practices, the antitrust plank in the Democrat platform singles out “tying arrangements, price fixing, and exclusionary conduct,” saying nothing about mergers, other vertical restraints, or anticompetitive patent practices. In fact, the platform never mentions patents, although it makes frequent references to innovation, largely in the context of proposed government intervention to stimulate production24 or to finance research and development and educate people for more technically demanding jobs.25 Of the three anticompetitive practices that it singles out, “price fixing” is completely uncontroversial and has always been a central focus of nearly every articulation of antitrust policy, left, center, and right—including in Bork’s The Antitrust Paradox. 26 The term “exclusionary conduct” is so vague that it is meaningless. Both socially harmful and socially beneficial conduct can be “exclusionary.” The inclusion of “tying arrangements” is mystifying. Tying is ubiquitous in modern economies and is an essential characteristic of networks and technology.27 Further, the vast majority of it is procompetitive because it increases output without excluding anyone. Finally, the number of antitrust tying cases is small in comparison with merger cases, which make up a large portion of antitrust enforcement activity. A major party platform that identifies “tying arrangements” but not “mergers” as a fundamental concern requires an explanation. Most importantly, it seems to miss the whole point of competitive markets, which is to produce a high output of quality, competitively priced goods.

At least in part, the Democratic Party platform reflects the reappearance of movement antitrust. While it is hardly the only expression, and certainly not the most extreme, it represents a troublesome development—namely, the idea that America needs higher prices in order to give smaller firms a fair chance. The platform also gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the illiterati, and perhaps that is all that can be expected of a political platform. In the process, however, it does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined. Its supporters generally disparage the use of economics, sometimes suggesting that antitrust policy should be governed by political theory instead.28 Exactly how political theory gets one to specific antitrust rules is not completely clear, but it involves excluding the opinions of antitrust experts concerning the public’s interest.29

Movement antitrust argues variously for abandoning the measurement of competition by reference to output and price,30 or even abandoning consumer welfare as an antitrust proscription altogether.31 It accuses retailers such as Amazon of engaging in “predatory pricing” without providing a coherent definition of the practice.32 It never explains how a nonmanufacturing retailer such as Amazon could ever recover its investment in belowcost pricing by later raising prices, and even disputes that raising prices to higher levels ever needs to be a part of the strategy, thus indicating that it is confusing predation with investment.33 Charging low but profitable prices indefinitely is not unlawful “predatory pricing”‘ nor is forcing suppliers to price competitively.

The movement antitrust attack on “consumer welfare” reflects both a misunderstanding of that term, and an exaggeration of its influence on recent antitrust jurisprudence. This point is critical because much of movement antitrust blames the consumer welfare principle for the current state of antitrust law. Consumer welfare as it is properly used today refers to the welfare of consumers as consumers, pure and simple.34 Speaking objectively, consumer welfare is improved by high output and low prices, as well as high quality. Under this definition the welfare of producers, competitors, or anyone other than consumers who might be affected by a practice is ignored. In addition to its substantive advantages, this principle has a powerful administrative advantage: it does not require courts to compute welfare “tradeoffs,” because there is nothing to trade off.35

In sharp contrast, Robert Bork very famously used the term “consumer welfare” when he was really referring to the combined welfare of both producers and consumers.36 He observed that an economic tradeoff occurs when a supplier practice causes monopolistic increases in consumer prices but also reduces the supplier’s costs.37 Most peculiarly, for Bork the word “consumer” referred to suppliers as well as customers.38 For Bork, a practice that generated one hundred dollars in seller profits but buyer losses of sixty dollars would be counted as a net improvement of “consumer welfare.” Bork also believed, however, that actual computation of welfare tradeoffs in individual cases would be too difficult. Further, an attempt to do so would overlook important efficiencies. Rather, efficiencies should be presumed, even when the challenged practice creates market power.39 That presumption of efficiency without proof is one of the most controversial aspects of Bork’s approach to the welfare question.

These two understandings of consumer welfare have produced a troublesome ambiguity in antitrust law ever since. For example, some of those who write in movement antitrust today attribute the consumer welfare principle to Bork,40 and as a result blame it for higher prices that accrue to producers. But the important thing is that high producer profits for Bork was part of the consumer welfare that antitrust law should produce.

This ambiguity about definition has also affected Supreme Court usage of “consumer welfare.” The Supreme Court has never categorically embraced any particular definition of consumer welfare, even though it has used the term several times. Six majority opinions speak of consumer welfare. Two were quotations from Bork’s The Antitrust Paradox, suggesting that the Court was either speaking of producer welfare as well, or else that it did not appreciate the difference between Bork’s definition and true consumer welfare.41 Plaintiffs won both cases, however, and the holdings are consistent with true consumer welfare. Indeed, in one of them, Reiter v. Sonotone Corp., the Supreme Court held that end-use consumers had standing to pursue price fixing, making it an important consumer welfare decision.42

Of the remaining four uses, two involved predatory pricing cases observing that consumer welfare would be enhanced by a period of below-cost pricing that was not followed by recoupment of losses through subsequent higher prices.43 That would very likely be true. An unsuccessful attempt at predatory pricing would result in lower consumer prices temporarily, but no subsequent period of high prices. The final uses of consumer welfare are related to the Leegin Creative Leather Products, Inc. v. PSKS, Inc. decision holding that some instances of resale price maintenance may promote consumer welfare. The first was Leegin itself44 and the second was Ohio v. American Express Co., making essentially the same observation.45 That could also be true under either definition of consumer welfare.

Four additional usages of the term are in dissents.46 Finally, the term appeared in Justice Brennan’s concurring opinion in the Jefferson Parish Hospital District No. 2 v. Hyde tying case. Justice Brennan observed that some ties could impair horizontal competition, injuring consumer welfare.47 A few other cases never use the phrase “consumer welfare” but do speak more generally about benefits to consumers.48 None of these Supreme Court decisions distinguish the Bork definition of consumer welfare from the true consumer welfare position. Beyond the Supreme Court, the strongest case for application of a consumer welfare principle is in merger law under the Horizontal Merger Guidelines, which embrace a consumer welfare principle to the extent that they tie merger policy to the effect on output and consumer prices.49

One of the most disturbing things about movement antitrust is its indifference or even disparagement of low consumer prices. Without citing any evidence, some of its protagonists proclaim that most Americans are not concerned with high prices that might result from monopoly, but rather with “loss of their properties, hence their independence, even their dignity.”50 They recommend harsh rules against vertical integration without ever stating a test, other than a very general suggestion that vertical integration leads to leveraging and foreclosure.51 They call for a return to the merger enforcement standards expressed in the 1968 Merger Guidelines—for example, blocking any merger between a firm with fifteen percent of a market and any other firm whose market share is one percent or more. The relevance of these numbers is not apparent, other than their suggestion that firms are

currently too big.52

Clearly, high prices are not the target. The movement’s proponents denigrate the importance of prices to merger analysis—for example, objecting to the fact that, while the 1968 Merger Guidelines were not particularly focused on consumer prices, guidelines issued in the 1980s and after were. Indeed, low prices appear to be the enemy that antitrust must combat.53 Movement protagonists argue in favor of resale price maintenance, not in order to promote lower cost distribution, but rather to protect less efficient retailers’ higher margins from predatory pricing—without any evidence of a type of predatory pricing that resale price maintenance could combat.54 They enthusiastically embrace Louis Brandeis’s repeated arguments that “price-cutting” is in fact “the most potent weapon of monopoly—a means of killing the small rival.”55 Much of the resale price maintenance that Brandeis supported occurred at the behest of dealer cartels who forced suppliers to use resale price maintenance as a way of disciplining price cutters.56

Certainly, big business can cause harm to the lives of Americans in other ways than through competitive pricing. But these ways need to be articulated, supported by evidence, and then sorted into those things that are conceivably within the domain of antitrust and those that are not. Promiscuous application of the antitrust laws so as to make big firms smaller and prices higher could cause irreparable harm, not only to consumers, but to the entire economy.

#### The stakes are high—antitrust policy can and should be distinguished from broad political economy—conflating the two risks undoing every achievement of the past 100 years

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(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal

Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59

Santa Clara L. Rev. 703)

The justification for a consumer welfare standard, as well as for neoliberal political economy more generally, should be distinguished from a defense of this sense of neoliberalism as a comprehensive social order which, like its Marxist rival, shares in this totalitarianizing of the economic. 150 Put simply, notwithstanding its fruits, neoliberalism should not become the very sort of utopian and totalitarian ideology that it was designed to replace. The existence of a justification for neoliberal competition policy does not mean that the wealth maximizing logic of the market should be the organizing principle for society writ large' 5 ' -or even law, as a general matter. 52 To paraphrase Schum- peter, it is the higher order question of "Meaning," upon which the indictment of neoliberalism is likely most sound and most neededhowever difficult that may be to articulate.

VI. CONCLUSION

The United States has been the preeminent embodiment of capitalism and democracy around the world. As it transitioned through what we have understood as the classical liberal, progressive, and neoliberal phases of its political economy, it played a leading role in overcoming the greatest authoritarian and totalitarian forces in modem history: the last of the monarchies of the Old Order in World War I, national socialism in World War II, and communism in the Cold War. But rather than herald a liberal and democratic end of history,'53 the current crisis of the neoliberal order is an occasion for policymakers to reflect upon precisely where things may have went wrong.

The stakes are high. But for the United States' unique achievements in republican government, victory in two world wars, and technological and economic progress, Schumpeter may very well have been proven right that the great revolution of capitalist democracy, which preceded over a hundred and fifty years of inter-Western wars, civil strife, and the resultant loss of hundreds of millions of lives, could have been merely a precursor'5 4 to a far more barbaric and inhumane system of government than what came before it,'55 and which would put to death by the tens of millions the very masses it claimed it would liberate. 156 The United States, with its unrivaled system of free enterprise, commitment to the rule of law, and inheritance of the Western tradition remains the best hope to prevent, in solidarity with its allies, the final triumph of such a totalitarian tragedy.

The competition policy community, which during the neoliberal period accustomed itself to a comfortable and technocratic discourse about which conduct rules will maximize consumer welfare, 157 must adapt its thinking by considering changes to antitrust law within the context of a broader debate that questions not only the consumer welfare consensus, but also the neoliberal principles upon which contemporary antitrust is premised. In this debate, competition policymakers should remain steadfast in their conviction that history has justified a consumer welfare standard as the lodestar of antitrust law158 --even if incremental changes are appropriate in some areas. Simply put, the inability for antitrust law to operate as an economic, social, or political panacea does not mean it isn't working.

Rather, what is good policy for antitrust law may not be good policy for all organs of society, and the fundamental problem with neoliberalism may not so much as involve what has been gained, but what has been lost-that is, so to speak, Burke's "chivalry" or Schumpeter's "holy grail"-within neoliberalism's broader program to generalize the market form across society. 159 Seeking to use antitrust or other market tools as a means to understand, let alone solve, larger social problems fundamentally fails to grasp the deeper forms of which societies have historically been constituted. 60 Even if man is a homo economicus- as he always has been' 6 '-that is certainly not all he is, and his economic nature need not and should not come at the expense of the higher rational faculties that ground moral and political order. These questions, as uncomfortable as they may be, far outstrip the search of the New Brandeisians and others for a golden mean in the Herfindal- Hirschman index that balances the interests of capitalism and democracy in a given market. They are also more important.

The hope lies not, moreover, in a return to either Jeffersonian democracy or New Deal progressivism. 162 Just as the analysis of the problem may be better found on the classical "anthropological' 163 analysis, to avoid the Scylla and Charybdis of tyranny and ochlocracy, a path forward for America and the West lies in its unique and millennia- old tradition of republican government. In particular, if liberal capitalist democracy continues to falter,164 the United States can take the lead in looking back to the cosmopolitan and meritocratic model of republican Rome1 65 that inspired Presidents166 and abolitionists167 -even if America ultimately chartered a different course. 68 The West's ability to once again renew its civilization around a rightful heir-lest imposters claim the title-to its great tradition of right order, individual liberty, and progress in the condition of man may hang in the balance.

#### Evaluate consequences – debating risks in particular contexts moves beyond determinism – k2 bridge research and practice

Lacey et al., Commonwealth Scientific and Industrial Research Organisation, Australia, ‘15

(Justine, S. Mark Howdenb, Christopher Cvitanovicb, Anne-Maree Dowda, “Informed adaptation: Ethical considerations for adaptation researchers and decision-makers,” Global Environmental Change Volume 32, May 2015, Pages 200–210)

These changes range from incremental adaptation (e.g. change in crop varieties) through to systemic change (e.g. change from cropping to a mixed crop-livestock system) and finally, transformational adaptation (e.g. adopting a fundamentally different land use or the relocation of production activities). While Rickards and Howden (2012) note that, in reality, the distinction between each of these scales of activity can become blurred due to their heuristic and subjective nature and by the duration, extent and timing of the activities taking place, it may also be instructive to think about these scales of activity as representing a range of possible adaptation options available to decision-makers depending on their particular circumstances and motivations. In this context, we seek to understand the impact and relevance of researchers’ contributions and how research findings can be used both ethically and effectively to help agricultural producers understand and navigate the full range of relevant options that may be available to them; in effect, we are interested in the role of researchers as ‘honest brokers’ of this adaptation knowledge (sensu Pielke, 2007).

It is also recognised the focus of climate adaptation research is about addressing transitions. This has been reflected in a shift from a sole focus on understanding and projecting the biophysical basis of climate change towards being more inclusive of social, economic, cultural, policy and institutional research about adaptation and mitigation (i.e. the transitions required to move from problem identification through to solution identification and implementation) (e.g. Cornell et al., 2013, Howden et al., 2013 and Lebel, 2013). In order to move from impacts to understanding what it takes to adapt successfully and support people making decisions, the science has also needed to undergo transition. The risk of delivering science that does not meet these needs is a reduction in adaptation gains, and this has been widely documented. For example, Moser and Dilling (2011) refer to this as the need to close the science-action gap through better communication, education and engagement practices. Similarly, Sarewitz and Pielke (2007) highlight the problem as a growing gap between the supply of and demand for the research that is being undertaken versus that which is most needed. This is perhaps reflected in the proportionally fewer studies in the literature that report on adaptation actions and their impact (Berrang-Ford et al., 2011). Howden et al. (2013) also document the mismatch between the science and adaptation frontiers which effectively means there is a gap between the science being undertaken and the needs of those actually adapting. This gap could also reflect a growing tension between the metrics of science outputs and the direct and indirect impacts of research on the lives and decisions of end-users (which in some cases, are confounded by other factors or simply not measured). For researchers working in the applied context, these are very real challenges (Boardman and Ponomariov, 2007).

Thus, while biophysical climate research has been critical in fostering our understanding of the issues facing the agricultural sector, there arguably should now be a move beyond problem identification phase into solution identification and implementation supported by mechanisms for evaluating the effectiveness of these solutions. Understanding how science can make a difference in this way reflects the need to better understand the public good outcomes of adaptation research (Bozeman and Sarewitz, 2011 and Meyer, 2011). This means demonstrating how adaptation research supports decision-makers in the context of the complexities they are operating within and in accord with broadly-held societal values (i.e. environmental, economic, institutional, social etc.). It also highlights the need to refocus our attention on the goals of adaptation research, and as researchers, to reflect quite explicitly on whether our efforts are delivering the public good benefits that are required of our (mostly) publically funded research. This is relevant because the public good values of science are often balanced against professionally-valued science outputs such as publications, awards, recognition within the science community, and the ability to secure ongoing research funding (Panaretos and Malesios, 2009). While these activities are critical to developing scientific careers and furthering scientific research, they are not always aligned with promotion of the public good values that drive the research itself (Guston, 2000 and Shanley and López, 2009). Hence, there are calls for claims about the social benefits of adaptation research to be demonstrated (Sarewitz and Pielke, 2007 and Meyer, 2011). This is particularly the case where those claims have the capacity to affect the livelihoods of agricultural producers and society more broadly.2

3. At the ethical interface of risk and responsibility

The interface of the research and operational aspects of adaptation research brings the ethical nature of our practice as adaptation researchers and our interactions with end-users into focus. We regard the core ethical dimensions of our practice as adaptation researchers (and/or practitioners) as revolving around how we conceptualise and manage risk and responsibility in those interactions.

The study of risk has a long history and it is recognised as “one of the major conceptual categories with which we describe our attempts to deal with an unpredictable future” (Hansson, 2008, p. 423). Broadly however, risk can be understood as being comprised of two components: the probability of an occurrence taking place and the consequences associated with that occurrence (Fischhoff et al., 1984 and Holton, 2004). Both elements are critical at the interface of climate adaptation research and decision-making (Hewitson et al., 2014). Despite this, an approach that has dominated our thinking for close to a century identifies probability as the key defining aspect (Knight, 1921). While this is a highly deterministic approach to risk in that it relies on calculated probabilities to determine the likelihood or scale of risk present in a range of options, according to O’Brien (2011, p. 2), it is not unlike the way adaptation responses “often seem to be constrained by the projections of climate models and integrated assessment models, as if the future has already been decided and the challenge is for humans to adapt”. Thus while the use of probabilities has provided one model for conceptualising risk, which has been taken up in a wide range of decision contexts, one of the main critiques of this approach is that it often fails to adequately take into account the element of exposure (i.e. the material consequences of making a particular decision) (Holton, 2004). These consequences may be positive or negative, anticipated or unanticipated but a critically important part of decision-making is about understanding, as best as possible, the consequences of a given decision. This means that while we can build part of the picture with our research models and predictions, there remain elements of decision-making that must be based on making a judgement about what constitutes an acceptable or unacceptable level of risk from agricultural decision-makers’ own perspectives. This question of what constitutes an acceptable level of risk for decision-makers represents the point at which ethical judgement intersects explicitly with how we respond to scientific uncertainty (Brown, 2013).

We argue this intersection is instructive in terms of considering the distinct roles and responsibilities of adaptation researchers and decision-makers (Vogel et al., 2007). It also emphasises the very different relationship a researcher and a decision-maker have to the adaptation decision itself – particularly in terms of who should determine the level of risk and who should accept responsibility for the level of risk associated with a particular adaptation decision. Brown et al. (2009) argue that determining what constitutes an acceptable level of risk is almost impossible in the absence of any criteria of acceptability and this highlights a critical difference between scientific research and ethical decision-making (see also Hansson, 2003). How a decision-maker responds to the results of scientific research and determines the ‘right’ course of action is very much driven by their subjective values and beliefs. Science “cannot, by itself, generate prescriptive guidance” (Brown et al., 2009, p. 26). Determining the ‘right thing to do’ is simply not the domain of scientific research, it is a decision based on ethics and values. The point here is that such a decision can be informed by science, but the science itself does not and cannot fully resolve the complexities of the decision process which tend to include the range of personal, social, political, economic and institutional factors that affect such processes (Meyer, 2011 and Jacobs, 2014).

Brown (2013) points out that the tension between science and ethics is evident in the way the proof standards of science become problematic when we attempt to apply them to practical situations. In particular, this becomes most pronounced when we consider who should bear the burden of proof when it comes to potential harms resulting from a decision to act (or not). For example, every decision carries consequences but it is difficult to see how scientific research is capable of determining just how much risk should be carried by individual decision-makers, or what responsibility would be carried by researchers assigning that risk to decision-makers. This reflects a combination of scientific and ethical decision-making that can only be achieved if researchers are working together with decision-makers, and can be responsive to and inclusive of a range of particularities of context, motivations and capacities (Jacobs, 2014). This means working beyond the mechanical application of a probabilistic risk-based framework to ensure that researchers do not (either intentionally or unintentionally) impose unnecessary risks on decision-makers, and that decision-makers are informed about the risks to the greatest extent practicable so that they can determine if they are willing and able to accept those risks. It is for these reasons we argue it is necessary that researchers and decision-makers must have a clear understanding of their respective roles as either describing, resolving, imposing or accepting risk, and that the framing of these roles cannot be predicted in terms of probability frameworks or modelling. Rather, the ethical nature of these responsibilities must be determined based on recognising a clear difference between:

•intentional and unintentional risk exposure in adaptation: in this case, researchers have significant responsibility in terms of ensuring their research recommendations provide the full range of appropriate options to decision-makers and do not unintentionally close out relevant options as this may increase the risk exposure, which includes risk created by conflicts of interest such as advocating one's own research, for example; and

•voluntary risk taking: risks imposed on a decision-maker who willingly accepts them (i.e. is well informed), and risks imposed on a decision-maker who does not accept them (i.e. paternalistic or coercive behaviour or as a result of not being well informed) (based on Hansson, 2012).

Thus, if we view one of the core responsibilities of adaptation researchers as supporting effective adaptation decision-making, we might anticipate this would be achieved through provision of decision support resources (i.e. information, knowledge, support tools) and the unbiased and comprehensive communication of the options, and the benefits and risks associated with them. Not to do this may place researchers in the position of imposing higher levels of risk on decision-makers (whether intentionally or unintentionally). This emphasises the need for the information being exchanged between researchers and decision-makers to be useful, relevant and actionable, and for the communication process to be appropriate for the relevant end-user(s) (Cash and Buizer, 2005, Meinke et al., 2006 and Buizer et al., 2010). Importantly however, this can only happen if researchers have a good understanding of what decision-makers need and decision-makers know what researchers have to offer; in other words, establishing an effective knowledge market.

4. Ethical considerations related to stakeholder engagement and knowledge exchange for agricultural adaptation

We consider the ethical issues around increased risk exposure, and voluntary or imposed risk, are most visible at the interface of knowledge exchange between researchers and decision-makers. This requires that, as researchers, we are willing to acknowledge the role of our own expertise, beliefs and values in the exchange of research findings but also how this can implicitly or explicitly inform recommendations made to end-users.

Risk can arise in part from the different ways researchers define and respond to adaptation. While we suggest there are various scales of adaptive change (Fig. 1), not all researchers agree with this, instead choosing to focus exclusively on one aspect of adaptation (e.g. examining technological innovation but ignoring institutional change). The risk here is that researchers may become advocates for their own research without full transparency that their recommendations represent only select information (aligned with their own knowledge or expertise) and not necessarily the broader array of adaptation options that are available, thus transferring un-identified risk to the end-user (Pielke, 2007). Such behaviour on the part of the researcher effectively diminishes the choices available to decision-makers and to some extent, assumes a partial role in the decision-making process, which we argue is not the responsibility or function of the researcher. Rather, recommendations that are appropriate to decision-makers must be aligned with their specific contextual circumstances, needs, beliefs and values, not those of the researcher (O’Brien and Wolf, 2010).

# 2AC

## Case

#### Their critique of U.S. leadership is conservative essentialism – there is no inevitable valence to U.S. policy

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Christopher Patrick, “Anti-imperial World Politics: Race, class, and internationalism in the making of post-colonial order.” http://etheses.lse.ac.uk/4140/1/Murray\_Anti-imperial-world-politics.pdf

Questions about difference and diversity are raised to critique the totalising and homogenising tendencies of Realism, Liberalism, or modernisation theories more broadly. I concur with the argument that international theory needs to cast a wider net, and open its analytic scope to account for global processes and inequalities, subaltern politics, and inter- societal connections. However, some anti-Eurocentric IR carries a danger of reifying ‘non- Western difference’ by ascribing to it a geography and an essence. Take for example ‘Global IR’, which has come to stand in as the latest iteration of this longstanding debate. In his 2014 declaration of Global IR’s new agenda to the International Studies Association, Amitav Acharya accepts Stanley Hoffmann’s account of IR as ‘born and raised in America’, but adds that the discipline has now ‘mushroomed’ through ‘schools, departments, institutes, and conventions’ around the world.33 He argues that this new state of affairs presents an opportunity to open IR to the rest of the world; to push for ‘greater inclusiveness and diversity’, and to address the widely acknowledged problem of the discipline’s empirical focus and ‘main theories’ being ‘too deeply rooted in, and beholden to, the history, intellectual traditions, and agency claims of the West.’34

Such a conception reproduces, what I call, epistemic mapping: the notion that knowledge has a single or rightful geographic provenance, that it is owned by a single race, culture, nation, or region. Similarly ‘decolonial’ scholars, often drawing on the work of Enrique Dussel or Walter Mignolo, characterise modernity as a bifurcated process in which ‘epistemologies of the South’ have been systematically disenfranchised, excluded, or eradicated according to the racial chauvinism inherent to Western thought systems.35 Some writing in this register argue for the need to seek out ‘places of otherness’, to borrow a phrase from Gyan Prakash, as a resource from which to contest the fundamental assumptions of hegemonic liberal politics and nationalist historiography, which are characterised as essentially Western.36 Similar to Global IR, there is a danger of reproducing essential and stereotypical definitions of human difference in promoting a Western universalism/non- Western authenticity binary. Strategic essentialism has long been a feature of political discourse; it can serve progressive or conservative ends, as well as have unintended consequences. The role of the scholar should not be to do strategic essentialism ourselves, but to better understand how it becomes possible, and/or to assess its aims and outcomes.

## K

#### Aff is a DA to the alt – imperative of survival requires that we invest in institutions – that outweighs

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(Anthony, Stefanie Fishel is Assistant Professor, Department of Gender and Race Studies at the University of Alabama, Audra Mitchell is CIGI Chair in Global Governance and Ethics at the Balsillie School of International Affairs, Simon Dalby is CIGI Chair in the Political Economy of Climate Change at the Balsillie School of International Affairs, and, Daniel J. Levine is Assistant Professor of Political Science at the University of Alabama, “Planet Politics: Manifesto from the End of IR,” Millennium: Journal of International Studies 1–25)

8. Global ethics must respond to mass extinction. In late 2014, the Worldwide Fund for Nature reported a startling statistic: according to their global study, 52% of species had gone extinct between 1970 and 2010.60 This is not news: for three decades, conservation biologists have been warning of a ‘sixth mass extinction’, which, by definition, could eliminate more than three quarters of currently existing life forms in just a few centuries.61 In other words, it could threaten the practical possibility of the survival of earthly life. Mass extinction is not simply extinction (or death) writ large: it is a qualitatively different phenomena that demands its own ethical categories. It cannot be grasped by aggregating species extinctions, let alone the deaths of individual organisms. Not only does it erase diverse, irreplaceable life forms, their unique histories and open-ended possibilities, but it threatens the ontological conditions of Earthly life.

IR is one of few disciplines that is explicitly devoted to the pursuit of survival, yet it has almost nothing to say in the face of a possible mass extinction event.62 It utterly lacks the conceptual and ethical frameworks necessary to foster diverse, meaningful responses to this phenomenon. As mentioned above, Cold-War era concepts such as ‘nuclear winter’ and ‘omnicide’ gesture towards harms massive in their scale and moral horror. However, they are asymptotic: they imagine nightmares of a severely denuded planet, yet they do not contemplate the comprehensive negation that a mass extinction event entails. In contemporary IR discourses, where it appears at all, extinction is treated as a problem of scientific management and biopolitical control aimed at securing existing human lifestyles.63 Once again, this approach fails to recognise the reality of extinction, which is a matter of being and nonbeing, not one of life and death processes.

Confronting the enormity of a possible mass extinction event requires a total overhaul of human perceptions of what is at stake in the disruption of the conditions of Earthly life. The question of what is ‘lost’ in extinction has, since the inception of the concept of ‘conservation’, been addressed in terms of financial cost and economic liabilities.64 Beyond reducing life to forms to capital, currencies and financial instruments, the dominant neoliberal political economy of conservation imposes a homogenising, Western secular worldview on a planetary phenomenon. Yet the enormity, complexity, and scale of mass extinction is so huge that humans need to draw on every possible resource in order to find ways of responding. This means that they need to mobilise multiple worldviews and lifeways – including those emerging from indigenous and marginalised cosmologies. Above all, it is crucial and urgent to realise that extinction is a matter of global ethics. It is not simply an issue of management or security, or even of particular visions of the good life. Instead, it is about staking a claim as to the goodness of life itself. If it does not fit within the existing parameters of global ethics, then it is these boundaries that need to change.

9. An Earth-worldly politics. Humans are worldly – that is, we are fundamentally worldforming and embedded in multiple worlds that traverse the Earth. However, the Earth is not ‘our’ world, as the grand theories of IR, and some accounts of the Anthropocene have it – an object and possession to be appropriated, circumnavigated, instrumentalised and englobed.65 Rather, it is a complex of worlds that we share, co-constitute, create, destroy and inhabit with countless other life forms and beings.

The formation of the Anthropocene reflects a particular type of worlding, one in which the Earth is treated as raw material for the creation of a world tailored to human needs. Heidegger famously framed ‘earth’ and ‘world’ as two countervailing, conflicting forces that constrain and shape one another. We contend that existing political, economic and social conditions have pushed human worlding so far to one extreme that it has become almost entirely detached from the conditions of the Earth. Planet Politics calls, instead, for a mode of worlding that is responsive to, and grounded in, the Earth. One of these ways of being Earth-worldly is to embrace the condition of being entangled. We can interpret this term in the way that Heidegger66 did, as the condition of being mired in everyday human concerns, worries, and anxiety, to prolong existence. But, in contrast, we can and should reframe it as authors like Karen Barad67 and Donna Haraway68 have done. To them and many others, ‘entanglement’ is a radical, indeed fundamental condition of being-with, or, as Jean-Luc Nancy puts it, ‘being singular plural’.69 This means that no being is truly autonomous or separate, whether at the scale of international politics or of quantum physics. World itself is singular plural: what humans tend to refer to as ‘the’ world is actually a multiplicity of worlds at various scales that intersect, overlap, conflict, emerge as they surge across the Earth. World emerges from the poetics of existence, the collision of energy and matter, the tumult of agencies, the fusion and diffusion of bonds.

Worlds erupt from, and consist in, the intersection of diverse forms of being – material and intangible, organic and inorganic, ‘living’ and ‘nonliving’. Because of the tumultuousness of the Earth with which they are entangled, ‘worlds’ are not static, rigid or permanent. They are permeable and fluid. They can be created, modified – and, of course, destroyed. Concepts of violence, harm and (in)security that focus only on humans ignore at their peril the destruction and severance of worlds,70 which undermines the conditions of plurality that enables life on Earth to thrive.

#### Pessimism overdetermines human actions within a changeable system – the alt abdicates the responsibility of political commitment and conflates “an antiblack world” with “the world is antiblack”

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Lewis Gordon, “Freedom, Justice, and Decolonization,” Routledge, December 31, 2020, https://www.routledge.com/Freedom-Justice-and-Decolonization/Gordon/p/book/9780367632465

Afropessimism grew into an influential area of black thought by the second decade of the new millennium. The term “Afropessimism,” as I am using it here, came out of “Afro-pessimism.” The elimination of the hyphen is an important development since it dispels ambiguity and in effect announces a specific mode of thought. Should the hyphen remain, the ambiguity would be between pessimistic people of African descent and philosophical or theoretical pessimism.1 The conjoined, theoretical term is what proponents of that intellectual movement often have in mind in their diagnosis of what I shall call “the black condition.”

The appeal to a black condition is peculiarly existential, though it is done in this context in ironic ways. Existentialists, after all, as is well known, reject notions of human “nature,” on the grounds that human beings live in a world of possibility, which makes an essentialist notion such as “nature” a matter, at least for such realities, always in the making.2 In the classic formulation, human reality exists prior to its essence. For each human being, essence is, as it were, an appointment whose actuality is not always fulfilled. Such a task does not mean that human beings lack anchorage. Everyone has to start from somewhere and that or those are conditions of possibility for a human world. Existentialists, thus, often prefer to speak or write of “human condition” or conditions for these reasons. What human beings produce is manifold, but key in every instance is a mode of life, a world, so to speak, in and through which human beings could emerge as human. Human beings thus, for the most part, produce human realities and worlds (whether good or bad). Such realities and worlds offer a network of relations and relationships through which many other things are produced, all of which are constellations of meaning. Again, what comes about could be appreciated or rejected, but either is valuable or not in terms of how meaningful it is for ongoing human projects. There is, thus, also a very pragmatic dimension to this existential portrait of what is also called “human reality.”

Critics of existentialism often reject its human formulation. Heidegger, for instance, in his “Letter on Humanism,” lambasted Sartre for supposedly in effect subordinating Being to a philosophical anthropology with dangers of anthropocentrism.3 Yet, as I have argued in a variety of writings, a philosophical understanding of culture raises the problem of the conditions through which philosophical reflections become meaningful.4 Though a human activity, a more radical understanding of culture raises the question of the human being as the producer of an open reality. If the human being is in the making, then “human reality” is never complete and is more the relations in which such thought takes place than a claim about the thought. Additionally, what Heidegger fails to understand is, as Keiji Nishitani reminds us, Being is not all it is cracked up to be, as it also covers over instead of reveal reality.5 That includes human reality.

The etymology of existence already points to these elements. From the Latin ex sistere, “to stand out,” it also means to appear; against invisibility in the stream of effects through which the human world appears, much follows through the creative and at times alchemic force of human thought and deed.

Quarrels with and against existential thought are many. In more recent times, they have surfaced primarily from Marxists, structuralists, and poststructuralists, even though there were, and continue to be, many existential Marxists and even existentialists with structuralist and poststructuralist leanings and tendencies.6

I begin with this tale of philosophical abstraction to contextualize, at least in philosophical terms, Afropessimism. Its main exemplars, such as Jared Sexton and Frank Wilderson III, began their careers with training in academic literary theory, an area dominated by poststructualism since the 1970s through recent times in the Northern academies, even in many cases that avow “Marxism.” Sexton and Wilderson divert from a reductive poststructuralism, or at least attempt to do so, through examining important existential moves inaugurated, as Daniel McNeil observed, by Frantz Fanon and his intellectual heirs.7

The critical question that Afropessimism addresses in this fusion is the viability of posed strategies of Black liberation. (I am using the capital “B” here to point not only to the racial designation “black” but also to the emancipatory one “Black.” Afropessimists often mean both, since blacks and Blacks have a central and centered role in their thought.) The world that produced blacks and in consequence Blacks is, for Afropessimists, a crushing historical one whose Manichaean divide is sustained contraries best kept segregated. There is not only epistemic apartheid, as Reiland Rabaka would formulate it, but also ontological apartheid.8 Worse, any effort of mediation leads, in their view, to confirmed Black subordination and, worse, erasure. Overcoming this requires purging the world of antiblackness, although achieving such would be futile where the black remains since, for them, the black would by definition not “be” there, or, for that matter, anywhere.9

Where cleansing the world is unachievable, an alternative is to disarm the force of antiblack racism. Where whites lack power over Blacks, they lose relevance—at least politically and at levels of cultural and racial capital or hegemony. This is a position I have argued since my first book Bad Faith and Antiblack Racism.10 Wilderson joins me in that critique through exploring my concept of “an antiblack world” to build similar arguments. Sexton makes similar moves, although with a focus on the thought of the sociologist Orlando Patterson, in his discussions of “social death.”11 The rest of this chapter is an exploration of some nonexhaustive criticisms I have of the Afropessimist versions of these arguments, which may be of some use for readers interested in this area of thought.

The first is that “an antiblack world” is not identical with “the world is antiblack.” The latter is an antiblack racist project. It is not the historical achievement of such. Its limitations emerge from a basic fact. Black people and other opponents of such an enterprise fought, and continue to fight, against it. The same argument applies to the argument about social death. Such an achievement would have rendered even those authors' and the reflections I am offering here stillborn. The basic premises of the antiblack world and social death arguments are, then, locked in performative contradictions. They fail at the moment they are articulated. Yet, they have rhetorical force. This is evident through the continued growth of its proponents, literature, and forums devoted to it, in which all lay claim to stillborn status.

In Bad Faith and Antiblack Racism, I argued that there are forms of antiblack racism that are also offered under the guise of love. I was writing about whites who exoticize blacks while offering themselves as white sources of black salvation. It was a response to those who regard racism exclusively as acts of demonization. There are also racist forms of valorization. Analyzed in terms of bad faith, where one lies to oneself in an attempt to flee displeasing truths for pleasing falsehoods, exoticists romanticize blacks while affirming white normativity and themselves as principals of reality. These ironic, performative contradictions are features of all forms of racism, where one group is elevated to a godlike status and another is pushed below or outside that of human despite both claiming to be human.

Antiblack racism offers whites self–other relations (necessary for ethics) with each other but not so for groups forced in a “zone of nonbeing” below or outside them. Although to be outside is not necessarily to be below, it is so in a system of hierarchy in which above is also interpreted as being within. There is asymmetry where whites and any designated racially superior groups stand as others who look downward to those who are not their others or their analogs. Antiblack racism is, thus, not a problem of blacks being “others.” It is a problem of their not-being-analogical-selves-and-not-even-being-others.

Fanon, in Black Skin, White Masks, reminds us that Blacks among each other live in a world of selves and others. It is in attempted relations with whites under circumstances where whites control the conditions that these problems of dehumanization and subordination occur. Reason in such contexts, as he observes, has a bad habit of walking out when Blacks enter. What are Blacks to do? As reason cannot be forced to recognize Blacks because that would be “violence,” they must ironically reason reasonably with such forms of unreasonable reason. Contradictions loom. Racism is, given these arguments, a project of imposing nonrelations as the model of dealing with people designated “black.”12

In The Damned of the Earth, Fanon goes further and argues that colonialism is an attempt to impose a Manichean structure of contraries instead of a dialectical one of ongoing, human negotiations of contradictions. The former segregates the groups; the latter is produced from interaction. The police, he observes, is the primary mediator between the two models, as their role is the use of force/violence to maintain the contraries instead of the human, discursive one of politics and civility requiring the elimination of separation through the interactive, and ultimately intimate, dynamics of communication. Such societies draw legitimacy from Black nonexistence or invisibility. Black appearance, in other words, would be a violation of those systems. Think of the continued blight of police, extra-judicial killings of blacks and Blacks in those countries.13 The ongoing model of fascist white rule as the daily condition of blacks is to prevent the emergence of Blacks.

An immediate observation of many postcolonies is that antiblack attitudes, practices, and institutions are not exclusively white. Black antiblack dispositions make this clear. In addition to black antiblackness taking the form of white hatred of black people, there is also the adoption of black exoticism. Where this exists, blacks simultaneously receive avowed black love alongside black rejection of agency. Many problems follow. The absence of agency bars maturation, which would reinforce the racial logic of blacks as in effect wards of whites. Without agency, ethics, liberation, maturation, politics, and responsibility could not be possible. This is because blacks would not actually be able to do anything outside of the sphere of white approbation and commands.

Afropessimism endorses the previous set of observations, but this agreement is supported by a hidden premise of white agency versus black and Black incapacity. They make much of Fanon's remark that “the Black has no ontological resistance in the eyes of the white.”14 Fanon's rhetorical flare led many unfortunate souls to misread this remark. As he had already argued that racism is a socially produced phenomenon, his point was that those who produced it take it to be ontological. In other words, such people—in this case whites—do not take seriously that blacks have any ontological resistance to white points of view. Fanon was not arguing that blacks are ontologically beings, or even nonbeings, of that kind. If this were so, he would not have pointed out, in numerous sections of that book, black and Black experiences with each other. The whole point of the chapter in which that remark is made, “The Lived-Experience of the Black,” is to explore blacks' and Blacks' points of view. This is a patent rejection of an ontological status while pointing to the presumed ontological status of a skewed perspective.

Proponents of Afropessimism might respond that their position on white agency and black incapacity comes from Fanon's famous remark that though whites created le Nègre—the French term for, depending on the context, “negro,” “nigger,” and “black”—it was les Nègres who created Négritude.15 Whites clearly did not create Afropessimism, which Black liberationists should, in agreement, celebrate. We should avoid the fallacy of confusing the source with the outcome. History is not short of bad ideas from good or well-intentioned people. If intrinsically good, each person of African descent would become ethically and epistemologically a switching of the Manichean contraries, which means in effect only changing the players instead of the racist game. We come, then, to the crux of the matter. If the goal of Afropessimism is Afropessimism, its achievement would be attitudinal and, in the language of old, stoic—in short, a symptom of antiblack society.

At this point, there are several observations that follow. The first is a diagnosis of the implications of Afropessimism as a symptom. The second pertains to the epistemological implications of Afropessimism. The third is whether a disposition counts as a political act and, if so, is it sufficient for its avowed aims. There are more, but for the sake of brevity, I will simply focus on these.16

An ironic dimension of pessimism is that it is the other side of optimism. Oddly enough, both are connected to nihilism, which is, as Nietzsche showed, a decline of values during periods of social decay.17 It emerges when people no longer want to be responsible for their actions. The same problem surfaces in movements. When one such as the Black Liberation movement is suffering from decay, nihilism is symptomatic. Familiar tropes follow. Optimists expect intervention from beyond. Pessimists declare that relief is not forthcoming. Neither takes responsibility for what is valued. The valuing is what leads to the second, epistemic point. The presumption that what is at stake is what can be known to determine what can be done is the problem. If such knowledge were possible, the debate would be about who is reading the evidence correctly. Such judgment would be a priori—that is, prior to events actually occurring. The future, unlike transcendental conditions such as language, signs, and reality, is ex post facto; it is yet to come. Facing the future, the question is not what will be or how do we know what will be but instead the realization that whatever is done will be that on which the future will depend. Rejecting optimism and pessimism, there is a supervening alternative, as we have seen throughout the reflections offered throughout this book—namely, political commitment.

The appeal to political commitment is not only in stream with what French existentialists call l'intellectuel engagé (the committed intellectual) but also in what reaches back through the history and existential situation of enslaved, racialized ancestors. Many were, in truth, an existential paradox of commitment to action without guarantees. The slave revolts, micro and macro acts of resistance, escapes, and returns to help others do the same, the cultivated instability of plantations and other forms of enslavement, and countless other actions, were waged against a gauntlet of forces designed to eliminate any hope of success. The claim of colonialists and enslavers was that the future belonged to them, not to the enslaved and the indigenous. Such people were, in colonial eyes, incapable of ontological resistance. A result of more than 500 years of “conquest” and 300 years of enslavement was also a (white) rewriting of history in which African and First Nations' agency was, at least at the level of scholarship, practically erased. Yet there was resistance even in that realm, as Africana and First Nation intellectual history and scholarship attest; what, after all, are Africana, Black, and Indigenous Studies? What, after all, are those many sites of intellectual production and activism outside of hegemonic academies? Such actions set the course for different kinds of struggle today.

Such reflections occasion meditations on the concept of failure. Afropessimism, the existential critique suggests, suffers from a failure in their analysis of failure. Consider Fanon's notion of constructive failure, where what does not initially work transforms conditions for something new to emerge. To understand this argument, one must rethink the philosophical anthropology at the heart of a specific line of Euromodern thought on what it means to be human. Atomistic and individual-substance-based, this model, articulated by Thomas Hobbes, John Locke, John Stuart Mill, and many others, is of a nonrelational being that thinks, acts, and moves along a course in which continued movement depends on not colliding with others. Under that model, the human being is a thing that enters into a system that facilitates or obstructs its movement. Under this model, the human being is actually a being. An alternative model, shared by many groups across southern Africa, Asia, South America, and even parts of Continental Europe, is a relational version of the human being as part of a larger system of meaning. Actions, from that perspective, are not about whether “I” succeed but instead about “our” unending story across time. Under this model, no human being is a being simpliciter or being-in-her-or-himself-or-themselves. As relational, it means that each human being is a constant negotiation of ongoing efforts to build relationships with others, which means no one actually enters a situation without establishing new situations of action and meaning. Instead of entering a game, their participation requires a different kind of project—especially where the “game” was premised on their exclusion. Thus, where the system or game repels initial participation, such repulsion is a shift in the grammar of how the system functions, especially its dependence on obsequious subjects. Shifted and shifting energy afford alternatives. Kinds cannot be known before the actions that birthed them. Participation, understood in these terms, is never in games but acts of changing them.

Abstract as this sounds, it has much historical support. For example, Evelyn Simien, in her insightful political study Historic Firsts, examines the new set of relations established in the United States by Shirley Chisholm's and Jesse Jackson's U.S. presidential campaigns.18 There would have been no President Barack Obama without such important predecessors affecting the demographics of voter participation. Simien intentionally focused on the most mainstream example of political life to illustrate this point. Though no exemplar of radicalism or revolution, Obama's “success” came from Chisholm and Jackson's (and many others') so-called “failure.” Despite the appalling reactionary response of a right-wing majority in the 114th Congress during the second term of Obama's presidency and the election of Donald Trump, whose obsession with erasing Obama's legacy exemplified a form of psychoanalytical little man's trauma, the historic fact remains that Obama took the helm of a mismanaged executive branch and gave it a level of dignity and intelligence matched by few of its white exemplars. His successors claim for a restored greatness only reveals the joke that is, in fact, any project on which the term “supremacy” is built: the naked racism and mediocrity that followed—there is an amusing photograph of a Klansman holding up a sign declaring his race's “superior jeans!”—reveal the folly and terror of white megalomania. Beyond presidential electoral politics, there are numerous examples of how prior, radical so-called “failures” transformed relationships that facilitated other kinds of outcome. The trail goes back to the Haitian Revolution, which offered a vision of Black sovereignty that garnered the full force of Euromodern colonial and racist alliances to stall, and back to every act of resistance from Nat Turner's Rebellion in the USA, Sharpe's in Jamaica, or Tula's in Curaçao, and so many other efforts for social transformation to come.19

In existential terms, then, many ancestors of the African diaspora embodied what Kierkegaard calls an existential paradox. All the evidence around them suggested failure and the futility of hope. They first had to make a movement of infinite resignation—that is, resigning themselves to their situation. Yet they must simultaneously act against that resignation. Kierkegaard, as we have seen, called this seemingly contradictory phenomenon “faith,” but that concept relates more to a relationship with a transcendent, absolute being, which could only be established by a “leap,” as there are no mediations or bridge to the Absolute whose distant is, as Kierkegaard put it, absolutely absolute. Ironically, if Afropessimism appeals to transcendent intervention, it would collapse into faith. If the Afropessimist's argument rejects transcendent intervention and focuses on committed political action, of taking responsibility for a future that offers no guarantees, then the movement from infinite resignation becomes existential political action.

At this point, the crucial meditation would be on politics and political action. An attitude of infinite resignation to the world without the leap of committed action would simply be pessimistic or nihilistic. Similarly, an attitude of hope or optimism about the future would lack infinite resignation. We see here the underlying failure of the two approaches. Yet ironically, there is a form of failure at failing in the pessimistic turn versus the optimistic one, since if focused exclusively on resignation as the goal, then the “act” of resignation would have been achieved, which, paradoxically, would be a success; it would be a successful failing of failure. For politics to emerge, there are two missing elements in inward pessimistic resignation to consider.

The first is that politics is a social phenomenon, which means it requires the expanding options of a social world. It must transcend the self. Turning away from the social world, though a statement about politics, is not in and of itself political. As we have seen, the ancients from whom much Western political theory or philosophy claimed affinity had a disparaging term for an individual resigned from political life—namely, idiōtēs, a private person, one not concerned with public affairs, in English: an idiot. I mention “Western political theory” because that is the hegemonic intellectual context of Afropessimism; I have not come across Afropessimistic writings on thought outside of that framework. We do not have to end our etymological journey in ancient Greek. Recall that extending our linguistic archaeology back a few thousand years we could examine the Middle Kingdom (2000 BCE–1700 BCE) of Kmt's Mdw Ntr word idi (deaf). The presumption, later taken on by the ancient Athenians and other Greek-speaking peoples, was that a lack of hearing entailed isolation, at least in terms of audio speech. The contemporary inward resignation of seeking a form of purity from the loathsome historical reality of racial oppression, in this reading, retreats ultimately into a form of moralism (private, normative satisfaction) instead of public responsibility born of and borne by action. The nonbeing to which Afropessimists refer is also a form of inaudibility.

The second is the importance of power. Politics makes no sense without it. As we have seen throughout our earlier reflections on power, Eurocentric etymology points to the Latin word potis as its source, from which came the word “potent” as in an omnipotent god. If we again look back farther, we will notice the Middle Kingdom Mdw Ntr word pHty, which refers to godlike strength. Yet for those ancient Northeast Africans, even the gods' abilities came from a source. In the Coffin Texts, HqAw or heka activates the ka (sometimes, as we have seen, translated as soul, spirit, womb, or “magic”), which makes reality.20 All this amounts to a straightforward thesis on power as the ability with the means to make things happen.

There is an alchemical quality of power. The human world, premised on symbolic communication, brings many forms of meaning into being, and those new meanings afford relationships that build institutions through a world of culture, a phenomenon that Freud, we should recall, rightly described as “a prosthetic god.” It is godlike because it addresses what humanity historically sought from the gods—protection from the elements, physical maledictions, and social forms of misery. Such power clearly can be abused. It is where those enabling capacities (empowerment) are pushed to the wayside in the hording of social resources into propping up some people as gods that the legitimating practices of cultural cum political institutions decline and stimulate pessimism and nihilism. The institutions in Abya Yala and in Northern countries, such as the United States and Canada, very rarely  attempt to establish positive relations to blacks, and Blacks the subtext of Afropessimism and this entire meditation.

The discussion points to a demand for political commitment. Politics is manifested under different names throughout the history of our species, but the one occasioning the word “politics” is, as we have seen, from the Greek pólis, which refers to ancient Hellenic city-states. It identifies specific kinds of  activities conducted inside the city-state, where order necessitated the resolution of conflicts through rules of discourse the violation of which could lead to (civil) war, a breaking down of relations into those appropriate for  “outsiders.” Returning to the Fanonian observation of selves and others, it is clear that imposed limitations on certain groups amount to impeding or blocking the option and activities of politics. Yet, as a problem occurring within the polity, the problem short of war becomes a political one.

Returning to Afropessimistic challenges, the question becomes this. If the problem of antiblack racism is conceded as political—where antiblack institutions of power have, as their project, the impeding of Black power, which in effect requires barring Black access to political institutions—then antiblack societies are ultimately threats also to politics defined as the human negotiation of the expansion of human capabilities or, more to the point, appearance, speech, and freedom.

Antipolitics is one of the reasons why societies in which antiblack racism is hegemonic are also those in which racial moralizing dominates; moralizing stops at individuals at the expense of addressing institutions the transformation of which would make immoral individuals irrelevant. As a political problem, it demands a political solution. It is not accidental that blacks continue to be the continued exemplars of unrealized freedom and against whom violence is waged against appearance and speech. As so many from Ida B. Wells-Barnett to Angela Y. Davis, Michelle Alexander, Angela J. Davis, Noël Cazenave have shown the expansion of privatization and incarceration is squarely placed in a structure of states and civil societies premised on the limitations of freedom (Blacks)—ironically, as seen in countries such as South Africa and the United States, in the name of freedom.21

That power is a facilitating or enabling phenomenon, a functional element of the human world, a viable response must be the establishment of relations that reach beyond the singularity of the body. I bring this up because proponents of Afropessimism might object to this analysis because of its appeal to a human world. If that world is abrogated, the site of struggle becomes that which is patently not human. It is not accidental that popular race discourse refers today to “black bodies” instead of “black people,” for instance. As the human world is discursive, social, and relational, this abandonment amounts to an appeal to the nonrelational, the incommunicability of radicalized singularity, and appeals to the body and its very limited reach, if not isolation. At that point, it is perhaps the psychologist, psychiatrist, or psychoanalyst who would be helpful, as turning radically inward offers the promise of despair, narcissistic delusions of divine power, and, as Fanon also observed, madness.22 Even if that slippery slope were rejected, the performative contradiction of attempting to communicate such singularity or absence thereof requires, at least for consistency, the appropriate course of action: silence.

The remaining question for Afropessimism, especially those who are primarily academics, becomes this: Why write?

It is a question for which, in both existential and political terms, I do not see how an answer could be given from an Afropessimistic perspective without the unfortunate revelation of cynicism. The marketability of Afropessimists in predominantly white institutions—perhaps as an exotic phenomenon that affirms white standpoints as ontological sites of legitimacy—is no doubt in the immediate and paradoxical satisfaction in dissatisfaction it offers. Indeed, if Afropessimists were correct, their only solace would be in black institutions, but that, too, would pose a problem since the argument is that such institutions lack agency because, as black, they are absent. This is not to say that critical black and Black thinkers should not do their work in predominantly white spaces. It is simply that the argument of the impossibility of their doing so makes their location in such places patently contradictory. We are at this point on familiar terrain. As with ancient logical paradoxes denying the viability of time and motion, the best option, after a moment of immobilized reflection, is, eventually, to move on, even where the pause is itself significant as an encomium of thought.

#### The Neg’s approach homogenizes black life and shuts off pragmatic action that can meaningfully resist antiblackness

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(David, “The Pragmatics of Resistance: Framing Anti-Blackness and the Limits of Political Ontology,” Critical Philosophy of Race Volume 5, Issue 1)

Political Ontology and the Limitation of Social Analysis and Legitimate Praxis

Wilderson’s critique of Agamben is certainly correct within the specific framework of a political ontology of racial positioning. His description of anti-Black antagonism shows a powerful macropolitical sedimentation of [End Page 56] Black suffering in which Black bodies are ontologically frozen into (non-) beings that stand in absolute political distinction from those “who do not magnetize bullets” (Wilderson 2010, 80). In the same framework, Jared Sexton, whose work is very close to Wilderson’s, is also right when he shows how biopolitical thought—specifically the Agambenian form centered on questions of sovereignty—and its variant of “necropolitics” found in Mbembe has so often run aground on the figure of the slave (see Sexton 2010).5 Locating the reality of anti-Blackness wholly within this account of political ontology does provide an undeniably effective analysis of its violence and sedimentation over the modern world as a whole. However, in terms of a general structure, I understand Wilderson’s (and Sexton’s) political ontology to remain tied in form to Agamben’s even as it seemingly discounts it and therefore remains bound to some of the problems and limitations that beset such a formal structure, as I’ll discuss in a moment. Despite the critique of Agamben’s ontological blind spots regarding the extent to which Black suffering is non-analogous to non-black suffering, as I’ve tried to show, Wilderson keeps the basic contours of Agamben’s ontological structure in place, maintaining a formal political ontology that expands the bottom end of the binary structure so as to locate an absolute zero-point of political abjection within Black social death. To be clear, this is not to say that the difference between the content and historicity of Wilderson’s social death and Agamben’s bare life does not have profound implications for how political ontology is conceived or how questions of suffering and freedom are posed. Nor is it to say that a congruence of formal structure linking Agamben and Wilderson should mean that their respective projects are not radically differentiated and perhaps even opposed in terms of their broader implications and revelations. Rather, what I want to focus on is how the absolute prioritization of a formal ontological framework of autonomous and irreconcilable spheres of positionality—however descriptively or epistemologically accurate in terms of a regime of ontology and its corresponding macropolitics of anti-Blackness—ends up limiting a whole range of possible avenues of analysis that have their proper site within what Deleuze and Guattari describe as the micropolitical. The issue here is the distinction between the macropolitical (molar) and the micropolitical (molecular) fields of organization and becoming. Wilderson and Afro-pessimism in general privilege the macropolitical field in which Blackness is always already sedimented and rigidified into a political onto-logical position that prohibits movement and the possibility of what Fred Moten calls “fugitivity.” The absolute privileging of the macropolitical as [End Page 57] the frame of analysis tends to bracket or overshadow the fact that “every politics is simultaneously a macropolitics and a micropolitics (Deleuze and Guattari 1987, 213). Where the macropolitical is structured around a politics of molarisation that immunizes itself from the threat of contingency and disruption, the micropolitical names the field in which local and singular points of connection produce the conditions for “lines of flight, which are molecular” (ibid., 216). The micropolitical field is where movement and resistance happens against or in excess of the macropolitical in ways not reducible to the kind of formal binary organization that Agamben and Wilderson’s political ontology prioritizes. Such resistance is not necessarily positive or emancipatory, as lines of flight name a contingency that always poses the risk that whatever develops can become “capable of the worst” (ibid., 205). However, within this contingency is also the possibility of creative lines and deterritorializations that provide possible means of positive escape from macropolitical molarisations.

Focusing on Wilderson, his absolute prioritization of a political onto-logical structure in which the law relegates Black being into the singular position of social death happens, I contend, at the expense of two significant things that I am hesitant to bracket for the sake of prioritizing political ontology as the sole frame of reference for both analyzing anti-Black racism and thinking resistance within the racialized world. First, it short-circuits an analysis of power that might reveal not only how the practices, forms, and apparatuses of anti-Black racism have historically developed, changed, and reassembled/reterritorialized in relation to state power, national identity, philosophical discourse, biological discourse, political discourse, and so on—changes that, despite Wilderson’s claim that focusing on these things only “mystify” the question of ontology (Wilderson 2010, 10), surely have implications for how racial positioning is both thought and resisted in differing historical and socio-political contexts. To the extent that Blackness equals a singular ontological position within a macropolitical structure of antagonism, there is almost no room to bring in the spectrum and flow of social difference and contingency that no doubt spans across Black identity as a legitimate issue of analysis and as a site/sight for the possibility of a range of resisting practices. This bracketing of difference leads him to make some rather sweeping and opaquely abstract claims. For example, discussing a main character’s abortion in a prison cell in the 1976 film Bush Mama, Wilderson says, “Dorothy will abort her baby at the clinic or on the floor of her prison cell, not because she fights for—and either wins [End Page 58] or loses—the right to do so, but because she is one of 35 million accumulated and fungible (owned and exchangeable) objects living among 230 million subjects—which is to say, her will is always already subsumed by the will of civil society” (Wilderson 2010, 128, italics mine). What I want to press here is how Wilderson’s statement, made in the sole frame of a totalizing political ontology overshadowing all other levels of sociality, flattens out the social difference within, and even the possibility of, a micropolitical social field of 35 million Black people living in the United States. Such a flattening reduces the optic of anti-Black racism as well as Black sociality to the frame of political ontology where Blackness remains stuck in a singular position of abjection. The result is a severe analytical limitation in terms of the way Blackness (as well as other racial positions) exists across an extremely wide field of sociality that is comprised of differing intensities of forces and relational modes between various institutional, political, socio-economic, religious, sexual, and other social conjunctures. Within Wilderson’s political ontological frame, it seems that these conjunctures are excluded—or at least bracketed—as having any bearing at all on how anti-Black power functions and is resisted across highly differentiated contexts. There is only the binary ontological distinction of Black and Human being; only a macropolitics of sedimented abjection.

Furthermore, arriving at the second analytical expense of Wilderson’s prioritization of political ontology, I suggest that such a flattening of the social field of Blackness rigidly delimits what counts as legitimate political resistance. If the framework for thinking resistance and the possibility of creating another world is reduced to rigid ontological positions defined by the absolute power of the law, and if Black existence is understood only as ontologically fixed at the extreme zero point of social death without recourse to anything within its own position qua Blackness, then there is not much room for strategizing or even imagining resistance to anti-Blackness that is not wholly limited to expressions and events of radically apocalyptic political violence: the law is either destroyed entirely, or there is no freedom. This is not to say that I am necessarily against radical political violence or its use as an effective tactic. Nor is to say that I think the law should be left unchallenged in its total operation, but rather that there might be other and more pragmatically oriented practices of resistance that do not necessarily have the absolute destruction of the law as their immediate aim that should count as genuine resistance to anti-Blackness. For Wilderson, like Agamben, anything less than an absolute overturning [End Page 59] of the order of things, the violent destruction and annihilation of the full structure of antagonisms, is deemed as “[having nothing] to do with Black liberation” (quoted in Zug 2010). Of course, the desire for the absolute overturning of the currently existing world, the decisive end of the existing world and the arrival of a new world in which “Blacks do not magnetize bullets” should be absolutely affirmed. Further, the severity and gratuitous nature of the macropolitics of anti-Blackness in relation to the possibility of a movement towards freedom should not be bracketed or displaced for the sake of appealing to any non-Black grammar of exploitation or alienation (Wilderson 2010, 142). The question I want to pose, however, is how the insistence on the absolute priority of framing this world within a rigid structure of formal ontological positions can only revert to what amounts to a kind of negative theological and eschatological blank horizon in which actually existing social sites and modes of resisting praxis are displaced and devalued by notions of whatever it is that might arrive from beyond.

It seems that Wilderson, again, is close to Agamben on this point, whose ontological structure also severely delimits what might count as genuine resistance to the regime of sovereignty. As Dominick LaCapra points out regarding the possibility of liberation outside of Agamben’s formal ontological structure of bare life and sovereignty,

A further enigmatic conjunction in Agamben is between pure possibility and the reduction of being to mere or naked life, for it is the emergence of mere naked life in accomplished nihilism that simultaneously generates, as a kind of miraculous antibody or creation ex nihilo, pure possibility or utterly blank utopianism not limited by the constraints of the past or by normative structures of any sort.

(LaCapra 2009, 168)

With life’s ontological reduction to the abjection of bare life or social death, the only possible way out, it seems, is the impossible possibility of what Agamben refers to as the “suspension of the suspension,” the laying aside of the distinction between bare life and political life, the “Shabbat of both animal and man” (Agamben 2003, 92). It is in this sense that Agamben offers, again in the words of LaCapra, a “negative theology in extremis . . . an empty utopianism of pure, unlimited possibility” (LaCapra 2009, 166). The result is a discounting and devaluing of other, perhaps more pragmatic and less eschatological, practices of resistance. With the “all or nothing” [End Page 60] approach that posits anything less than the absolute suspension of the current state of things as unable to address the violence and abjection of bare life, there is not much left in which to appeal than a kind of apocalyptic, messianic, and contentless eschatological future space defined by whatever this world is not.

#### Outgroup bias exists, but isn’t inevitable --- neuroscience confirms that different attributes can be more or less salient, and aren’t fixed around race, but malleable

Sapolsky 19

Robert Sapolsky, American neuroendocrinologist and author, currently a professor of biology, and professor of neurology and neurological sciences and, by courtesy, neurosurgery, at Stanford University, “This Is Your Brain on Nationalism,” Foreign Affairs. March/April 2019.

TURBANS TO HIPSTER BEARDS

For all this pessimism, there is a crucial difference between humans and those warring chimps. The human tendency toward in-group bias runs deep, but it is relatively value-neutral. Although human biology makes the rapid, implicit formation of us-them dichotomies virtually inevitable, who counts as an outsider is not fixed. In fact, it can change in an instant.

For one, humans belong to multiple, overlapping in-groups at once, each with its own catalog of outsiders—those of a different religion, ethnicity, or race; those who root for a different sports team; those who work for a rival company; or simply those have a different preference for, say, Coke or Pepsi. Crucially, the salience of these various group identities changes all the time. Walk down a dark street at night, see one of “them” approaching, and your amygdala screams its head off. But sit next to that person in a sports stadium, chanting in unison in support of the same team, and your amygdala stays asleep. Similarly, researchers at the University of California, Santa Barbara, have shown that subjects tend to quickly and automatically categorize pictures of people by race. Yet if the researchers showed their subjects photos of both black and white people wearing two different colored uniforms, the subjects automatically began to categorize the people by their uniforms instead, paying far less attention to race. Much of humans’ tendency toward in-group out-group thinking, in other words, is not permanently tied to specific human attributes, such as race. Instead, this cognitive architecture evolved to detect any potential cues about social coalitions and alliances—to increase one’s chance of survival by telling friend from foe. The specific features that humans focus on to make this determination vary depending on the social context and can be easily manipulated.

Even when group boundaries remain fixed, the traits people implicitly associate with “them” can change—think, for instance, about how U.S. perceptions of different immigrant groups have shifted over time. Whether a dividing line is even drawn at all varies from place to place. I grew up in a neighborhood in New York with deep ethnic tensions, only to discover later that Middle America barely distinguishes between my old neighborhood’s “us” and “them.” In fact, some actors spend their entire careers alternating between portraying characters of one group and then the other.

This fluidity and situational dependence is uniquely human. In other species, in-group/out-group distinctions reflect degrees of biological relatedness, or what evolutionary biologists call “kin selection.” Rodents distinguish between a sibling, a cousin, and a stranger by smell—fixed, genetically determined pheromonal signatures—and adapt their cooperation accordingly. Those murderous groups of chimps are largely made up of brothers or cousins who grew up together and predominantly harm outsiders.

Humans are plenty capable of kinselective violence themselves, yet human group mentality is often utterly independent of such instinctual familial bonds. Most modern human societies rely instead on cultural kin selection, a process allowing people to feel closely related to what are, in a biological sense, total strangers. Often, this requires a highly active process of inculcation, with its attendant rituals and vocabularies. Consider military drills producing “bands of brothers,” unrelated college freshmen becoming sorority “sisters,” or the bygone value of welcoming immigrants into “the American family.” This malleable, rather than genetically fixed, path of identity formation also drives people to adopt arbitrary markers that enable them to spot their cultural kin in an ocean of strangers—hence the importance various communities attach to flags, dress, or facial hair. The hipster beard, the turban, and the “Make America Great Again” hat all fulfill this role by sending strong signals of tribal belonging.

Moreover, these cultural communities are arbitrary when compared to the relatively fixed logic of biological kin selection. Few things show this arbitrariness better than the experience of immigrant families, where the randomness of a visa lottery can radically reshuffle a child’s education, career opportunities, and cultural predilections. Had my grandparents and father missed the train out of Moscow that they instead barely made, maybe I’d be a chain-smoking Russian academic rather than a Birkenstockwearing American one, moved to tears by the heroism during the Battle of Stalingrad rather than that at Pearl Harbor. Scaled up from the level of individual family histories, our bigpicture group identities—the national identities and cultural principles that structure our lives—are just as arbitrary and subject to the vagaries of history.

#### The Symbolic Order is contingent, not a permanent and unchanging matrix of cultural meaning and symbols --- they’re wrong about the grammar of anti-Black violence being unmovable and fixated on the slave.

Hudson 14 Peter Hudson - senior lecturer in politics with research interest in social and political theory and South African studies at Wits Institute of Social and Economic Research—2014 (The State and Colonial Unconscious, *Social Dynamics: A Journal of African Studies*, 39.2: 263-277,266).

Thus the self-same/other distinction is necessary for the possibility of identity itself. There always has to exist an outside, which is also inside, to the extent it is designated as the impossibility from which the possibility of the existence of the subject derives its rule (Badiou 2009, 220). But although the excluded place which isn’t excluded insofar as it is necessary for the very possibility of inclusion and identity may be universal (may be considered “ontological”), its content (what fills it) – as well as the mode of this filling and its reproduction – are contingent. In other words, the meaning of the signifier of exclusion is not determined once and for all: the place of the place of exclusion, of death is itself over-determined, i.e. the very framework for deciding the other and the same, exclusion and inclusion, is nowhere engraved in ontological stone but is political and never terminally settled. Put differently, the “curvature of intersubjective space” (Critchley 2007, 61) and thus, the specific modes of the “othering” of “otherness” are nowhere decided in advance (as a certain ontological fatalism might have it) (see Wilderson 2008). The social does not have to be divided into white and black, and the meaning of these signifiers is never necessary – because they are signifiers.

To be sure, colonialism institutes an ontological division, in that whites exist in a way barred to blacks – who are not. But this ontological relation is really on the side of the ontic – that is, of all contingently constructed identities, rather than the ontology of the social which refers to the ultimate unfixity, the indeterminacy or lack of the social. In this sense, then, the white man doesn’t exist, the black man doesn’t exist (Fanon 1968, 165); and neither does the colonial symbolic itself, including its most intimate structuring relations – division is constitutive of the social, not the colonial division.

“Whiteness” may well be very deeply sediment in modernity itself, but respect for the “ontological difference” (see Heidegger 1962, 26; Watts 2011, 279) shows up its ontological status as ontic. It may be so deeply sedimented that it becomes difficult even to identify the very possibility of the separation of whiteness from the very possibility of order, but from this it does not follow that the “void” of “black being” functions as the ultimate substance, the transcendental signified on which all possible forms of sociality are said to rest. What gets lost here, then, is the specificity of colonialism, of its constitutive axis, its “ontological” differential. A crucial feature of the colonial symbolic is that the real is not screened off by the imaginary in the way it is under capitalism. At the place of the colonised, the symbolic and the imaginary give way because non-identity (the real of the social) is immediately inscribed in the “lived experience” (vécu) of the colonised subject. The colonised is “traversing the fantasy” (Zizek 2006a, 40–60) all the time; the void of the verb “to be” is the very content of his interpellation. The colonised is, in other words, the subject of anxiety for whom the symbolic and the imaginary never work, who is left stranded by his very interpellation. “Fixed” into “non-fixity,” he is eternally suspended between “element” and “moment”– he is where the colonial symbolic falters in the production of meaning and is thus the point of entry of the real into the texture itself of colonialism.

Be this as it may, whiteness and blackness are (sustained by) determinate and contingent practices of signification; the “structuring relation” of colonialism thus itself comprises a knot of significations which, no matter how tight, can always be undone. Anti-colonial – i.e., anti-“white” – modes of struggle are not (just) “psychic” but involve the “reactivation” (or “de-sedimentation”)7 of colonial objectivity itself. No matter how sedimented (or global), colonial objectivity is not ontologically immune to antagonism. Differentiality, as Zizek insists (see Zizek 2012, chapter 11, 771 n48), immanently entails antagonism in that differentiality both makes possible the existence of any identity whatsoever and at the same time – because it is the presence of one object in another – undermines any identity ever being (fully) itself. Each element in a differential relation is the condition of possibility and the condition of impossibility of each other. It is this dimension of antagonism that the Master Signifier covers over transforming its outside (Other) into an element of itself, reducing it to a condition of its possibility.

#### Political hope is essential to combat structural racism – they conflate hope with certainty and inverts meaningful efforts to challenge white supremacy – we can be hopeful without being optimistic

Rogers, Associate Professor of Political Science at Brown University, ‘17

(Melvin, “Keeping the Faith,” November 1, <http://bostonreview.net/race/melvin-rogers-keeping-faith)>

But when the United States selects its eloquent spokesperson on the “race issue”—as it always does—all other voices become mere noise, and the complexity of our political traditions and our lived experiences are flattened out. In Coates’s view, for instance, Harriet Tubman, Ida B. Wells, and Martin Luther King Jr. were all failures. They performed the same script, they failed to move their audience to action, and they never reshaped U.S. life and culture. “All of these heroes,” Coates insists, “had failed to cajole and coerce the masters of America.” In Coates’s telling, fine historical distinctions disappear, time stands still, and the past and future collapse into the political horrors of the present.

This is what happens when we listen only to a single voice; no conversation is possible. We are disabled from speaking thoughtfully and accurately about political and cultural transformation on racial matters.

But there is a sleight of hand in Coates’s “black atheism”; it conflates hope with certainty, and hope becomes our fatal flaw. Yet we don’t need to believe that progress is inevitable to think that, through our efforts, we may be able to move toward a more just society. We can, however, be sure that no good will come of the refusal to engage in this work.

There is much in this that should concern us. Coates describes the pain visited on black bodies and engenders white guilt. He erodes the idea that who we are need not determine who we may become. He obstructs rather than opens any attempt to reckon with our racial past and present in the service of an inclusive future. And he participates in a politics where words and actions can never aspire to change the political community in which we live, and for that reason they only fortify our indignation and deepen our suspicion—namely, that as black Americans, we are as alien to this polity as it is alien to us. The aspiration to defend a more exalted vision of this country’s ethical and political life is taken as the hallmark of being asleep, dreaming in religious illusions. To be alive to an unvarnished reality, to be woke, is to recognize that no such country is possible.

This runs roughshod over that thread in the grand tradition of U.S. struggles for justice—a tradition in which hope and faith are forged through political darkness. Hope involves attachment and commitment to the possibility of realizing the goods we seek. Faith is of a broader significance, providing hope with content. Faith, the black scholar Anna Julia Cooper suggested in 1892, is grounded in a vision of political and ethical life that is at odds with the community one inhabits. It is a vision that one believes ought to command allegiance, for which one is willing to fight, and in which one believes others can find a home. Faith looks on the present from the perspective of a future vision of society, and uses the vision as a resource to remake the present. And so faith, the philosopher and psychologist William James explained in 1897, is “the readiness to act in a cause the prosperous issue of which is not certified to us in advance.” In other words, faith has never been exhausted by the political reality one happens to be living in.

Political faith has always rested on the idea that we are not finished, a thought that Coates rejects out of hand. In the nineteenth century, Ralph Waldo Emerson called this capacity for human renewal “ascension, or the passage of the soul into higher forms.” In our political life this means, as James Baldwin well knew, that both our liberal democratic institutions and its culture “depends on choices one has got to make, for ever and ever and ever, every day.”

Faith has always been a loving but difficult commitment precisely because it makes politics about maybes rather than certainties. One of the greatest dangers of U.S. exceptionalism, for instance, is that it has habituated us to think about the structure of political life as necessarily progressing. Writing in the wake of the Montgomery bus boycott—a successful nonviolent campaign against racial segregation—King sought to chasten the obvious excitement: “Human progress is neither automatic nor inevitable. Even a superficial look at history reveals that no social advance rolls in on the wheels of inevitability.”

Yet Coates appears simply to invert U.S. exceptionalism, replacing it with the equally fatalistic idea that the United States is fundamentally broken. In a world where the good or bad is fated to happen, faith and hope have no foothold. This ultimately weakens our resolve and undermines our ability to take seriously the idea of an “American experiment.”

Black activists have not forged their faith with the stone of U.S. exceptionalism. Rather, they have used their darkest hours to “make a way out of no way”—to address the triple crises of exclusion, domination, and violence. Abolitionists such as David Walker faced it in the form of the enslavement of black folks. Frederick Douglass encountered it with the rise and crash of reconstruction. Wells faced it as she confronted the horror of lynching and the disposability of black life. And in our own time, Black Lives Matter (BLM) activists are reminded of a similar disposability of black life that goes unpunished.

And yet, they are keepers of the faith, recognizing that its vitality is not exhausted by the reality they struggle against. In her recent New York Times article, “Black Lives Matter Is Democracy in Action,” Barbara Ransby narrates a powerful account of BLM activists creating contexts for collective leadership and using those opportunities to transform the power of voice into actions that meet the needs of ordinary people. This effort would be impossible for people who accept Coates’s perspective. Their efforts may not win the day, but they certainly won’t win the day without the faith that winning is a possibility.

Faith does not deny the present, but refuses to be defined by it and sink into it. We now face a president who seeks to colonize every waking moment of our lives with feelings of dread, thus arresting our ability to imagine a reality beyond television, social media feeds, and newspapers. The illusion of our present moment is not expressed in political faith, but in the belief that we can respond constructively without such faith. Political faith is fully realistic about the present disasters and rejects illusions about assured future progress, while also insisting that we are not certain to fail. It is hopeful without being optimistic.

We may falter, and the material, psychological, and political goods of white supremacy may deplete our desire to transform. We know the history—from the 1880s to the 1960s—of white backlash in response to a more expansive racial justice. In fact, we are living through one such backlash given the ascendancy of Trump. But our political community is what it is because we have made it this way. It is not fated to be. Believing otherwise makes white supremacy something more than a collection of choices, habits, and practices—it makes it part of human nature itself. Coates wants us to face the facts and embrace black atheism. But throughout the book he often slides from working in the historical register to speaking in the idiom of philosophical metaphysics—at one moment he stands in time and at another he stands outside of it, confidently telling us how history will end. For this reason, Coates doesn't dismantle white supremacy; he ironically provides it with support.

Please understand my concern. Coates is right: he doesn’t have a “responsibility to be hopeful or optimistic or make anyone feel better about the world.” We must, as he has often done, speak the truth. But we must not claim to know what we cannot possibly know. Humility creates space for hope.

#### The historical antiblackness of antitrust law is contingent rather than an inevitable facet of antimonopoly policy – the alt forecloses antimonopoly activism in favor of racial justice

Greer and Rice 21 – Jeremie Greer and Solana Rice are Co-founders and Co-executives of Liberation in a Generation, a national movement-support organization working to build the power of people of color to transform the economy.

Jeremie Greer and Solana Rice, “Anti-Monopoly Activism: Reclaiming Power Through Racial Justice,” *Liberation in a Generation*, March 2021, pp. 3-14, https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism\_032021.pdf.

Unfortunately, though the start of the 20th century saw robust anti-monopoly government action, the government rapidly retreated from anti-monopoly enforcement in the second half of the century. Since, the federal government and the federal courts have aided—not prevented—the exponential growth in monopoly power in nearly every sector of our economy, including technology, telecommunications, food supply chains, banking, and health care. In 2015, for example, the US saw a record number of corporate mergers, totalling $3.8 trillion in merger and acquisition activity.5 Mergers that year involved massive companies, such as Time Warner Cable, AnheuserBusch, and Berkshire Hathaway, becoming more massive. In 2020, T-Mobile—the third-largest wireless carrier in the US— acquired Sprint,6 and Morgan Stanely acquired online stock trading company E-Trade.7

The economic problems created by monopoly power have been widely studied, and many solutions to curtail it have been developed by experts. Unfortunately, like so many large-scale and so-called “race-neutral” policy efforts, anti-monopoly policy ideation and implementation have left people of color behind. In researching this paper we found limited research or policy ideation on the impact of monopoly power on people of color. We believe that the absence of grassroots leaders of color in anti-monopoly policy conversations can be attributed to this disconnect.

It is critical that grassroots leaders of color are positioned to lead on anti-monopoly policy, as they are uniquely positioned to understand its impact on people of color at the household, community, and societal levels. This gives them a unique perspective in policy ideation efforts that should be valued and validated. These leaders also possess the unique skills to mobilize the people and public power that are necessary to force the government to reclaim its historic role of reining in runaway corporate monopoly power.

We at Liberation in a Generation believe that the power to change our economic systems rests with the organizers of color who are building the political strength of communities of color. Anti-monopoly research and advocacy need to better quantify, center, and reflect what people of color are experiencing and the ways that they are being harmed by monopoly power’s reach. These efforts should also better connect anti-monopoly policy and advocacy as tools to advance the existing priorities of leaders of color, such as the Green New Deal, Medicare for All, closing the racial wealth gap, and a Homes Guarantee. This paper aims to contribute a major step in the long journey of bridging the divide between anti-monopoly researchers and policy advocates and grassroots leaders of color. The first step on that journey is knowledge.

Recognizing that anti-monopoly work is a new policy issue to many grassroots leaders of color, this paper will serve as a primer to 1) educate grassroots leaders on the issue of corporate concentration, 2) connect the issue to racial justice, and 3) recommend a path forward for grassroots leaders as well as the researchers and advocates who need to embrace them. Our hope is that this paper provides a foundation of knowledge that grassroots leaders of color can use to build race-conscious solutions and mobilize for action to rein in runaway corporate monopoly power. To that end, the paper is organized into six sections.

SECTION 1 Monopoly Power Is Corporate Power Magnified and Maximized

In 1975, millions flooded theaters to see the blockbuster thriller Jaws. The story follows a police chief in a small resort town as he risks his life to protect beachgoers from a monstrous man-eating great white shark.

Monopolies are a lot like the shark in Jaws. While enormous, ruthless, dangerous, and scary, the movie’s monster is just a shark, and the police chief uses tools and community to defeat it. Comparatively, while also enormous, ruthless, dangerous, and even scary, monopolies are just corporations, and we, together, can confront them. Their massive power controls the wages we earn, the prices we pay, and the actions of the politicians who are supposed to represent us in DC, the statehouse, and city hall. In a representative democracy, we the people are at the top of the food chain, and it is within our power to make these monopolies fear us— and end their existence in the first place.

Grassroots leaders of color are highly experienced and uniquely skilled at challenging corporate power, and these capacities can and should be used to curb monopoly power. For example,8 the Athena Coalition has successfully leveraged grassroots power to challenge the monopoly power of Amazon, and Color of Change9 has effectively used grassroots digital organizing to challenge the monopoly power of social media platforms such as Facebook. Putting monopolies in the crosshairs of organizers is critical because they best understand the real human and structural devastation caused by monopoly power, which is otherwise all too easily neglected.

Though we believe that grassroots leaders of color have the experience and expertise necessary to challenge monopoly power, the question remains: Why should they lead this fight? Grassroots leaders of color are already engaged in high-stakes battles with the forces of corporate power on fundamental issues, including environmental justice, worker justice, housing justice, prison and police abolition, and voter and democratic justice. We believe that these efforts can be bolstered if anti-monopoly policy development and advocacy were incorporated into these existing efforts but then followed the lead of organizers. For example, the primary opponents of prison and police abolition are private prison monopolies, such as GEO Group and CoreCivic, which profit from the arrest and incarceration of Black and brown people. Opponents of the Green New Deal include energy monopolies BP and ExxonMobile, whose profits are derived from polluting Black and brown communities.10 Finally, opponents of the Homes Guarantee, and its call for creating 12 million units of social housing outside of the for-profit housing market, include big banks that profit from the commodification of affordable and low-income housing. Challenging these opponents by diminishing their monopoly power could prove to be a powerful weapon in the fight to dismantle unchecked corporate power and its real-life economic impact on people of color.

How Corporate Monopolies Show Up in Today’s World

The distinguishing features of monopolies, when compared to your run of the mill corporation (large or small), are the reach and intensity of the corporate power that they wield. Monopoly power turbocharges the ills of corporate power and creates a wider impact of the overlapping consequences for people. In many ways, monopolies are created when corporate power becomes governing power.11 Their sheer size and market dominance allow them to govern markets, and their expansive wealth gives them the power to manipulate prices, crush workers, and steamroll governments. Ultimately, monopolies’ extreme economic power—which they use to gain outsized political power and then more economic power—undermines the collective power of workers, consumers, small businesses, local communities, and governments.

It has become difficult, and inadequate, to rely on legal definitions to identify monopolies. The legal definition of monopolization is highly technical and complicated by centuries of conflicting jurisprudence. It's been narrowed to exclusively focus on the negative impact that anticompetitive actions have on consumers.12 This narrower focus intentionally shielded monopolies from any accountability for anticompetitive harm inflicted on workers, the environment, local communities, government, and democracy. Federal enforcement of monopoly power is confined to the highly specialized legal practice of antitrust law enforcement.13 However, centuries of political power wielded by corporate monopolies and their acolytes (e.g., universities, think tanks, trade associations, and major law firms) have rendered much of antitrust law enforcement toothless.14

In the late 19th and early 20th century, the definition of monopoly was much wider and comprehensive. In this paper, we will expand the definition as well. Recognizing that this definitional work is in many ways a work in progress, we offer our definition as a point of discussion and debate for the larger field of anti-monopoly advocates.

In this paper, we define monopoly as a corporate entity (a single corporation or a group of corporations) whose sheer size and anticompetitive behavior grant it disproportionate economic power and governing influence. This negatively affects the well-being of workers, consumers, markets, local communities, democratic governance, and the planet.

Below are a few major industries that reveal how corporate concentration and monopolistic industries harm the economic lives of workers, consumers, and communities of color.

Big Tech

Four corporations comprise what has come to be known as “Big Tech”: Amazon, Apple, Facebook, and Alphabet (the parent company of Google). Each of these technology firms dominate an enormous share of their respective technology markets. Google, for example, controls 90 percent of the internet search market, and it controls the largest video sharing platform on the internet through its ownership of YouTube. Apple controls 50 percent of the cellphone market,15 and Amazon controls 50 percent of all ecommerce. Facebook and its many subsidiaries (such as WhatsApp and Instagram) dominate the social media and online advertising marketplace.16 Other technology firms, including Uber, Lyft, Microsoft, and Netflix, also demonstrate monopolistic, anticompetitive behavior in their respective markets. In many ways, these companies, and the people who control them, are the “robber barons” of our time.

Big Pharma

The world's largest pharmaceutical corporations, including Johnson & Johnson, Pfizer, Merck, Gilead, Amgen, and AbbVie, together comprise “Big Pharma.” These monopolies build their profits by controlling the prices of critical life-saving pharmaceuticals (e.g., insulin, drugs that regulate blood pressure, and critical antibiotics) and life-altering medical devices (e.g., heart stents and joint replacement devices). Between 2000 and 2018, a disproportionately small number of pharmaceutical companies made a combined $11 trillion in revenue and $8.6 trillion in gross profits.17 In 2014, the top 10 pharmaceutical companies had 38 percent of the industry’s total sales revenue.18 Much of these profits were gained driving up the price of critical drugs , extorting research and development (R&D) funding from the government, and leveraging Big Pharma’s political influence to weaken government oversight of the industry.19

Big Agriculture

Big Agriculture, or “Big Ag,” refers to monopolies that control major aspects of the global food supply chain. This includes companies such as Cargill, Archer Daniels Midland Company (ADM), Bayer, and John Deere. Though once a diffuse network of small farmers and supply chain companies, recent mergers have created a system comprising a small number of corporations that are crowding out smaller, family-run companies including small farms. Similar to Big Pharma, government subsidies are a massive component of the obscene profits made by Big Ag. Further, as often the largest employer in many small rural towns, these corporations often ruthlessly wield their monopoly power to drive down wages and benefits to workers, skirt government safety regulations, and bully (and even buy out) small farmers.

Big Banks

Known as the “Big Five,” five banks control almost half of the industry’s nearly $15 trillion in financial assets: JPMorgan Chase, Bank of America, Wells Fargo, Citigroup, and US Bancorp. Their collective importance to the nation’s financial system has led some to consider them “too big to fail.”20 In fact, in response to the financial crisis of 2008, the federal government provided trillions of dollars in relief to ensure that they did not collapse under the weight of the crisis.21 The Big Five have an incredible influence over the flow of money throughout our economy. They finance critical goods and services, such as housing, higher education, infrastructure, and renewable energy. They also finance extractive elements of our economy, such as fossil fuels and private prisons. But, most importantly, they set the rules for who can and cannot access loan capital, and their exclusionary practices have been widely linked to the growth of racial wealth inequality (as described in Section 3).

These are just four examples of industries that have been taken over by monopolies, but they are in no way exclusive. Many other critical industries in our economy have been corrupted by monopolies, including the energy, health insurance, hospital, for-profit college, and delivery service industries.

One note of caution on monopolies: While all corporate monopolies are harmful, some government monopolies can be critical to providing essential programs and services. Examples of government monopolies include public K–12 schools, publicly owned utilities, and the United States Postal Service (USPS). In fact, the USPS is codified in the US constitution to ensure that all people—even those in remote rural areas—can send and receive mail. Today, the USPS is an important employer to people of color, particularly Black people, in providing competitive wages and quality health and retirement benefits.

The predation of corporate monopolies creates racial wealth inequality. Low-wage employers that employ people of color, such as Walmart—the nation’s largest private employer—often set the wage floor for local communities and the nation.22 Agribusinesses and pharmaceutical monopolies set prices at a “poverty premium” where people of color pay more for food and life saving drugs. Also, bank monopolies set the prices that people of color pay for basic financial services, and they provide capital to predatory lenders, including payday and car title lenders.

#### Matheson misunderstands how impact calculus works – the only ethical option is examining whether or not our threats are real

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Rita Floyd, “Introduction” in The Morality of Security, Cambridge Core, April 2019, pp 10-12, <https://doi.org/10.1017/9781108667814>.

Securitization has been heavily debated in the scholarly community. Among other things much discussion has focused on the issue of whether securitization is satisfied simply by audience acceptance of the securitizing move, or whether it has to involve extraordinary measures (Balzacq, Le´onard and Ruzicka, 2015). All securitization scholars accept, however, that security threats are socially and politically constructed, or in other words that: ‘Security issues are made security issues by acts of securitization’ (Buzan et al., 1998: 204). This has allowed scholars to recognize what Jef Huysmans calls ‘the political force of security’ whereby ‘[s]ecurity is a practice not of responding to enemies and fear but of creating them’ (2014: 3). An exclusive focus on the constructedness of security means, however, that securitization scholars tend to ignore whether or not the threats that inform securitization are real or otherwise. And as Thierry Balzacq argues, this has had the disadvantage of securitization scholars overlooking the fact that securitizing moves that refer to ‘brute threats’ are more likely to succeed because, ‘to win an audience, security statements must, usually, be related to an external reality’ (2011b: 13). Balzacq’s observation is important in the context of this book as it goes some way towards paving the way for the inclusion of objective existential threats into securitization analysis. As I will argue in this book, real threats are important for the purposes of just securitization theory as only these may constitute a just reason19 for securitization.

The Copenhagen School’s refusal to ‘peek behind [threat construction] to decide whether it is really a threat’ (Buzan et al., 1998: 204) and the just war tradition’s insistence on real threats as just causes, appear to suggest insurmountable differences at the meta-theoretical level between the two theories. Importantly, however, the Copenhagen School’s unwillingness to, as they put it, ‘peek behind’ threat construction, does not stem from a denial that real threats exist (after all Wæver (2011: 472) recognizes that ‘lots of real threats exist’),20 but from the belief that the study of threat construction is ultimately more fruitful than pondering the presence of real threats (Buzan and Hansen, 2009: 213; Buzan et al., 1998: 204). Beyond this, the decision not to try and examine whether security threats refer to real threats is also – at least in part – driven by a strong normative conviction. Thus by focusing on the political force of security as opposed to whether or not threats are real, Wæver and the Copenhagen School highlight the fact that securitization is/was not inevitable; things could have been treated in a different way (for example, perceived threats could have been criminalized or simply politicized). This enables scholars following this logic to highlight that securitizing actors bear responsibility for framing things in this way. Wæver calls this ‘the politics of responsibility’ (2011: 472), which he explains as follows: ‘The securitization approach points to the inherently political nature of any designation of security issues and thus it puts an ethical question at the feet of analysts, decisionmakers and activists alike: why do you call this a security issue? What are the implications of doing this – or of not doing it?’ (Wæver 1999 cited in Wæver, 2011: 468; emphasis added).

The significance of the fact that securitization is a political choice cannot be overstated; however, it is also the case that decision-makers are likely to consider securitization the right political choice when they believe that they are in fact dealing with a real threat. In other words, the possibility of framing the issue differently will not be tempting if they believe that there is a real threat. Given that the Copenhagen School and their followers cannot tell them anything about the actual objective existence of the threat, the framework seems of limited persuasiveness here; it is simply the securitizing actor’s belief against the scholar’s argument that things could and perhaps should be different. Indeed the Copenhagen School recognizes ‘our inability to counter securitization (say, of immigrants) with an argument that this is not really a security problem or that the environment is a bigger security problem’ as the securitization approach’s ‘main disadvantage’ (Buzan et al., 1998: 206). I propose that if the ethical goal of securitization analysis is that securitizing actors take responsibility for their actions, then a better strategy is to begin by (helping them in) judging the objective existence of a threat, because unless there is a real threat, securitization is most definitely the wrong political and ethical choice. Importantly, however, as I argue in this book, the existence of a real threat does not automatically necessitate securitization (indeed this remains a political choice), neither does it – by itself – render it morally permissible; the presence of real threats is rather one important requirement for securitization to be justified. In other words, just securitization is informed by the idea that securitizing actors are not only responsible for choosing to securitize, they ought to be responsible for securitizing in an ethical manner. In my view, the fact that the original variant of securitization theory excludes objective existential threats not on ontological, but at least partially on normative grounds means that a variant of securitization theory that includes real threats is at least permissible, provided, of course, that a theoretical framework that shows how we can know that threats are real is delivered. In this book, such a framework is set out in Chapter 2. 21

[FOOTNOTE 21 BEGINS

1 Some scholars may object to the possibility of combining insights of opposed theories on the grounds of inconsistency – for example, critical security studies, with its postmodern roots, with insights gained from analytical, moral and political philosophy. Interestingly, Wæver has faced similar charges of inconsistency for combining elements that ordinarily don’t go together (notably, Wæver refers to himself as a poststructural realist). To these critics Wæver offers this persuasive riposte: ‘This criticism presupposes that these larger groups are internally consistent and mutually isolated. On the contrary, we all know numerous examples of internally consistent theories that draw on several traditions – and many more examples of theories that stay within their “box” and yet are horribly inconsistent. Therefore, investigations of the internal consistency and productivity of research traditions should focus on distinct theories, not loose collections hereof’ (Wæver, 2015:124). Generally speaking, I am critical of the tendency to confuse theory with ideology, and thus disallowing and discounting anything outside of one’s perceived and tightly regulated theoretical remit. In the past in IR such thinking has led to bad scholarship; thankfully now scholars are working to dispel artificially imposed dichotomies, such as that on the relationship between causation and discourse (Kurki, 2008).

FOOTNOTE 21 ENDS]

#### Empirics prove that racism is contingent, and progress is possible

Omi and Winant 13 Michael Omi and Howard Winant. Omi is an Associate Professor at UC Berkeley andWInant is a Professor of Sociology at the University of California, Santa Barbara “Resistance is futile?: a response to Feagin and Elias,” Ethnic and Racial Studies, Vol. 36, Issue 6. 2013

Their essay has an overly tendentious tone and sometimes misreads and misinterprets our book. Still there are many points of agreement between the racial formation and systemic racism theories. Where we disagree most strongly is over our respective understanding of racial politics. Feagin and Elias focus so intensely on racism that they lose sight of the complexities of race and the variations that exist among and within racially defined groups. In their ‘systemic racism’ account white racist rule is so comprehensive and absolute that the political power and agency of people of colour virtually disappear. Indeed, the ‘white racial frame’ (Feagin 2009) is so omnipotent that white racism seems to usurp and monopolize all political space in the USA. Yes, ‘counter framing’ is present, but it appears marginal at best, unable effectively to challenge the pervasiveness, persistence and power of white racism. Since Feagin and Elias dismiss ideas of ‘racial democracy’ tout court, their perspective makes it difficult to understand how anti-racist mobilization or political reform could ever have occurred in the past or could ever take place in the future. They see racism as so exclusively white that any notion of white anti-racism is virtually ignored and completely unexplained. Despite Feagin and Elias's good intentions of linking their analysis to anti-racist practice, we believe their views have quite the opposite effect: without intending to do so, they dismiss the political agency of people of colour and of anti-racist whites. In Feagin/Elias's view, ‘systemic racism’ is like the Borg in the Star Trek series: a hive-mind phenomenon that assimilates all it touches. As the Borg announce in their collective audio message to intended targets, ‘Resistance is futile’. We have a smaller space than the main essay, so we'll dispense with a point-by-point refutation of their understanding of racial formation theory. We assume readers of Racial Formation and of our other work know that we are not closet neocons, that we consider racism a foundational and continuous part of US history (and indeed modern world history), that we agree that whites have been the primary creators and beneficiaries of racist institutions and practices, and that we not only respect but also situate ourselves in the black radical tradition, especially the Duboisian tradition. We will focus on our fundamental point of disagreement with Feagin and Elias – how we respectively understand the very nature of racial politics in the USA. Here we will engage Feagin and Elias on a few important questions that will highlight both where we agree and where we disagree. Our topics are as follows: • What is the relationship between race and racism? • What is distinctive about our own historical epoch in the USA – from post-Second World War to the present – with respect to race and racism? • What are the political implications of contemporary racial trends? We discuss these questions with the intent of clarifying racial formation theory as well as sharpening the debate with the systemic racism perspective. We appreciate the opportunity to do so. What is the relationship between race and racism? In Racial Formation we suggest that the concepts of race and racism should be distinguished and not be used interchangeably (Omi and Winant 1994, p. 71). Some have argued that race is solely a product of racist domination; on that account race does not exist outside of racism. As readers of Ethnic and Racial Studies well know, many writers place quotation marks around race (‘race’) to distinguish their use of the concept from popular biological notions of human variation. This is meant to designate the wobbly social scientific status of the race concept. In contrast to this perspective, we consider race to be real because it is ‘real in its consequences.’1 Our ideas about how the meaning of race is produced are basically Duboisian and Jamesian: we all make our racial identities, though we do not make them under circumstances of our own choosing. Race and racism do not exist merely because of white domination, but also because of resistance and independent action: what C. L. R. James called ‘self-activity’ (James, Lee, and Castoriadis 2005 [1958], p. 99). The process of making and remaking race – racial formation – is fundamentally political. It is about the ‘freedom dreams’ (Kelley 2002) that shape racial conflict as much as the white racism emphasized by Feagin and Elias. As Feagin and Elias acknowledge, we have developed a fairly detailed approach to racial politics, centred on the constant and cumulative interaction of what we call ‘racial projects’. In our account, racial formation proceeds through such projects, which both signify upon race (representing it, interpreting it) and reciprocally structure social relationships (of power, inequality, solidarity, etc.) according to race. If there is a disagreement with Feagin and Elias here, it seems to be about how much power people of colour have in this process of race-making, this racial formation process. In their account, the very meaning of race is overwhelmingly, if not totally, shaped by a ‘white racial frame’. By contrast, we believe that people of colour have a lot of power in the production of racial meanings, much more than Feagin and Elias are willing to concede. OK, what about racism? There are points of agreement and difference between Feagin and Elias's perspective and ours. We provide a hard-core definition and extensive discussion (Omi and Winant 1994, pp. 69–76), defining racism as a racial project that combines essentialist representations of race (stereotyping, xenophobia, aversion, etc.) with patterns of domination (violence, hierarchy, super-exploitation, etc.). Racism ‘marks’ certain visible characteristics of the human body for purposes of domination. It naturalizes and reifies these instrumental distinctions. Racism is the product of modern history: empire and conquest, race-based slavery, and race-based genocide have shaped the modern world; they have been met with resistance and sometimes revolution, also race-based in crucial ways. This is where race comes from: the drive to rule, and the imperative to resist. Feagin and Elias think (white) racism shapes race. Although they read us quite selectively and negatively here, they recognize that we also identify whites as the most comprehensive practitioners and by far the greatest beneficiaries of racist practices. We agree that racism is a ferocious force, a deeply structured-in dimension of US (and world) society. But this is apparently not enough: Feagin and Elias also want to confine racist agency to whites and whites alone. We argue that not all racism is white, and that people of colour can practise racism as well. Let us look more deeply at this question. Who is white? Beyond the question of the contingent and highly porous boundaries of this group lies the question of whether there are any ‘positive’ dimensions of white identity or whether it is a purely ‘negative’ quality, signifying only the absence of ‘colour’.2 Then there is the ‘white privilege’ question, which builds on Du Bois's analysis (1999, p. 700) of the ‘psychological wage’ received by poor whites in virtue of their race. While we are in substantial agreement with the ‘privilege’ argument regarding whites’ ‘possessive investment’ in racism (Lipsitz 1998), there are problems there too. How do we account for white anti-racism if we understand privilege as the source of racism? Is white anti-racism even possible, if racism is envisioned as an economistic zero-sum game in which clear winners and losers are demarcated? We think that race is so profoundly a lived-in and lived-out part of both social structure and identity that it exceeds and transcends racism – thereby allowing for resistance to racism. Race, therefore, is more than ‘racism’; it is a fully fledged ‘social fact’ like sex/gender or class. From this perspective, race shapes racism as much as racism shapes race. Racial identities (individual and group), and other race-oriented concepts as well, are unstable. They are not uniforms; races are not teams; they are not defined solely by antagonism to one another. They vary internally and ideologically; they overlap and mix; their positions in the social structure shift; in other words they are shaped by political conflict. In Feagin and Elias's account, white racist rule in the USA appears unalterable and permanent. There is little sense that the ‘white racial frame’ evoked by systemic racism theory changes in significant ways over historical time. They dismiss important rearrangements and reforms as merely ‘a distraction from more ingrained structural oppressions and deep lying inequalities that continue to define US society’ (Feagin and Elias 2012, p. 21). Feagin and Elias use a concept they call ‘surface flexibility’ to argue that white elites frame racial realities in ways that suggest change, but are merely engineered to reinforce the underlying structure of racial oppression. Feagin and Elias say the phrase ‘racial democracy’ is an oxymoron – a word defined in the dictionary as a figure of speech that combines contradictory terms. If they mean the USA is a contradictory and incomplete democracy in respect to race and racism issues, we agree. If they mean that people of colour have no democratic rights or political power in the USA, we disagree. The USA is a racially despotic country in many ways, but in our view it is also in many respects a racial democracy, capable of being influenced towards more or less inclusive and redistributive economic policies, social policies, or for that matter, imperial policies. What is distinctive about our own epoch in the USA (post-Second World War to the present) with respect to race and racism? Over the past decades there has been a steady drumbeat of efforts to contain and neutralize civil rights, to restrict racial democracy, and to maintain or even increase racial inequality. Racial disparities in different institutional sites – employment, health, education – persist and in many cases have increased. Indeed, the post-2008 period has seen a dramatic increase in racial inequality. The subprime home mortgage crisis, for example, was a major racial event. Black and brown people were disproportionately affected by predatory lending practices; many lost their homes as a result; race-based wealth disparities widened tremendously. It would be easy to conclude, as Feagin and Elias do, that white racial dominance has been continuous and unchanging throughout US history. But such a perspective misses the dramatic twists and turns in racial politics that have occurred since the Second World War and the civil rights era. Feagin and Elias claim that we overly inflate the significance of the changes wrought by the civil rights movement, and that we ‘overlook the serious reversals of racial justice and persistence of huge racial inequalities’ (Feagin and Elias 2012, p. 21) that followed in its wake. We do not. In Racial Formation we wrote about ‘racial reaction’ in a chapter of that name, and elsewhere in the book as well. Feagin and Elias devote little attention to our arguments there; perhaps because they are in substantial agreement with us. While we argue that the right wing was able to ‘rearticulate’ race and racism issues to roll back some of the gains of the civil rights movement, we also believe that there are limits to what the right could achieve in the post-civil rights political landscape. So we agree that the present prospects for racial justice are demoralizing at best. But we do not think that is the whole story. US racial conditions have changed over the post-Second World War period, in ways that Feagin and Elias tend to downplay or neglect. Some of the major reforms of the 1960s have proved irreversible; they have set powerful democratic forces in motion. These racial (trans)formations were the results of unprecedented political mobilizations, led by the black movement, but not confined to blacks alone. Consider the desegregation of the armed forces, as well as key civil rights movement victories of the 1960s: the Voting Rights Act, the Immigration and Naturalization Act (Hart- Celler), as well as important court decisions like Loving v. Virginia that declared anti-miscegenation laws unconstitutional. While we have the greatest respect for the late Derrick Bell, we do not believe that his ‘interest convergence hypothesis’ effectively explains all these developments. How does Lyndon Johnson's famous (and possibly apocryphal) lament upon signing the Civil Rights Act on 2 July 1964 – ‘We have lost the South for a generation’ – count as ‘convergence’? The US racial regime has been transformed in significant ways. As Antonio Gramsci argues, hegemony proceeds through the incorporation of opposition (Gramsci 1971, p. 182). The civil rights reforms can be seen as a classic example of this process; here the US racial regime – under movement pressure – was exercising its hegemony. But Gramsci insists that such reforms – which he calls ‘passive revolutions’ – cannot be merely symbolic if they are to be effective: oppositions must win real gains in the process. Once again, we are in the realm of politics, not absolute rule. So yes, we think there were important if partial victories that shifted the racial state and transformed the significance of race in everyday life. And yes, we think that further victories can take place both on the broad terrain of the state and on the more immediate level of social interaction: in daily interaction, in the human psyche and across civil society. Indeed we have argued that in many ways the most important accomplishment of the anti-racist movement of the 1960s in the USA was the politicization of the social. In the USA and indeed around the globe, race-based movements demanded not only the inclusion of racially defined ‘others’ and the democratization of structurally racist societies, but also the recognition and validation by both the state and civil society of racially-defined experience and identity. These demands broadened and deepened democracy itself. They facilitated not only the democratic gains made in the USA by the black movement and its allies, but also the political advances towards equality, social justice and inclusion accomplished by other ‘new social movements’: second-wave feminism, gay liberation, and the environmentalist and anti-war movements among others. By no means do we think that the post-war movement upsurge was an unmitigated success. Far from it: all the new social movements were subject to the same ‘rearticulation’ (Laclau and Mouffe 2001, p. xii) that produced the racial ideology of ‘colourblindness’ and its variants; indeed all these movements confronted their mirror images in the mobilizations that arose from the political right to counter them. Yet even their incorporation and containment, even their confrontations with the various ‘backlash’ phenomena of the past few decades, even the need to develop the highly contradictory ideology of ‘colourblindness’, reveal the transformative character of the ‘politicization of the social’. While it is not possible here to explore so extensive a subject, it is worth noting that it was the long-delayed eruption of racial subjectivity and self-awareness into the mainstream political arena that set off this transformation, shaping both the democratic and anti-democratic social movements that are evident in US politics today.

#### The perm reconstructs liberalism by recognizing the centrality of race – racial liberalism is formed through contingent acts of racial violence, and the perm’s deracialization is key to condemn violence

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(Charles W. Mills is a Distinguished Professor of Philosophy at The Graduate Center, City University of New York,“Black Rights/White Wrongs: The Critique of Racial Liberalism,” 2017, Oxford University Press, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190245412.001.0001/acprof-9780190245412-chapter-3)

For me, then, racial liberalism (analogous to patriarchal liberalism) is a liberalism in which key terms have been written by race and the discursive logic shaped accordingly. This position expresses my commitment to what has been called the “symbiotic” view of racism, which sees race as historically penetrating into liberalism’s descriptive and normative apparatus so as to produce a more-or-less consistent racialized ideology, albeit one that evolves over time, rather than seeing race as being externally and “anomalously” related to it.5 Unlike my post-structuralist and post-colonial colleagues, however, I see this penetration as contingent, not a matter of a pre-ordained logic of liberalism itself, but a consequence of the mandates for European liberal theorists of establishing and maintaining imperial and colonial rule abroad, and nonwhite racial subordination at home.6 Hence the hope of redeeming liberalism by self-consciously taking this history into account: recognizing the historic racialization of liberalism so as better to deracialize it—thereby producing a color-conscious, racially reflexive, anti-racist liberalism on the alert for its own inherited racial distortions.7 Abstract Platonized liberalism erases actual liberalism’s racist history, a blinding white Form that, in pretending a colorlessness that it did not and does not achieve, obfuscates more than it illuminates. The problem is not abstraction as such but a problematic mode of idealizing abstraction that abstracts away from social oppression, and in that way both conceals its extent and inhibits the development of the conceptual tools necessary for understanding and dealing with its workings.8 Identifying the historically hegemonic varieties of liberalism as racialized and white alerts us to the erasure, the whiting-out, of the past of racial subordination that current, seemingly genuinely inclusive varieties of liberalism now seek to disown. (p.xvi)

As the title of this book signifies, then, it is an enterprise based on the inversion of the standard metaphors in which white is right and black is wrong. It urges us to recognize how the historically exclusionary rights of white liberalism (a.k.a. “liberalism”), based on the suppression of equal black rights, have left a legacy of white wrongs. These wrongs have thus been not merely material but also normative and conceptual, wrongs within the apparatus of liberalism itself—as summarized by the two famous judgments about white “moderates” (in context roughly equivalent to “liberals”) made by Martin Luther King Jr. and Dick Gregory that I have used as my epigraphs. Hence the need for their black righting.

Part I of the book covers the overarching themes of epistemology, personhood, and property, all central to the liberal project, and all, in my opinion, distortionally shaped by race. Liberal enlightenment presumes an objective perception of things as they are and as they should be, factually and morally, for political communities characterized by reciprocally respecting relations among equally recognized persons in agreement on the fair terms for the appropriation of the world. But racial domination interferes with objective cognition, denies equal racial personhood, and generates rationalizations of unjust white acquisition. Thus they are all negatively transformed by the dynamic of racial liberalism.

The opening chapter sets the stage with a 2012 interview I did with Tom Mills (no relation, so far as I know) of the British New Left Project. For the benefit of a transatlantic audience less familiar with critical race theory, I explain the rationale for retaining “race” as a crucial category, suitably transformed, and what I see as its historic link with imperial domination and its relation to the conceptually distinct, if empirically overlapping, systems of gender and class. Racial liberalism is introduced as homologous with the far more familiar “patriarchal liberalism” identified by feminist theory.

Chapter 2, “Occupy Liberalism!,” locates the project within the broader context of the need to transform liberalism for a progressive political agenda. Invoking the slogan of the (then) recent “Occupy!” movement, I argue—against radical orthodoxy—that liberalism has an under-appreciated radical potential that is masked by the long complicity of its hegemonic varieties with plutocratic, patriarchal, and white-supremacist structures of power. But this complicity, I argue, is a function of dominant group interests and the successful political projects of the privileged, not the consequence of any ineluctable immanent conceptual dynamic of liberalism as a political ideology. Once we pluralize liberalism into liberalisms (both actual and hypothetical), we should be able to see how many claims about liberalism’s putatively problematic ontology and alleged incapacity to recognize and/or theorize social oppression really depend on the contingent features (p.xvii) of its historically dominant (but not inevitable) incarnations. An emancipatory liberalism can, I contend, be reconstructed that is not theoretically constrained in these unfortunate ways.

With this background established, I go on in chapter 3, “Racial Liberalism,” to make a detailed case for the usefulness of the construct. I point out the global hegemony of liberalism in a post–Cold War world and the triumph in the academy over the last few decades of Rawlsian contractarian liberalism in particular. But in the wide range of political responses to the work of John Rawls, the historic racialization of the contract apparatus and of the dominant varieties of liberalism will rarely be a topic of inquiry. Yet insofar as racism (ostensibly) violates the moral norms of modern political theory in general, liberal theorists across the spectrum, however much they disagree on other issues, should be able to converge on the necessity for purging contemporary liberal theory of its racist ancestry. Contra the exponents of color-blindness, however, I argue that this project can only be accomplished through a color-conscious investigative genealogy and reconstruction. Thus I urge a self-conscious deracializing of liberalism that would begin by recognizing the centrality of a social ontology of race to the modern world and the acknowledgment of a corresponding history of racial exploitation that needs to be registered in liberal categories and addressed as a matter of liberal social justice.

Oppositional bodies of political thought are often preoccupied with epistemological questions, in part for the simple reason that they are trying to explain how a dominant but misleading body of ideas (classist, sexist, racist) continues to perpetuate itself. One wants to understand both how the privileged can continue to deny the unfairness of their privilege and how (perhaps) one was oneself originally taken in by these ideas. I suggest that this pattern of denial and misapprehension can in the case of race be thought of as a “white ignorance,” an elaboration of the concept I introduced in The Racial Contract of an “epistemology of ignorance.”9 Chapter 4, “White Ignorance,” locates white miscognition as a structural phenomenon rather than a matter of individual white myopias. It is the result (not unavoidably, but as a strong psychological tendency) of racial location. Because of racial privilege, an inherited racialized set of concepts and beliefs, differential racial experience, and racial group interest, whites tend to get certain kinds of things wrong. As such, the chapter can be seen as a contribution from critical philosophy of race to the new “social” epistemology that has emerged in recent decades, a welcome turn away from the solipsistic Cartesian meditations that have typically characterized modern epistemology.

Chapter 5, “ ‘Ideal Theory’ as Ideology,” takes a critical look at what could be called the epistemology of normative theory, specifically the normative (p.xviii) apparatus of “ideal theory” liberalism. Like chapter 2, it also adopts a broader perspective, reminding us that a focus on race should not exclude a concern with gender and class privilege also, all of which are indeed always in the modern world in intersection and interaction with one another. First written as a contribution to a feminist collection on moral psychology, it was then reprinted in a special symposium of the feminist philosophy journal Hypatia, stimulating widespread discussion. The chapter expressed a frustration I and many others at the time (as it turned out) had begun to feel with “ideal theory” in ethics and political philosophy, most notably, of course, though not exclusively, in the work of Rawls. “Ideal theory” is not just normative theory, which by definition is a prerequisite for ethics and political philosophy, but the normative theory of a perfectly just society. The rationale was that developing such a perspective was crucial to doing non-ideal justice theory properly later on. But to many of us at the time it became increasingly questionable whether this “later on” was ever going to arrive, and that in reality ideal theory—whatever its original motivation—was functioning as a way of avoiding the hard facts of class, gender, and racial oppression; how they shape the human agents enmeshed in these relations of domination; and what our normative priorities should be. So the essay was an early effort in what has since become a growing wave of criticism of ideal theory, and I would like to think that it made at least a small contribution to getting things going.

No Western Enlightenment philosopher can equal the standing of Immanuel Kant, the luminary par excellence of eighteenth-century thought, with stellar accomplishments not merely in ethics and political philosophy, but in metaphysics and aesthetics also. Yet Kant, the pre-eminent theorist of personhood, whose work through his appropriation by John Rawls and Jürgen Habermas has become central to normative political philosophy as well as ethics, has also a more dubious accomplishment to his (dis)credit: being one of the founders—or (for some theorists) the founder—of modern “scientific” racism. As such, he wonderfully illustrates the combination of light and darkness in the “white” Enlightenment’s racial liberalism. Until recently, when the challenge from scholars of race made some response unavoidable, mainstream white political philosophers and ethicists had for the most part scrupulously avoided any mention of his racist writings in anthropology and physical geography. Now the dominant line of argument is that they are embarrassing and should of course be condemned, but they form no part of his philosophy. In chapter 6, “Kant’s Untermenschen,” I challenge this conceptual segregation and ask whether it would not be more theoretically fruitful to explore the possible presence in Kant’s work of a philosophical anthropology of persons and sub-persons, thereby inevitably raising questions about the standard (p.xix) interpretations of the prescriptions of his ethics, political philosophy, and teleology.

The seeming demise of Marxism—though as I write this introduction in 2016, the worsening conditions of plutocracy, not merely in the United States but globally, must surely be fostering a rethinking10—has taken “exploitation” off the table as a subject for moral analysis. Exploitation is assumed to be necessarily tied to the labor theory of value, long repudiated not merely by mainstream economists but by even most contemporary Marxists. But a concept of exploitation can easily be developed that is straightforwardly condemnable by respectable liberal criteria: exploitation as the “using” of people for illicit benefit and unjust enrichment. Marx famously contrasted the transparent exploitation of slave and feudal societies with the more opaque exploitation of capitalism, which, resting as it did on “free” wage-labor and voluntary consent, generally needed theoretical work to uncover. But racial exploitation in modernity was originally as transparently exploitative as (or even more transparently exploitative than) exploitation in pre-modern systems. Racial chattel slavery, aboriginal expropriation, colonial forced labor, and so forth are paradigms of non-consensual coercive systems directed by liberal polities at home and abroad. Yet they have not received the attention they deserve in liberal descriptive and normative theory for what they say about the actual architecture of the liberal state and its supervision of the wrongful transfer of wealth and opportunities from people of color to whites. In chapter 7, “Racial Exploitation,” I argue for a revival of the concept of exploitation in philosophical discourse that could be brought into fruitful engagement with the by now large body of literature in sociology and economics on racial differentials in wealth and how they serve to perpetuate racial inequality.

Part II of the book focuses on Rawls, Rawlsianism, and white political philosophy more generally. My claim is that most of this work either exemplifies the racial liberalism I am critiquing or adopts strategies for addressing and correcting it that are, in my opinion, going to be inadequate.

Chapter 8, “Rawls on Race/Race in Rawls,” examines the writings of the person generally regarded (certainly in Anglo-American analytic philosophical circles) as the most important American political philosopher of the twentieth century, and, for some, the most important political philosopher, period, of the twentieth century. I try to bring out the absurdity of the leading American philosopher of justice having nothing substantive to say over his working lifetime about what has historically been the most salient form of American injustice, racial domination. Moreover, by analyzing the underpinnings of Rawlsian ideal theory, I try to make the stronger case not merely that Rawls and Rawlsians have not addressed the issue of racism, but that the apparatus itself hinders them from doing so adequately, (p.xx) not merely contingently but also structurally. In the conclusion, I point the reader to my own work in my 2007 book with Carole Pateman, Contract and Domination, where I argue that retrieving the Rawlsian apparatus for racial justice and non-ideal theory will require radical changes in it.11

The natural follow-up is a look at the work of Tommie Shelby, since he—as a black philosopher at Harvard, Rawls’s home institution for most of his career—is the most prominent African American representative of the position that, contra my claims, Rawls’s apparatus as is can indeed be used to tackle racial injustice. In chapter 9, “Retrieving Rawls for Racial Justice?,” I do a detailed analysis of one of Shelby’s articles and explain why I think his attempted appropriation of Rawls (an extension to race of Rawls’s “fair equality of opportunity” principle) cannot work. I should emphasize here that I do not, of course, see Shelby as himself an exponent of racial liberalism but rather as a philosopher trying, as I am, to correct it. But my contention is that the racial liberalism that for me Rawls represents is more deeply embedded in the apparatus and thus requires more conceptual rethinking and reworking of that apparatus than Shelby recognizes.

Chapter 10, “The Whiteness of Political Philosophy,” takes a retrospective look at the evolution (and non-evolution) of the field in the many years since my graduation. Commissioned by the hyperactive (in a good way) George Yancy for a volume bringing together seventeen black and Hispanic/Latino philosophers to reflect on their experiences in the profession, it offers both an account of how much progress has been made in recent decades in Africana philosophy and race as legitimate philosophical areas of research, and how far we still have to go. Though there has been a burgeoning of literature in the discipline, the low demographic numbers of black philosophers and people of color generally, and the radicalness of the challenge race poses to conventional ways of doing philosophy, somewhat temper one’s optimism about its future. Using a well-known companion to political philosophy as a representative target, I point out how “white” its conceptual framework and underlying assumptions are, paying virtually no attention to the large body of work in post-colonial theory and critical race theory not just in philosophy but across many other disciplines.

Finally, in an epilogue that is simultaneously a prologue (in gesturing toward what I intend to be a future project), I sketch the contours of what I am calling a “black radical liberalism.” Taxonomies of Africana political thought have traditionally opposed black radicalism and black liberalism, the latter seen as necessarily committed to mainstream white norms and assumptions, even if adjusted somewhat for racial difference. But in keeping with the overall line of argument of this book, I make a case here for a different variety of black liberalism, one radicalized by taking seriously (in a way that mainstream black liberalism does not) the shaping of the modern (p.xxi) world by white supremacy. Black radical liberalism as an emancipatory ideology will of course have to be supplemented and modified by the experience of other racially subordinated communities. But given the centrality of African slavery and subsequent anti-black oppression to the making of modernity, it represents a crucial step toward the comprehensive theorization and reconstruction of the deracialized, color-conscious liberalism for which I am calling.

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