# 1NC vs Worker Welfare Standard

## OFF

### 1NC – T – “Prohibition”

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought – that’s distinct from just the standard that courts apply

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### A prohibition requires ending something fully

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### Violation: the AFF changes the standard that courts use to interpret cases, it does not expand the scope to prohibit a new pattern of conduct – their new standard could lead to more OR less conduct being prohibited

#### Vote neg—

#### A] Limits—endless AFFs that make small tweaks to antitrust laws without prohibiting conduct on the basis of illegality

#### B] Ground—All core disad links and CP competition is based on prohibiting conduct rather than adjusting legal standards

### 1NC – Healthcare PIC

#### The United States federal government should regulate private sector business practices that violate an antitrust worker welfare standard except for hospital mergers.

**Hospital mergers violate the worker welfare standard**

Suresh **Naidu 18**. \*Associate Professor of International and Public Affairs and Economics, Columbia University. \*Eric Posner is a Kirkland & Ellis Distinguished Service Professor of Law, University of Chicago Law School. \*E. Glen Weyl is a Principal Researcher, Microsoft Research New England and Visiting Senior Research Scholar, Yale University Department of Economics and Law School. “Antitrust Remedies for Labor Market Power”. University of Chicago Law School. 2018. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13776&context=journal\_articles

Defenses. Because we have never seen an attempt to justify anticompetitive labor market effects of mergers, it is hard to know what efficiencies merging partners would attempt to bring to bear. One possibility, noted above, is that a merger could reduce redundancy. Another possibility would be increased productivity because of greater ease of medical record sharing or cross-hospital referrals. The merging parties would have to show that these efficiencies would be likely to increase wages and could not be achieved without a merger. Other informal factors seem important here, especially changes to hours, benefits, and job descriptions, as these can be highly specific to a particular hospital, and nurses can be asked to work odd hours. Given large economies of scale in hospitals and often the necessity of affiliating with a major university, we doubt that entry analysis would play a large role in this case, nor would potential competition. However, the prospect of coordinated effects might be important given the close geographic proximity of hospitals and their frequent communication about community health, which may serve as a ruse for collusion on wages.

In short, the tools already used by antitrust regulators to predict the product market price effects of mergers can be readily applied to predicting their labor market wage effects. Using available estimates of hospital market power in the nursing market and existing antitrust heuristics, we guess that the wage effects of hospital mergers are substantial, suggesting that antitrust regulators should subject them to an additional level of scrutiny.

**Consolidation is necessary to preserve rural hospitals, but antitrust expansion deters and prevents necessary mergers**

**Kaufman 20** – chair of Kaufman, Hall & Associates LLC

Ken Kaufman, "Removing Antitrust Barriers to Solve the Rural Health Care Crisis," Morning Consult, 1-2-2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated **21 percent** of rural hospitals are at **high risk of closure**.

The high number of financially stressed hospitals is creating a **crisis of access** for rural communities and a potential **crisis of quality** and patient safety, as these hospitals **struggle to secure** **sufficient** clinical and technological **resources**. These struggles can be even more difficult in towns that could once support two hospitals but can **no longer do so**.

A **solution** to the rural health crisis that promotes **partnerships** with larger health systems addresses two critical needs. First, it enables a **rational, equitable approach** to a fundamental restructuring of rural health care resources. Second, it provides **access to sufficient financial resources** to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current **antitrust law makes it difficult** for individual hospitals or health systems to **collaborate on efforts** to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a **single health system**, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the **value** of a **system-based approach** to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a **safe zone** for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are **unlikely** to **reduce competition substantially**.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving **efficiencies** may be **realized** … **through a merger**.”

The situation becomes **more difficult** when a community has two hospitals that do not fall within the safe zone and it can **no longer support both**. Such markets will be considered highly concentrated, and an attempt to merge the hospitals **likely will be challenged** by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The **threat** of **antitrust enforcement** actions **throws a chill** over health system-led efforts to make the **rural health care** delivery system **more rational**, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and **ongoing scrutiny** these systems take on certainly might **dissuade other health systems** from pursuing a **similar route**.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a **practical reality** in rural communities.

The rural health care crisis is **happening now**; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that **understand** and **are willing** to take on the challenges of rural health care markets should be **given the opportunity** to do so.

**Rural hospital closures cause massive food spikes**

**Alemian 16** – President & CEO of Alemian & Associates

David Alemian, "Rural Healthcare Is a Matter of National Security," HCPLive, 11-8-2016, https://www.hcplive.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If **too many** rural health organizations go **out of business**, it then becomes a matter of **national security** and here’s why:

In most rural communities, the healthcare organization is the **largest employer**. When the largest employer goes out of business, the **community collapses** and **people move away**. What was once a thriving community then **becomes a ghost town**. Rural America **produces the food** that feeds the rest of the country.

What will happen when our **amber waves of grain turn to desert wastelands** because there is **no one to work our great farmlands**? As the source of food dries up, and store shelves empty, the price of food will go **through the roof**. As food prices go up, hyperinflation will become a reality, and our printed money will **become worthless**. Almost **overnight**, Americans will **begin to go hungry** because they won’t be able to afford to put food on the table.

**Food insecurity causes conflict and war---continued US leadership is key and no one fills the vacuum**

**Flowers**, director of the Global Food Security Project and the Humanitarian Agenda at the Center for Strategic and International Studies (CSIS), **‘18**

(Kimberly, “Keeping it Stable: The Connection Between Hunger and Conflict,” January 31, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/31/keeping-it-stable-the-connection-between-hunger-and-conflict)>

Although achieving this SDG’s targets in totality is unlikely, a global focus on reducing poverty, malnutrition, and hunger around the world **remains essential** both as a universal moral value in a world of inequalities, and as an important contributor to economic growth and **national security**. The United States has been a **global leader** in **addressing the root causes** of hunger and poverty through **agricultural development**, including President Obama’s leadership role in creating the L’Aquila Initiative at the 2009 G8 summit in Italy. The initiative emerged in **response to a food price crisis** and resulted in a promise by donors to provide $22 billion in agricultural development assistance over three years.

It is **more critical now than ever** for leaders within the Trump administration to continue to leverage that progress, starting with gaining a better understanding of the complexity of global food insecurity and its inherent connection with conflict. As food insecurity is both a cause and a consequence of conflict, addressing food insecurity goes well beyond a moral obligation; **it is a national security imperative.**

A lack of access to food can **spark unrest** among civilian populations, particularly when triggered by food **price spikes**. Hungry populations are more likely to express their discontent with unresponsive or corrupt leadership, perpetuating a **cycle of political instability** and further undermining long-term economic development. In addition, governments and non-state actors alike can **use food as a strategic instrument of war**, as witnessed in instances spanning from Sudan’s civil conflict in the 1990s to President Bashar al-Assad’s war-torn Syria today. In Syria, all sides have used food as a tool to **control** and **expel** populations. ISIS has used food resources as both a source of **funding** and a lure for **recruitment**. Food **weaponization** further **underscores the importance of United States** action to protect food security abroad and recognize strategies employed to transform a basic necessity into a military tool.

Today, between 1.2 and 1.5 billion people live in fragile, conflict-ridden states. These conflicts have pushed over 56 million people into crisis and emergency levels of food insecurity. The U.N. estimates that 65 million people are internally displaced within their own countries or are refugees in other countries. These numbers continue to rise as conflicts and violence **escalate across the world,** in countries like **Yemen**, South **Sudan**, and **Syria**, causing social and economic devastation. Meanwhile, the number of people dependent on humanitarian assistance has mushroomed. Projections indicate that by 2030, more than two-thirds of the world’s poor could be living in fragile countries.

The international community is increasingly recognizing the **linkages** between **food insecurity** and **political instability.** Sharp rises in global food prices in 2007 and 2008 sparked riots and street demonstrations in more than 40 countries across the world. Since political leaders started paying attention to this connection, there has been notable progress in increasing international attention and funding to address the root causes of hunger and poverty. The United States has dedicated roughly $1 billion to agricultural development since 2010 through its global food security programs. Thanks to the bipartisan Global Food Security Act that passed in July 2016, multiple U.S. agencies are implementing a global food security strategy that reduces poverty, bolsters resilience, and improves nutrition.

Even the U.S. intelligence community has noticed food security challenges. In November 2015, the National Intelligence Council released an assessment that linked food insecurity to political instability and conflict. The report states that the overall risk of food insecurity in many countries, **compounded** by demographic shifts and constraints on key resources such as land and water, **will increase** during the next decade. The assessment concludes that in some countries, declining food security will contribute to social disruptions and **large-scale political instability** or conflict. The intelligence community’s highlighting of the importance of food security as a diplomacy tool and security strategy broadens the number of stakeholders who are tracking, responding to, and mitigating food insecurity. It is no longer solely a focus for policymakers in the development space.

After nearly a decade of progress, global hunger is again on the rise. A U.N. report on food security and nutrition released last year estimates that 815 million people, or 11 percent of the global population, are chronically malnourished, an increase of nearly 40 million people over the previous year. Conflict and climate change are the two primary causes of this reversed trend. More than half of those experiencing extreme hunger live in countries affected by protracted conflict. Droughts and natural disasters also pose a serious threat to food security, particularly to smallholder farmers vulnerable to a volatile climate.

The 2017 State of Food and Agriculture report explains that conflict and climate change are responsible for rising global hunger levels. Smallholder farmers around the world will be forced to adjust to changing rainfall patterns and severe droughts and floods, which will directly impact their crops and incomes. Many weeds, pests, and pathogens are influenced by climate and thrive in warm conditions. Severe floods can wipe out fields and block market transportation routes, reducing smallholders’ abilities to maintain a sustainable income. Researchers, including those at the National Academies of Science, conclude that human-induced climate change and drought is one of the root causes of Syria’s conflict. Climate change thus places an added burden on countries with limited resources already struggling to feed their populations, as declining agricultural growth and incomes can create displacement and heighten hunger.

Food insecurity and climate change are not the sole cause of the conflict in Syria, but their contribution to the country’s instability cannot be ignored. Investing in international development programs and humanitarian **assistance** that fosters agricultural-led growth and **strengthens the resilience** of vulnerable people can **create peace**, improve lives, and **reduce conflict.** U.S. foreign policy priorities should include strengthening the health and prosperity of those less fortunate before a crisis occurs because our investments can help prevent a crisis in the first place. As Former Secretary of Defense Robert M. Gates said, “Development is a lot cheaper than sending soldiers.”

### 1NC – Antidomination K

#### The 1AC’s faith in markets and rejection of direct state commands naturalizes corporate domination at the expense of the most vulnerable.

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

ii. antitrust law is not and cannot be “apolitical”

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a “spontaneous order” is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.24 This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different con- figurations of state action and different sets of beneficiaries.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions curtailed the reach of antitrust law, scaling back its objectives39 and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an “apolitical” antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is not anchored in congressional intent and reflects a narrow conception of monopoly and oligopoly

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges short- term consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.62

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.63

The consumer welfare model, moreover, affords little or no importance to corporations’ ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a product of big business’s reaction against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Neoliberal antitrust is part and parcel with legal proceduralism. That guts the administrative state, which is key to solve every existential threat.

Bagley 19 – Professor of Law, UMich

Nicholas Bagley, Professor of Law, University of Michigan Law School, ARTICLE: THE PROCEDURE FETISH, 118 Mich. L. Rev. 345 (December, 2019)

Administrative law comprises a set of procedural rules that affect the pace and composition of government action. That same government action--whether it involves dispensing public benefits or regulating private conduct--allocates resources, risk, and power within the United States. The manner in which administrative law operates will thus favor some interests over others. That's not an indictment: any set of rules has the same character. Increasing the stringency of judicial review for new agency regulations, for example, will tend to aid those who have the most to lose from government action. By the same token, curbing judicial review will help those who stand to gain. There is no neutral, value-free way to calibrate the stringency of judicial review, and the point holds for administrative procedure more generally. The distribution of resources, risk, and power in the United States is partly a function of an administrative law that is supposed to be agnostic as to that distribution.

With increasing urgency over the past two decades, congressional Republicans have advanced proposals to discipline a regulatory state that, in their view, does too much and with too little care. These proposals travel under an array of names and acronyms, but they embrace a common tactic: they pile procedure on procedure in an effort to create a thicket so dense that agencies will either struggle to act or give up before they start. 1 The Regulatory Accountability Act (RAA), for example, would subject high-impact rules to an oral hearing, complete with cross-examination and a formal record; ban agencies from engaging in public outreach to advocate for their rules; stitch centralized executive oversight and rigorous cost-benefit analysis into law; impose onerous new rules on the issuance of guidance documents; and make adherence to all of these procedures subject to judicial review. 2 By tilting the scales against agency action, Republicans hope to end "job-killing regulations" and invigorate the free market. Not coincidentally, that means favoring industry over environmentalists, banks over consumer advocates, and management over labor.

The point is not that these are bad priorities. The point is that they are political priorities. Democrats understand as much. "By hamstringing the dedicated public servants charged with ensuring everything from safe infant [\*347] formula to clean drinking water to a fair day's pay for a fair day's work," writes Sam Berger, a former official in the Obama White House, "this bill would put corporate profits before people's lives and livelihoods." 3 William Funk notes that the RAA will "slow down, if not make impossible, the development of regulations that have major effects on the economy. It does not matter how many lives the regulation might save." 4 But the opposition from the left presents a puzzle. If adding new administrative procedures will so obviously advance conservative priorities, might not relaxing existing administrative constraints advance liberal ones? What if dedicated public servants are already hamstrung? What if it already does not matter how many lives a regulation might save?

Yet there is no Democratic version of the RAA, and little organized energy behind the idea that relaxing administrative procedures will be good for the environment, consumers, and workers. The game is strictly defensive: to protect administrative law, not to transform and rethink it. Actually, matters are worse than that. Some liberals are so enchanted with administrative procedures that they are calling for more. Democrats Heidi Heitkamp and Joe Manchin were Senate cosponsors of the RAA, arguing that it would make regulations "smarter." 5 Cass Sunstein also supports the bill, though not without reservation, and in so doing has thrown his support behind the imposition of the same procedures that Republicans hope will frustrate agency action. 6 Even those who are especially sensitive to the deficiencies of modern administrative law--Jon Michaels comes to mind--endorse court-centered proceduralism as part of their cure. 7

[\*348] Why aren't progressives clamoring to loosen administrative law's constraints? It's not for want of targets. Administrative law is shot through with arguably counterproductive procedural rules. In past work, for example, I have argued that the Office of Information and Regulatory Affairs imposes a drag on regulation without adequate justification; 8 that the presumption in favor of judicial review of agency action, and particularly the presumption in favor of preenforcement review, should be reevaluated; 9 and that the reflexive invalidation of defective agency action is wasteful and unnecessary. 10 But the list goes on. The judicially imposed rigors of notice-and-comment rulemaking, the practice of invalidating guidance documents that are "really" legislative rules, the Information Quality Act, the logical outgrowth doctrine, nationwide injunctions against invalid rules--all could and perhaps should be reconsidered.

In today's political landscape, however, "regulatory reform" is strictly the province of Republican policymakers, so much so that the anodyne phrase has acquired an antiregulatory connotation. Republicans have a reform agenda. Democrats don't. 11 What's more, the left's hesitation is not a response to Republican control of the federal government. When Democrats held both Congress and the White House in 2009 and 2010, they didn't press to streamline or rethink administrative law.

Liberal quiescence can be traced, instead, to two stories about the administrative state that have become deeply embedded in our legal culture. Fidelity to procedures, one story runs, is essential to sustain the fragile legitimacy of a powerful and constitutionally suspect administrative state. 12 On the other story, procedures assure public accountability by shaping the decisions of an executive branch that might otherwise be beholden to factional [\*349] interests. 13 Taken together, these stories suggest we should be thankful for the procedures we have and nervous about their elimination.

But this legitimacy-and-capture narrative is overdrawn--indeed, it is largely a myth. Proceduralism has a role to play in preserving legitimacy and discouraging capture, but it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address. In building this argument, I hope to call into question the administrative lawyer's instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to the relaxation of unduly burdensome procedural rules. Notwithstanding academic claims that the Administrative Procedure Act (APA) has attained a kind of quasi-constitutional status, 14 administrative law remains very much an object of political contestation. Any convention that Congress can't tinker with the APA is quickly eroding, if indeed any such convention ever existed. We should acknowledge that fact even if we lament its loss.

In this, I hope to bring the practice of administrative law into conversation with a line of revisionist academic work that questions the left's embrace of court-centric legalism. That work, among other things, recovers how Progressive and New Deal state-builders embraced a results-oriented, nonlegalistic approach to administrative power. They understood--more clearly than we do now--that strict procedural rules and vigorous judicial oversight could be mobilized to frustrate their efforts to curb market exploitation, protect workers, and press for a fairer distribution of resources. 15 "Substantial justice," declared President Franklin Roosevelt in vetoing a predecessor bill to the APA, "remains a higher aim for our civilization than technical legalism." 16

The left's antiproceduralist orientation shifted in the wake of Brown v Board of Education, when the fight for civil rights moved into a legalistic register--a shift that, in the revisionist telling, both narrowed the scope of the civil rights movement's ambitions and hampered its efforts to address yawning racial inequalities. 17 Progressive reformers in the 1960s and the 1970s [\*350] drew inspiration from the civil rights example, and adopted the tools of adversarial legalism (to use Robert Kagan's phrase) 18 in an effort to spur the vigorous enforcement of new environmental and consumer protection laws. 19 That legalism, which opponents of state action avidly supported, 20 is our inheritance from that era. 21

Along the way, a positive vision of the administrative state--one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals--has been shoved to the side. 22 [FN22] See Kessler, supra note 15, at 733 (recalling the views of progressive reformers who "believed that an autonomous administrative state was necessary to achieve a more just distribution of the nation's resources, and that the achievement of this political economic goal, along with democratic support and expert guidance, were the sufficient conditions of the state's legitimacy"). [End FN] I recognize that now may not be the most auspicious time to press the point, when liberals have seized on administrative law as a means to resist the Trump Administration. But President Trump is temporary; administrative law is not. And an administrative law oriented around fears of a pathological presidency may itself be pathological--a cure worse than the disease. A decade after a financial crisis roiled the financial markets, in a century when climate change threatens environmental catastrophe, and in an era of growing income and wealth inequality, the wisdom of allowing procedural rules to hobble federal agencies is very much open to question. Administrative law may be about good governance, but it is also about power: the power to maintain the existing state of affairs, and the power to change it. It's well past time for more skepticism about procedure.

#### Neoliberalism guarantees extinction thru economic downturns, environmental destruction, and democratic backsliding

**Kuttner 19** – Co-founder and co-editor of The American Prospect, and professor at Brandeis University’s Heller School

Robert Kuttner, “Neoliberalism: Political Success, Economic Failure,” The American Prospect, 6/25/19, https://prospect.org/economy/neoliberalism-political-success-economic-failure/

Since the late 1970s, we've had a grand experiment to test the claim that free markets really do work best. This resurrection occurred despite the practical failure of laissez-faire in the 1930s, the resulting humiliation of free-market theory, and the contrasting success of managed capitalism during the three-decade postwar boom.

Yet when growth faltered in the 1970s, libertarian economic theory got another turn at bat. This revival proved extremely convenient for the conservatives who came to power in the 1980s. The neoliberal counterrevolution, in theory and policy, has reversed or undermined nearly every aspect of managed capitalism—from progressive taxation, welfare transfers, and antitrust, to the empowerment of workers and the regulation of banks and other major industries.

Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

By the 1990s, even moderate liberals had been converted to the belief that social objectives can be achieved by harnessing the power of markets. Intermittent periods of governance by Democratic presidents slowed but did not reverse the slide to neoliberal policy and doctrine. The corporate wing of the Democratic Party approved.

Now, after nearly half a century, the verdict is in. Virtually every one of these policies has failed, even on their own terms. Enterprise has been richly rewarded, taxes have been cut, and regulation reduced or privatized. The economy is vastly more unequal, yet economic growth is slower and more chaotic than during the era of managed capitalism. Deregulation has produced not salutary competition, but market concentration. Economic power has resulted in feedback loops of political power, in which elites make rules that bolster further concentration.

The culprit isn't just “markets”—some impersonal force that somehow got loose again. This is a story of power using theory. The mixed economy was undone by economic elites, who revised rules for their own benefit. They invested heavily in friendly theorists to bless this shift as sound and necessary economics, and friendly politicians to put those theories into practice.

Recent years have seen two spectacular cases of market mispricing with devastating consequences: the near-depression of 2008 and irreversible climate change. The economic collapse of 2008 was the result of the deregulation of finance. It cost the real U.S. economy upwards of $15 trillion (and vastly more globally), depending on how you count, far more than any conceivable efficiency gain that might be credited to financial innovation. Free-market theory presumes that innovation is necessarily benign. But much of the financial engineering of the deregulatory era was self-serving, opaque, and corrupt—the opposite of an efficient and transparent market.

The existential threat of global climate change reflects the incompetence of markets to accurately price carbon and the escalating costs of pollution. The British economist Nicholas Stern has aptly termed the worsening climate catastrophe history's greatest case of market failure. Here again, this is not just the result of failed theory. The entrenched political power of extractive industries and their political allies influences the rules and the market price of carbon. This is less an invisible hand than a thumb on the scale. The premise of efficient markets provides useful cover.

The grand neoliberal experiment of the past 40 years has demonstrated that markets in fact do not regulate themselves. Managed markets turn out to be more equitable and more efficient. Yet the theory and practical influence of neoliberalism marches splendidly on, because it is so useful to society’s most powerful people—as a scholarly veneer to what would otherwise be a raw power grab. The British political economist Colin Crouch captured this anomaly in a book nicely titled The Strange Non-Death of Neoliberalism. Why did neoliberalism not die? As Crouch observed, neoliberalism failed both as theory and as policy, but succeeded superbly as power politics for economic elites.

The neoliberal ascendance has had another calamitous cost—to democratic legitimacy. As government ceased to buffer market forces, daily life has become more of a struggle for ordinary people. The elements of a decent middle-class life are elusive—reliable jobs and careers, adequate pensions, secure medical care, affordable housing, and college that doesn't require a lifetime of debt. Meanwhile, life has become ever sweeter for economic elites, whose income and wealth have pulled away and whose loyalty to place, neighbor, and nation has become more contingent and less reliable.

Large numbers of people, in turn, have given up on the promise of affirmative government, and on democracy itself. After the Berlin Wall came down in 1989, ours was widely billed as an era when triumphant liberal capitalism would march hand in hand with liberal democracy. But in a few brief decades, the ostensibly secure regime of liberal democracy has collapsed in nation after nation, with echoes of the 1930s.

As the great political historian Karl Polanyi warned, when markets overwhelm society, ordinary people often turn to tyrants. In regimes that border on neofascist, klepto-capitalists get along just fine with dictators, undermining the neoliberal premise of capitalism and democracy as complements. Several authoritarian thugs, playing on tribal nationalism as the antidote to capitalist cosmopolitanism, are surprisingly popular.

It's also important to appreciate that neoliberalism is not laissez-faire. Classically, the premise of a “free market” is that government simply gets out of the way. This is nonsensical, since all markets are creatures of rules, most fundamentally rules defining property, but also rules defining credit, debt, and bankruptcy; rules defining patents, trademarks, and copyrights; rules defining terms of labor; and so on. Even deregulation requires rules. In Polanyi's words, “laissez-faire was planned.”

The political question is who gets to make the rules, and for whose benefit. The neoliberalism of Friedrich Hayek and Milton Friedman invoked free markets, but in practice the neoliberal regime has promoted rules created by and for private owners of capital, to keep democratic government from asserting rules of fair competition or countervailing social interests. The regime has rules protecting pharmaceutical giants from the right of consumers to import prescription drugs or to benefit from generics. The rules of competition and intellectual property generally have been tilted to protect incumbents. Rules of bankruptcy have been tilted in favor of creditors. Deceptive mortgages require elaborate rules, written by the financial sector and then enforced by government. Patent rules have allowed agribusiness and giant chemical companies like Monsanto to take over much of agriculture—the opposite of open markets. Industry has invented rules requiring employees and consumers to submit to binding arbitration and to relinquish a range of statutory and common-law rights.

#### The alternative posits an anti-domination approach to the political economy.

Jackson 21 – DeOlazarra Fellow at the Program in Political Philosophy, Policy & Law at the University of Virginia. She received her Ph.D. with distinction in political theory at Columbia University.

Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than four urgent crises: an ongoing pandemic1; racial injustice and its consequent civil unrest2; an economic depression approaching the pain inflicted in 1929; and the accumulating, existential threat of climate change.4 Citizens must rely on their state to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this multi-pronged anti-administravist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends (lawmaking) and the implementation (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that administration does indeed carry constitutional liberal democratic credentials – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal participants in the collective decision-making process.

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus not a question of ascertaining the existence of some non-existent popular “will” to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a question of developing transparent and accessible collective decision- making procedures that ensure that all citizens can understand themselves as equal participants in their collective ordering; that ordinary people are involved in public life and have a say in their collective destiny.89 They do not rule. Rather, they are equal players in the game of representative democracy.90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity, human equality and the public good.93 Because if the sovereign is a “we,” then governing involves more than the interests and preferences of single individuals. We will therefore demand that political institutions remain accountable and accessible to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also unlocks the closed doors of power and forces the inclusion of voices previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this place of power remain an empty one – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because all citizens contribute in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that administrative agencies can be made consistent with the requirements of constitutional popular sovereignty.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as co-equal participants in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

### 1NC – Section 5 CP

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC act to prohibit [private sector business practices that violate an antitrust worker welfare standard] and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in conduct that [violates an antitrust worker welfare standard.]stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitive practices under section 5 – the CP prevents a slew of anticompetitive practices

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

**Section 5 expansion and clarification is critical to preventing international protectionism**

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act’s considerable normative influence abroad,66 especially with respect to areas of regulator discretion in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act’s purview over any “unfair methods of competition”68 per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act’s reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

## Inequality adv

1. Aff is super vague – no explanation of what their labor standards constitute or how it should be applied

#### Oligarchic capture makes populism inevitable – it makes people feel powerless in the world which incentivizes them to lean towards populist leaders

**Cayla 21** – Associate Professor of Economics and Vice-Dean of the Faculty of Law, Economics and Management at Angers University, France

David Cayla, “Neoliberalism and Populism,” Routledge, 2021, https://www.routledge.com/Populism-and-Neoliberalism/Cayla/p/book/9780367427702

In addition to the lack of new ideas, what exactly to change and how to do it, the political situations in many countries do not favour a radical overhaul of public policies. The management of the 2007–2008 crisis, as well as the sharp rise in inequality that most countries experienced since the 1980s, has led to a deep distrust among a section of the population that has resulted in the emergence of populist forces and broad social protest movements. The turn that the political debate has taken since then is not conducive to a thorough rethinking and rebuilding of societies. Instead, populism generates sterile opposition against elites accused of betraying the people and against minorities or foreign populations. Populism is also an “identitarianism”. It seeks to rehabilitate popular cultures and identities in response to representations and social hierarchies that fail to give them the consideration they expect.

But populism cannot be reduced to its political dimension. It is, more fundamentally, the expression of a social disorder. The vote for the Brexit and the election of Donald Trump are sometimes considered the most striking populist events of recent years. That is forgetting that populist movements took root in many countries long before they reached the Anglo-Saxon world. Central Europe was, in the early 2010s, the laboratory of a form of populism that man- aged to gain and maintain power. In Southern Europe, a specific form of populism emerged, shaped by social issues and the Eurozone crisis. In Turkey, Russia and the Philippines, populism has taken an authoritarian dimension that challenges civil rights and democracy itself. The list is long: the key point is that populism, although fairly easy to identify, is embodied politically and socially in very diverse ways. Moreover, its causes are not always clear, and no consensus can be found among those who study it.

For instance, while social and economic inequalities appear to be a decisive factor in the emergence of populism, it is not clear that fiscal redistribution alone would be sufficient to weaken it. Indeed, once populist leaders come to power, they rarely implement equalitarian measures. Behind the nationalist rhetoric many employ, there are frequent injunctions to work and effort instead of waiting for governmental subsidies. Similarly, populist leaders are often businessmen, and some of them are billionaires.

In this book, I wish to explore the link between populism and neoliberalism. Why? Perhaps because the former may be a consequence of the latter, and to understand them, it may be necessary to deal with them together. The idea to study populism and neoliberalism in conjunction is not new. Most authors who have studied populism connect it to the economic disarray that the working classes have fallen into. And those scholars have no difficulty in linking this disarray to economic policies and neoliberalism.

What is more debatable, however, is the nature of the relationship between these two phenomena. In order to characterize it, it is primarily necessary to delve deeper into the origin of the different forms of populism and to understand what it is that unites them despite the apparent heterogeneity of their agendas. Secondly, it is essential to clearly define what neoliberalism stands for. What a curious doctrine whose name is itself a matter of debate! Is it a simple “market fundamentalism” as the Nobel Prize winner in economics, Joseph Stiglitz claims? If that is all there is, then one would conclude that the global economy has already emerged from neoliberalism since states have intervened widely and massively to rescue markets in recent years.

First, let us honestly admit that no one seriously believes in the perfection of markets any more. Everyone now accepts that markets need public institutions to function and, on occasion, strong support from public authorities to rescue them from chaos. But if neoliberalism is not simply market fundamentalism, how shall it be defned and characterised precisely?

This book seeks to answer all these questions. More specifcally, I defend two main arguments. The frst one is that the roots of populism lie frst and foremost in the feeling of distrust that people feel towards a powerless political structure. It is argued that if politics have become impotent, it is mainly because its ability to act in the economic sphere has been taken away. In the name of free competition and free trade, many levers of action have been deactivated by competitive markets in favour of regulation. The state has thus gradually resigned from its role as a producer and economic regulator in favour of merely preserving and repairing the market order. Neoliberalism is therefore not market fundamentalism because it does not rest on the perfection and autonomy of markets. That is why it puts the state at its service. There are, of course, as we shall see, several forms of neoliberalism and different conceptions about the nature of the order that is supposed to ensure the proper functioning of markets. But all neoliberals, including Hayek and Friedman, believe that some form of public intervention is necessary to make markets work in the best possible way.

#### Basic economics shows oligarchic increases inequality via gutting aggregate demand – it concentrates wealth into the hands of elites crushing the worth of the dollar and diminishing demand

Bivens 17 – Director of research at the Economic Policy Institute. He has a PhD in economics from the New School for Social Research.

Josh Bivens, “Inequality is slowing US economic growth,” *Economic Policy Institute*, 12 December 2017, pp. 3-9, https://files.epi.org/pdf/136654.pdf.

This new attention to the crisis of American pay is totally proper. The failure of wages of the vast majority of Americans to benefit from economy-wide growth in productivity (or income generated in an average hour of work) has been the root cause of the stratospheric rise in inequality and the concentration of economic growth at the very top of the income distribution. Had this upward redistribution not happened, incomes for the bottom 90 percent of Americans would be roughly 20 percent higher today. 3 In short, the rise in inequality driven by anemic wage growth has imposed an “inequality tax” on American households that has robbed them of a fifth of their potential income.

There would be huge benefits to American well-being from blocking or reversing this upward redistribution. This welfare gain stemming from blocking upward redistribution is the primary reason to champion policy measures to boost wage growth and lead to a more equal distribution of income gains. Put simply, a dollar is worth more to a family living paycheck to paycheck than it is to families comfortably in the top 1 percent of the income distribution.

Proponents of increases in the minimum wage and other measures to boost American wages have often argued that there are benefits to these policies besides the welfare gains stemming from pure redistribution. These proponents have often argued that boosting wages would even benefit aggregate economic outcomes, like growth in gross domestic product (GDP) or employment.

Recent evidence about developments in the American and global economies strongly indicate that these arguments are correct: boosting wages of the bottom 90 percent would not just raise these households’ incomes and welfare (a more-than-sufficient reason to do so), it would also boost overall growth. For the past decade (and maybe even longer), the primary constraint on American economic growth has been too-slow spending by households, businesses, and governments. In economists’ jargon, the constraint has been growth in aggregate demand lagging behind growth in the economy’s productive capacity (including growth of the labor force and the stock of productive capital, such as plants and equipment). Much research indicates that this shortfall of demand could become a chronic problem in the future, constantly pulling down growth unless macroeconomic policy changes dramatically.

Our rising inequality is being driven by the slowdown in wage growth for the bottom 90 percent

It is now well-known that incomes in America grew much less equally after 1979. Probably the most important fact about this growing inequality is that it has overwhelmingly been driven by trends in market-based income rather than in the taxes and transfers component of income. Table 1 shows the sources of income growth for the top 1 percent of households in the three decades before the Great Recession. It uses Congressional Budget Office (CBO 2016) data on comprehensive household income, which includes noncash market-based income such as employer contributions to health insurance premiums as well as non–market-based income such as government transfers. The CBO data show that inequality is increasing (the share of all income that is going to the top is rising) because the top 1 percent are getting a greater share of each type of market income and because the types of market income that are most concentrated at the top (particularly capital gains and business income) constitute a growing share of all income, whereas income from less-concentrated sources (particularly labor compensation) is falling as a share of overall income. The data in the table also indicate that the direct, arithmetic influence of taxes and transfers has been minimal, with rising inequality of market incomes explaining more than 100 percent of the rise in the after-tax income share of the top 1 percent.4

The first block of columns simply shows the top 1 percent share of overall household income and of various income types as identified in CBO (2016). A clear finding is that the top 1 percent share of every source of income except government transfers rose significantly between 1979 and 2007. The share of overall income held by the top 1 percent more than doubles (rising from 8.9 to 18.7 percent of total income) between 1979 and 2007. And even with the enormous blow to top 1 percent incomes dealt by the 40 percent loss in the stock market from 2007 to 2010, the top 1 percent share in 2012 of 17.3 percent was almost double its 1979 level. Particularly salient to this analysis is the rough doubling of both labor and total capital shares claimed by the top 1 percent from 1979 to 2007 and 2012.

The next block of columns shows each income category’s share of overall household income. The most striking finding here is the large decline in the labor compensation share of total income, falling from 70.6 percent in 1979 to 61.0 percent in 2007 and 2012. Correspondingly, the share of total capital and business income (driven by capital gains and business income) rose substantially, from 17.5 percent in 1979 to 22.1 percent in 2007. 5 Due to the stock market crash in 2007 and the hangover from that crash through 2010, capital income shares (and thus total capital and business income) remained lower in 2012 than in 2007, but still above the 1979 levels. Finally, pension payments and transfer incomes have risen steadily over time as shares of total income.

The third block of columns calculates how much growing concentration within each income category contributed to the increasing top 1 percent share of income from 1979 to 2007 and from 1979 to 2012. The growing concentration of particular income types in the top 1 percent of households contributed 7.2 percentage points to the 9.8 percentage-point increase in the top 1 percent’s income share from 1979 to 2007, accounting for essentially three quarters of the rise. The vast majority of this concentration within income sources is accounted for by labor and capital incomes. The last block of columns summarizes how much the shift from less-concentrated (labor) income to more-concentrated (capital) incomes boosted the top 1 percent share of overall household income. The sum of these shifts contributed 2.6 percentage points to the growth of the top 1 percent share from 1979 to 2007, and 0.4 percentage points from 2007 to 2012.

One way to summarize what these data tell us is that the vast majority of households (those outside the top 1 percent) are losing out in claiming their proportionate share of total income growth in two significant ways. First, workers as a group are losing out to capital owners, with the shift from labor to capital income explaining a significant portion of the rise of the top 1 percent. Second, the bottom 99 percent of income earners in America are able to claim only an ever-shrinking portion of the overall wage bill, with the highest-paid workers in the top 1 percent more than doubling their share of labor income over the last three and a half decades.

In our view, these are simply two sides of the same coin: a pronounced reduction in the collective and individual bargaining power of ordinary American workers that led to pay growth lagging productivity so badly in recent decades. If wages of the bottom 99 percent had kept pace with productivity growth for most of the past generation (the way that typical workers’ wages did in the post-WWII generation), then most of the increase in income inequality we have seen simply would not have had space to develop, as concentration within labor incomes would not have grown and the share of total output available to be claimed by capital owners would have been significantly smaller. 6

But wages for the vast majority of workers stopped keeping pace with economy-wide productivity growth in the late 1970s, and the cumulative wedge between productivity and typical workers’ pay has risen ever since, as shown below in Figure A. This figure shows growth in economy-wide productivity, defined as the amount of income and output generated in an average hour of work in the economy. While the pace of productivity growth slowed down in the late 1970s, productivity still grew steadily in the following decades. The figure also shows a measure of hourly pay (including both wages and benefits) for production and nonsupervisory workers in the U.S. economy. This nonmanagerial group includes roughly 80 percent of the private-sector workforce. After growing right in line with productivity for decades following World War II, hourly pay for these workers all but stagnated after 1979. Because productivity kept growing but pay for 80 percent of the private-sector workforce stagnated, this means that the economy continued to generate growing incomes on average each year, but pay for typical workers slowed radically. In short, the growing wedge between these lines represents the disproportionate share of economic growth claimed by those at the top after 1979.

Table 1 and Figure A together tell a clear story about the rise in American inequality: it has been made possible by the suppression of wage growth for the vast majority of American workers. Until this wage suppression ends and hourly pay for the vast majority of workers begins rising in lockstep with economy-wide productivity, there is very little reason to hope that rising inequality can be arrested. This makes focusing policy attention on boosting wage growth absolutely crucial.

“Secular stagnation,” or, the chronic shortage of aggregate demand constraining economic growth

A useful (if admittedly too-simple) way to think about an economy’s growth is as an interplay between the economy’s productive capacity and the level of aggregate demand. The economy’s productive capacity is a measure of potential that includes three major “inputs” of production: the labor force, the capital stock, and the state of technology. However, for these potential inputs to be fully utilized, aggregate demand—or spending by households, businesses, and governments—must be strong enough to mobilize them. Take the example of a hotel’s economic fortunes from 2007 to 2010. In 2007, the building and physical plant existed, the systems for taking reservations existed, and there were plenty of workers, both actual employees and potential workers willing to take jobs at the right wages. Also in that year, there were customers; rooms were likely booked to capacity and the owners may have even considered adding rooms. In 2010, this hotel still had a physical plant and reservation systems, and while their own staff was likely much smaller because of layoffs in the wake of the Great Recession, there was a huge increase in potential workers looking for jobs that could have been hired. But what kept the hotel’s hiring constrained and profits low in 2010 was lack of customers, not slow growth in the economy’s potential (or productive capacity).

Recently, a number of economists have noted that evidence over recent decades indicates that growth has been constrained more by slow growth in aggregate demand than by slow growth in the economy’s productive capacity. For example, the full business cycle between the peaks of 2001 and 2007 saw the slowest economic growth then on record. The result of this slow growth was that the unemployment rate never returned to prerecession levels, and the prime-age employment-to-population (EPOP) ratio never approached prerecession levels. (See Bivens and Irons 2008 for a full accounting of this business cycle’s place in historical comparisons.) All of this indicates that the slow growth that took hold even before the Great Recession hit was likely a function of too-slow growth in aggregate demand—or spending by households, businesses, and governments.

Before the Great Recession, most macroeconomists would have rejected the idea that economic growth could be constrained for long periods of time by too-slow demand growth relative to the economy’s productive capacity. The typical view was that growth in productive capacity was driven by long-run trends that did not change very fast, such as the aging of the population (which determines the pace of potential labor force growth), the accumulation of plants, equipment, and buildings that is the result of decades of past investment, and accelerations and decelerations of technology that were largely exogenous (unrelated to the state of the business cycle). In this view, ensuring that growth in productive capacity (or growth in potential GDP) is fully realized essentially means ensuring that aggregate demand grows quickly enough to keep resources (labor and capital) fully employed.

In past decades, policymakers considered it relatively easy to keep aggregate demand growing fast enough high enough to fully utilize the economy’s productive capacity. In fact, macroeconomic policymakers thought their most difficult task was restraining, not boosting, growth in aggregate demand. When aggregate demand for economic output outstrips the economy’s productive capacity to meet that demand, the result is inflation. So policymakers focused on controlling inflation—or ensuring that aggregate demand did not run chronically too fast. Of course, the U.S. economy underwent recessions during which demand growth lagged behind potential GDP growth, but it was thought that the demand shortfalls could be easily solved by the Federal Reserve reducing short-term interest rates to spur more spending. Because aggregate demand was thought to need policy restraint, not stimulus, this implies that overall growth was constrained by how fast the economy’s productive capacity could grow. Any worry that persistently slow growth (say lasting more than one year) in aggregate demand could be a primary constraint on economic growth over a meaningfully long time period was largely dismissed. We now know that this dismissal was premature, and that sluggish demand growth can pull down economic growth for long periods of time.

The data show we are in such a period, and likely have been for over a decade. The extraordinarily weak GDP growth between 2001 and 2007 was accompanied by decelerating wage growth, and low inflation and interest rates. These trends are strong indicators that demand was lagging growth in productive capacity. This weakness in demand was especially striking given that aggregate demand (or spending by households, businesses, and governments) was buoyed in those years initially by near-zero interest rates (set by the Federal Reserve in the early 2000s) and then by an enormous asset bubble in residential real estate that increased household wealth in the mid-2000s. The housing bubble burst, ushering in the Great Recession. The recovery from that recession was even slower than the recovery from the 2001 recession, despite extraordinarily expansionary monetary policy in the wake of the Great Recession.

#### Neoliberalism’s focus on short-term profit over long-term breakthroughs prevents the US from competing with China and increases national security threats

**Harris and Sullivan 20** – Fellow at the Roosevelt Institute and non-resident Senior Fellow at the Brookings Institution [1]

Non-resident Senior Fellow at the Carnegie Endowment for International Peace [2]

Jennifer Harris and Jake Sullivan, “America Needs a New Economic Philosophy. Foreign Policy Experts Can Help.,” Foreign Policy, 2/7/2020, https://foreignpolicy.com/2020/02/07/america-needs-a-new-economic-philosophy-foreign-policy-experts-can-help/

History is again knocking. The growing competition with China and shifts in the international political and economic order should provoke a similar instinct within the contemporary foreign-policy establishment. Today’s national security experts need to move beyond the prevailing neoliberal economic philosophy of the past 40 years. This philosophy can be summarized as reflexive confidence in competitive markets as the surest route to maximizing both individual liberty and economic growth and a corresponding belief that the role of government is best confined to securing those competitive markets through enforcing property rights, only intervening in the supposedly rare instance of market failure.

The foreign-policy establishment need not come up with the next economic philosophy; the task is more limited—to contribute a geopolitical perspective to the unfolding debate on what should follow neoliberalism and then to make the national security case for a new approach as it emerges.

Toward this end, the foreign-policy community needs to shed a number of old assumptions. Whereas the most damaging elements of the previous approach are being discarded from mainstream economics, certain tropes still linger in the foreign-policy conversation.

First, policymakers should recognize that underinvestment is a bigger threat to national security than the U.S. national debt. At annual gatherings both inside and beyond Washington, senior national security experts still inveigh against the debt as a top national security threat. Generals and admirals testify to this effect before the U.S. Congress on a regular basis. But by now it should be beyond argument that secular stagnation (whereby satisfactory growth can only be achieved through unstable financial conditions), not debt, is far and away the more pressing national security concern. After all, the world has now had a 10-year live experiment showing how austerity and lack of investment in the face of low growth produce destabilizing autocrats in the mold of Hungary’s Viktor Orban and Brazil’s Jair Bolsonaro.

This is not to suggest debts and deficits never matter. Rather, it is to emphasize the distinction between good debt and bad debt—a point now widely embraced in economic circles. The U.S. national security community is rightly beginning to insist on the investments in infrastructure, technology, innovation, and education that will determine the United States’ long-term competitiveness vis-à-vis China. With growth, inflation, and interest rates all lagging, policymakers should not be intimidated by arguments going back to the Simpson-Bowles commission (and likely to return if a Democrat takes office in 2021) that the United States cannot afford these investments.

Bad debt, though, does create risk without enhancing medium- and longer-term growth potential. The Trump administration’s 2018 tax legislation, with a price tag of between $1.5 trillion and $2.3 trillion (two or three times what the 2009 stimulus cost), serves as an expensive lesson. There are now too many nails in the coffin of trickle-down tax cuts for corporations and the wealthiest Americans to view it as anything but a zombie ideology that is redistributing trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should likewise dismiss it.

The idea of trickle-down tax cuts for corporations and the wealthiest Americans is discredited. It simply redistributes trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should dismiss it.

Second, advocating industrial policy (broadly speaking, government actions aimed at reshaping the economy) was once considered embarrassing—now it should be considered something close to obvious. Despite a 40-odd-year hiatus, industrial policy is deeply American. Alexander Hamilton’s vision for U.S. manufacturing was the first American industrial policy, a tradition carried forward throughout U.S. history—from Henry Clay’s American System to Dwight D. Eisenhower’s interstate highway network and Lyndon Johnson’s Great Society—until it lost favor in the 1980s.

A return to industrial policy shouldn’t simply pick up where the country left off a few decades ago. Rather than focusing on picking winners in specific sectors, there is an emerging consensus that suggests governments should focus instead on investing in large-scale missions—like putting a man on the moon or achieving net-zero emissions—that require innovations across many different sectors.

The biggest geopolitical reason to get back to industrial policy is climate change. It cannot be addressed by taxing carbon alone. It will take a surge of deliberate and directed public investment that underwrites a shift to a post-carbon U.S. economy through research and development, deployment of new technologies, and development of climate-friendly infrastructure.

Another good reason is that others are doing it, especially the United States’ competitors. President Xi Jinping’s Made in China 2025 strategy is a 10-year blueprint aimed at catapulting China into a technology and advanced manufacturing leader in both the commercial and military domains. Good estimates are elusive, but China’s subsidies alone reach into the hundreds of billions of dollars. And these investments have already paid off handsomely in several areas, like artificial intelligence, solar energy, and 5G, where many experts believe China is on par with or already outstripping the United States.

U.S. firms will continue to lose ground in the competition with Chinese companies if Washington continues to rely so heavily on private sector research and development, which is directed toward short-term profit-making applications rather than long-term, transformative breakthroughs. And the United States will be more insecure if it lacks the manufacturing base necessary to produce essential goods—from military technologies to vaccines—in a crisis.

#### 5. Antitrust enforcement doesn’t solve wealth inequality – market dynamics are way too complex for this facile argument to be true – CEOs in consolidated markets make less than in competitive ones

Schechter ’16 – writer at ProMarket citing Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim

Asher, “Is More Antitrust the Answer to Rising Wealth Inequality?” ProMarket, <https://promarket.org/2016/07/08/antitrust-answer-rising-wealth-inequality/>

Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim. He also disputes the growing notion that a more rigorous antitrust enforcement can diminish wealth inequality, arguing that “more antitrust is not the answer to wealth inequality.”4

In a recent paper, Crane challenges what he deems as an oversimplification, claiming that that the relationship between antitrust law and wealth inequality is “far more complex” and that the relationship between income distribution and market power is “subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize.” Crane then goes on to argue that more antitrust can in fact lead to greater inequality, and that “when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”5

That the U.S. economy is suffering from increasing concentration levels, and that this rise in concentration has led in some cases to significant price increases, has been established in recent years by a growing number of studies. A recent paper by José Azar, Martin C. Schmalz, and Isabel Tecu6 showed that ticket prices are 3-11 percent higher due to common ownership among airlines. A similar paper by Azar, Schmalz, and Sahil Raina that looked at common ownership in U.S. banking7 found that that the largest U.S. banks share identical top shareholders, and that reduced competition in banking leads to worse service for consumers in the form of higher fees for deposit accounts and lower savings interest rates.

In health care, studies show that consolidations among hospitals led to significant price hikes. A 2015 study by Zack Cooper, Stuart Craig, Martin Gaynor, and John Van Reenen found that in markets where hospitals have a monopoly, prices are 15.3 percent higher than in more competitive markets that have four or more hospitals.8

To be sure, Crane does not completely dispute the idea that antitrust enforcement (or lack thereof) is related in some way to growing wealth inequality. What he does dispute, he says, is the “simplistic” version of the relationship between wealth inequality and antitrust, in which consumer-to-producer wealth transfers, enabled by lax antitrust enforcement and rent extractions, create regressive distributional effects. “In a complex, advanced economy, the lines of exploitation and profiting run in too many complicated and cross-cutting directions to permit broad generalization,” he writes in the paper.

“I am not claiming that there is no relationship between wealth inequality and antitrust or market competitiveness,” Crane tells ProMarket. “I am also not claiming that there couldn’t be certain antitrust interventions that would reduce wealth inequality. I think that there could be. All I am saying is that the overall picture, this facile assumption that more antitrust means greater equality and wealth is just way over-broad. The interactions between the distribution of wealth in society and market competitiveness are very complex and cross-cutting, and there are a number of ways in which more antitrust would actually increase wealth inequality.”

He adds: “I am not going to argue that there could never be case in which it would be appropriate to rationalize antitrust enforcement because of the inequality factor—if inequality is your priority, you could try to make a case—but it’s just that there are countercurrents where the effects are much more complicated than the people understand.”

In his paper, Crane disputes one of the key arguments for more antitrust enforcement–that shareholders and senior corporate managers are the main beneficiaries of monopoly rents. The literature on these issues, he argues, is ambiguous. Shareholding is something tens of millions of Americans do across social classes, as part of their 401(k)s and other retirement plans. It is far from clear that shareholders reap the lion’s share of monopoly profits, he notes, and a number of studies have shown that mergers don’t necessarily produce positive returns to the shareholders of the acquiring firm.

Some empirical studies, he claims, have actually shown that CEO compensation declines as markets become less competitive. Labor unions have also supported anti-competitive mergers in the past, he notes—such as the merger between US Airways and American Airlines—expecting that higher concentration would lead to a monopoly wage premium.

“When it comes to regressivity in monopoly, there are two questions: who bears the brunt—who is the effective payer of monopoly overcharges—and who obtains the gains. If you look at CEOs, for instance, the economic literature on CEOS earning a higher wage or stock option in more concentrated markets is very weak. In fact, there’s some literature that suggests that CEOs actually earn a lower wage in monopoly markets. If it’s a monopoly market, they’re less valuable to the firm, because it’s easier to generate income. There’s some literature suggesting it’s precisely where you see highly paid corporate executives that markets are very competitive, because then special talent is most beneficial to shareholders,” he says.

Moreover, Crane argues, antitrust cases have been brought not only against abusive corporations, but against middle-class professionals, such as music teachers, dentists, and lawyers. As an example, he points to a case brought by the Department of Justice against the National Association of Realtors in 2005, a case that concerned restrictions on home buyers to search for listings online.“If you look at statistics on the income of relators and the income of people selling homes, the income profile of a home-selling family is roughly twice the income profile of a realtor, on average,” he says. “Which means that if these allegations were correct, this is a huge wealth transfer from much-richer home sellers to much poorer realtors, and the enforcement action would have actually been regressive.” His point, he stresses, is not to dispute the case, but the notion that antitrust enforcement necessarily leads to progressive wealth redistribution.

Another factor that is often not taken into account, he argues, is government purchasing. Monopolists, he notes, often sell to “large intermediary organizations, which may distribute the incidence of monopoly charges progressively.” In the US, federal procurement accounts for roughly one-seventh of the GDP, not including state and local governments. Government, he argues, pays these monopoly overcharges and ultimately transmits them to taxpayers. Since the U.S. tax code is generally progressive, he argues, those overcharges are being borne progressively. Meaning: wealthy people should, in theory at least, pay a greater share, “which actually means that an antitrust intervention that diminishes anticompetitive conduct in government procurement actually has the effect of increasing wealth inequality.”

When it comes to the issue of price discrimination, says Crane, the relatively wealthy tend to be exploited proportionally more than the relatively poor. “According to most economic accounts, price discrimination has progressive distribution effects, meaning that a greater share of the higher prices charged by price discrimination comes from wealthier individuals than from poorer ones. That’s not uniformly true, but as a generality, in a market characterized by less competition, as monopolists are increasing their prices they are going to be charging proportionally higher prices on higher-income people, on average.”

The proponents of government antitrust action, argues Crane, ignore private efforts to curtail monopoly power. Government, he argues, should “get out of the way” of these private efforts. In the paper, he writes: “When it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”

“I think it’s just a mistake, as a general matter, to include reducing wealth inequality as one of the goals of antitrust law,” says Crane. “I’m resisting the idea that somehow talking about wealth inequality will improve antitrust enforcement. If anything, it will just distract, making it a political hot potato, but I don’t think it will have any appreciable effect on wealth inequality. Antitrust law works best when it’s concerned with economic efficiency and the protection of consumer welfare. That has been the consensus by economists, people in the field, and antitrust agencies for several decades now. My concern [is] that at a political level, people are looking for new scapegoats for wealth inequality, and particularly in recent times people have been looking at weak antitrust enforcement.”

## Modeling adv

#### No evidence they solve modeling –

#### Their evidence says consumer welfare results in more U.S. aggressive antitrust law abroad NOT that other states do that

#### other countries self interested, zero reason they’re motivated to change

#### Their modeling ev is from 2013 – doesn’t assume Trump, which undermines democracy and leadership

#### No internal link to populism impact—their ev DOES not say workers bring stability to the brink

1. **Multiple alt causes where they can’t solve – Austerity barriers, Health budget cuts, delayed spending, premature reopening, inequality testing**

**Punongbayan 20** – Jan Carlo “JC” Punongbayan is a Ph.D. candidate and teaching fellow at the University of the Philippines School of Economics (UPSE). He obtained his master’s degree from UPSE in 2013 and has since taught there as a lecturer and teaching fellow.

JC Punongbayan, October 23 2020, “[ANALYSIS] 5 ways Duterte is derailing PH economy’s recovery,” Rappler, https://www.rappler.com/voices/thought-leaders/analysis-ways-duterte-derailing-philippine-economy-recovery

Brace yourselves for a slow, **shaky recovery.**

It’s bad enough the Philippine economy shrank by a record [16.5%](https://www.rappler.com/voices/thought-leaders/analysis-end-growth-how-pandemic-ruined-philippine-economy) in the second quarter of this year, the worst on record. Analysts also suggest we will likely suffer the worst economic contraction in ASEAN by year-end.

The International Monetary Fund foresees our economy will shrink by [8.3%](https://www.rappler.com/business/philippines-gdp-forecast-imf-world-economic-outlook-october-13-2020), while ASEAN-5 in general will shrink by only 3.4%. The Asian Development Bank estimates a [7.3%](https://www.rappler.com/business/adb-philippines-gdp-forecast-september-2020) contraction. The World Bank expects a [6.9%](https://www.rappler.com/business/philippine-economy-forecast-2020-world-bank-report) downturn, possibly 9.9% if worse comes to worst.

The root problem, of course, is that the Duterte government failed to act quickly against the pandemic. (READ: [Had Duterte acted earlier, PH economy would be safe to open by now](https://www.rappler.com/voices/thought-leaders/analysis-had-duterte-acted-earlier-philippine-economy-safe-open-now))

Nearly 8 months later, things are still not looking up. In fact, Duterte’s policies are set to prolong rather than hasten the economy’s recovery. Here are 5 reasons for that.

Misplaced austerity

Duterte and his economic managers are being unreasonably stingy.

Amid the global recession and large-scale economic suffering, economists worldwide — even those who used to advocate austerity — are pushing governments to spend aggressively, even if it means aggressive borrowing.

**As some put it, “**[**austerity is dead**](https://www.afr.com/policy/economy/global-economy-the-burial-of-austerity-20201018-p5667c)**.” Above anything else, people’s welfare and economic dignity must be upheld.**

But Duterte and his economic managers are immune to these changing winds. They have long insisted that our government cannot afford to shell out mammoth funds for economic stimulus and aid. For months Duterte even kept deceiving the public by saying walang pera (there’s no money).

Such misplaced austerity manifested itself in the paltry [Bayanihan 2](https://www.rappler.com/voices/thought-leaders/analysis-bayanihan-2-here-yet-too-small-late) law (which allocated just P165.5 billion for the pandemic response) as well as the 2021 budget bill (which totals P4.5 trillion, only 10% larger than this year’s budget).

This, at a time when government spending is likely to be the strongest — if not the only — source of spending growth. (READ: [End of growth: How the pandemic ruined PH economy beyond recognition](https://www.rappler.com/voices/thought-leaders/analysis-end-growth-how-pandemic-ruined-philippine-economy))

**2. Health, aid budget cuts**

Apart from being small compared to our needs, the 2021 budget is also focused on all the wrong things.

For one, the health sector will not get the budget boost it sorely needs. Government hospitals will suffer a whopping [P2 billion budget cut](https://www.rappler.com/nation/hontiveros-questions-billions-cut-government-hospitals-proposed-2021-budget). The budget item called “Prevention and Control of Communicable and Non-Communicable Diseases” will get P10 billion less than what the Department of Health said it needs. And merely P2.5 billion was allocated for vaccines; at best that’s good for less than 5% of the population. (READ: [Where is Duterte’s proper vaccine budget, plan?](https://www.rappler.com/voices/thought-leaders/analysis-where-is-duterte-proper-vaccine-budget-plan))

Significant aid for poor households and unemployed workers is also not forthcoming. [Businesses are left to die left and right](https://www.rappler.com/business/uncertainty-philippine-firms-despite-eased-coronavirus-restrictions-world-bank-survey-2020) without receiving any financial assistance. If this goes on, the economy will be much harder to jumpstart.

Government is instead pouring hundreds of billions of pesos on big-ticket infrastructure projects (think roads, bridges, flood control projects). Not only will these prove infeasible in the middle of a pandemic, but they’ll also serve as pork projects in the run-up to the 2022 elections. (READ: [Why we can’t Build, Build, Build our way out of this pandemic](https://www.rappler.com/voices/thought-leaders/analysis-why-we-cannot-build-our-way-out-of-coronavirus-pandemic))

Duterte is also pouring [P16.44 billion](https://www.rappler.com/newsbreak/in-depth/duterte-eyes-fund-for-anti-communist-task-force) into support of its “anti-insurgency” campaign, which will likely intensify the military’s red-tagging, harassment, and propaganda efforts. A “generals’ pork,” if you will.

The economy’s recovery hinges on Filipino’s health and economic dignity. Underfunding the health sector and economic aid at this time can only spell trouble.

**3. Delayed spending**

Even more directly, Duterte himself is hampering the recovery by failing to spend emergency funds urgently. He’s taking his time too much.

Budget Secretary Wendel Avisado himself admitted that as much as [P46.2 billion](https://www.rappler.com/nation/billions-urgently-needed-bayanihan-recover-as-one-funds-stuck-duterte-office) — or more than 30% of the P140 billion provided for by the Bayanihan 2 law — has yet to be approved by the Office of the President.

These funds are meant for, say, emergency subsidies for poor households, employment and livelihood programs, pandemic-related expenses, as well as the Department of Agriculture’s Plant, Plant, Plant program.

A measly [P4.4 billion](https://www.philstar.com/business/2020/10/22/2051517/government-justifies-slow-stimulus-spending-sans-reason-delay) (3%) has been released to agencies on the frontlines of the pandemic response.

Before this, it took Duterte nearly 3 weeks to sign the Bayanihan 2 law after it was approved by both houses of Congress — as if the pandemic didn't warrant any urgency on Duterte’s part.

Spending bottlenecks have also hampered the emergency subsidies in Bayanihan 1: it’s October already, yet [only 98%](https://www.gmanetwork.com/news/news/nation/760980/distribution-of-second-tranche-cash-aid-98-done-says-dswd/story/) of the aid meant for May has been distributed.

Unless disbursement and absorptive capacity issues are resolved, Build, Build, Build will also fail to be the [showpiece](https://www.cnnphilippines.com/news/2020/4/13/Build-Build-Build-economy-bounceback-COVID-crisis.html) of our recovery, as constantly touted by the economic managers.

**4. Premature reopening**

The Duterte government is also pushing for the quick and premature reopening of our economy.

The idea is well-meaning enough: to counter the staggering decline of consumer spending, the swelling ranks of the unemployed, and the alarming rate of business closures.

But loosening quarantine restrictions is by no means an economic panacea.

The reopening of select sectors in past months did not produce an economic snapback. Malls and restaurants are still largely empty. Beaches and other tourist sites are still devoid of tourists. Domestic flights are still few and far in between.

Consumer confidence is key to the recovery. But that confidence won’t bounce back until the epidemic curve has truly been flattened and new COVID-19 cases are brought to or near zero. (READ: [Kalusugan muna bago ekonomiya](https://www.rappler.com/voices/thought-leaders/analysis-health-first-before-economy))

The virus must be controlled first. Prematurely opening huge swathes of the economy could only push back its full recovery to a much later date — paradoxical as that may sound.

**5. Inadequate testing**

Finally, government is reopening the economy even as its COVID-19 testing capacity has been severely compromised.

Analysts have noted a [considerable drop](https://www.rappler.com/nation/doh-affected-philippine-red-cross-stopping-covid-19-testing-operations) in tests conducted in recent days. This follows the fact that on October 15 the Philippine Red Cross [stopped conducting tests](https://www.rappler.com/nation/philippine-red-cross-stops-free-coronavirus-tests-philhealth-debt) because of the P930 million still owed to it by PhilHealth.

This unfortunate turn of events highlights the fact that the Duterte government, by itself, has miserably failed to significantly expand its testing capacity. Yet even with Red Cross around, government has failed to meet its avowed targets of 30,000 to 50,000 tests a day.

Red Cross’ exit will invariably cripple our country’s testing effort which, as recently as September, the Palace [boasted](https://newsinfo.inquirer.net/1335592/palace-rates-pandemic-response-grade-of-85-touts-ph-for-having-best-testing-policy-in-asia) to be the “best testing policy in the whole of Asia and probably in the whole world.

#### Internal link says we need to change all labor laws – plan not sufficient

1. **Piracy is getting less sever in Asia now – now impact**

**Maritime Executive 8/13** – The maritime industry's leading source for breaking maritime and marine news including shipping news, offshore news, piracy news and more.

The Maritime Executive, August 13 2021, “Incidents Against Ships Declined Significantly in Asia in 2021,” https://maritime-executive.com/article/incidents-against-ships-declined-significantly-in-asia-in-2021

The number of incidents against ships in Asia declined significantly in the first half of 2021 falling to the second-lowest level in the past fourteen years. The six-month report on piracy and armed robbery against ships in Asia released by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) highlights the decline in serious crime while reporting five incidents, including one where a crew member was threatened with “an improvised gun,” in July.

“The total number of incidents of armed robbery against ships in Asia reported during January-July 2021 has deceased compared to 2020,” ReCAAP reports. “However, of concern is the persistent occurrence of incidents in the Singapore Strait and the continued threat of abduction of crew in the Sulu-Celebes Seas and the waters off Eastern Sabah (Indonesia).”

On the five incidents reported to ReCAAP last month, one however included a higher level of violence. It happened on July 17 in the anchorage in Manila. The duty watcher aboard the Maersk Nussfjord containership encountered an unidentified person at the forecastle of the vessel who pointed “an improvised gun at the back of the duty watcher’s head.” During the incident, the perpetrator took the watchman’s two-way radio and tied him to the railing of the ship. Seven other unidentified persons then boarded the ship, broke the padlock of the boatswain mate locker, and took away one roll of new spare rope mooring line. After they left, the watchman untied himself from the railings and reported the incident.

The other reports in July included two further boardings both in the eastbound lane of the Singapore Strait, which is a continuing area of concern for ReCAAP with a total of 22 reports in the first six months of the year. In one case, five people armed with knives were seen aboard a bulk carrier but left without stealing anything, and another sighting was of a single individual also armed with a knife who was discovered and left without taking anything. There were also two other incidents where equipment was stolen ranging from fire hose couplings to power tools and a welding machine in anchorages in Manila and Indonesia.

Despite these reports, **overall incidents in Asia were down by a third in the first half of 2021 versus 2020**. According to ReCAAP, it is the second-lowest level between January to July from 2007 to 2021. They further reported that th**ere were no incidents of piracy and no crew were abducted in 202**1. Currently, R**eCAAP is not aware of any cases where crew members are being held in captivity in Asia.**

Beyond the increase in incidents in the Singapore Strait, ReCAAP says the majority of reports were from the Philippines and Indonesia. There were only three reports in Indian and two in Vietnam, while there were none in Bangladesh, the South China Sea, or the Sulu-Celebes Seas in the first half of 2021.

Of the 41 total incidents reported this year**, in nearly two-thirds the perpetrators were not armed**, often fled when they were discovered, and no crew was harmed.

ReCAAP credits the ongoing patrols and law enforcement efforts as well as reporting. They however cautioned that until the perpetrators are arrested incidents are likely to continue and that heightened vigilance must be maintained

## Democracy adv

#### Court will rule to uphold Roe v Wade now because of concerns about legitimacy

Ziegler 9/1 – Law professor at Florida State University.

Mary Ziegler, “Supreme indifference: What the Texas case signals about the court’s treatment of abortion,” *SCOTUSblog*, 1 September 2021, https://www.scotusblog.com/2021/09/supreme-indifference-what-the-texas-case-signals-about-the-courts-treatment-of-abortion/.

In some ways, the court’s inaction can tell us only so much about the fate of Roe v. Wade and Casey, which the justices are slated to consider this coming term in Dobbs v. Jackson Women’s Health Organization, a case about a Mississippi law that bans most abortions after 15 weeks. While Texas has tried to avoid a confrontation with Roe and Casey through its private-enforcement scheme, the Mississippi case will all but force the justices to reverse or transform the court’s most important abortion precedents. Mississippi outlaws many abortions before viability — the point at which survival is possible outside the womb — notwithstanding the fact that Roe and Casey disallow undue burdens on the right to choose abortion before viability. To uphold Mississippi’s law, the court will have to reverse Roe outright or declare an end to viability as a limit on abortion bans. The Texas case does not require the same kind of sea change, especially given the emergency posture in which it came up to the court. Lower courts have upheld narrower laws allowing for lawsuits against abortion providers while purporting to enforce Roe and Casey (the U.S. Court of Appeals for the 5th Circuit, in Okpalobi v. Foster, is the most prominent example). The justices might yet respond to the Texas providers’ emergency application — or may simply think that providers cannot sue the state judges they have hauled into court.

Besides, the best chance for supporters of abortion rights is to lean on precedent. Chief Justice John Roberts wrote at length about the importance of stare decisis in voting to strike down a Louisiana abortion restriction last year in June Medical Services v. Russo. Justices Brett Kavanaugh and Amy Coney Barrett spoke at length about respect for precedent during their confirmation hearings. Reversing Roe and Casey would upend nearly a half century of jurisprudence. Allowing S.B. 8 to go into effect does not as obviously contradict precedent — or expose the court to backlash. Siding with Mississippi in Dobbs in what is sure to be a closely watched opinion next June seems risky. Allowing Texas’ law to go into effect through inaction in the middle of a night when the court is not even in session, not so much.

But the court’s willingness to allow Texas to functionally outlaw abortions sends a powerful message. The justices have shown that they can respond quickly to emergency applications when the spirit moves them. It is possible that one or more of the justices is writing a lengthy dissent that explains the wait here. Just the same, the court’s silence seems to mark a fundamental break with the respect the justices have long shown those on either side of the abortion issue. Saying nothing suggests that there was no emergency — and that a massive shift in abortion law in one of the nation’s largest states is a matter of no particular import. Americans opposed to abortion will celebrate Texas’ law as a crucial step toward the protection of the nation’s most vulnerable. Supporters of abortion rights mourn that the court has effectively reversed Roe without saying a word. Only the justices themselves seem to think that the matter is not worthy of comment.

The court’s silence cannot tell us whether the court will reverse Roe openly this June or in a subsequent decision. Inaction on the emergency application does not reveal much about how the court’s new 6-3 conservative majority views precedent; nor does it establish whether Roberts’ commitment in June Medical will persist (or whether Barrett, who replaced the late Justice Ruth Bader Ginsburg after June Medical was handed down, will share that commitment). But the events of the past 24 hours do raise questions about whether the court will approach Dobbs as the legacy-defining case that it is.

The Supreme Court’s membership has changed, but the gravity of the abortion issue has not. Dobbs gives the justices a second chance to show that they have not forgotten.

#### Reproductive rights key to solve overpopulation and systemic death – solves climate change and food shortages

Schlanger 14

Zoë Schlanger is a Newsweek reporter based in New York, Elijah Wolfson is Newsweek's Senior Editor, primarily responsible for the publication's science, health and technology coverage, Newsweek, December 18, 2014, “How to Defuse the Population Bomb”, http://www.newsweek.com/2014/12/26/fixing-crowded-earth-293024.html

It’s an ancient problem, with a very obvious solution: give women full reproductive rights, including easy access to contraception and other family-planning options. Family planning and reproductive health are some of the most crucial tools for reducing human suffering in a changing and increasingly crowded world.

No Food, No Water

Like many Kibera residents, Akinyi moved to the city only recently—she arrived a year ago from “the upcountry.” It’s not clear how many people live in Kibera, but the Kenyan census says that at least 200,000 are crammed into this makeshift, two-square-mile shantytown. The impact of this massing of humans is like a physical blow: The land and city infrastructure can’t keep up with the people. Step between the houses of Kibera and into a back alley and you are likely to come across gulches carved into the dirt by streams of wastewater, the ad hoc sewage system here, and garbage and waste piled high.

Kenya is in the midst of a population explosion. With a high fertility rate—the average Kenyan woman has 4.5 children, compared with 2.3 worldwide—Kenya’s population of 44 million is projected to more than double to 97 million by 2050. Meanwhile, more than a quarter of Kenyan women are still unable to access the contraceptives they want. Despite over a century of family-planning aid work, it remains one of the most misunderstood aspects of international development. This is in large part because of Western efforts to apply a coercive form of population control under the guise of “family planning.”

Globally, birth rates are lower today than ever, and more women than ever before are masters of their own bodies. But global populations are still on the rise, and in many parts of the world—Africa most prominently—the problems created by a lack of reproductive rights are getting more dire. In 1650, there were about 500 million people on Earth. By 1804, the population had doubled to 1 billion. In just 123 years, it doubled again, to 2 billion, and it doubled yet again, to 4 billion, by 1974. The world’s population passed 7 billion in 2011. The latest U.N. projections suggest we’ll be up to 12.3 billion by 2100, with no stabilization in sight.

Meanwhile the rest of Earth’s flora and fauna are being pushed aside. We are in the midst of the biggest mass-extinction event since the dinosaurs were obliterated 65 million years ago. A recent paper in Science found that plant and animal species are now going extinct at least 1,000 times faster than they did before humanity’s arrival, due mostly to human-caused habitat destruction and climate change. Some scientists have taken to describing our current epoch as the Anthropocene, to highlight the fact that humans have irreversibly changed the ecological makeup of the planet.

In the 1970s, with the global population hovering around 4 billion, humanity began using more resources than the Earth could replenish each year, and was producing more waste than it could absorb, pushing us all deeper and deeper into “ecological overshoot,” according to California think tank Global Footprint Network. It estimates that in 2014 humans used the resources of 1.5 Earths.

Most of the population growth is occurring in African nations. The continent hosts 15 percent of the world’s people; by 2050, the U.N. projects, that number will be closer to 25 percent. This is particularly problematic, because much of the continent is also where people are less able to adapt to the effects of overpopulation, says John Wilmoth, director of the U.N. Population Division. If the world can’t meet Africa’s need for family planning, the result will be more and more poor, and poorly educated, people, he says. Kenya, Ethiopia and Malawi, for example, are three nations where large numbers of women can’t get the contraception they need and are at high risk for climate change effects like flooding and drought.

As climate change turns more coasts into flood zones and more farmland to desert, the damage will be inextricably linked to population growth—the more of us there are, the more water, food and energy we’ll need to survive. In the past three years, Australia, Canada, China, Russia and the U.S. have all suffered devastating floods and droughts that severely impaired food harvests. Earlier this year, the Food and Agriculture Organization said that to feed a population of 9 billion in 2050, the world must increase its food production by an average of 60 percent or else risk serious food shortages that could bring social unrest and civil wars. By comparison, wheat and rice production have grown at a rate of less than 1 percent for the past 20 years.

Mark Montgomery, a scholar at the Population Council, studies how the urban population boom will cause dramatic freshwater shortages. By 2050, the U.N. projects that 70 percent of the world’s population will live in cities. Already, 150 million people in cities around the world suffer from freshwater shortages. In a recent paper, Montgomery and his colleagues found the number of urbanites with inadequate water will rise by more than 1 billion by 2050, and cities in certain regions “will struggle to find enough water for the needs of their residents.”

The Big Taboo

Roger-Mark de Souza is fed up. The director of the population, environmental security and resilience arm of the Wilson Center, a government think tank in Washington, D.C., he says most of the discussion about adapting to climate change ignores the population explosion. “If you have all of these initiatives being put in place, and you have ongoing population growth, to what end?” he asks. “If we only invest in programs that do not take into account these broader social interventions, there is a missed opportunity.”

The Green Climate Fund, perhaps the most high-profile fund helping developing countries adapt to climate change, does not say anything about population on its website. The United Nations Framework Convention on Climate Change, which manages climate-focused “national adaptation programmes of action” for the least-developed countries, devotes a section of its website to the role gender plays in climate change. Women, it explains, are more vulnerable to its ravages and must be included in adaptation efforts. But family planning and contraception aren’t on the official list of adaptation projects.

This failure has been exacerbated by the long and ugly history of wealthy, predominantly white powers manipulating family planning on the continent for several centuries. Europeans came to Africa “looking for bodies,” says Nwando Achebe, a professor of history at Michigan State University. First was the slave trade. Then came the colonist era, when Europeans settled in Africa, establishing massive farms and plantations requiring local labor. Both groups of invaders “needed a population of able-bodied Africans,” says Achebe. “They were enacting laws to make sure the population grew.”

Columbia University history professor Matthew Connelly argues that the 20th century was filled with wrong-minded approaches to family planning that have ranged from using risky contraceptives on unwitting clients—in 1967 a Ford Foundation report praised a proposal for a new technology involving “an annual application of a contraceptive aerial mist” (from a single airplane over India)—to offering cash incentives to poor people who agreed to be sterilized. Policies like these “made family planning seem like an imposition, rather than something that served clients’ own ­interests,” writes Connelly, and the backlash was ferocious. Revolutionary leaders worldwide (including Daniel Ortega in Nicaragua and Zulfikar Ali Bhutto in Pakistan) attacked family planning as a symbol of American imperialism, and the Vatican jumped on board, helping organize a global campaign against family-planning efforts, which just happened to line up with the Catholic Church’s official stance on procreation, particularly in developing countries.

In 1984, President Ronald Reagan instituted what has become known as the “global gag rule” (officially the Mexico City Policy), which stopped U.S. dollars from flowing to any international family-planning groups that provided abortions. The rule also stipulated that any organization receiving U.S. funding could not educate patients on abortion or take a stand against unsafe abortion. President Bill Clinton repealed the policy in 1993, George W. Bush reinstated it in 2001, and Barack Obama repealed it again in 2009. If a Republican takes the presidency in 2016, the gag rule will likely come back.

When the gag rule was in effect, United States Agency for International Development (USAID) funding to family-planning organizations plummeted. Clinics providing everything from condom distribution to HIV/AIDS treatment to neonatal care cut back their staff and services, and in some cases shuttered their doors entirely. In some cases, the rule backfired: Kelly Jones, a senior researcher at the International Food Policy Research Institute, found that in Ghana during gag rule periods, rural pregnancies increased by 12 percent and the rural abortion rate increased right along with it, going up by 2.3 percent.

Meanwhile, U.S. funding for family planning abroad has flatlined for several years, at about $530 million, although it would take relatively little money to make an enormous difference. For every dollar spent on family planning, USAID’s website boasts, up to $6 is saved on health care, immunization, education and other services. Put another way, every dollar not spent on family planning will cost the U.S. up to $6 more in the long run. “It’s not difficult to understand that contraceptive devices are relatively cheap compared to the cost of building roads and schools and hospitals,” Wilmoth, the head of the U.N. Population Division, says. “So it’s not for lack of money that it isn’t accomplished.”

While the West waffles on providing aid for family planning, “Africans are asking for [it],” says Faustina Fynn-Nyame, Marie Stopes’s country director for Kenya, who is from Ghana. “Africans see the importance of this. It’s not the West telling us to do something.”

Leaving Half the Population Behind

In 2012, the estimated number of unintended pregnancies was 80 million (63 million in the developing world). World population growth? Also 80 million. In other words, if women all over the world had the ability to prevent the pregnancies they don’t want, the world’s population would stabilize.

That would immediately improve both maternal and infant health. In most parts of the global south, access to abortion is either extremely limited or prohibited. In Kenya, a nurse was sentenced to death for providing abortions this past September. Any pregnancy terminations in Nairobi have to be done on the backstreets, often using DIY drugs made by chemists more concerned with sales than efficacy, says Njagi, the Marie Stopes clinic manager. That’s how Florence Akinyi ended up nearly bleeding to death in a wheelbarrow.

Worldwide, it’s estimated that 20 million women have unsafe abortions every year because they lack better options. Over 5 million of them end up needing urgent medical attention, and 47,000 die in the process. In addition, in the developing world pregnancies are often dangerous. Every year, an estimated 358,000 women die during childbirth, and many more suffer debilitating pregnancy-related health problems. In sub-Saharan Africa, the lifetime risk of dying from pregnancy-related problems is 1 in 22. Lower pregnancy rates and you lower those risks—fewer pregnancies means resources don’t have to be spread dangerously thin.

Since 2011, the United Nations Population Fund (working to “ensure universal access to reproductive health, including family planning”) has been led by Dr. Babatunde Osotimehin, a Nigerian national. At the U.N. General Assembly meeting in September, Osotimehin urged the group to focus on gender equality. “We cannot advance by leaving half of the population—our women and girls—behind,” he said. At the same meeting, Bathabile Dlamini, a representative of South Africa, said her country had recently implemented policies allowing access to safe abortion services and had seen an increase in life expectancy from 54 in 2005 to 60 in 2011.

Of course, abortion is the last resort; it’s far better to help women before conception. According to research from the Guttmacher Institute, 39 percent of all pregnancies in sub-Saharan Africa—an estimated 19 million—were unintended in 2012. Of those 19 million, the institute estimates 10 million resulted in unplanned births, 3 million in miscarriages and 6 million in abortions, most performed in unsafe conditions. Providing access to contraception for every woman in sub-Saharan Africa who wanted it might prevent 5 million abortions and save the lives of 48,000 women. What’s more, 555,000 fewer newborns and infants would die, cutting infant mortality in the region by 22 percent.

Many Kenyan women would like to have power over how many children they have, and when. “We have a high unmet need,” says Fynn-Nyame, adding that “20.9 percent of married women say they want to control their fertility somehow but don’t have the access, money or awareness of where to go.”

In the developing world, 222 million women want contraceptives but can’t get them. (That is more than the population of Germany, France, Belgium, Spain and the Netherlands combined, notes a video by Population Action International.) Meeting their needs would have prevented 54 million unwanted pregnancies, 26 million abortions, 79,000 deaths of mothers in pregnancy or childbirth and 1.1 million infant deaths in 2012 alone.

Plus, contraceptives let women space out births, leading to far healthier children. If all families in the developing world put a three-year gap between pregnancies, almost 2 million fewer children under 5 would die each year, according to research from the USAID.

The problem is that too many of these important decisions are taken out of women’s hands. Over 10 percent of Kenyan women report being raped by their partners. “Women have very little power when they are having sex within their marriage,” says Fynn-Nyame. A woman might know that she’s at a fertile point in her menstrual cycle, but she won’t be able to negotiate with her husband. If he wants sex, she has to give in.

Fynn-Nyame says a lot of the work her team does is with men. It works, she says, particularly among young men. The problem is that misinformation about contraceptives is so endemic that even men who want to participate in family planning either don’t know how or don’t have the access. For example, recent research shows that young Kenyan men in universities will often have a glass of water and the morning-after pill ready for their date to take before sex. It’s effective—though not exactly healthy for the woman who takes it. But “what else are you going to do?” asks Fynn-Nyame. “You want to finish your education and have a different life—you have all these dreams and aspirations.”

‘God Will Provide’

Achebe’s first name, Nwando, is a shortened version of Nwabundo, an Igbo word that translates roughly to “a child is the shade.” She says, “It means as the youngest daughter, I’m expected to stay with my parents as they grow old and shade them as a tree. Let my lineage not end. Let my path not close. These are names that Africans give their kids.”

In much of the developing world, there remains a deep-seated imperative to have as many children as possible. In part, this is due to the pernicious influence of colonialists and missionaries, but it also stems from many decades ago, when child mortality was so high that if you wanted to have a few kids, you had no choice but to follow one pregnancy with the next. This is particularly the case among people who live off of subsistence farming in the rural areas, who feel that “the more hands we have, the more work we can do, and the more money we can take in,” says Fynn-Nyame. Children are also considered an investment for a parent’s old age. After all, if you have eight children, there’s a chance at least one will have the wherewithal to care of you when you grow too old to care for yourself. And it doesn’t matter if you can’t afford eight children right now. “If you ask people whether they can afford these children,” says Achebe, “the answer is always, ‘God will provide.’”

Meanwhile, too many children lack information about sex and procreation. Many of the women in the Marie Stopes Kibera clinic come alone, with no real knowledge of their options. Often they will have been told by their husband what contraceptive to ask for—usually they are told to avoid intrauterine devices (IUDs) because it “makes sex less fun,” says Njagi. “I try to teach them about their options so they can make a more informed decision.”

And that might just be IUDs, which are one of the best forms of birth control—they have a failure rate of less than 1 percent, while birth control pills have a failure rate of between 8 and 9 percent. Plus, in regions where the health care infrastructure is shoddy, relying on a daily supply only drives up failure rates. As Elaine Lissner, director of the Male Contraception Information Project, puts it, “If you’re somewhere on the pill and the pill truck doesn’t show up one month, you’re pregnant.”

The Great Girl Bounce

What would happen if contraception suddenly became a universal right?

It did, in Bangladesh, which is seasonally flooded from Himalayan ice melt and is regularly bombarded by cyclones. The rising sea level, driven by climate change, is projected to wipe out 17 percent of its landmass by 2050 and displace 18 million people.

In the 1970s, Bangladesh, freshly independent, concluded it was growing too quickly—it was on pace to nearly triple its size in four decades. Women on average gave birth to more than six children. So the government made contraception free and distributed it widely.

In 1975, 8 percent of Bangladeshi women used contraception. By 2010, the number was over 60 percent. At the same time, educational opportunities increased: More than 90 percent of girls enrolled in primary school in 2005. Just five years earlier, female enrollment was half that number, according to The Economist. Women’s literacy hit 78 percent in 2010, compared with just 27 percent in 1981. Women who had an average of six children in the 1970s have roughly 2.2 children today. That fertility rate is well below India’s and far lower than Pakistan’s. Bangladesh is now the only developing country on track to meet the Millennium Development Goals for child and maternal health.

“This is not just a medical issue; it is a social issue as well,” the U.N.’s Wilmoth says. “The Bangladesh program did that community by community, with these women who would talk to people. It’s amazing that [the fertility rate] has fallen that low in a country so poor. It’s an example of what’s possible.”

The “Iranian miracle” is another example. It was the steepest population drop ever recorded—faster even than China’s one-child policy. And it came without coercion.

In the late 1980s, Iran’s Ayatollah Ruhollah Khomeini reversed a pro-natal policy meant to produce soldiers for the war against Iraq. Persuaded that the Iranian economy could not handle the bloated population, he issued fatwas making contraception available for free at government clinics. State-run TV broadcast information about birth control, and health workers educated patients on family planning as a means to leave more time between births. The fertility rate fell from seven births per woman in 1966 to fewer than two today. The plunging birth rate, coupled with increasing public education for girls, shifted the role of women in Iran. More women postponed childbirth to attend college, and now the country’s universities are 60 percent female.

But in 2006 the-President Mahmoud Ahmadinejad attempted to halt the decline, calling the family-planning programs a “prescription for extinction,” according to the Los Angeles Times. He urged Iranian girls to marry young, offered cash incentives per child, and thegovernment recently outlawed permanent surgical contraception. But it hasn’t worked. “Iranian women are not going back,” Sussan Tahmasebi, an Iranian women’s rights leader, told the Times.

When women can have fewer children further apart, the effect on their lives is dramatic and immediate. They have more time to pursue education and get jobs, earning money that they are more likely to invest back into their family and community than their male counterparts do. They lead healthier lives and have healthier children. The power dynamic between men and women can change too: Women with more access to resources are less frequently victims of domestic violence, according to USAID.

The Aspen Institute estimates that if all women globally had access to the contraceptives they want, the reduction in unwanted pregnancies would translate into an 8 to 15 percent reduction in global carbon emissions. Fewer people would be in harm’s way as sea levels rise and farmland dries out, and less pressure on resources already stretched thin would mean less violent conflict over those resources.

#### Extinction – increasing reproductive rights is key

Ehrlich 13

Paul R. Ehrlich is the Bing Professor of Population Studies, and President, Center for Conservation Biology at Stanford University, Millennium Alliance for Humanity and Biosphere, November 5, 2013, “Overpopulation and the Collapse of Civilization”, http://mahb.stanford.edu/blog/overpopulation-and-the-collapse-of-civilization/

A major shared goal of the Millennium Alliance for Humanity and the Biosphere (MAHB) and Sustainability Central is reducing the odds that the “perfect storm” of environmental problems that threaten humanity will lead to a collapse of civilization. Those threats include climate disruption, loss of biodiversity (and thus ecosystem services), land-use change and resulting degradation, global toxification, ocean acidification, decay of the epidemiological environment, increasing depletion of important resources, and resource wars (which could go nuclear). This is not just a list of problems, it is an interconnected complex resulting from interactions within and between what can be thought of as two gigantic complex adaptive systems: the biosphere system and the human socio-economic system. The manifestations of this interaction are often referred to as “the human predicament.” That predicament is getting continually and rapidly worse, driven by overpopulation, overconsumption among the rich, and the use of environmentally malign technologies and socio-economic-political arrangements to service the consumption.

All of the interconnected problems are caused in part by overpopulation, in part by overconsumption by the already rich. One would think that most educated people now understand that the larger the size of a human population, ceteris paribus, the more destructive its impact on the environment. The degree of overpopulation is best indicated (conservatively) by ecological footprint analysis, which shows that to support today’s population sustainably at current patterns of consumption would require roughly another half a planet, and to do so at the U.S. level would take four to five more Earths.

The seriousness of the situation can be seen in the prospects of Homo sapiens’ most important activity: producing and procuring food. Today, at least two billion people are hungry or badly in need of better diets, and most analysts think doubling food production would be required to feed a 35% bigger and still growing human population adequately by 2050. For any chance of success, humanity will need to stop expanding land area for agriculture (to preserve ecosystem services); raise yields where possible; increase efficiency in use of fertilizers, water, and energy; become more vegetarian; reduce food wastage; stop wrecking the oceans; significantly increase investment in sustainable agricultural research; and move feeding everyone to the very top of the policy agenda. All of these tasks will require changes in human behavior long recommended but thus far elusive. Perhaps more critical, there may be insurmountable biophysical barriers to increasing yields – indeed, to avoiding reductions in yields – in the face of climate disruption.

Most people fail to realize the urgency of the food situation because they don’t understand the agricultural system and its complex, non-linear connections to the drivers of environmental deterioration. The system itself, for example, is a major emitter of greenhouse gases and thus is an important driver of the climate disruption that seriously threatens food production. More than a millennium of change in temperature and precipitation patterns is now entrained, with the prospect of more crop-threatening severe storms, droughts, heat waves, and floods— all of which are already evident. Thus maintaining – let alone expanding – food production will be ever more difficult in decades ahead.

Furthermore, agriculture is a leading cause of losses of biodiversity and the critical ecosystem services supplied to agriculture itself and other human enterprises, as well as a major source of global toxification, both of which pose additional risks to food production. The threat to food production of climate disruption alone means that humanity’s entire system for mobilizing energy needs to be rapidly transformed in an effort to hold atmospheric warming well below a lethal 5o C rise in global average temperature. It also means we must alter much of our water-handling infrastructure to provide the necessary flexibility to bring water to crops in an environment of constantly changing precipitation patterns.

Food is just the most obvious area where overpopulation tends to darken the human future – virtually every other human problem from air pollution and brute overcrowding to resource shortages and declining democracy is exacerbated by further population growth. And, of course, one of our most serious problems is the failure of leadership on the population issue, in both the United States and Australia. The situation is worst in the U.S. where the government never mentions population because of fear of the Catholic hierarchy specifically and the religious right in general, and the media keep publishing ignorant pro-natalist articles, and in Australia even advertise on prime-time TV to have more kids.

A prime example was a ludicrous 2010 New York Times screed by David Brooks, calling on Americans to cheer up because “Over the next 40 years, the U.S. population will surge by an additional 100 million people, to 400 million.” Equal total ignorance of the population-resource-environment situation was shown in 2012 by an article also in the New York Times by one Ross Douthat “More Babies, Please” and one by a Rick Newman in the USNews “Why a falling birth rate is a big problem,” both additional signs of the utter failure of the US educational system.

A popular movement is needed to correct that failure and direct cultural evolution toward providing the “foresight intelligence” and the agricultural, environmental, and demographic planning that markets cannot supply. Then analysts (and society) might stop treating population growth as a “given” and consider the nutritional and health benefits of humanely ending growth well below 9 billion and starting a slow decline. In my view, the best way to accelerate the move toward such population shrinkage is to give full rights, education, and job opportunities to women everywhere, and provide all sexually active human beings with modern contraception and backup abortion. The degree to which that would reduce fertility rates is controversial, but it would be a win-win for society. Yet the critical importance of increasing the inadequate current action on the demographic driver can be seen in the decades required to change the size of the population humanely and sensibly. In contrast we know from such things as the World War II mobilizations that consumption patterns can be altered dramatically in less than a year, given appropriate incentives.

#### Court authority lets them to gut democratic institutions and causes every impact

Bazelon and Posner 17 – Emily Bazelon is a staff writer for *The New York Times Magazine* and the Truman Capote Fellow for Creative Writing and Law at Yale Law School. Eric Posner is a professor at the University of Chicago Law School.

Emily Bazelon and Eric Posner, “The Government Gorsuch Wants to Undo,” *The New York Times*, 1 April 2017, https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html.

At recent Senate hearings to fill the Supreme Court’s open seat, Judge Neil Gorsuch came across as a thoroughly bland and nonthreatening nominee. The idea was to give as little ammunition as possible to opponents when his nomination comes up this week for a vote, one that Senate Democrats may try to upend with a filibuster.

But the reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government — including the rules that keep our water clean, regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the White House adviser Steve Bannon, who has called for its “deconstruction.” The Republican-dominated House, too, has passed a bill designed to severely curtail the power of federal agencies.

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that’s not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state “poses a grave threat to our values of personal liberty.”

The 80 years of law that are at stake began with the New Deal. President Franklin D. Roosevelt believed that the Great Depression was caused in part by ruinous competition among companies. In 1933, Congress passed the National Industrial Recovery Act, which allowed the president to approve “fair competition” standards for different trades and industries. The next year, Roosevelt approved a code for the poultry industry, which, among other things, set a minimum wage and maximum hours for workers, and hygiene requirements for slaughterhouses. Such basic workplace protections and constraints on the free market are now taken for granted.

But in 1935, after a New York City slaughterhouse operator was convicted of violating the poultry code, the Supreme Court called into question the whole approach of the New Deal, by holding that the N.I.R.A. was an “unconstitutional delegation by Congress of a legislative power.” Only Congress can create rules like the poultry code, the justices said. Because Congress did not define “fair competition,” leaving the rule-making to the president, the N.I.R.A. violated the Constitution’s separation of powers.

The court’s ruling in Schechter Poultry Corp. v. the United States, along with another case decided the same year, are the only instances in which the Supreme Court has ever struck down a federal statute based on this rationale, known as the “nondelegation doctrine.” Schechter Poultry’s stand against executive-branch rule-making proved to be a legal dead end, and for good reason. As the court has recognized over and over, before and since 1935, Congress is a cumbersome body that moves slowly in the best of times, while the economy is an incredibly dynamic system. For the sake of business as well as labor, the updating of regulations can’t wait for Congress to give highly specific and detailed directions.

The New Deal filled the gap by giving policy-making authority to agencies, including the Securities and Exchange Commission, which protects investors, and the National Labor Relations Board, which oversees collective bargaining between unions and employers. Later came other agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration (which regulates workplace safety) and the Department of Homeland Security. Still other agencies regulate the broadcast spectrum, keep the national parks open, help farmers and assist Americans who are overseas. Administrative agencies coordinated the response to Sept. 11, kept the Ebola outbreak in check and were instrumental to ending the last financial crisis. They regulate the safety of food, drugs, airplanes and nuclear power plants. The administrative state isn’t optional in our complex society. It’s indispensable.

But if the regulatory power of this arm of government is necessary, it also poses a risk that federal agencies, with their large bureaucracies and potential ties to lobbyists, could abuse their power. Congress sought to address that concern in 1946, by passing the Administrative Procedure Act, which ensured a role for the judiciary in overseeing rule-making by agencies.

The system worked well enough for decades, but questions arose when Ronald Reagan came to power promising to deregulate. His E.P.A. sought to weaken a rule, issued by the Carter administration, which called for regulating “stationary sources” of air pollution — a broad wording that is open to interpretation. When President Reagan’s E.P.A. narrowed the definition of what counted as a “stationary source” to allow plants to emit more pollutants, an environmental group challenged the agency. The Supreme Court held in 1984 in Chevron v. Natural Resources Defense Council that the E.P.A. (and any agency) could determine the meaning of an ambiguous term in the law. The rule came to be known as Chevron deference: When Congress uses ambiguous language in a statute, courts must defer to an agency’s reasonable interpretation of what the words mean.

Chevron was not viewed as a left-leaning decision. The Supreme Court decided in favor of the Reagan administration, after all, voting 6 to 0 (three justices did not take part), and spanning the ideological spectrum. After the conservative icon Justice Antonin Scalia reached the Supreme Court, he declared himself a Chevron fan. “In the long run Chevron will endure,” Justice Scalia wrote in a 1989 article, “because it more accurately reflects the reality of government, and thus more adequately serves its needs.”

That was then. But the Reagan administration’s effort to cut back on regulation ran out of steam. It turned out that the public often likes regulation — because it keeps the air and water clean, the workplace safe and the financial system in working order. Deregulation of the financial system led to the savings-and-loans crisis of the 1980s and the financial crisis a decade ago, costing taxpayers billions.

Businesses, however, have continued to complain that the federal government regulates too much. In the past 20 years, conservative legal scholars have bolstered the red-tape critique with a constitutional one. They argued that only Congress — not agencies — can create rules. This is Schechter Poultry all over again.

And Judge Gorsuch has forcefully joined in. Last year, in a concurring opinion in an immigration case called Gutierrez-Brizuela v. Lynch, he attacked Chevron deference, writing that the rule “certainly seems to have added prodigious new powers to an already titanic administrative state.” Remarkably, Judge Gorsuch argued that Chevron — one of the most frequently cited cases in the legal canon — is illegitimate in part because it is out of step with (you guessed it) Schechter Poultry. Never mind that the Supreme Court hasn’t since relied on its 1935 attempt to scuttle the New Deal. Nonetheless, Judge Gorsuch wrote that in light of Schechter Poultry, “you might ask how is it that Chevron — a rule that invests agencies with pretty unfettered power to regulate a lot more than chicken — can evade the chopping block.”

At his confirmation hearings, Judge Gorsuch hinted that he might vote to overturn Chevron without saying so directly, noting that the administrative state existed long before Chevron was decided in 1984. The implication is that little would change if courts stopped deferring to the E.P.A.’s or the Department of Labor’s reading of a statute. Judges would interpret the law. Who could object to that?

But here’s the thing: Judge Gorsuch is skeptical that Congress can use broadly written laws to delegate authority to agencies in the first place. That can mean only that at least portions of such statutes — the source of so many regulations that safeguard Americans’ welfare — must be sent back to Congress, to redo or not.

On the current Supreme Court, only Justice Clarence Thomas seeks to strip power from the administrative state by undercutting Chevron and even reviving the obsolete and discredited nondelegation doctrine, as he explains in opinions approvingly cited by Judge Gorsuch. But President Trump may well appoint additional justices, and the other conservatives on the court have expressed some uneasiness with Chevron, though as yet they are not on board for overturning it. What would happen if agencies could not make rules for the financial industry and for consumer, environmental and workplace protection? Decades of experience in the United States and around the world teach that the administrative state is a necessary part of the modern market economy. With Judge Gorsuch on the Supreme Court, we will be one step closer to testing that premise.

#### Court procedures decks effective democracy promotion

Bagley 19 – Professor of Law, UMich

Nicholas Bagley, Professor of Law, University of Michigan Law School, ARTICLE: THE PROCEDURE FETISH, 118 Mich. L. Rev. 345 (December, 2019)

Apart from increasing costs, adhering to procedures also **delays agency action**. That’s obviously true in a narrow sense: every task takes time. But the problem runs deeper, as Herbert Simon’s work on organizational decisionmaking suggests. Any agency must juggle a host of competing priorities, which means employees and political appointees with managerial responsibilities tend to oversee multiple projects. But complying with legally mandated **procedures requires** the **time and attention** of those harried federal managers, creating organizational bottlenecks. 99 The problem is exacerbated because government agencies **tend to have too few staff to carry out** their **many responsibilities**. And so even a minor procedural hurdle can become a source of delay, and multiple procedural rules can introduce multiple bottlenecks.

**Delay** then **affords** groups opposed to agency action **more time to mobilize against it.** They can lobby Congress, the White House, and the agency itself, whether by mustering coalitions to support their cause, channeling financial contributions to key political officials, or threatening to withhold support for future initiatives. 100 As delays mount, changes in the political weather—the replacement of key political appointees, a midterm election that changes the odds of congressional oversight, the election of a new president—give those groups yet another opportunity to thwart agency action. In agencies as in legislatures, limited bandwidth and the need to sustain political capital means that, for any reasonably complex action, the window of opportunity will open only briefly. **Delay allows that window to be shut before the agency can act.**

Procedural rules can also empower gatekeepers to stop agency action dead in its tracks. **Courts are the most obvious example**. For salient actions with sizable economic consequences, judicial review has become, in effect, the final step in the agency process. And the **risk of losing in court is real**: empirical research indicates that about one in three challenges to agency action succeeds on some ground or another. 101 In all of those cases, the agency must either respond to the court’s concerns, with the attendant resource diversion that entails, or abandon the action altogether. Either way, judicial review systematically **depletes agency resources and frustrates agency action**. 102

The **uncertainty** of judicial review **also works against agencies** that seek to make the **most sensible use of their resources.** On the margin, rational agencies will shy away from actions that are likely to provoke litigation 103 (or, alternatively, soften those actions to mitigate litigation risk104), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that’s an especially good use of their time.105 **Courts thus distort agency judgment** even when they don’t review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it. 106 Depending on the year, that means that about four dozen employees107 working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions.108 The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that “[m]any, many rules linger at OIRA long past the 90- or 120-day deadline” by which it is supposed to complete its review.109 “Some rules have been at OIRA for years.”110 Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, “a judgment that important aspects require continuing substantive discussion.”111 Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a reactive institution, one with the power to reject agency action but little capacity to spur it. 112 Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism **drains agency resources, introduces delay, and thwarts agency action**. 113 To that extent, it puts a thumb on the scale in favor of the status quo;114 by itself, that’s enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state?115 If that were the case, administrative law’s apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn’t be an asymmetry at all. Without question, administrative law can entrench Democratic achievements.116 In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending Obama-era rules without observing procedural niceties. 117 For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, **proceduralism favors a libertarian agenda over a progressive one.**

# Block

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### 2NC—Framework

**Failing to question the ideologies and assumptions that shape antitrust entrenches domination**

**Khan 18** – Chairwoman of the Federal Trade Commission and associate professor of law at Columbia Law

Lina Khan, “The Ideological Roots of America's Market Power Problem,” The Yale Law Journal Forum, 6/4/18, https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/yljfor127&id=962&men\_tab=srchresults

As public recognition of this problem grows, **increased attention** is focusing on antitrust law. Politicians, advocacy groups, academics, and journalists have all questioned whether the **failure of antitrust** is to blame for declining competition, and whether the law must be reformed in order to tackle the monopoly problems of the twenty-first-century. For example, members of the House of Representative recently created an Antitrust Caucus, a forum for Congress to study and address monopoly issues. Democrats, meanwhile, last year identified renewed antitrust as a key pillar of their economic agenda, promising to "revisit our antitrust laws to ensure that the economic freedom of all Americans - consumers, workers, and small businesses - come before big corporations that are getting even bigger."' The interest is bipartisan: a Republican Attorney General, for example, is leading an antitrust investigation into Google, explaining, "We need to have a conversation in Missouri, and as a country, about the concentration of economic power." In recent months, The American Prospect, The Nation, and The New York Times Magazine have all devoted stories to America's monopoly problem." No longer the exclusive purview of a small group of lawyers and economists, antitrust is going mainstream.

The Yale Law journal's recent series on the future of antitrust, "Unlocking Antitrust Enforcement," offers potential solutions to our market power problem. Generally, the authors seek to map out paths for stronger enforcement under current law. They do so by identifying (1) areas where cases could fix past judicial errors;12 (2) areas where enforcers have not brought cases that they could;" and (3) areas requiring enforcers to recognize traditional harms in new settings.14

The commentary offered by many of these Features is timely and valuable. **What is missing** from these pieces, however, is any **discussion of what philosophy should guide antitrust law** and its enforcement. Some of the authors explicitly ratify the current "consumer welfare" approach, which holds that out- put maximization is the proper goal of antitrust." Others do not address the topic directly, but nonetheless offer recommendations embedded in the current frame.16 And for others, perhaps, this question falls beyond the scope of the project: because the goal is to identify opportunities for more enforcement under the current regime, debating the guiding framework of the law is to them merely academic.

But **neglecting this question is misguided**. The **sweeping market power problem** we confront today is a **result of the current antitrust framework**. The **enfeebled state of antitrust enforcement** **traces directly to an intellectual movement** that fundamentally rewrote antitrust law - redefining its purpose, its orientation, and the values that underlie it. Addressing the full scope of the market power problem **requires grappling with the fact that the core of antitrust has been warped**. To be sure, many of the ideas the Features authors introduce are worth pursuing. But they pick at the symptoms of an ideology rather than the ideology itself.

**Engaging the issue**, by contrast, will go to the heart of why the current regime is crippled, enabling us to **tackle the underlying theories and assumptions** that have **defanged antitrust**. It will help **ensure that calls for reinvigorated enforcement are not misdirected** or exploited, and help ensure that doctrine develops to promote - and not undercut- the proper values of antitrust. Doing so is also likely to reveal or illuminate additional areas of unused authority, underused doctrine, or contestable areas of both.

Moreover, politicians and public figures are debating the framework head-on: a Senate hearing last December asked whether "consumer welfare" is the right standard," while a cable TV host in January said our current approach to antitrust undermines key freedoms." Strikingly, critiques of the current philosophy have come from The American Conservative and The Nation alike." Ignoring the broader conversation risks reinforcing the latent sense that antitrust experts are blind to the society-wide impacts of their profession and dismissive - or even unwelcoming - of the public's interest.20

This Response explains why **addressing America's market power problem requires recognizing its ideological roots**. Part I describes the Chicago School's interventions in antitrust. Part II explains how this ideological intervention bears on enforcement. Part III considers how the recommendations offered in the Col- lection are useful but will likely prove inadequate to address the scope of the problem, and Part IV offers some concluding thoughts.

#### AND, a narrow focus on debate as excluding ethical considerations makes political engagement impossible and causes extinction.

Henry Giroux, currently holds the McMaster University Chair for Scholarship in the Public Interest in the English and Cultural Studies Department and a Distinguished Visiting Professorship at Ryerson University, “Reclaiming the Radical Imagination: Challenging Casino Capitalism's Punishing Factories,” Monday, 13 January ‘14

Higher education, especially in the post-World War II period through the '60s and '70s, was, however ideally, considered a place where young people were taught how to **think, engage in critical dialogue**, **and take on** the **responsibilities** of informed and critical citizens. Now such students are subject to a **technically trained docility**, defined largely as **consumers** **and told that the** only value **education has is to prepare them to be workers and consumers** ready and eager **to serve the ideological and financial interests of the global economy**. Critical thought and the radical imagination have become a liability under casino capitalism and for a growing number of institutions the enemy of public and higher education because they hold the potential to be at odds with the reproduction of a criminogenc culture in which greed, unchecked power, political illiteracy and unbridled self-interest work to benefit the wealthy and corporate elite. Under such circumstances, education becomes **simply a business**, developing an obsession with accountability schemes, measurable utility, authoritarian governing structures, and a crude empiricism for defining what counts as research. How else to explain the following comment made by the president of Macomb Community College in Michigan: "Macomb is working with the federal government and other community colleges to better prepare students for the world that exists, not the world they want to live in." [13] Or for that matter the blatant anti-intellectual bias imposed on colleges in Florida where Governor Rick Scott wants to push students toward business-friendly degrees by lowering tuition for academic fields and subjects that "steer students toward majors that are in demand in the job market." [14] Of course, those areas such as philosophy, sociology, music, the arts, and other mainstays of the liberal arts would be more costly and their demise would intensify. Graeber argues that this assault on higher education has now become an object of intense state violence. He writes: Make no mistake: to threaten someone with a stick is the ultimate anti-intellectual gesture. And if one thing has become clear in recent months, this is the first - really the only - impulse of the current government when faced with challenges to their vision for higher education. Police infiltration, surveillance, elected student leaders banned from political activities on campus, the arrest of students for simple acts of expression like chalking slogans on sidewalks, send a clear and constant message. There can be no **reasoned discussion** on these issues. There is no longer anything to talk about. Certainly, democracy has absolutely nothing to do with it. The pursuit of knowledge and understanding have been declared **nothing but a consumer product, or** else a form of technical training **to increase** **overall** economic **productivity**; these are the only way these matters can be discussed; if anyone wishes to gather to object to this, to gather in places of learning to insist that knowledge and understanding are not mere economic goods but something precious and valuable in their own right, they can only do so by permission of those who are telling them otherwise; otherwise, they can expect to be physically attacked. [15] Similarly, higher education has become a **dead zone** for killing the imagination, a place where ideas that don’t have practical results go to die and where faculty and students are punished through the threat of force or harsh disciplinary measures for speaking out, engaging in dissent and holding power accountable. Faculty in most universities have been reduced to part-time jobs and function as indentured servants with no benefits, shockingly low salaries and no power to shape the conditions under which they work. With over 70 percent of faculty now holding the status of contingent labor, they are increasingly becoming one of the largest groups of professionals that qualify for food stamps to survive. These contingent and debt-ridden faculty live in a culture in which time is a burden rather than a luxury and have few opportunities to research, write and engage important social issues. At the same time, they live under both a survivalist mode and a culture of fear knowing that they can be dismissed arbitrarily at any time for the slightest infraction. Even tenured faculty are feeling the heat of a business-oriented de-democratizing university. For example, the Kansas Board of regents recently drastically curtailed tenure and academic freedom by claiming that both tenured and non-tenured faculty who used social media in ways that were not in the interest of the university, decided exclusively by the CEO of the university, were subject to dismissal. Speech that now impairs or reduces the university’s "efficiency" overrides the right of faculty to exercise free speech or address issues they deem socially and politically important. For all intent and purposes, this signifies not only the end of tenure but academic freedom. Moreover, as William Black points out, "in both substance and dishonesty of presentation, the Regents’ policy is literally Orwellian." [16] Increasingly students are exposed to a **low-intensity war** in which they are held hostage to disciplinary measures in which they are subject to police violence and corporate and government modes of surveillance. Such practices are designed to punish them whenever they exercise the right of protesting peacefully against a range of policies that are depriving them of a decent education and turning higher education into an adjunct of the military-industrial-surveillance complex. A more subtle form of **pedagogical repression** burdens them with a lifetime of debt and does **everything possible** to depoliticize them and remove them from being able to **imagine** **a more just and different society**. Debt bondage is the **ultimate disciplinary technique of casino capitalism** to rob students of the time to think, dissuade them from entering public service, and reinforce the debased assumption that they should simply be efficient cogs serving a consumer economy and a punishing society. The ongoing attack on civic values, critical education and the social state has taken on the status of a low-intensity war that began with the election of Ronald Reagan in 1980, though its emergent tendencies are deeply rooted in the American past. Reagan’s infamous claim in his first inaugural address that, "Government is not the solution to our problems; government is the problem," represented not just a celebration of greed, but also an attack on public values and social rights as well as a full-fledged attempt to undermine all of those social relations, spaces and spheres organized to define the public good outside of the primacy of privatization and commodification. He was joined at the hip with Margaret Thatcher, the prime minister of England, another apostle of neoliberalism who argued further that there was no such thing as society only individuals and families. These ideological shots were heard around the world and provided the foundation for a punishing and politically reactionary formative culture that waged a full-fledged assault on not only public goods, non-commodified public spaces and dissent itself, but the very idea of the radical imagination, a democratic citizenry, and the power of critical and civic literacy. Over the last 40 years, the assault on all forms of social protections and rights has further intensified with the unchecked reign of **neoliberal policies** that has been supported in the ensuing years by all American presidents since Ronald Reagan’s presidency, including Barack Obama. The basic elements of casino capitalism and its death wish for democracy are now well known: Society is a fiction; sovereignty is market-driven; deregulation, privatization, and commodification are legitimate elements of the corporate state; government is the problem; higher education should model itself after the culture of business; market ideology is the template for governing all of social life, exchange values are the only values that matter, and the yardstick of profit is the only viable measure of the good life and advanced society. As Noam Chomsky has insisted, civic engagement, public spheres that celebrate the common good and the notion of public values are viewed by politicians and the public alike as either a hindrance to the goals of a market-driven society or a drain on society to be treated as a sign of weakness. [17] Ethical considerations and social responsibility are now **devalued**, if not disdained, in a society wedded to short-term investments, easy profits and a mode of economics in which social costs are increasingly borne by the poor, while financial and political benefits are reaped by the rich. **Unrestrained self-interest** and ruthless modes of competition now **replace politics**, or at least they become the foundation for trivializing politics as complex issues are reduced to friend/enemy, winner/loser dichotomies. The crass social Darwinism played out on reality TV now finds its counterpart in the politics of both the Democratic and the Republican parties and spreads its poisonous influence in the media and popular culture through an ongoing celebration of hyper-masculinity, unbridled individualism, rampant consumerism and spectacles of violence. Chomsky is right in insisting that humans are social beings dependent not only on each other but also on the cultural values, institutions, policies, modes of governance and social arrangements that embrace the common good and enable each of us to fulfill our capacities as autonomous citizens capable of exercising the social, personal and political rights necessary for us to learn how to govern rather than simply be governed. Under casino capitalism, the opposite is true. Modes of solidarity, public values, obligations to the other and compassion for those in need **are** now **viewed as a pathology** and have given way to machineries of death imbued with a new visibility of savagery, cruelty and **indifference** **to the suffering of others**. As Tony Judt has observed, the "thick mesh of social interactions and public goods has been reduced to a minimum" by casino capitalism’s takeover of the rhetorical culture and of vital functions of politics. [18] Democratic values, social relations, and public spheres are no longer a symbol of hope and the future. Rather, they are now viewed **as a drain on the economy**, if not an outright threat **to neoliberal policies**. Increasingly, such values are treated with contempt or understood as dispensable, along with the individuals and groups they benefit. In a society obsessed with customer satisfaction and the rapid disposability of both consumer goods and long-term attachments, politics loses its democratic character, becoming **not just** dystopian and **dysfunctional but also** deeply authoritarian. In my view, the American public is no longer offered the guidance, opportunities and modes of civic education that cultivate their capacity for critical thinking and engaged citizenship. As public values are written out of the vocabulary circulating **within important pedagogical spheres** **such as** public and **higher education**, for example, a mode of **civic illiteracy** and **moral irresponsibility** emerges in which it becomes difficult for young people and the broader American public to **translate** private troubles into **public concerns**. When civic literacy declines and the attacks on civic values intensify, the commanding institutions of society are **divorced from** matters of **ethics, social responsibility and civic engagement**. One consequence is the emergence of a **kind of anti-politics** in which the discourses of privatization, possessive individualism and crass materialism inundate **every aspect of social life**,

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making it easy for people to **lose their faith** **in** the critical function of **civic education** and the culture of an open and substantive democracy. The very essence of politics has been **emptied of** any **substantive meaning** and is now largely employed as a form of anti-politics legitimating a range of anti-democratic policies and practices ranging from attacks on women’s reproduction rights and the voting rights act to a war on unions, public servants, public school teachers, young people immigrants and poor minorities. As public spaces are transformed into **spaces of consumption**, the formative cultures that provide the **preconditions** **for critical thought and agency crucial to any** **viable notion of democracy** are eviscerated. The conditions for encouraging the radical imagination has been transformed into the spectacle of illiteracy, repression, state violence, massive surveillance, the end of privacy, and the ruthless consolidation of power by the ultrarich and powerful financial interest. The imagination is under intense assault and increasingly is relegated to the **dead zone of casino capitalism**, **where social** **and civil death has become the norm**. Under such circumstances, civil society along with critical thought **cannot be sustained** **and become short-lived**, fickle and ephemeral. At the same time, it becomes more difficult for individuals to comprehend what they have in common with others and what it means to be held together by shared responsibilities rather than shared fears and competitive struggles. As the dominant culture is emptied out of any substantive meaning and filled with the spectacles of the entertainment industry, the banality of celebrity culture, and a winner-take-all consumer mentality, the American people lose both the languages and the public spheres in which they can actually "think" politics; can, in Tony Judt’s words, "respond energetically or imaginatively to new challenges"; and can collectively organize to influence the commanding ideologies, social practices, and institutions that bear down daily on their lives.[19] **Numbed into a moral and political stupor**, large segments of the American public and media have not only renounced the political obligation to question authority but also the moral obligation to care for the fate and well-being of others. In a market-driven system in which economic and political decisions are removed from social costs, the flight from responsibility and critical thought is further accentuated by a toxic fog that resembles a **moral coma**. In such instances, as Wendy Brown has noted, depoliticization works its way through the social order, removing social relations from the configurations of power that shape them and substituting "emotional and personal vocabularies for political ones in formulating solutions to political problems." [20] As private interests trump the public good, public spaces are corroded, and short-term personal advantage replaces any larger notion of civic engagement and social responsibility. Missing from the neoliberal market society are those public spheres - from public and higher education to the mainstream media and digital screen culture - **where people can develop** what might be called the civic imagination. In my judgment, for-profit spheres are increasingly replacing the spaces in which the civic and radical imagination enables individuals to understand and hold accountable the larger historical, social, political and economic forces that bear down on their lives. The rules of commerce now dictate the meaning of what it means to be educated. Yet, spaces that promote a radical imaginary are **crucial** in a democracy because they are **foundational** for developing those formative cultures **necessary** for young and old alike to develop the knowledge, skills and values **central to democratic forms of education, engagement, and agency**. What is particularly troubling in American society is the growing absence of a formative culture necessary to construct questioning agents who are capable of dissent and collective action in an imperiled democracy. Matters of justice, equality, and political participation are foundational to any functioning democracy, but it is important to recognize that they have to be rooted in a vibrant formative culture in which democracy is understood not just as a political and economic structure but also as a civic force enabling justice, equality and freedom to flourish. While the institutions and practices of a civil society are crucial to both imagining and sustaining the dreamscape of an aspiring democracy, what must also be present are the principles and modes of civic education and critical engagement that support the very foundations of democratic culture. Sheldon Wolin makes this clear in his insistence that, "If democracy is about participating in self-government, its first requirement is a supportive culture, a complex of beliefs, values and practices that nurture equality, cooperation and freedom. A rarely discussed but crucial need of a self-governing society is that the members and those they elect to office tell the truth." [21] The importance of civic education in the shaping of democratic values and critical agents cannot be underestimated and functions as the basis for developing specific modes of resistance and larger social movements. Cultivating the radical imagination, civic education and engaged and critical modes of literacy and agency are central to producing an informed citizenry, but even more so to constituting any viable notion of politics. Education must be considered central to any viable notion of politics. This suggests that progressives make clear how cultural apparatuses and media sources work pedagogically to produce market-driven subjects who are summoned to inhabit the values, dreams and social relations of an already established repressive social order. As I have often argued, the educational force of the wider culture, and the sites where it is delivered to the public, demand a radical rethinking of modes of civic education, if not politics itself. Democracy begins to fail and political life becomes impoverished in the absence of those vital public spheres in which civic values, public scholarship and social engagement allow for a more imaginative grasp of the promise of a future that takes seriously the demands of justice, equity and civic courage. Democracy should be a way of thinking about education, one that thrives on connecting equity to excellence, learning to ethics, and agency to the imperatives of social responsibility and the public good. The time has come to develop a political language in which civic **values**, the **radical imagination, social responsibility and** the **institutions that support them** become central to invigorating and fortifying a new era of civic courage, a renewed sense of social agency and an impassioned political will. We live in an age of proliferating political zombies, disimagination machines and punishing factories. This is an age of full blown authoritarianism parading, ironically, in the name of freedom and liberty. This type of freedom and liberty is designed for the walking dead who drain democracy of any substance, who produce misery and suffering all over the globe. There is more at work here than a new predatory culture, there is a politics of denial, disposability and avarice. **The lights are going out fast**, and democracy is on life support. Individual and collective resistance to this death machine can no longer be seen as **simply necessary**, it has become imperative. [22] Refusing to remain voiceless and powerless in determining their future, the time has come for intellectuals, workers, students, educators and other members of the American public to organize a broad-based social movement for the defense of public goods. This is a first but important step designed to create the conditions for a democracy that refuses to use politics as an act of war and markets as the measure of democracy. At the very least, it is time to take seriously the words of the great abolitionist Frederick Douglas, who bravely argued that freedom is an empty abstraction if people fail to act, and "If there is no struggle, there is no progress."

### AT: tech k2 climate

#### Don't believe the techno-optimists. Technological solutions to climate increase emissions and reproduce neoliberal frameworks.

Gunderson, PhD, et al. 17

(Ryan, Sociology @Miami, Diana Stuart, PhD Environmental Studies and Earth Science @Northern Arizona, Brian Petersen, PhD Environmental Studies, Sustainable Communities @ Northern Arizona, Ideological obstacles to effective climate policy: The greening of markets, technology, and growth Capital & Class ﻿1– 28 © The Author(s) 2017 Reprints and permissions: sagepub.co.uk/journalsPermissions.nav DOI: 10.1177/0309816817692127 journals.sagepub.com/home/cnc)

National climate policies and international climate agreements to reduce carbon emissions, exhibited by Article 10 of the Paris Climate Agreement, often focus on technological fixes that further extend the capitalist logic underpinning carbon emissions rather than the root causes leading to climate change. This represents an ideological, not a pragmatic, reasoned response because, as argued below, techno-optimists displace the technical potential-productive relations contradiction by viewing technology as neutral and disinterested, or, malleable and applicable independent of social context. In other words, techno-optimism in climate policy and its failure to reduce GHG emissions partially results from an assumption that displaces a cause of climate change – the use of technology to increase resource throughput for capital accumulation onto technology itself. Techno-optimism in environmental thought comes in at least three distinct variants. First, those supporting ecological modernization focus on technology and the shift in the responsibility for environmental outcomes from a command-and-control state to a more central role for the market and other non-state actors (Mol 1995). Second, reformists, namely environmentalists and environmental non-governmental organizations, seek solutions that fit within existing institutions (Demaria et al. 2013) rather than calling for alternatives to the reigning capitalist system. Regarding climate change, this means finding market approaches that facilitate and promote alternative technologies as a means to address climate change, a position captured by market logic that fails to see the futility in a platform predicated on growth-based alternative energy production. Finally, policy elites and corporatists favor a neoliberal approach to governance that privileges entrepreneurial motives to meet societal needs by diminishing or eliminating governmental regulation and oversight to the greatest extent possible. Unlike ecological modernization proponents who see a role for government in a shift to new technology, this perspective seeks to drastically reduce or even eliminate government intervention in the market and instead rely on technological solutions to address climate change that come from the private sector. Techno-optimists point to alternative energy, energy efficiency, and/or geoengineering as potential advancements that could help ameliorate the negative consequences posed by climate change. Although technological advances theoretically hold the potential to address the challenges posed by climate change, these approaches have limited viability in contemporary societies. By producing energy without fossil fuels, alternative energy appears as the most obvious means by which to reduce GHG emissions globally. However, alternative energy sources such as wind and solar do not necessarily lead to diminished fossil fuel derived emissions, at least at the levels needed to effectively address climate change. York (2012) shows that although alternative energy production has increased, it has not proportionally displaced fossil fuel emissions from energy production. In contrast, on average one unit of alternative energy production displaced only one-quarter of a unit of fossil fuel produced energy and only one-tenth of a unit of fossil fuel generated electricity. This does not bode well given energy demand projections. The US Energy Information Administration projects a 48% increase in global energy consumption by 2040 and that despite significant investment in renewable energy fossil fuels will supply greater than 75% of total energy (Showstack 2016). As energy demand increases, especially for electricity, renewable energy production would have to grow at a rate faster than any energy technology in history to meet climate stabilization goals (Hook et al. 2012). An additional problem relates to efficiency and energy use. As William Stanley Jevons identified in the 1860s, increased efficiency (coal-powered steam engines in this case) can lead to an increase in total consumption. This counter-intuitive outcome has come to be known as Jevons paradox. A rebound effect refers to situations in which energy efficiency gains are lost due to increased resource use due to those gains (Santarius 2012). There are different levels of rebound effects. Rebound effects above 100% are termed ‘backfire effects’ or ‘backfires’, which means total resource use is higher after the improved efficiency was implemented due to improvements in efficiency. Although the exact mechanisms that lead to this outcome remain unclear (Santarius 2012; Sorrel 2007; York & McGee 2016), many empirical examples confirm the overall trend. These include the findings that countries with high levels of efficiency tend to have higher rates of carbon dioxide emissions, electricity consumption, and energy use (York & McGee 2016; for reviews, see Alcott 2005; Polimini et al. 2008; Santarius 2012). These findings undermine the claims made by techno-optimists that greening technology alone can stabilize the global climate. Perhaps the strongest manifestations of techno-optimism in proposed climate policy are found in geoengineering strategies, which also fail to address or acknowledge the limitations of technological interventions for addressing climate change. Geoengineering represents a technological approach to alter the Earth’s climate system in an attempt to alleviate the impacts of climate change (Boucher et al. 2013). Geoengineering interventions include injecting aerosols (sulfur) into the atmosphere to reflect incoming solar radiation and fertilizing the ocean to sequester carbon, among many others. These and other geoengineering approaches have the potential to contribute to climate stabilization, but they also pose significant risks. For example, injecting sulfur into the atmosphere, modeled on volcanic eruptions, would reduce incoming solar radiation, but it would require continued effort (Keith 2013), has the potential to significantly affect weather patterns and agricultural production (Robock 2008), and could lead to prolonged droughts (Ferraro et al. 2014). More importantly, however, this intervention could prevent actions to reduce GHG emissions. Doing so would reduce the need to reduce GHG emissions, potentially leading to dramatic temperature rise should the intervention stop (Robock et al. 2010). Similarly, iron fertilization in the open oceans could detrimentally affect food webs and ecological functions (Strong et al. 2009) and lead to harmful algal blooms (Allsopp et al. 2007), among other serious risks. Proponents of renewable energy, energy efficiency, and/or geoengineering have put forth seemingly viable options to address the challenges posed by climate change. These approaches, however, are aligned with the current socio-economic order that created the climate crisis. They are not alternatives to it. The reliance on technology as the solution to the climate change problem comes in different variants, but all reflect an ideological position: they conceal the technical potential-productive relations contradiction. More specifically, they displace the contradiction by presupposing that technology is neutral and disinterested, free to be used and shaped by rational individuals uninfluenced by social-structural context. This assumption is problematic for a number of reasons (for review in environmental context, see Whyte et al. forthcoming). As Marcuse (2011) points out, the ends that technology serve are prepared by the ‘pregiven empirical reality’ (p. 152), or, ‘in line with the prevalent interests in the respective society’ (Marcuse 2001: 44). In other words, technology embodies the values and power of the society for which it functions. In world-system and ecological context, Hornborg (1992, 2001, 2009) uses the term ‘fetishism’ to describe the common illusion of the autonomy of productive technologies, which conceals various socio-ecological processes, such as unequal exchange and the Global North’s forgotten dependence on land. Techno-optimists wrongly view old technologies as the cause of climate change and can be reformed, rather than interpreting ‘dirty’ and ‘green’ technologies in social-structural context. The latter allows one to see that the potential of reducing GHG depends on changing the social structures and interests that condition them. For example, the Jevons paradox may partially result from capitalism’s aim to maximize profits through two routes: (1) reduce costs of production and (2) produce/ sell more, requiring resource use (York & McGee 2016). Improvements in efficiency reduce costs, thereby increasing profits, which are reinvested to expand production, requiring higher rates of resource use. By displacing the technical potential-productive relations contradiction in this way, climate policy that depends on the greening of technology reproduces existing systems to the exclusion of social alternatives. Focusing on technological solutions in a marketbased system omits consideration of both more effective alternatives (discussed below) and, perhaps more importantly, ignores the institutionalized social relations that led to the problems forming in the first place. In all cases, techno-optimist perspectives implicitly or explicitly rely on the market for solutions. Even if proponents are unaware, climate policy that depends on green technology represents a continuation of a larger project to serve capitalist interests. It does so by relying on technology rather than social change to reduce carbon emissions, thereby allowing the fossil-fuel-based economy to continue unfettered. Technological solutions devised to alter social processes that lead to reduced emissions hold great potential (Keary 2016) but simply focusing on technology as the solution to climate change represents an ideological rather than a practical solution. Few proponents of renewable energy, energy efficiency, and/or geoengineering prioritize total energy reduction or technologies that might guide social behaviors in a new direction. Instead, they focus on techno-fixes designed to increase economic growth and hold assumptions that displace the technical potential- productive relations contradiction. This represents an ideological approach orchestrated to fit ‘solutions’ into an existing economic paradigm rather than looking for effective, long-term alternatives.(11-13)

#### AND, Oligarchic capture turns it—Even if we get the wonder-tech, we'll fail to save ourselves in time.

**Bigger and Dempsey 18** – lecturer in the critical geographies group at Lancaster University [Patrick Bigger]

ASSOCIATE PROFESSOR | ASSOCIATE HEAD OF UNDERGRADUATE PROGRAM at the University of British Columbia [Jessica Dempsey]

Patrick Bigger and Jessica Dempsey, “Reflecting on neoliberal natures: An exchange,” Environment and Planning E: Nature and Space, 2018, https://journals.sagepub.com/doi/10.1177/2514848618776864

The **lack of action on climate change** in this decade is one of the most illustrative and **deeply troubling** trends. In the past decade, we have witnessed a series of **failed**, or close to failed United Nations Framework Convention on Climate Change (UNFCCC) negotiations – with the most spectacular being Conference of Parties (COP) 15 in Copenhagen, which crushed many climate activists’ hopes. Along with **disappointing supranational agreements**, in this decade, we decisively moved from climate change models to climate change impacts. Heat waves (Christidis et al., 2015), forest fires (Abatzoglou and Williams, 2016), aquatic mass die-offs (Hughes et al., 2017): all of it is happening. The decade saw a slew of **socio-natural catastrophes**, particularly super storms that **impact the poor and racialized** more than anyone else, from Houston to the Philippines, which experienced 5 of its 10 most deadly typhoons since 2006. Such superstorms can now, at least in part, be attributed to anthropogenic greenhouse gas (GHG) emissions (Harvey, 2018). One of the bright spots in the last decade has been the concerted effort to mainstream climate change as a moral, ethical and/or justice issue, demonstrated perhaps best by the divestment movement’s tagline: if it is wrong to wreck the climate, it is wrong to profit from it.

But even if climate change is increasingly understood in term of injustices along raced and classed lines, the outrageous, take-your-breath-away fact is that world oil production between 2006 and 2016 increased by 11%, and even more tellingly, world proven **oil reserves grew** by a third over the same time period (BP, 2017). **Governments have been loath to impose meaningful restrictions on production**, despite knowing that the vast majority of this newly exploitable oil must be kept in the ground. Instead, most states have preferred to **dabble with regulations** on the consumption side through mechanisms like automobile fuel efficiency standards, while **trusting capital markets** to regulate hydrocarbon producers through stock valuation. These valuations, according to (neo)liberal orthodoxy, should govern future capacities to extract those fuels, but stable share prices suggest capital markets foresee **no impending slowdown** in extraction. As Christophers (2017) demonstrates, this is emblematic of **neoliberal governance** strategies that rely on data disclosure and rational financial actors to achieve desired outcomes; the same logic that defines financial (self)regulation drives hydrocarbon (self)regulation. Yet when it comes to huge and necessary GHG emissions reductions, **such strategies have yet to deliver**, a point made over and over by critics of mechanisms ranging from disclosure to emissions markets (Carton, 2014; Kama, 2014; Klein, 2015). **Zombie climate neoliberalism** lurches along, with little sign of the necessary brain-crushing blow to the head (Lane and Stefan, 2014). The gap between an emphasis on disclosure of climate risks in capital markets and the felt effects of climate change on the bodies of poor people of color is appalling.

In many ways, **the decade of inaction reflects the sine qua non of neoliberal natures** – the shift from government to governance, or the re-placing of critical regulatory functions from the state to non/quasi-state actors, **driven by policy failures** (a la Copenhagen) and also by ideologies that privilege the efficiency and rationality of markets often coupled with a **mistrust** or **outright disdain** for direct state regulations. Yet, the deadlock in the governmental sphere is also yielding innovations through the typical power structures of the state, namely the courts. There are a spate of climate justice-like cases that look to make fossil fuel firms and governments accountable for knowingly causing harm from New York to India,3 reflecting the discursive shift to understanding climate change in the terms of uneven costs and benefits that can be tried in court. However, such cases flow against the grain, as governance strategies for actual mitigation of environmental issues tend not only toward self-regulation, but also by actively **facilitating new financial incursions** into non- human natures.

#### root cause—Neolib makes econ collapse structurally inevitable

**Saad-Filho 19** – Alfredo has degrees in Economics from the Universities of Brasilia (Brazil) and London (SOAS). He has worked in universities and research institutions based in Brazil, Canada, Japan, Mozambique, Switzerland and the UK, and was a senior economic affairs officer at the United Nations Conference on Trade and Development (UNCTAD)

ALFREDO SAAD-FILHO, “CRISIS IN NEOLIBERALISM OR CRISIS OF NEOLIBERALISM?,” Socialist Register, 1/25/19, https://brill.com/view/book/9789004393202/BP000018.xml

NOT MOVING FORWARD

The **financial collapse** delivered a **stunning blow to the neoliberal consensus**, as was aptly illustrated by Alan Greenspan’s confession of ‘shocked disbelief’.25 The Economist was nothing less than apocalyptic:

[E]conomic liberty is under attack and capitalism ... is at bay ... but those who believe in it must fight for it ... In the short term defending capitalism means, paradoxically, state intervention. There is a justifiable sense of outrage ... that $2.5 trillion of taxpayers’ money now has to be spent on a highly rewarded industry. But the global bailout is pragmatic, not ideological ... If confidence and credit continue to dry up, a near-certain recession will become a depression, a calamity for everybody.26

For a few weeks in 2008 global **capitalism seemed to bleed uncontrollably**, as losses reportedly climbed towards US$ 40 trillion or, alternatively, 45 per cent of the world’s wealth.27 Several states nationalized key financial institutions, guaranteed deposits and financial investments, cut interest rates and implemented expansionary fiscal policies and so-called ‘quantitative easing’ to support finance, aggregate demand and employment. It is impossible to calculate the cost of these initiatives. They included central bank purchases of temporarily worthless financial assets, which may gain value as the global economy stabilises, ‘Keynesian’ initiatives to protect employment, which partly pay for themselves through additional tax revenues and reduced social security transfers, and a significant amount of borrowing to fund regular spending, which became necessary because of the crisis-driven decline in taxation. These measures were unsurprising: they reflect, on the one hand, the post-Great Depression consensus that aggressive expansionary policies can avert a deflationary spiral, and, on the other, the neoliberal claim that financial sector stability is paramount.

Heavy state spending and the socialization of losses and risks stemmed the haemorrhage of bank capital and postponed the collapse of some large manufacturing conglomerates, especially the old US automakers. However, they did not revive bank credit, and their huge costs have triggered severe fiscal problems especially in the US, UK, peripheral European economies and fragile Gulf states. As Joseph Stiglitz put it,

[T]he very actions that saved the economies of the world have presented a **new problem for fiscal policy**, as questions are being raised about governments’ ability to finance their deficits. There are speculative attacks against the weakest countries, which find themselves caught between a rock and a hard place ... The **financial markets that caused the crisis** – which in turn caused the deficits – went silent as money was being spent on the bailout; but now they are telling governments they have to cut public spending. Wages are to be cut, even if bank bonuses are to be kept.28

Despite their tactical proficiency, instantly coming up with trillions of dollars to support the banks and shore up the global economy, the neoliberal bourgeoisies and their paid economists have demonstrated a **staggering lack of strategic imagination**. Even the most promising recovery scenarios offers only **slow growth**, a **decade of austerity** and a **wave of unemployment** which may last for an entire generation. The emerging consensus is that the system of accumulation can be fixed with a little financial regulation, marginal exchange rate adjustments, a rebalancing between exports and domestic demand in Germany and East Asia, and austerity for wages and public consumption in the UK and eventually in the US. These **cosmetic changes** are **unlikely to rebalance the global economy or make much of a contribution to managing the ongoing restructuring of accumulation**. Their **simplicity is symptomatic of the mainstream’s superficial understanding of the crisis**

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; they point to a **slow** and **very bumpy recovery**, with the emergence of deep financial, fiscal, exchange rate and **unemployment crises** in one country after another, and over a long period of time.

Most recovery plans **bypass the need for an alternative mechanism** of social integration, fail to recognise that the **manipulation of personal debt will be insufficient** to stabilise demand and employment, and ignore the fact that the contraction of credit, wages and pensions and the need for fiscal retrenchment will **compromise long term demand growth**. Although state spending has plugged the gap during the crisis, **this is unsustainable** without significant changes in taxation and the distribution of income, but these are not currently on the cards.29 Recovery plans also presume that contractionary fiscal policies are essential to protect state credit ratings in the short-run and avoid inflation in the long-run, and envision that, after the return of ‘normal’ conditions, the manipulation of interest rates should become once again the most prominent macroeconomic policy tool. That is, the neoliberal camp essentially expects the global system of accumulation to get back to its pre-crisis state (plus or minus some marginal tinkering) after a **prolonged and rather costly period of instability**.30

Even more alarmingly, although many proposals to address the crisis and prevent a repeat have been aired, three years after the onset of the crisis and two years after the collapse of Lehman Brothers very **little of substance has actually happened**. The ideas on the table or being discussed in the world’s legislatures include a devaluation of the dollar to help rebalance the US economy, a coordinated set of higher inflation targets to erode public debts while preventing explosive capital movements to low inflation countries,31 the taxation of bank assets and financial transactions, a review of supervisory agency responsibilities, the prohibition of certain types of short-selling, regulatory changes requiring the financial institutions to prepare ‘living wills’ and/or buy insurance against possible failure, and rules to increase capital requirements countercyclically, constrain leveraging and speculation, ban proprietary trading, restrict the hedge funds and cap bonuses. Other suggestions include stricter regulation of the credit rating agencies, increased transparency in derivatives trading (for example, through the creation of centralized exchanges), and stronger consumer protection against predatory lending.32

However, **no significant macroeconomic adjustments have taken place** yet, and the financial institutions have been lobbying ferociously against any attempt to curb their operations. They argue that the US and UK should not deliberately maim a large industry in which they have a comparative advantage, and that taxation or regulation would lead to the mass exodus of banks, hedge funds and traders to Switzerland, Singapore or the Gulf.33 Their well-funded campaign is only part of the problem.

**Macroeconomic adjustments have been hamstrung by a number of major economic challenges** that remain in place. A first is the conflicting pressures on the dollar (it must fall to help correct the US current account deficit, but it tends to rise whenever there is uncertainty elsewhere, especially in the systemically important countries or the Eurozone); China’s parallel unwillingness to let its currency appreciate is a second. Structural contradictions within the Eurozone are a further difficulty: between surplus and deficit countries; between entrenched monetary conservatism and the need to deploy expansionary policies to address the crisis in the smaller countries; and – more fundamentally – between monetary unification and continuing fiscal fragmentation.

A fourth obstacle is the extraordinarily inflexible monetary policy apparatus that has remained in place to lock in low inflation.34 Its rigidities are compounded by significant monetary policy differences between the US, Japan, the UK and the Eurozone. For example, the first two do not have legally binding inflation targets to raise, the UK cannot act in isolation, and the ECB has been built to enforce low inflation, and its governance structure makes it difficult to change course.35 Complications of a different order would arise if inflation rose too fast in certain countries, because governments would be compelled to limit their fiscal stimuli and raise interest rates, potentially stalling the recovery.

Finally, another **set of difficulties** concerns reaching legislative agreement about how to **tax the financial sector**, set capital requirements, **dismantle institutions** that are too big to fail (and, therefore, that have in-built incentives to behave recklessly), and unscramble players’ incentives (bonuses are outrageously high in the good times, and absurd when the financial sector refuses to lend even though it is being propped up by the state). These difficulties are especially visible in the debates surrounding the financial market reform bill in the US Congress. In conclusion, the largest economic crisis since 1929 has demonstrated that **transferring control of capital to finance fosters speculation and systemic instability and does not improve macroeconomic performance**. Yet, the institutional imperatives of reproduction of neoliberalism make it **difficult for governments to introduce a new economic policy framework.**

### 2NC – AT: Proceduralism good

#### Making political decisions based in procedures crushes agency action

Bagley 19 – Professor of Law, UMich

Nicholas Bagley, Professor of Law, University of Michigan Law School, ARTICLE: THE PROCEDURE FETISH, 118 Mich. L. Rev. 345 (December, 2019)

Apart from increasing costs, adhering to procedures also **delays agency action**. That’s obviously true in a narrow sense: every task takes time. But the problem runs deeper, as Herbert Simon’s work on organizational decisionmaking suggests. Any agency must juggle a host of competing priorities, which means employees and political appointees with managerial responsibilities tend to oversee multiple projects. But complying with legally mandated **procedures requires** the **time and attention** of those harried federal managers, creating organizational bottlenecks. 99 The problem is exacerbated because government agencies **tend to have too few staff to carry out** their **many responsibilities**. And so even a minor procedural hurdle can become a source of delay, and multiple procedural rules can introduce multiple bottlenecks.

**Delay** then **affords** groups opposed to agency action **more time to mobilize against it.** They can lobby Congress, the White House, and the agency itself, whether by mustering coalitions to support their cause, channeling financial contributions to key political officials, or threatening to withhold support for future initiatives. 100 As delays mount, changes in the political weather—the replacement of key political appointees, a midterm election that changes the odds of congressional oversight, the election of a new president—give those groups yet another opportunity to thwart agency action. In agencies as in legislatures, limited bandwidth and the need to sustain political capital means that, for any reasonably complex action, the window of opportunity will open only briefly. **Delay allows that window to be shut before the agency can act.**

Procedural rules can also empower gatekeepers to stop agency action dead in its tracks. **Courts are the most obvious example**. For salient actions with sizable economic consequences, judicial review has become, in effect, the final step in the agency process. And the **risk of losing in court is real**: empirical research indicates that about one in three challenges to agency action succeeds on some ground or another. 101 In all of those cases, the agency must either respond to the court’s concerns, with the attendant resource diversion that entails, or abandon the action altogether. Either way, judicial review systematically **depletes agency resources and frustrates agency action**. 102

The **uncertainty** of judicial review **also works against agencies** that seek to make the **most sensible use of their resources.** On the margin, rational agencies will shy away from actions that are likely to provoke litigation 103 (or, alternatively, soften those actions to mitigate litigation risk104), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that’s an especially good use of their time.105 **Courts thus distort agency judgment** even when they don’t review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it. 106 Depending on the year, that means that about four dozen employees107 working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions.108 The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that “[m]any, many rules linger at OIRA long past the 90- or 120-day deadline” by which it is supposed to complete its review.109 “Some rules have been at OIRA for years.”110 Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, “a judgment that important aspects require continuing substantive discussion.”111 Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a reactive institution, one with the power to reject agency action but little capacity to spur it. 112 Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism **drains agency resources, introduces delay, and thwarts agency action**. 113 To that extent, it puts a thumb on the scale in favor of the status quo;114 by itself, that’s enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state?115 If that were the case, administrative law’s apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn’t be an asymmetry at all. Without question, administrative law can entrench Democratic achievements.116 In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending Obama-era rules without observing procedural niceties. 117 For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, **proceduralism favors a libertarian agenda over a progressive one.**

#### Agency flex is key to every impact – agencies need to be able to respond quickly to emerging risks

Bagley 19 – Professor of Law, UMich

Nicholas Bagley, Professor of Law, University of Michigan Law School, ARTICLE: THE PROCEDURE FETISH, 118 Mich. L. Rev. 345 (December, 2019)

Because the world is changing at a breakneck clip, a bias toward inaction means that the state will respond too slowly as new risks present themselves and existing risks come into focus. Internet commerce, drones, social media, cellular phones, algorithmic trading, driverless cars, and artificial intelligence barely existed two decades ago; today, they are part (or are becoming part) of the fabric of our lives. We only dimly understand how to cope with the attendant risks to health, welfare, and privacy associated with these technological changes. At the same time, older risks have become more prominent, whether because of evolving scientific understanding (climate change, the waning efficacy of antibiotics), shifting patterns of industrial organization (the rise of monopoly power across multiple industries), or crises that exposed fragility in complex systems (the financial crisis, Hurricane Maria). An administrative apparatus that cannot adapt to a changing world threatens to become a relic of a bygone era. It also becomes easier to dismantle. Regulations adopted in a very different environment will come to look ill fitting and unresponsive to modern problems. Justifying their abandonment or relaxation is straightforward: the world really has changed. 118 Adopting a new rule and defending it against concerted attack, however, remains enormously difficult.

### --Alt Solves Inequality

#### The alternative is a radical reorientation of our conception of politics and the economy – instead of blind faith in the function of markets as long as there’s competition, we recognize the crucial role the government plays in the economy.

#### That solves inequality – anti domination allows rapidly effective redistributions of wealth and political power that drastically reduce inequality

Rahman 16 – Associate professor of law at Brooklyn Law School and former visiting professor of law at Harvard Law School.

K. Sabeel Rahman, “Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism,” *Texas Law Review*, vol. 94, 2016, pp. 1353-1359, https://texaslawreview.org/wp-content/uploads/2016/09/Rahman.pdf.

IV. Constitutional Political Economy and Fourth-Wave Legal Realism

This admittedly brief recasting of legal realist and Progressive Era thought highlights some valuable starting points for developing an alternative conceptualization of political economy. While there is much more to be said about how exactly we might adapt and apply antidomination regulatory strategies like antitrust and public utility or expand democratic agency through urban, regulatory, or social-movement-driven governance, for our purposes what matters is this central conceptual framework animating these different approaches to reconstituting economic and political processes. In this framework, the problem of capitalism is understood as a problem of domination and economic power. The response to such power must entail attempts to expand the democratic capacities of citizens. This approach to political economy offers a substantive alternative to the laissez-faire political economy of the Roberts Court. It also importantly departs from conventional traditions of New Deal liberalism. While the New Deal, in many ways, gave voice and reality to Progressive Era aspirations for expanded government regulation of the economy and for creating economic opportunity through the forging of the modern social contract, it also represented a significantly thinner vision of political economy, placing too much emphasis on economic growth and technocratic management in place of more robust commitments to full economic equality, inclusion, and democracy. 95 The focus on domination and democracy suggests a more far-reaching vision of political economy.

What, then, is the relationship between constitutionalism and this antidomination, democratic-agency account of political economy? The Progressive Era thinkers, referenced above as catalysts for constructing this vision of political economy, were also notably hostile to courts and judges. 96 While we may temper somewhat our own views of the judiciary in comparison to theirs, we can take note of the theory of change suggested by Progressive Era reformers. Certainly there are important points of tangency between the kind of economic and political restructuring needed to redress problems of domination and expand democratic agency and major interpretive battles over the Constitution itself, from campaign finance to voting rights to class actions and questions of congressional power and federalism, not to mention the continued battles over equality, discrimination, and fundamental rights under the Fourteenth Amendment. But this account suggests a different mode of constitutionalism and social change - one where courts might still play a role, but a secondary and downstream one. At the level of ideas, it was the intellectual battle over laissez faire that was paramount; for the Progressives this meant unmasking the realities of power operating under the surface in the market economy and arguing for the value of popular sovereignty. At the same time, change also manifested through reforms that focused on the underlying structures of economy and politics - through attempts to shift the basic legislative, regulatory, and legal foundations of modern capitalism. The primary sites of contest are therefore in the realms of public philosophy, legislation, and regulatory governance.

Constitutionalism appears at two levels. First, it appears at the level of fundamental values. The critique of domination and the value of democratic agency help give further content to core moral values of equality, freedom, and democracy that animate so much of constitutional discourse. The second way in which this account of political economy is constitutional stems from its view of how power is distributed and can be reallocated: through radical changes to the basic structure of economic and political order. Thus, while many of the Progressive Era thinkers profiled above were deeply skeptical of judges and courts, they nevertheless offered a constitutional vision of political economy in this particular sense. Their constitutionalism was not the constitutionalism of text, interpretation, and doctrine. Rather, their account sought to make real fundamental public values of freedom, democracy, and equality; and it sought to do so through reforms that would literally reconstitute basic economic, political, and social structures to make these values real. From economic structural changes like antitrust and public utility regulation to radically different political structures like regulatory agencies and municipal Home Rule, the democratic political economy excavated above was thus deeply constitutional.

This is not the "big-C" constitutionalism of constitutional text, doctrine, or Supreme Court jurisprudence. It is rather what we might think of as the "small-c" constitutionalism of our basic economic and political structures: how we constitute the market economy through laws that define its basic forces and dynamics, and how we constitute the polity through regulations and processes that shape the allocation of political power. So on this understanding of constitutionalism, looking for a constitutional claim of right under the constitutional text is, in a sense, looking in the wrong place. Instead, constitutional political economy has its impact by informing diagnosis, critique, and reform through the vectors of legislation, regulation, and social movements. Thus, we might turn to the constitution of the market, looking to legislative and regulatory regimes like antitrust and public utility to curb private power. We might see the impact of constitutional political economy in efforts to rebalance the political power of new forms of worker association and grassroots social movements, and more democratically participatory vehicles for governance and policymaking through regulation and local government. We might also see shifting public discourse and norms through the contestation and mobilization of civil society and social movement actors.

There is an important reason why we might want to understand constitutionalism in this way - as values and as basic structure. Reconceptualizing constitutionalism and constitutional political economy in this vein helps pull the high politics of constitutionalism outside of its narrow province in the c

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ourts and in constitutional theory, deemphasizing the primacy of courts, doctrine, and text. It also helps to elevate legislation, regulation, public philosophy, and social movements as sites of law, politics, and contestation that implicate our most critical normative values and shape our most foundational economic and political structures. These are not merely domains of "ordinary politics" or technical public policy. Imbuing them with the stature of constitutionalism appropriately elevates the moral and structural concerns that are at stake in these domains.

Joseph Fishkin and William Forbath's forthcoming The Anti-Oligarchy Constitution and the Essays in this Symposium represent exactly this kind of effort to reimagine our fundamental constitutional values of democracy and equality in context of our New Gilded Age of economic and political inequality. Their account of constitutional political economy is most compelling in these two senses: as engaging the fundamental moral questions of what freedom, opportunity, and democracy mean in today's society, and as securing this moral vision through laws that alter the basic structure of our economy and politics. Such moral and structural change can be accomplished through a particular approach to law and social change, prioritizing the synergies between normative arguments, social movements, and legislative and regulatory changes to the basic structure. Nor are Fishkin and Forbath alone in this. In the aftermath of the financial crisis and in the face of the Roberts Court, this emerging wave of legal scholarship can open up a variety of avenues for deeper critique and reform. While some of these legal and policy arguments do involve battles in the Supreme Court, many of them take place more directly on the terrain of regulation, legislation, state-and local-level policy, and social movement advocacy.

Indeed, this wave of legal scholarship might be considered another heir to the legal realism of the early twentieth century. Like the legal realists of a century ago, there is a growing cascade of scholarship that takes as its focus the investigation of the deep underlying structures of our economy and political process, and is closely linked with questions of public policy and social change. In addition to this very Symposium, consider for example the rich new scholarship unpacking the legal and intellectual foundations of political economy and modern capitalism, 97 or the booming scholarship since the 2008-2009 financial crisis on how law constitutes the financial system, and how this system can be reconstituted to create a better balance between private power and public values. 98 We also are seeing new literature on political-process design in the context of regulatory agencies, in particular, along the front lines of participatory and democratic institutional design. 99 Many other areas of law might be cited as well. The point is that, like the legal realists reacting to the First Gilded Age, we see in legal scholarship today a wide array of scholars in diverse subfields employing different methodologies to critique, unpack, and deconstruct contemporary political economy - all with an eye towards deconstructing problematic forms of economic and political power - and recovering the ideas, policies, and reforms that might shift us in a more democratic and egalitarian direction.

In context of the broader moral challenges of political and economic inequality, these trends suggest what we might call a "fourth wave" of legal realism. Conventionally, the legal realist movement is understood to have two primary successors, each of which revolutionized legal scholarship: law and economics, and critical legal studies. Each of these movements in turn developed a key aspect of the original legal realist method, yet faced important limitations as they developed. The turn to empirical social science and expertise is modeled by the rise of law and economics, while the antiformalist critique has helped fuel the deconstructive project of critical legal studies. 100 Yet the law-and-economics revolution of the late twentieth century, with its focus on efficiency, welfare, and neoclassical economic models, has been rightly criticized as a revived formalism. 101 Similarly, the antiformalism of legal realism was more deeply developed by the critical legal studies (CLS) movement, 102 which unmasked the many ways in which law reproduced hierarchies of power and unfreedom. Yet CLS suffered from its own limitations: while it was effectively disruptive of both legal-process and law-and-economics accounts, as a whole it ultimately did not provide a constructive alternative vision for a more egalitarian and democratic political economy. As Roberto Unger himself argued, CLS "largely failed in its most important task: to turn legal thought into a source of insight into the established institutional and ideological structure of society and into a source of ideas about alternative social regimes." 103

In the last twenty-five years or so, there has been a third wave of legal realism, a hybrid combination of these two heirs into a more pragmatic focus on policy and institutional design. Legal realism in this wave manifested itself, in the leveraging of behavioral, empirical, and institutional analysis, to suggest changes to policy-making processes to make them more efficient and just. 104 This third wave of legal realism repurposed the critique of formalism as a way to open space for policy expertise - expertise which can be achieved by leveraging the insights of social science, including law and economics. 105 The critical project of revealing how law constructs inequalities along racial, gendered, or class lines is, therefore, now paired with an analytical focus on policy design, and on assessing comparative institutional competencies. 106 Similarly, the insights of law and economics, on this view, can be seen not as a hostile ideology against democratic or egalitarian values, but rather as a way to analyze micro-scale behaviors and macro-scale costs and benefits of different institutional systems. 107

But as the anxieties about neo-Lochnerism and the Supreme Court underscore, the challenges for law and public discourse in this New Gilded Age of economic and political inequality go beyond the scope of pragmatic policy design. We need to harness these institutional design insights towards the substantive ends of counteracting domination, rebalancing economic and political power, expanding opportunity, and reviving democratic agency. The techniques of contemporary legal scholarship, from behavioral analyses to contextually rich studies of law and society to comparative institutional analyses, offer tremendous potential. But absent a fuller engagement with the normative question of values, these approaches risk falling into an overly narrow or seemingly neutral policy science. 108 A fourth wave of legal realism could build on these traditions, linking the analysis of underlying ideas and structures to a substantive moral vision of democratic political economy.

The import of this kind of a project points to a final mode in which we might understand this focus on values and structures as "constitutional" - in the political aspiration to literally reconstitute American political economy today. The timing of Fishkin and Forbath's project - and of the remarkable confluence of scholarly interest in issues of inequality, power, structure, and democracy on display at the symposium - suggests as much. Arguably we find ourselves in a unique moment today, often referred to as a "Second Gilded Age," where the country faces a confluence of economic and political inequality. But I suspect that the reason why so many scholars are gravitating towards these questions of inequality, exclusion, oligarchy, and power is because many of us sense that this moment is also unique in its capacity to shift - perhaps radically - our broad understandings and structures of political economy. We are living in a moment of rupture. And so the stakes of this moment are not just in its negative dimensions, in the problems of inequality and disparities of power and opportunity we see all around us. The stakes are in the as-yet-unrealized potential for the emergence of new constitutional understandings and basic structures. We may be in a Second Gilded Age, but done right, the politics and potential of this moment could be a Third Reconstruction - or a new refounding.

The Populists, Progressives, and Labor Republicans of the late nineteenth century certainly understood themselves as participating in a battle to redefine the fundamental and literal constitution of the country (the 1892 People's Party platform, for example, styled itself deliberately as a Second Declaration of Independence). This ferment eventually produced the ideas that became the New Deal settlement a generation later. These projects of constitutional political economy appearing in a variety of forms and disciplines in legal scholarship today could help contribute, in some small way, to a similar constitutional shift - one that, if we are lucky and if done right, would not merely recreate the New Deal settlement, but instead reinvent it for a radically different social, economic, and political context.

### 2NC – Democracy

#### Representation is the largest internal link to democracy – via anti-domination the alt leads to millions gaining representation

Jackson 21 – DeOlazarra Fellow at the Program in Political Philosophy, Policy & Law at the University of Virginia. She received her Ph.D. with distinction in political theory at Columbia University.

Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 38-42, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

Yet if representation is not an inferior re-presentation of the will of an embodied popular sovereign, but instead an institutional tool that helps citizens understand themselves as co-equal participants in lawmaking, then there is little reason to exclude agencies ex ante from the democratic process.279 They, like formal electoral representation, can be a part of a system of democratic autonomy, a political order that promises to provide everyone the greatest say possible that is also compatible with the equal inclusion of others.

This insight is not unprecedented. French philosopher Pierre Rosanvallon argues280 that independent agencies can and do serve as representative agents (of the trusteeship variety281) and provide the neutrality and impersonality that republicans once sought from deliberative legislative bodies. Richard Stewart, in his seminal 1975 essay,282 described in U.S. administrative law a turn towards pluralist interest representation and away rigid applications of the separation of powers doctrine. The interest-group politics of administrative policymaking can, like the interest-group politics of Congressional lawmaking, provide “opportunities for policy proposals to be criticized from a variety of directions, both before and after their implementation.”283 For Stewart, interest group representation might even serve as a new ground for agencies’

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political legitimacy.284 Indeed, the legitimacy ascribed through representation seems to be embraced by agencies themselves. In its own educational literature, the “politically independent” U.S. Federal Reserve System (“The Fed”) asserts that “decentralizing the central bank into twelve districts helped to ensure more voices were represented”285 as it went about its business.

Of course, Theodore Lowi, in his famous 1969 study of interest group representation in administration, did not celebrate agencies’ pluralist politics. He lamented its “irrational” incrementalism and the influence it lent to powerful industry actors. 286 In contrast, Noh points out that agencies enjoy a better capacity than Congress to achieve ideal representative deliberation, given their smaller constituencies and limited subject matter.287 With the concurrent rise in public interest advocacy and civil rights legislation, agencies accommodated a growing array of individual rights by incorporating rulemaking procedures that accept input from diverse civil society representatives.288 More recently, Emerson, 289 Rahman & Gilman290 and Mansbridge291 argue that there is an ongoing, constitutive relationship between administrative agencies and citizens as they collaborate to make regulations. Mary E. Guy, past president of the American Society for Public Administration, characterized the people serving public agencies as “facilitators, interpreters, and mediators of public action”292 – a characterization that could just as easily be attributed to elected representatives. Even Locke, despite his commitment to an organ-body conception of popular sovereignty, theorized a connection between the executive and representation. In his theory of government, it is up to the Prince to create new representative offices if time and social change corrupts the representativeness of extant lawmaking institutions.293

There is a stiff backbone of principle behind these authors’ arguments. As mentioned above, representative systems serve democracy by structuring public contestation, stimulating debate and provoking judgment. They thereby permit disaggregated and diverse citizens to participate in the process of forming collective purposes. One can observe this dynamic within agency decision-making, demonstrated by public reactions following recent U.S. Executive Orders regarding immigration, environmental deregulation, etc. They mobilize objections, enabling citizens to make judgments about agency responses. The public criticism to which agencies are routinely subject are sufficient to limit, at least according to Vermeule and Posner, executive agencies far more effectively than do the tenets of statutory delegation and the separation of powers.294

Moreover, agencies serve as fora for the kind of non-electoral political representation that supplements political equality by calling forth previously ignored or silent constituencies.295 In the past, minority communities excluded from electoral politics fruitfully engaged with administrators tasked with implementing social welfare rights.296 Administrative experiments in participatory budgeting and collaborative governance encourage citizens’ engagement in the infrastructure shaping their lives. 297 They can, in Waldron’s terms, “secur[e] multiple points of access for citizen input” and thus add to the “housing” of the kind of public deliberation that promises to secure democratic autonomy.298

Indeed, administration can, perhaps better than Congress, provide a forum where “conflicts and rendered both comprehensible and solvable” and where the values at stake are sufficiently “specific and understandable to generate opinions and dialogue.”299 Because an elected representative will make a variety of unrelated claims regarding lawmaking in a generalized arena (Congress), the potential exercise of political power can become obscure. In contrast, an agency with a particular subject matter jurisdiction can attract representatives and generate claims that target the specific policies that impact citizens’ lives. They give rise to “affected constituencies,” providing “a point of identification around which [citizens] might coalesce as a ‘people’ or demos defined along some dimensions of common interest.”300 Civil society and public interest representatives, for example, have a better opportunity to exercise judgment on and lodge objections to, e.g., how much pollution is permitted in drinking water (EPA); whether discrimination claims are adequately enforced (Department of Justice); and how policing is executed (“citizen audits” of local departments). Indeed, many social movements target their organizing around agency jurisdictions.301 In other words, agencies provide an opportunity for citizens to form the kind of considered political judgments that new theories of representation value. Indeed, it is agencies that can provide that factual information necessary for citizens seeking to exercise judgment on many matters of public concern.302 One need only consider the usefulness of CDC scientists to democratic deliberation during a pandemic. As a result, agencies, like electoral politics, facilitate the “circuation of judgment and opinion that should unite state institutions and the citizens.”303

Furthermore, agencies themselves serve as representatives of underserved consumer and minority interests.304 For example, the Consumer Financial Protection Bureau (“CFPB”), created in response to the capture and fragmentation of financial regulators in the aftermath of the 2008 crisis, was tasked to protect the consumers of financial products. Typically, consumers are poorly situated to influence banking regulation through normal channels. Accordingly, the CFPB serves not as a neutral bureaucracy, but as consumers’ “proxy advocate” (representative!) that solicits the input of veterans, students and pensioners.305 Meanwhile, financial institutions receive (more than) equal representation in other policy-making locations. The CFPB both educates and solicits the opinions and complaints of those who do not normally possess the capacity to make their voices heard when lawmakers turn their attention to high finance. Indeed, the Progressives who supported New Deal agencies created them precisely to balance public might against the already over-represented “aristocracy of wealth.”306 An agency, serving as a counter-power capable of breaking up monopolies or safeguarding labor rights,307 can speak for the consumers and workers neglected by elected politicians.308 President Franklin D. Roosevelt, in a 1932 campaign speech, expressed this idea in colorful language. He dubbed regulators the “Tribune[s] of the people.”309 During Reconstruction, furthermore, federal agencies spoke for those recently freed from slavery when local governments did not.310

### 2NC—AT: CCS

#### 2] CCS can’t solve climate change – the tech is ineffective and can’t be scaled up without increased environmental destruction

**Brown 21** – a founding editor of Climate News Network, is a former environment correspondent of The Guardian newspaper, and still writes columns for the paper.

Paul Brown, “Carbon capture and storage won’t work, critics say,” Eco-Business, 1/19/21, https://www.eco-business.com/news/carbon-capture-and-storage-wont-work-critics-say/

One of the key technologies that governments hope will help save the planet from dangerous heating, carbon capture and storage, will not work as planned and is a dangerous distraction, a new report says.

Instead of financing a technology they can neither develop in time nor make to work as claimed, governments should concentrate on scaling up proven technologies like renewable energies and energy efficiency, it says.

The report, from Friends of the Earth Scotland and Global Witness, was commissioned by the two groups from researchers at the UK’s Tyndall Centre for Climate Change Research.

CCS, as the technology is known, is designed to strip out carbon dioxide from the exhaust gases of industrial processes. These include gas and coal-fired electricity generating plants, steel-making, and industries including the conversion of natural gas to hydrogen, so that the gas can then be re-classified as a clean fuel.

The CO2 that is removed is converted into a liquid and pumped underground into geological formations that can be sealed for generations to prevent the carbon escaping back into the atmosphere.

Fossil fuel CCS is a distraction from the growth of renewable energy, storage and energy efficiency that will be critical to rapidly reducing emissions over the next decade.

Attempts abandoned

It is a complex and expensive process, and many of the schemes proposed in the 1990s have been abandoned as too expensive or too technically difficult.

An overview of the report says: “The technology still faces many barriers, would only start to deliver too late, would have to be deployed on a massive scale at a scarcely credible rate and has a history of over-promising and under-delivering.”

Currently there are only 26 CCS plants operating globally, capturing about 0.1 per cent of the annual global emissions from fossil fuels.

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Ironically, 81 per cent of the carbon captured to date has been used to extract more oil from existing wells by pumping the captured carbon into the ground to force more oil out. This means that captured carbon is being used to extract oil that would otherwise have had to be left in the ground.

The report also makes clear that the technology has not lived up to expectations. Instead of capturing up to 95 per cent of the carbon from any industrial process, rates have been as low as 65 per cent when they begin and have only gradually improved.

Despite these drawbacks and a number of failed CCS developments in the UK, the British government has just ploughed another £1 billion (US$1.36bn) into more research and development of the technology, and to provide infrastructure. The report says this reliance by government on CCS means it is unlikely to reach its target of zero emissions by 2050.

The report says that CCS features prominently in many energy and climate change scenarios, and in strategies for meeting climate change mitigation targets. These include the approaches backed by the Intergovernmental Panel on Climate Change, the European Commission, the International Energy Agency and the UK Committee on Climate Change.

But it is apparent that the current trend of CCS deployment worldwide has yet to reach the pace of development necessary for these scenarios to be realised.

If CCS is to have a meaningful role in mitigation, deployment would need to accelerate markedly, the report says.

Policy change needed

Friends of the Earth and Global Witness say that because of the clear failure of the technology to live up to expectations there should be a change of emphasis by governments. Policy should be directed towards renewables, particularly solar, onshore and offshore wind, because they have by contrast exceeded all targets in both cost and deployment and provide real hope of solving the carbon dioxide problem.

These now proven renewable technologies, plus battery and other storage ideas and a much-needed energy efficiency drive, will deliver carbon reductions far more quickly and cheaply, the writers say.

The two organisations add: “It is the cumulative emissions from each year between now and 2030 that will determine whether we are to achieve the Paris 1.5°C goal. With carbon budgets increasingly constrained, the report shows that we cannot expect carbon capture and storage to make a meaningful contribution to 2030 climate targets.

“In this context, fossil fuel CCS is a distraction from the growth of renewable energy, storage and energy efficiency that will be critical to rapidly reducing emissions over the next decade.”

## Case

### Inequality Adv

#### Populism is caused by lack of substantive economic and political equity – alt solves but aff doesn’t

Rodrik 18 – Ford Foundation Professor of International Political Economy at the Harvard Kennedy School. His research revolves around globalization, economic growth and development, and political economy.

Dani Rodrik, “Populism and the economics of globalization,” *Journal of International Business Policy*, 2018, vol. 1, https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism\_and\_the\_economics\_of\_globalization.pdf.

THE POLITICAL ECONOMY OF THE BACKLASH

Globalization had a big upside. It greatly expanded opportunities for exporters, multinational companies, investors, and international banks, as well the managerial and professional classes who could take advantage of larger markets. It helped some poor countries – China in particular – rapidly transform farmers into workers in manufacturing operations for export markets, thereby spurring growth and reducing poverty. But the decline in global inequality was accompanied by an increase in domestic inequality and cleavages. Globalization drove multiple, partially overlapping wedges in society: between capital and labor, skilled and unskilled workers, employers and employees, globally mobile professionals and local producers, industries/regions with comparative advantage and those without, cities and the countryside, cosmopolitans versus communitarians, elites and ordinary people. It left many countries ravaged by financial crises and their aftermath of austerity.

Globalization was hardly the only shock which gutted established social contracts. By all accounts, automation and new digital technologies played a quantitatively greater role in de-industrialization and in spatial and income inequalities. But globalization became tainted with a stigma of unfairness that technology evaded. People thought they were losing ground not because they had taken an unkind draw from the lottery of market competition, but because the rules were unfair and others – financiers, large corporations, foreigners – were taking advantage of a rigged playing field.

Many of these consequences were predictable and are not a surprise. The same can be said about the political backlash as well. A number of empirical papers have linked the rise of populist movements – Trump and the right-wing Republicans in the US, Brexit in Britain, far-right groups in Europe – to forces associated with globalization, such as the China trade shock, rising import penetration levels, de-industrialization, and immigration.

Analyzing electoral results across US congressional districts, Autor et al. (2016a, b) have shown that the China trade shock aggravated political polarization: districts affected by the shock moved further to the right or the left, depending which way they were leaning in the first place. Elected Republicans became more conservative, while elected Democrats became more liberal. For Britain, Becker et al. (2016) find that austerity and immigration impacts both played a role in increasing the Brexit vote, in addition to demographic variables and industrial composition. Also analyzing Brexit, Colantone & Stanig (2016) find a much more direct role for globalization. Using an Autor et al. (2013)- type China trade shock variable, they show regions with larger import penetration from China had a higher Leave vote share. They also corroborate this finding with individual-level data from the British Election Survey that shows individuals in regions more affected by the import shock were more likely to vote for Leave, conditional on education and other characteristics.

A second paper by Colantone & Stanig (2017) undertakes a similar analysis for 15 European countries over the 1988–2007 period. It finds that the China trade shock played a statistically (and quantitatively) significant role across regions and at the individual level. A larger import shock is associated with support for nationalist parties and a shift toward radical right-wing parties. Finally Guiso, Herrera, Morelli, & Sonno (2017) look at European survey data on individual voting behavior and find an important role for economic insecurity – including exposure to competition from imports and immigrants – in driving populist parties’ growth. The same variables also affect voter turnout: individuals who experience greater economic insecurity are also less likely to show up at the polls. As Guiso et al. (2017) indicate, the latter result suggests that studies that focus on vote shares alone underestimate the importance of these economic drivers, including globalization shocks.

A question that has attracted little interest to date is why the backlash has taken the particular form it has in different countries. Most (but not all) populist movements in the current wave are of the right-wing variety. These emphasize a cultural cleavage, the national, ethnic, religious, or cultural identity of the ‘‘people’’ against outside groups who allegedly pose a threat to the popular will. In the US, Donald Trump has demonized at various times the Mexicans, Chinese, and Muslims. In Europe, right-wing populists portray Muslim immigrants, minority groups (gypsies or Jews), and the faceless bureaucrats of Brussels as the ‘‘other.’’

An alternative variety of populism revolves around a largely economic cleavage, the wealthy groups who control the economy and define its rules versus the lower income groups without access to power. The original American populism of the late nineteenth century was of this variety, focusing its opposition on the railroad barons and the Northeastern financial elite. Bernie Sanders’ presidential campaign in 2016 took a similar form. In Europe, there are a few left-wing populist movements, of which Greece’s Syriza and Spain’s Podemos are the best known. In Latin America, by contrast, populism has long taken mostly a leftwing form.

In Figure 4, I provide some systematic evidence on the dynamics of support for populist parties around the world since the 1960s. The figure shows the aggregate vote shares of populist parties in countries with at least one populist party. I distinguish between left-wing and right-wing populists and between Europe and Latin America. (The US presidential election of 2016 is not included.) The Appendix discusses data sources and parties/countries covered.

What jumps out of Figure 4 is the sharp contrast between the patterns of populism in Europe and Latin America. In Europe, the rise of populism is very recent and swift – from below 5 percent of the vote in the late 1980s to more than 20 percent by 2011–2015. Moreover, this increase is driven exclusively by right-wing parties. The left-wing populist vote share remains throughout well below 5 percent of the aggregate electorate in the countries included. By contrast, left-wing populism has always been strong in Latin America, with vote totals between 15 and 30 percent. It also has experienced a recent, if less marked, rise. Right wing populism has remained at very low levels in Latin America.

What explains the predominance of right-wing populism in Europe today, compared to the predominance of its left-wing variant in Latin America? To shed some light on this question, it helps to think of the rise of populism as the product of both demand- and supply-side factors at work.24

On the demand side, the distributional and other economic fault lines created or deepened by globalization generate potential public support for movements that position themselves outside the political mainstream and oppose established rules of the game. But the economic anxiety, discontent, loss of legitimacy, fairness concerns that are generated as a byproduct of globalization rarely come with obvious solutions or policy perspectives. They tend to be inchoate and need to be channeled in a particular programmatic direction through narratives that provide meaning and explanation to the groups in question. That is where the supply side of politics comes in. Populist movements supply the narratives required for political mobilization around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are the people who are doing it to you.

In Mukand & Rodrik (2017), we provide a model where political conflict can revolve around different axes. There are three different groups in society: the elite, the majority, and the minority. The elite are separated from the rest of society by their wealth. The minority is separated by particular identity markers (ethnicity, religion, immigrant status). Hence there are two cleavages: an ethnonational/cultural cleavage and an income/social class cleavage. These cleavages can be orthogonal or overlapping, producing different patterns of alliances and political outcomes.

With some simplification, we can say that populist politicians mobilize support by exploiting one or the other of these two cleavages. The ‘‘enemies of the people’’ are different in each case. Populist who emphasize the identity cleavage target foreigners or minorities, and this produces right-wing populism. Those who emphasize the income cleavage target the wealthy and large corporations, producing leftwing populism.

It is reasonable to suppose that the relative ease with which one or the other of these cleavages can be targeted depends on their salience in the everyday experience of voters. In particular, it may be easier to mobilize along the ethno-national/cultural cleavage when society is experiencing an influx of immigrants and refugees with dissimilar cultural and religious identities. Then economic anxiety can be channeled into opposition to these groups. Immigrants and refugees can be presented as competing for jobs, making demands on public services, and reducing public resources available for natives. Indeed, a major source of support for farright parties in Europe has been the fear that immigration will erode welfare state benefits, a fear that is heightened in countries experiencing austerity and recession (see for example Hatton, 2016). Cavaille & Ferwerda (2017) find that support for right-wing populist parties is very responsive to perceived competition with immigrants for in-kind benefits, in their case public housing.

An important implication of this reasoning is that even when the underlying shock is fundamentally economic the political manifestations can be cultural and nativist. What may look like a racist or xenophobic backlash may have its roots in economic anxieties and dislocations.25 The supply side of politics – the narrative on offer – matters a great deal. This is a point that is often overlooked in current diagnoses. For example, it is not easy to know whether Trump’s victory represents an economic or cultural phenomenon without disentangling the demand and supply sides – the underlying grievances, on the one hand, and his narrative, on the other.26

#### Economic inequality and elite entrenchment in government explains populism

Putzel 20 – Professor of Development Studies and former director of the Crisis States Research Centre at the London School of Economics.

James Putzel, “The ‘Populist’ Right Challenge to Neoliberalism: Social Policy between a Rock and a Hard Place,” *Development and Change*, vol. 51, no. 2, 19 February 2020, https://onlinelibrary.wiley.com/doi/full/10.1111/dech.12578.

The Return of Extreme Levels of Inequality

The reforms unleashed by the Reagan–Thatcher revolution of the early 1980s undid much of the redistributive fiscal and social policies that had characterized the ‘New Deal’ and post-World War II era. They led, after nearly four decades, to an enormous increase in inequality in most developed and developing countries. With tax cuts, expanded opportunities for investment in low-wage economies and for speculation in financial markets and almost unlimited opportunities for luxury consumption, the top 1 per cent of income earners in the developed countries captured an ever increasing share of income within their countries (Galbraith, 2002; Milanovic, 2003; Palma, 2009, 2011; Piketty, 2014). Through processes of privatization of state assets, trade liberalization, the radical curtailment of trade union rights, the promotion of flexible labour markets and the deregulation of finance, the reforms were designed to unleash the potential of markets to deliver economic growth. By encouraging finance to move much more freely around the globe, the reforms saw the destruction of many old industrial activities and communities in the developed counties.

This pattern of globalization saw the bifurcation of the developing countries. Those that had states capable of launching export-oriented industrialization (most remarkably so among the ‘developmental states’ in East Asia) benefited. The majority of developing countries, where moves towards industrialization were arrested or even set in reverse (Arrighi, 2002; Easterly, 2001; Mkandawire, 2005; Palma, 2003: 134–36), suffered.

Trade liberalization, the privatization of state assets and fiscal reforms favouring the owners of wealth allowed elites to maintain their position, or greatly improve it, with opportunities in the globalized economy. Even as growth returned after the millennium, it was founded either in the service sector or primary commodities trade, with limited expansion of manufacturing or agricultural production. The impact of post-1980 neoliberal reforms benefited the wealthy and the upper-middle classes, whose numbers expanded with growth in the service sector. However, lower-middle classes and workers in the formal sector, especially those whose families once had employment in the public sector or in embryonic manufacturing, as well as poor farmers and farmworkers, enjoyed fewer benefits from neoliberal reforms (Petras, 1999). Already high levels of inequality were either frozen or worsened (World Inequality Lab, 2018). There has been a rapid process of urbanization in many lower- and middle-income countries, but it has been urbanization without industrialization, seeing a vast expansion of informal economic activities as well as increased levels of crime (World Bank, 2017).

The financial crisis of 2007–08 marked a turning point in public awareness, particularly in the rich countries, about the extent of inequality that had evolved in the decades of accelerated globalization. The measures taken to avoid economic meltdown after the financial crisis hardly had an impact on the privileged position of the beneficiaries of globalization. The pattern of unequal distribution of the benefits of globalization, experienced to differing degrees among the developed and developing countries, contributed enormously to the sense of alienation and anger felt by old working class communities, small business owners and much of the middle class in the rich countries, and the lower-middle class and worker and farmer families in middle-income countries of the developing world (Koo, 2016; MGI, 2016).

The sharp rise in inequality and the destruction of old sites of stable industrial employment that had accompanied globalization and the financialization of capitalism, led to widespread popular resentment in both developed countries and middle-income countries in the developing world, and this provided a fertile terrain for the rise of right populist politics.

Vilification of the State and Politics: Social Policy as Service Delivery to Customers

The political legacies of neoliberalism, which involved the commodification of politics and social services, have led to widespread popular cynicism towards established political elites, rendering societies much more susceptible to the demagogic politics of the populist right. During the decades of neoliberal dominance there was the promotion of an entire intellectual architecture that modelled public authority, or the realm of the state, as a site of individual self-seeking behaviour, prone to rent seeking and corruption, as well as ‘free riding’ and inefficiency. The ‘rational choice’ theory evolved from neoclassical economics came to occupy a prominent place in the study of states and politics.4 Criticisms were mounted toward the direct participation of the state in economic activity; thus prescriptions of privatization of public assets and ‘outsourcing’ of administrative activities and ‘contracting out’ of service delivery were widely promoted in both the developed and developing countries. Analytical and prescriptive frameworks of ‘New Public Management’ were promoted with the objective of increasing efficiency in redirected public agencies (Hood, 1991).

This was not only a change in the way public authority was conceptualized, but actually a profound transformation in how states were organized and in the behaviour of both administrative and political authorities. States became ‘service providers’ and citizens became ‘customers’. The practice of politics also significantly changed as voters too were customers in the ‘political marketplace’. Notions of public administration as sites of ‘public service’ and politics as a ‘vocation’ were displaced by rational actor models, which increasingly informed organizational design and measurements of success and failure. The same occurred in what was previously known as the ‘voluntary sector’ re-invented as ‘non-governmental organizations’ (NGOs) that became increasingly ‘professionalized’ and organized along the same lines. Whole new ‘for profit’ businesses developed to carry out what once was considered the provision of public services. While political lobbying activities had long existed, a new sector of political lobbying firms emerged from the 1980s in Washington DC, spreading to political capitals around the world. The wholesale commodification of state and political activities became a self-fulfilling prophecy. Former prime ministers and presidents, senior politicians and administrators came to command hitherto unheard-of salaries after leaving public office or public service, not least on the boards of financial organizations and lobby firms.5 They joined the ranks of ‘globalized elites’, symbolized so appositely in the annual meetings of the World Economic Forum in Davos.

In a world of growing economic inequality, where people feel betrayed by established political parties, it is understandable that they have responded enthusiastically to the right populists’ calls to ‘drain the swamp’ of privileged elites at the heart of governments run on neoliberal principles.

Social Policy in the ‘Mature’ Phase of Neoliberalism: Market-friendly Individual Rights

More controversially, the neoliberals’ approach to social policy, based on granting rights to the poor, minorities and women, has created reserves of resentment among middle-class and working people who have experienced a decline in their own economic prospects. It is at least partly by stoking this resentment that right populists have built mass followings in recent years. During the second phase of neoliberalism, roughly from the mid-1990s, new attention was devoted to responding to civil society actors, already cowed by neoliberal authorities, who advocated reforms to alleviate the devastating economic and social impact of early neoliberal pro-market reforms (Fine and Saad-Filo, 2017: 695). In the domain of international development, on top of the hard-line prescriptions for structural adjustment and the social protest they generated, moves were made to make pro-market strategies more palatable. This involved the launching of ‘Voices of the Poor’, the turn to institutions and ‘good governance’, the endorsement of ‘human development’, ‘poverty reduction strategy papers’, ‘mainstreaming gender’ and eventually the Millennium Development Goals, followed by the Sustainable Development Goals.

It was this evolution during phase two neoliberalism that came to define social policy for the neoliberal era. Targets for poverty reduction, gender equity, access to health and education were to be achieved through aid and domestically funded targeted programmes with such delivery tools as conditional cash transfers (CCTs), none of which contradicted the market-oriented nature of neoliberal strategies. Saad-Filho (2015: 1227) documents the successfulness of the original CCT, the Programa Bolsa Família in Brazil, in providing ‘substantial income support to the poorest’, but he argues that long-term and widespread progress would have required ‘universalization and de-commodification of social provision’.

The changes in the development framework and the evolution of social policy under phase two neoliberalism were designed to cushion, but not undermine, the financialization of capitalism and were functional to the consolidation of the neoliberal order. In fact, these changes could be understood as a great triumph of neoliberalism since phase two, which roughly began in the early 1990s, corresponded to the final surrender of social democracy to the hegemonic neoliberal project. In country after country, social democratic parties and thinkers (Giddens, 1998), accepted the edict of TINA (‘there is no alternative’) and the logic of neoliberalism. This was when Tony Blair and Gordon Brown and their ‘New Labour’ party in the UK, Bill Clinton's Democratic Party in the US and Gerhard Schröder's Social Democratic Party in Germany not only surrendered to the reigning ideology by adopting it (with its softer ‘third way’ face), but actively implemented the agenda of phase two neoliberalism.

This evolution in neoliberal social policy was related at a deeper level to the move among neoliberal-dominated states to recognize a panoply of social and political rights, as long as such a move would further the consolidation of markets. Nancy Fraser (2009) demonstrated the ways in which ‘second wave feminism’, in its far-reaching critique of the patriarchal character of post-World War II state-managed capitalism, was accommodated and used to extend rights to women that facilitated their participation in labour markets and patterns of social reproduction consistent with the neoliberal project. Other feminist theorists and social scientists dispute such an interpretation, either by underlining gains of women in the process or insisting on the deleterious impact of neoliberalism on women and the feminist cause (Eschle and Maiguashca, 2018; Wilson, 2015; Yoo, 2011). However, the point is that the decades of neoliberal dominance saw a widespread increase in women's participation in the workplace, the development of microcredit programmes that shifted women's position in the power dynamics of households, programmes for women to access family planning and new legal measures (of course differentially achieved across countries) to formally target sexual harassment, gender discrimination in the workplace and violence against women (World Bank, 2019).

Kymlicka (2013) provides a similar argument about the pattern of recognition of ethnic minority rights and what he ends up calling ‘neoliberal multiculturalism’. While during the early days of neoliberalism, there was a widespread rejection of multiculturalism as overly state interventionist, over time there was an increasing enthusiasm among political authorities to endorse multicultural practices. This was in part a response to civil society organizations demanding recognition of ethnic rights and an end to discrimination, but it also became clear that the implementation of multiculturalism advanced the consolidation of markets everywhere. He documents how the World Bank became a strong advocate in the early 1990s on the grounds that ethnicity is a source of social capital, which enables deeper market participation. This was manifested differently in terms of indigenous ethnic groups and immigrants: ‘Immigrant transnationalism, then, is an asset in an increasingly global marketplace — it facilitates global trade’ (Kymlicka, 2013: 110).

In the developed countries, the widespread practice of recognizing the individual rights of women, ethnic minorities and immigrants, and the associated ‘political correctness’ adopted by reigning political elites, has likely contributed as much to the rise of right populist politics as the patterns of income inequality unleashed by neoliberalism. Working-class and many middle-class families saw their worlds of work and their communities eviscerated by globalization. On top of this, white working-class men saw their traditional position of authority over women, their ‘superiority’ over ethnic minorities and the unorganized poor put into question by the recognition of these rights, creating widespread feelings of resentment against liberal elites in power.

In middle-income developing countries, where workers, farmers and lower-middle-class people suffered from neoliberal structural adjustment and financial stabilization programmes, elites had opportunities to maintain or even increase their wealth and status in the globalized economy. By the time that phase two neoliberalism emerged, elites endorsed the ‘rights-granting’ practices that accompanied new programmes of ‘good governance’ and ‘institutional reform’ financed in large measure by foreign aid. Neoliberal social policy programmes were geared towards the ‘poorest of the poor’, with much less attention to urban workers, lower-middle-class families in the urban service sector, or rural farmers.

As growth slowly picked up, fast-expanding urbanization without industrialization saw a proliferation of criminal activities in cities in situations where policing budgets were weak, not least because of the low tax efforts and regressive patterns of taxation. Crime was experienced differently by elites and upper-middle-class people in urban gated communities than by those who lived in more open city neighbourhoods. International development agencies and NGOs, backed by national governments, elite philanthropic initiatives and the growing numbers of middle-class professionals with permanent jobs in the NGOs, propagated ideas of gender equality, social inclusion and the due process of law. But in many countries pro-poor programmes and the recognition of social rights rang hollow among the lower-middle class and the working urban and rural poor, particularly as they experienced rising levels of income inequality, crime and daily hardship from the lack of adequate transport and other public services.

Right populist politics in both rich and middle-income countries have mobilized popular support among those angered by what they see as hypocritical liberal elites in government. Many of the hard-won gains made by women, minorities and the poor were achieved in negotiations between civil society organizations and state officials, rather than through widespread social movements, so in many cases there was little sign of a deep social consensus, or social transformation, over the rights won. Neoliberal elites presided over new forms of ‘political correctness’ when it came to minority and gender rights, but it is questionable how far these changes have been internalized by ordinary people in society.

In sum, the market-oriented policies neoliberals have pursued have led to widespread popular anger over exacerbated economic inequality and the destruction of jobs, communities and social aspirations. The neoliberal reorganization of the state and politics as sites of purely self-interested behaviour and the accompanying commodification of social services have greatly increased the cynicism of populations towards public authority and established political organizations, making them willing audiences for calls to ‘drain the swamp’. The social rights and social policy agenda of ‘mature’ neoliberalism, which recognized the rights of women, minorities and immigrants and targeted social programmes to them, as long as they were consistent with the promotion of markets, has been perceived by many people not only as unfair, but as an assault against traditional norms. By the early 2010s, in the wake of the financial crisis, all this has made the lower and middle classes feel insecure even in their homes and communities, creating widespread receptiveness to the divisive messages of the right populists.

#### More examples of why antitrust can’t solve equality – A] College financial aid

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1213-1215, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

1. College Financial Aid

In 1958, eight Ivy League schools and MIT (the Ivies) embarked on a collaborative scheme to allocate scarce financial aid resources to students based on need rather than merit.174 The schools formed an “Ivy Overlap Group” that involved financial aid personnel from the nine schools collectively determining the financial need profile of all commonly admitted students.175 The schools agreed that they would provide financial aid based on need only—merit-based aid was prohibited.176

In 1991, the Justice Department brought an antitrust lawsuit against the Overlap program, characterizing it as a form of price fixing for tuition.177 The eight Ivy League schools immediately entered into a consent decree agreeing to abandon the Overlap program.178 MIT soldiered on alone, ultimately winning an appellate decision that required a full rule of reason determination of the purposes and effects of the overlap system.179 On remand, having established an important precedent with little immediate practical importance since the other Ivies had withdrawn, MIT also settled on terms preventing the Overlap program from continuing in the future.180

Important to the court of appeals’ decision was MIT’s “alleged pure altruistic motive and alleged absence of a revenue maximizing purpose.”181 MIT justified the program as enhancing educational opportunities for economically disadvantaged and minority students.182 Financial aid competition for students with the highest grades and test scores inevitably resulted in scarce financial aid resources being allocated to wealthy students who did not need the money to attend college. By agreeing to match financial aid to need and compete on nonprice factors such as educational quality and fit, the schools could make an elite college education affordable for a wider socioeconomic group.183

The abandonment of the Overlap program arguably had regressive effects on admissions to elite higher education programs. According to the president of Yale University, the Overlap program “served the good social purposes of making sure that a limited amount of financial funds went to the neediest students.”184 MIT argued that the Overlap program had dramatically increased the percentage of minority enrollment in its student body in the three decades it was in place.185 Over a decade after the Overlap program ended, the student bodies at Ivy League schools remain overwhelmingly drawn from wealthy families.186 Antitrust enforcement against the Ivies is surely not the only cause of this inequality but it may have contributed to it.

#### B] College athletics

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1215-1217, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

2. College Athletics

The second example involves the NCAA’s rule prohibiting member institutions from compensating their student-athletes, which has the practical effect of keeping NCAA member schools from providing lucrative compensation to a handful of men’s football and basketball players. A currently pending antitrust class action lawsuit filed by a high-profile sports labor attorney, Jeffrey Kessler, alleges that the NCAA rule amounts to price fixing.187 Under current NCAA rules, member schools may grant athletic scholarships and cover various student expenses such as room, board, housing, health insurance, and athletic clothing but may not pay their student-athletes compensation for services rendered.188 According to Kessler, “[t]he main objective is to strike down permanently the restrictions that prevent athletes in Division I basketball and the top tier of college football from being fairly compensated for the billions of dollars in revenues that they help generate.”189 In other words, NCAA Division I football and basketball players would become school employees compensated for their labor at market-determined rates.

If successful, this lawsuit would likely exacerbate various inequalities due to the role that high revenue–generating sports currently play in subsidizing other educational activities.190 Most universities have made their athletic departments financially independent from the rest of the university, allowing them to keep their own revenues and reinvest them in athletic programs.191 The high commercial value sports—particularly football and basketball—generate far more income than they cost (in large part because they rely on free labor). For example, according to the Department of Education’s data, in 2013 the top twenty-five football programs had expenses of $561 million and revenues over $1.2 billion.192 The effect has been the massive subsidization of athletic programs with less commercial market appeal but that still afford important educational opportunities. In particular, the NCAA system has enabled athletic departments to make significant investments in women’s athletic programs, some of which are quite expensive to run but have little commercial value.193 If the antitrust challenge is successful and NCAA schools are forced to pay their football and basketball athletes market wages, there will be considerably less income available to subsidize less popular sports, especially women’s sports.194

The gender equality implications of reducing the funding for women’s collegiate athletics could be felt well beyond college playing fields. Empirical research by Betsey Stevenson has shown that a 10% increase in female sports participation in high school generates a 0.8% increase in the probability that a female attends four years of college and a 1.9% increase in the probability that a female will be employed.195 She also found that this same 10% increase in opportunities to play sports resulted in greater female participation in traditionally maledominated occupations, particularly in high-skill professions.196 If similar effects result from investments in collegiate women’s athletics, a collateral consequence of successful antitrust enforcement against the NCAA could be to diminish women’s achievements in the workplace.

### Democracy

#### Finishing card

Bagley 19 – Professor of Law, UMich

Nicholas Bagley, Professor of Law, University of Michigan Law School, ARTICLE: THE PROCEDURE FETISH, 118 Mich. L. Rev. 345 (December, 2019)

Apart from increasing costs, adhering to procedures also **delays agency action**. That’s obviously true in a narrow sense: every task takes time. But the problem runs deeper, as Herbert Simon’s work on organizational decisionmaking suggests. Any agency must juggle a host of competing priorities, which means employees and political appointees with managerial responsibilities tend to oversee multiple projects. But complying with legally mandated **procedures requires** the **time and attention** of those harried federal managers, creating organizational bottlenecks. 99 The problem is exacerbated because government agencies **tend to have too few staff to carry out** their **many responsibilities**. And so even a minor procedural hurdle can become a source of delay, and multiple procedural rules can introduce multiple bottlenecks.

**Delay** then **affords** groups opposed to agency action **more time to mobilize against it.** They can lobby Congress, the White House, and the agency itself, whether by mustering coalitions to support their cause, channeling financial contributions to key political officials, or threatening to withhold support for future initiatives. 100 As delays mount, changes in the political weather—the replacement of key political appointees, a midterm election that changes the odds of congressional oversight, the election of a new president—give those groups yet another opportunity to thwart agency action. In agencies as in legislatures, limited bandwidth and the need to sustain political capital means that, for any reasonably complex action, the window of opportunity will open only briefly. **Delay allows that window to be shut before the agency can act.**

Procedural rules can also empower gatekeepers to stop agency action dead in its tracks. **Courts are the most obvious example**. For salient actions with sizable economic consequences, judicial review has become, in effect, the final step in the agency process. And the **risk of losing in court is real**: empirical research indicates that about one in three challenges to agency action succeeds on some ground or another. 101 In all of those cases, the agency must either respond to the court’s concerns, with the attendant resource diversion that entails, or abandon the action altogether. Either way, judicial review systematically **depletes agency resources and frustrates agency action**. 102

The **uncertainty** of judicial review **also works against agencies** that seek to make the **most sensible use of their resources.** On the margin, rational agencies will shy away from actions that are likely to provoke litigation 103 (or, alternatively, soften those actions to mitigate litigation risk104), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that’s an especially good use of their time.105 **Courts thus distort agency judgment** even when they don’t review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it. 106 Depending on the year, that means that about four dozen employees107 working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions.108 The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that “[m]any, many rules linger at OIRA long past the 90- or 120-day deadline” by which it is supposed to complete its review.109 “Some rules have been at OIRA for years.”110 Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, “a judgment that important aspects require continuing substantive discussion.”111 Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a reactive institution, one with the power to reject agency action but little capacity to spur it. 112 Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism **drains agency resources, introduces delay, and thwarts agency action**. 113 To that extent, it puts a thumb on the scale in favor of the status quo;114 by itself, that’s enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state?115 If that were the case, administrative law’s apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn’t be an asymmetry at all. Without question, administrative law can entrench Democratic achievements.116 In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending Obama-era rules without observing procedural niceties. 117 For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, **proceduralism favors a libertarian agenda over a progressive one.**

#### Applies to the aff too – Courts are structurally biased against worker rights---unaccountable judges will circumvent.

**NELA 12**, National Employment Lawyers Association, “JUDICIAL HOSTILITY TO WORKERS’ RIGHTS: THE CASE FOR PROFESSIONAL DIVERSITY ON   THE FEDERAL BENCH,” https://exchange.nela.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=952ae48d-9dc1-4377-935e-a38ce5241d8e&forceDialog=0

FEDERAL COURTS HAVE GROWN INCREASINGLY HOSTILE TO EMPLOYEES

Significant research confirms that plaintiffs bringing employment discrimination claims are far less likely to prevail than plaintiffs in non‐employment cases.  This double standard is bolstered by recent empirical reports:

• From 1979‐2006, the plaintiff win rate for employment cases (15 percent) was lower than non‐employment cases (51 percent).

• For cases going to trial, employment discrimination plaintiffs (28.47 percent) won less often than other plaintiffs (44.94 percent).

• Employees succeeded on appeal only 9 percent of the time, while employers won 41 percent of appeals.

TOO FEW FEDERAL JUDGES POSSESS PROFESSIONAL DIVERSITY

The reality is that employees rarely stand before a federal judge who possesses any professional experience representing plaintiffs in labor, employment, or civil rights cases.  A study of the federal judiciary prior to the beginning of the Obama Administration confirms this reality:

• Only five out of 162 (3.1 percent) federal appellate judges had substantial legal experience working for non‐profit organizations.3  None of these judges had worked for a non‐profit organization more recently than 1981.

• Only five out of 162 (3.1 percent) active federal appellate judges had worked for organizations or government agencies that enforce civil rights.

• None had substantial experience as in‐house counsel for a labor union.

Only three federal appellate judges had worked for organizations that represent low‐ income Americans, and only one appeared to have had substantial experience advocating for consumer rights

JUDICIALLY CREATED BARRIERS MAKE IT MORE DIFFICULT FOR PLAINTIFF‐ EMPLOYEES TO PREVAIL

Anti‐worker bias in the courts also manifests itself through judicially created procedural and substantive legal barriers applicable only to employment cases.  These judge‐crafted obstacles, such as the ones highlighted below, are applied at the apex of judicial discretion, including on the pleadings, at summary judgment, during post‐trial motions, and on appeal.

• “Stray Remarks” – Allows judges to disregard discriminatory statements made by supervisors or other employees as merely “stray remarks,” and therefore not evidence of discrimination.

• “Business Judgment” – Permits judges to defer to an employer’s “business judgment” instead of carefully examining whether an asserted justification for an adverse employment action was pretext for unlawful discrimination.  Some courts have gone so far as to accept the defendant’s asserted reasons for the adverse employment action being challenged, even when the employer’s explanation is harsh or unreasonable.

• “Self‐Serving Witness” – Enables judges to presume the credibility of testimony from defense witnesses with a vested interest in helping employers avoid liability, while categorizing assertions by or on behalf of plaintiff‐employees as purely “self‐serving.”