# 1NC vs Kentucky AK

## OFF

### 1NC – Private Enforcement PIC

#### Text: The United States federal government should allow relevant agencies to sue to enjoin anticompetitive effects in the markets of countries that agree to a reciprocal framework regarding competition law and recover single damages.

#### The CP avoids private enforcement—private suits are an inextricable part of antitrust liability—public enforcement is sufficient

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Expanding liability to private plaintiffs is bad—turns case and undermines solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

### 1NC – T

#### 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.

#### To prohibit is to protect parties against a type of business – penalties are distinct

Craco et al. 92 – Attorney for American Institute of Certified Public Accountants

Louis A. Craco, Brief of American Institute of Certified Public Accountants as Amicus Curiae in Support of Respondent, Reves v. Ernst & Young, 1992 U.S. S. Ct. Briefs LEXIS 452, Supreme Court of the United States, June 1992, LexisNexis

The Senate Report also notes that, by "effectively remov[ing] the criminal figure from the particular corrupt organization[,]" the "prohibition is not a penalty against any individual[,]" but "instead a protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest." S. Rep. No. 91-617, supra, at 82 (emphasis added).

#### “Business practice” requires a pattern of conduct---that excludes single acts like mergers.

Lucas 88 – Judge, California Supreme Court

Malcolm Millar Lucas, Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147, Supreme Court of California, October 1988, LexisNexis

\*\* Italics in original.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent *business practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the Barquis court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

#### “Expand” means to enlarge from a first to a second larger dimension.

White 07 – United States District Court, California Northern

Jeffrey S. White, Medtronic, Inc. v. W.L. Gore & Assocs., 2007 U.S. Dist. LEXIS 80038, United States District Court for the Northern District of California, October 2007, LexisNexis

8. "Expand" and variations.

Medtronic contends that the Court should construe this term, and its variations, to mean "enlarge from a first to a second larger dimension." Medtronic's proposed construction is in accord with the plain meaning of the term "expand." See, e.g., Webster's Ninth New Collegiate Dictionary at 436 ("to open up; to increase the extent, number, volume or scope of'). Gore, in contrast, argues that the Court should construe this term, and its variations, to require that the device expanded is a "low memory metal stent," which is expanded by a balloon rather than by its own resilience. For the reasons previously stated, the Court rejects Gore's proposed construction.

The Court finds further support for its conclusion from the claims of the '062 Patent, which do not contain the "balloon-expandable" limitation proposed by Gore. In contrast, dependent claim 2 of the '219 Patent does contain such a limitation, whereas independent claim 1 of that patent, does not. (See Bianrosa Decl., Ex. 6 ("219 Patent, 8:2-I 1.) Similarly, dependent claim 15 of the '828 Patent requires the use of a balloon, whereas claim 14 of the '828 Patent, from which claim 15 depends, contains no such limitation. ('828 Patent, 8:29-59.) Moreover, the use of the balloon in the dependent claims is the only meaningful distinction from the independent claims. Thus, the presumption of claim differentiation weighs against Gore's proposed construction. See SunRace Roots, 336 F.3d at 1303.

Accordingly, the Court construes the term "expand" (and its variations) to mean: "to enlarge from a first to a second larger dimension."

#### Increase means to make greater.

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

#### Violation – the aff only prohibits conduct in the narrow circumstance that countries agree to a condition – that means thei aff doesn’t prohibits conduct across the board AND that the aff might not lead to an increase

#### Vote neg—

#### A] Limits— small tweaks to AT explode neg prep burden

#### B] Ground— core DAs are based on broad prohibitions

### 1NC – Antitrust DA

#### Frenzy of deals now because Biden’s antitrust push won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Immediately expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Internal link goes one way—large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Tech innovation prevents nuclear conflict—US leadership key

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

### 1NC – Comity CP

#### The United States federal government should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws pursuant to a prescriptive comity rule.

#### Uncertainty regarding extraterritorial application of the Sherman Act means foreign nations will enact blocking statutes in the status quo – that causes trade uncertainty and undermines the ability of businesses to effectively invest in R&D – amending the FTAIA to incorporate a robust international comity analysis solves.

Kava 19 – J.D./M.B.A. Candidate, 2020, University of Maryland Francis King Carey School of Law and Johns Hopkins University Carey School of Business

Samuel F. Kava, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity,” Journal of Business & Technology Law, Vol. 15, Issue 1, 2019, HeinOnline

However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect"162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies-i.e. the U.S. Department of Justice and the Federal Trade Commission-have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the International Guidelines-a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States."163 The International Guidelines have taken the broadest approach in determining if conduct is "direct"-finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"-and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.164 Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with Apple v. Pepper, foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, the adverse economic effects may be worse if foreign nations pursue modern blocking statutes. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and the economy as a whole will be adversely affected.

Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the overall health of the global economy. The only certainty is that trade will slow down as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.

#### The aff’s standard spills over and wrecks cooperation in areas beyond cartels.

Connolly 15 – Partner in the Washington, D.C. office of GeyerGorey, LLP

Robert E. Connolly, “Why the Motorola Mobility Decision was Good for Cartel Enforcement and Deterrence,” CPI Antitrust Chronicle, January 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2559149

A. What’s Good for the Goose…

Another concern I have related to the reach of the FTAIA is “what’s good for the goose is good for the gander.” Many foreign companies do business in the United States, either directly or through subsidiaries. What would the reaction be of a U.S. company, for example, if it was hauled into court in China for sales made in the United States to a Chinese subsidiary because the subsidiary operating in the United States felt the laws (courts) in China would be more favorable? The quote below, while in relation to FCPA enforcement, expresses my concern better than I can:

It’s most certainly not good economics that one court jurisdiction gets to fine companies from all over the world on fairly tenuous grounds. Who would really like it if Russia’s legal system extended all the way around the world? Or North Korea’s? And I’m pretty sure that the non-reciprocity isn’t good public policy either. Eventually it’s going to start getting up peoples’ noses and they’ll be looking for ways to punish American companies in their own jurisdictions under their own laws. And there won’t be all that much that the U.S. can honestly do to complain about it, given their previous actions.17

B. Cooperation in Areas Beyond Cartels

Continued cooperation among enforcement agencies isn't just important in the areas of cartels, but also in mergers and other competition conduct cases. Thomas O. Barnett, recent head of the Division, stated that global antitrust enforcement could create “burdensome requirements” if “procedures and substantive antitrust analysis diverge across countries, which can lead to inconsistent or even incompatible results.”18 And, in Europe, Joaquín Almunia, the former European Commissioner for Competition, voiced a similar concern, “In this setting, our ability to protect competition on the merits, foster innovation, and keep markets open and fair will depend on how well we manage to establish a common set of principles and goals for our enforcement work.”19

If the United States is seen as a competition bully, the blowback in other areas besides cartels could be far reaching. Of course, core principles should not be abandoned. So, for example, the United States will likely continue to disagree with partners about the treatment of resale price maintenance. But the ability of a U.S. parent to stand in the shoes of its foreign subsidiary in order to press damages claims in the United States is not a core principle. In that area companies may have to simply “vote with their feet” and not set up foreign subsidiaries. An even more simple solution, and simple is usually better, would be for the U.S. parent to make purchases if it does not want to have to seek antitrust remedies under the laws of the country in which its subsidiary is are operating.

#### Flexible extraterritorial regulation solves existential risks.

**Kent 16**

Dr. Randolph Kent, Director of the Humanitarian Futures programme at King’s College London, Senior Research Associate of the International Policy Institute, Fellow at The Policy Lab, long-time senior UN official, Joanne Burke, and Amanda Taylor, King’s College London, EXPLORING ALTERNATIVE WAYS OF UNDERSTANDING HUMANITARIAN CRISES AND SOLUTIONS, http://www.humanitarianfutures.org/wp-content/uploads/2017/10/Alternative-Humanitarian-Paradigm-Final-4-July-2016s.pdf

Never before have we been able to **disrupt the fundamental processes of Earth’s ecology**, and never before have we created **social, economic and technological systems** – from **continent-wide industrial agriculture** to the **international financial system** – with today’s **enormous** complexity, **connectedness** and **speed of operation**. Whether the issue is **drug resistant diseases** or **shiploads of migrants** dumped on our shores, our problems **spill across geographical** and intellectual **boundaries**, their complexity often exceeds our wildest imaginations, and they **converge and intertwine** in totally unexpected ways. The **real danger of the 21st century** is ‘**synchronous failure**.’1

Introduction: The Copernican challenge Nicholas Copernicus at the beginning of the 16th Century announced his theory that the earth was not at the centre of the universe, but actually rotated around the sun. This proposition, though resisted initially by the establishment, ultimately formed an alternative basis of knowledge and understanding about our universe that continues today. 1 Presentation by Dr. Thomas Homer-Dixon, of the University of Toronto’s Center for the Study of Peace and Conflict, ‘Synchronous Failure: the Real Danger of the 21st Century’, for the US Congressional bi-partisan study group on ‘Security for a New Generation’, 5 December 2002, US Capital, Washington, DC. The underlying assumptions upon which knowledge and the search for knowledge are based are generally referred to as paradigms. The search for alternative paradigms is intended to improve both understanding and explanations by challenging the assumptions that underpin present conceptual constructs. It is not about improving understanding and explanation by building upon existing assumptions, but rather by proposing alternative assumptions that might provide different frameworks for ordering evidence that leads to knowledge.2 This note comes at a time when there is growing concern that the present humanitarian sector may not be adequate to meet the crises – the disasters and emergencies -- of the present, let alone the future. Directly and indirectly a series of global consultations and meetings, including the World Humanitarian Summit, have been seeking ways to make humanitarian action more relevant to ever growing types, dimensions and dynamics of humanitarian threats. And, while there has been a wide spectrum of suggestions aimed at improving the sector, this spectrum is nevertheless sustained by a traditional set of assumptions that might be described 2 Two key figures in the understanding of paradigms and the assumptions that sustain or challenge them are Thomas Kuhn, The Structure of Scientific Revolutions, University of Chicago Press, 1962 and Imre Lakatos, Proofs and Refutations: The Logic of Mathematical Discovery, Cambridge University Press, 1976. 2 as ‘the Western hegemonic’ paradigm.3 Is there an emerging alternative? This exploration of alternative ways of understanding the contexts and factors which underpin crisis threats and their solutions is closely tied to the Planning from the Future [PFF] project. The PFF is primarily concerned with the loosely defined ‘humanitarian sector’s capacities to deal with ever more complex and uncertain humanitarian crises, or, disasters and emergencies. Towards that end, the PFF partnership, consisting of King’s College London, the Overseas Development Institute and Tufts University, will in the first instance explore the present landscape of the humanitarian sector, how that sector responds to ‘game changers’ that confront it with unanticipated challenges and the extent to which that sector is fit for the future. 4 In that context, if the sector is not fit for the future, plausible solutions may emerge for improving it through institutional change and methodologies that reflect our present understanding of the nature of crisis threats and mitigation. Or, alternatively, the assumptions that are made about crisis threats and appropriate action may stem from a paradigm which by analogue might be Copernican in consequence, and may well lead not only to different understandings about the nature of crises, but also to different approach to solutions. This exploration began with extensive research about the nature of paradigms and the assumptions that underpin humanitarian action. The concepts incorporated in the paper were frequently the result of seven meetings with humanitarian experts, and at the end with a major consultation that brought together all of those who had helped in the past. 3 See, for example, the forthcoming Planning from the Future report (Chapter 1). www.planningfromthefuture.org The result is Exploring alternative ways of understanding humanitarian crises and solutions. The paper is divided into three man sections: Section 1 suggests five assumptions that might serve as guideposts on the journey for alternative perspectives. In Section 2, the three key elements of the emerging paradigm are considered, each with a set of reflections about what will be described as their ‘normal life’ implications. Finally, Section 3 draws specific conclusions about what might be considered as the humanitarian implications that can be drawn from this emerging paradigm. In its totality, the paper links directly into what is called the Synthesis Report, or, Planning from the Future: Humanitarian spectres, a PFF product intended to make futures real for humanitarian practitioners. Exploring alternative ways has been designed to suggest different approaches for understanding the nature and drivers of risk as well as new ways to understand alternative solutions. The Synthesis Report is intended to incorporate these new perspectives into broad but practical approaches to planning and decisionmaking. I Hypotheses guiding the paradigmatic exploration There are five hypotheses that guide this effort to identify the possibility of an emerging alternative humanitarian paradigm: [1] Humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. They are not aberrant phenomena, divorced from ‘normal life,’ but rather a reflection of it,5 everything 4 See the forthcoming Planning from the Future report (Chapter 2). www.planningfromthefuture.org 5 ‘Normal life’ in this context refers to the fact that disasters and emergencies are an integral 3 from governance and leadership to human security and socio-economic opportunities; 6 [2] Humanitarian crisis drivers, their dimensions and dynamics are directly linked to human progress and related change, including technological advance;7 [3] Except for existential crises, e.g., asteroid impact8 , the types of humanitarian crisis drivers, their dimensions and dynamics, have increased exponentially over the past 200 years, and continue to do so even more intensely. This latest phase of exponential increase is due to a rapidly changing, interconnected and globalised world, one in which technology will continue to act as a major driver of change and determinant of human progress; [4] Increasing extra-terrestrial, or, outer space involvement by humankind is but one dramatic example of highly plausible change in the nature of vulnerability and the perception of what and who is vulnerable. The prospect of existential risk that have potential global impacts are increasing, all in one way or another underscoring the part of environmental abuse and economic and social exploitation. Rather than the assumption that disasters and emergencies foster vulnerability, the ways in which human beings organise their social and economic lives do. Randolph C. Kent, Anatomy of Disaster Relief: The International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 6 See the forthcoming Planning from the Future: Humanitarian spectres for specific discussions on governance and human security and human agency. 7 Linked to societal structure and resource allocation is the impact of technological advance, which over the past 200 years has bent the curve of human history – of populations and social development – by almost 90 degrees. See Eric Brynjolfsson and Andrew McAfee, The Second Machine Age: Work, Progress and Prosperity in a Time of Brilliant Technologies, W.W. Norton & Co., New York. 2014, p.6 8 The Cretaceous–Paleogene (K–Pg) extinction event was a mass extinction of some threequarters of plant and animal species on earth increasing speed of global vulnerability9 ; [5] As suggested in #1, above, humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. This is what was referred to above as the ‘normal life proposition’, and is based upon the dynamics of complex systems. Such systems are open, dynamic, non-linear and in a state of perpetual disequilibrium. This, therefore, suggests that ‘…in many of the pressing issues for our future welfare as well as for the management of our everyday life, [we] will need such a systemic complex system and multidisciplinary approach’10 to be adequately prepared to deal with ever more complex and uncertain threats. II An exploration of paradigmatic assumptions The search for the possibility of an emerging alternative paradigm might begin with the ‘normal life’ proposition that suggests that all societal phenomena, including disasters and emergencies, reflect highly complex that occurred over a geologically short period of time, 66 million years ago 9 The University of Cambridge’s Centre for Study of Existential Risk is but one of a growing number of interdisciplinary research centres focused on the study of human extinction-level risks that may emerge from amongst other things technological advances. Examples include M. Rees, Our Final Century: Will the human race survive the 21st century?; J.F.Richard, High Noon: 20 global problems, 20 years to solve them, New York – Basic Books, 2002, Nick Bostrom, “Existential Risks: Analysing human extinction scenarios and related hazards,” Journal of Evolution and Technology, Vol.9, No.1, 2002 10 D. Sornette, “Dragon-Kings, Black Swans and the Prediction of Crises,’ International Journal of Terraspace Science and Engineering, 2(1): 1-18, p.1, 2009 as quoted in Ben Ramalingam, Aid on the Edge of Chaos: Rethinking International Cooperation in a Complex World, Oxford University Press, 2013, p.138 4 messes, 11 and that such ‘messes’ are not restricted in either space or time. They perpetually evolve. This runs contrary to standard assumptions underlying the term, ‘humanitarian’. That term is principally concerned with systems failures, and reflects a belief that such failures have finite beginnings and ends. An emerging paradigm might be based upon the assumption that humanitarian crises from a whole of society perspective are not bound by clearly defined space and time dimensions. And, emerging from this perspective are three interconnected sets of propositions that form the basis of the proposed alternative humanitarian paradigm: [1] Reflections of normal life – The proposition that humanitarian crises are reflections of normal life is on the one hand generally accepted.12 Yet, on the other, ‘disasters are still predominantly seen as exogenous and unforeseen shocks that affect supposedly normally functioning economic systems and societies.’13 However, what all too often have not been appreciated are the full implications of ‘the normal life’ proposition. In this regard, a more comprehensive societal focus changes 11 In defining the use of the term, ‘messes’, Alpaslan and Mitroff state that problems ‘resist our attempt to confine them and rein them in by reducing them to a single discipline or point of view. For example, different stakeholders rarely have the same definition of the individual problems that constitute a mess and of the entire mess itself. Indeed the fact that different stakeholders have different perceptions of a mess is itself one of the keys defining attributes of messes! As a result “problem negotiation” is one of the most important aspects of managing messes. Before one can “solve” a problem one first has to agree on the nature of the problem. And if agreement is arrived at all, it should be reached only at the end of an intense debate about the “nature” of the problem instead of the all–too-common pressure to get a quick consensus.’ Can M. Alpaslan and Ian I. Mitroff, Swans, Swine and Swindlers: Coping with the growing threat of mega-crises and megamesses, Stanford University Press, Stanford, 2011, pp xx ff. 12 Op cit. #5 See, for example, Randolph C. Kent, Anatomy of Disaster Relief: The the ways that crisis threats are defined and solutions posited. This focus in turn suggests the following: n humanitarian crises consist of complex systems of changing problems that interact with each other. No crisis driver is in itself the sole explanatory factor for a crisis event or its consequences. People ‘are not confronted with problems that are independent of each other, but with dynamic situations that consist of complex systems of changing problems that interact with each other’.14 These are defined as ‘messes’, and this concept is an important starting point for understanding and explaining humanitarian crises. The need to understand and prepare for humanitarian threats and actions in terms of complex systems and interacting problems will become increasingly evident as such ‘messes’ reflect ever more fluid manifestations of vulnerability. Accepting the concept of ‘messes’ should narrow the perceived bifurcation between so-called natural disasters and man-made emergencies.15 And, International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 13 Allan Lavell and Andrew Maskrey, The Future of Disaster Risk Management: An Ongoing Discussion 14 Russell L. Ackoff, Re-creating the Corporation, Oxford University Press, New York, 1999, p.324 15 The definition of ‘emergency’ within a humanitarian context has various interpretations. Quarantelli sees ‘emergency’ as one of a threshold of events, each depending upon resource requirements, from accidents to emergencies to disasters and finally to catastrophes. The OCHA orientation handbook sees emergencies as ‘a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency.’ The IFRC views a complex emergency ‘as a reflection of disasters [which] can result from several different hazards or, 5 yet, while there are perceptible moves towards recognising the interconnectedness between certain types of humanitarian crises (e.g., natural hazards and technological failures), there continues to be resistance in the humanitarian world to accepting the interdependent nature of most if not all crisis events, including natural events and conflict. In that sense, ‘some of the greatest mistakes are made when dealing with a complex mess, by not seeing its dimensions in their entirety, carving off a part, and dealing with this part as if it were a complicated problem, and then solving it as if it were a simple puzzle, all the while ignoring the linkages and other connections to other dimensions of the mess.’16 This tendency to accept if not reinforce the dichotomy and to ignore basic causation and solutions can also be perceived as a convenience. Not unlike the reactions of the establishment in the time of Copernicus, politicians, policymakers and planners resist alternative perspectives because it goes against the inherent ‘short-termism’ of most institutions and their incremental approach to problem solving.17 n humanitarian response is underpinned by contending and not universal principles, the former reflecting cultural, local more often, to a complex combination of both natural and man-made causes and different causes of vulnerability. Food insecurity, epidemics, conflicts and displaced populations are examples.’ 16 Ben Ramalingam and H. Jones with T. Reba and J. Young, ‘Exploring the Science of Complexity: Ideas and Implications for Development and Humanitarian Efforts’, Working Paper 285, ODI, London, 2008, p.11 17 As described by one analyst, in crises, ‘political stakes logically increase….Disasters overload political systems, catastrophes can bring down regimes.’ Richard Stuart Olson, ‘Towards a Politics of Disaster: Losses, Values, Agendas and Blame, International Journal of Mass Emergencies, August 2000, Volume 18 #2. and regional perspectives and values. One prevailing assumption underpinning the predominant humanitarian paradigm is that there is an inherent human motivation that explains why human beings respond to the plight of other human beings, namely, an overarching moral sense of responsibility, benevolence and empathy that is universal. This abiding motivation in turn justifies what are regarded as universal humanitarian principles. Morality as motivation and universal principles, however, ignore the relationship between crises and the ways that they test and reinforce basic values – religious, spiritual, philosophical. There are profound differences in the ways that societies explain and interpret their respective worlds.18 Increasingly, ‘we will have to deal with “contending” and not “universal principles,” suggests the renowned anthropologist, Arjun Appadurai. In a world in which different power structures will emerge, with their concomitant local and regional perspectives and values, the presumption of common principles will be less and less relevant. More and more, perceptions of self-interest and possible mutual self-interest will be at the heart of humanitarian action.19 18 ‘Thank you for explaining your principles,’ said a member of a Middle Eastern group that had come to hear an ICRC delegate’s explanation of the organisation’s humanitarian role. ‘However, we, too, have our own principles,’ he continued, ‘Ours begins with justice. To what extent do your principles incorporate the concept of justice?’ In so many ways, the avowedly universal principles presented by humanitarians reflect a Western hegemony that can be traced to the age of discovery in the 15th and 16th centuries, to the age of industrialisation, colonialism and economic dominance of the 18th and 19th centuries – past Solferino – and clearly into the 20th century in the post 1945 world. 19 Students of humanitarian affairs will have ‘to deal with “tactical humanism” – a humanism that is prepared to see universals as 6 n humanitarian crises always have transformative consequences that go well beyond the geopolitical and socio-economic boundaries of the event, itself. As in physics, so, too, in the nature of ‘normal life’, dynamics are not constrained by fixed time and space. Their effects continue in various forms over time and across spatial boundaries. While these dynamics are inherent in all matter, they are becoming increasingly evident in a world that is overtly more interconnected, through trade and through movements of capital, people and information. ‘What we call “flows”’.20

The ‘normal life’ dimension of humanitarian crises means that the drivers of such crises are part of systems that are in constant flux, driven by a ‘persistent need for energy’.21 They are in a state of ‘non-equilibrium’. In that sense, as suggested below in the technological paradox, humanitarian crises also reflect the ever-fluctuating boundaries of ‘normal life’, and those boundaries are moving in myriad directions, including beyond the earth’s atmosphere. Hence, another assumption underpinning the alternative paradigm is that a growing number of crisis drivers and ways to mitigate them will become extraterrestrial. **Extraterritoriality** will emerge as a **major factor** in what we continue to call ‘humanitarian response’, and will fundamentally change many aspects of what is a crisis driver and who and what is a ‘humanitarian actor’.22

[Footnote 22] An example is ‘asteroid impact avoidance’ where technology enables human intervention to divert asteroids. Hence, the ‘humanitarian actor’ might well be someone who has the capacity to **prepare for** and **prevent** potentially **existential threats**. This could well be the humanitarian actor of the future. [End Footnote 22]

### 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 [anticompetitive effects in the markets of countries that agree to a reciprocal framework regarding competition law] and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in platform conduct that [produces anticompetitive effects in the markets of countries that agree to a reciprocal framework regarding competition law] stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitve 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.

#### Khan wants more authority---BUT, success is constrained now.

**Zakrzewski 21** --- Technology policy reporter, Northwestern University, BS in Journalism.

Cat, 6-17-2021, "Will Lina Khan bring a reckoning to Silicon Valley? She’ll face major challenges.," https://www.washingtonpost.com/technology/2021/06/17/lina-khan-ftc-actions/

Lina Khan’s rise to chair of the Federal Trade Commission has been celebrated by Silicon Valley’s critics as the dawn of a new age of tougher antitrust enforcement.

She was sworn into office with one of the most ambitious visions of any chair at the agency, following years of high-profile proposals to dismantle large tech companies’ power that she spelled out both in her academic writing and in her guiding of a congressional investigation into Big Tech’s power.

But her promise is about to collide with the reality of the FTC, an agency more than 100 years old that has come under fire in recent years for failing to police privacy and competition abuses.

“She wants to take a car that she thinks has been driving at about five miles per hour and make it go 250,” said William Kovacic, a former chairman of the agency.

Khan is entering the agency at a critical moment, with pressure mounting from members of both political parties to rein in tech companies. That’s resulting in greater scrutiny of the FTC’s track record.

Khan inherits a key antitrust lawsuit against Facebook, which seeks to break the social network up over allegations that it copied, acquired and killed its rivals. The lawsuit is being watched as a test of Washington’s ability to check Silicon Valley’s power amid a broader debate about reforming tech regulations.

She’ll also be running an agency that lawmakers and experts for years have warned is under-resourced and lacking deep technical expertise, at a time when companies are growing ever more powerful and wealthy and building bigger lobbying forces in Washington.

And there will be immediate pressure for Khan to do more: Anti-monopoly groups have called on the agency to pursue similar competition complaints against other tech giants, including the e-commerce titan Amazon. (Amazon CEO Jeff Bezos owns The Washington Post.)

But those efforts will confront a U.S. judicial system that for decades has held a fairly narrow view of what constitutes an antitrust harm, which could be a major hurdle to achieving Khan’s sweeping vision of competition enforcement.

“She’s got some things that can be done under existing law, but nothing like what she wants to get done,” said Herbert Hovenkamp, an antitrust professor at the University of Pennsylvania’s law school.

Amid this backdrop, Khan is likely to face immediate, intense pressure from anti-monopoly groups that have been calling for greater antitrust enforcement. Their expectations are incredibly high.

#### Gives the FTC an opportunity to assert Chevron---solves institutional expertise deficits in antitrust.

**Carlson 14** --- Vanderbilt University, J.D.; University of Oxford, M.Sc. (forthcoming); Colorado College, B.A.

Christian, 2014, “Antitrusting the Federal Trade Commission: Why Courts Should Defer to Federal Trade Commission Antitrust Decision Making”, Vanderbilt University Law.

As it turns out, the answers to these questions are not so simple. The FTC was founded to rein in judicial decision-making and place the expert decisions with the experts. However, the FTC does not serve the institutional role that Congress sought in 1914. One Senator sought "an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations."' This Senator's charge, and the charge of his fellow Congressman, has not been heeded.

Courts have acted contrary to congressional desires and not deferred to the independent expert body tasked with preventing unfair competition, the FTC. This is particularly troubling today, as modern antitrust economics have made courts increasingly less able to make normatively appropriate decisions. 2 Courts themselves have recognized this, erecting procedural and substantive barriers to protect themselves from disturbing the market status quo.3 Yet, at the same time, they have chosen not to defer to the FTC, the expert body tasked with regulating the market.4 Courts have usurped agency decision-making power with occasionally questionable results.5 The FTC should assert, and courts should grant, Chevron deference when the FTC makes antitrust legal decisions in order to mitigate judicial error and protect FTC expert decisions from the generalist judiciary's institutional shortcomings.

#### Allows the FTC to crack down on pay-for-delay.

**Zeisler 14** --- J.D. Candidate 2014, Columbia Law School; B.S., B.A. 2012, University of British Columbia.

Royce, 2014, HEVRON DEFERENCE AND THE FTC: HOW AND WHY THE FTC SHOULD USE CHEVRON TO IMPROVE ANTITRUST ENFORCEMENT, Columbia Law Review.

As a final example, this Note examines pay-for-delay liability. 162 The history of this problem can be summarized briefly. For over a decade, the FTC has cracked down on pay-for-delay settlements. 163 During this time, appellate courts consistently rejected the FTC's theory of liability because of the statutory presumptions inherent to patent law and the Hatch-Waxman Act.164 Eventually, the FTC succeeded in creating a circuit split, giving rise to the Actavis decision, where the Court held that a settlement "can sometimes violate the antitrust laws."16 5 From the perspective of this Note, what makes pay-for-delay important is that it provides a retrospective lesson-the FTC could not have forced this change earlier by taking advantage of Chevron deference-as well as a prospective opportunity- the FTC has a unique occasion to promulgate notice-and-comment rules.

Turning first to the retrospective lesson, understanding the logic of these courts' holdings leads to the conclusion that the FTC could not have used notice-and-comment rulemaking or Chevron deference to hasten this change. The FTC's rulemaking grant does not permit direct regulation of patents, nor does it empower interpretations of the HatchWaxman Act. 167 Circuits that have ruled against pay-fordelay settlements would also find that the FTC lacked authority to promulgate such regulations. In a sense, there is an inverse Chenery principle at work. In Chenery, the Supreme Court explained that the SEC's mandate included the ability to proceed either through litigation or adjudication.168 In the pay-for-delay context, the FTC can proceed with neither rulemaking nor litigation. Once a court determines that a substantive legal issue falls outside of an agency's mandate through litigation, rulemaking is also likely to be found inappropriate. As a larger jurisprudential insight, this reveals a powerful method that courts can use to check the FTC. If a court can justify a presumption on broader regulatory grounds, and not merely antitrust law, then the FTC lacks authority to regulate this conduct.

Moving to the post-Actavis antitrust regime, the FTC is now in a different situation. In Actavis, the Court created a new sphere of antitrust liability and left "to the lower courts the structuring of the present rule-of-reason antitrust litigation. 1 69 Faced with this new precedent, the FTC has three reasons to begin exercising its rulemaking authority. First, the FTC correctly identified reverse settlements as potentially anti-competitive while lower courts remained skeptical. The FTC's characterization of this conduct will carry a certain rhetorical force that can be leveraged toward more assertive regulation. Second, and building on the first point, the FTC's institutional advantages and capabilities to form presumptions in this regulatory arena are at their height. Indeed, as Professor Hemphill argues, the FTC's ability to aggregate data gives it the unique ability to form the presumptions required for understanding the pay-for-delay regulatory structure. 170 Third, FTC regulation can provide crucial guidance to businesses. In creating, but not defining, the scope of liability, the Court has created considerable uncertainty around settlements. 171 Concededly, while FTC regulation cannot shield a corporation from liability under the Sherman Act, it can provide initial guidance for conduct likely to lead to liability in this unsettled area.

#### Biologics innovation is key to US lead in mRNA development

Biopharma-Reporter 8/03 - News & analysis on the clinical development and manufacture of large molecule drugs

“mRNA and beyond: Opportunities for US biologics,” 03-Aug-2021, https://www.biopharma-reporter.com/Article/2021/08/03/Opportunities-for-US-manufacturing-in-biologics

The success of mRNA vaccine technology could be one of the new opportunities for US pharmaceutical manufacturing looking forward, with pandemic investments helping turbocharge the sector. Production of a number of drugs are likely to remain in lower cost production hubs, such as China and India. But biologics may tell a different story: with different dynamics for small volume, high margin treatments. There’s an opportunity for the US to lead in advanced biologicals; as well as manufacturing in viral vectors and cell and gene therapies, according to CPhI’s insight’s report ‘US Pharma Market 2022 and Beyond’, prepared for this year’s CPhI’s event. But first, the country must overcome current capacity restraints through increased efficiencies and investments.

A chunky boost of capital from Operation Warp Speed was designated to increasing development and manufacturing capacity in the US. “We expect to see the approval of mRNA-based cancer therapies in the next few years," notes Peter Shapiro, Senior Director of Drugs and Business Fundamentals at GlobalData, in the report. "Furthermore, these mRNA therapies will be able to use the same manufacturing equipment as mRNA vaccines now that the industry has shelled out the high CapEx cost for this equipment, and trained more staff in sophisticated pharma manufacturing.” Moderna, for example, has wasted no time in setting out a host of mRNA opportunities for the coming years. A mRNA quadrivalent flu vaccine has already started a Phase 1/2 clinical trial – dosing its first participants last month; with an HIV vaccine set to follow into the clinic later this year. Other programs include mRNA vaccines for CMV and RSV. A key advantage of the platform is not only its speed and flexibility in capacity for COVID-19 vaccine production: but also that the same tech could be applied to mRNA therapeutics.

Viral vectors – already in short supply pre-pandemic for gene therapies and gene-modified therapies – are now also required for viral vector vaccines (namely AstraZeneca and J&J). As of May, there were 14 therapies/vaccines that use a viral vector marketed in the EU, Japan, US and UK, according to GlobalData – who predicts this number will soar over the next six years to more than 100 (and with more than 3,000 in the longer term development pipeline). Meanwhile, there are only 87 viral vector contract manufacturing facilities available worldwide. “Adding to the shortage of supply is the current inefficiency in manufacturing – including low titres and complexity – with both biopharma innovators and contract manufacturers working on both upstream and downstream process innovations," notes the CPhI report. "One suggestion from our experts is for [regulatory] agencies to approve standardized viral platforms that could be used interchangeably by therapy developers, potentially speeding up cell and gene therapies’ development, approval, and technology transfer to CMOs.” With pressure on viral vector manufacturing coming from both COVID-19 vaccines and the increased number of gene therapies, manufacturing in this sector will have to increase through scaling up facilities, developing more efficient processes both upstream and downstream, and more investment from contract manufacturing organisations.

Biologics and cell and gene manufacturing are ‘potentially entering a hugely profitable period’, notes the report. But for this to be realised, greater capacity is needed. "In fact, the pandemic has further aggravated capacity constraints as priority is given to COVID vaccines. Anyone with available capacity in the US is likely to be booked up well in advance and able to charge a premium. For the CDMO space, this presents huge opportunities with a large number of acquisitions in the last year as well as increased capital coming in from VCs," notes the CPhI report.

And technological advances will have a particularly important role to play. “Our experts predict that the US is going to play a key role in the development of advanced manufacturing technologies improving the technology base in general and potentially lowering costs. While the country cannot compete on labour costs, it has the scope to bring new efficiencies to advanced biologics manufacturing,” notes the report. Cell and gene therapy, API manufacturing and injectable dose manufacturing are the best immediate opportunities for reshoring in the US, notes the report. “There are opportunities for the US to lead in particular for advanced biologicals. But there are also medium and long-term opportunities for manufacturers capable of manufacturing mRNA-based vaccines and therapies and vector manufacturing for recombinant vector vaccines, gene therapy and gene modified cell therapy." Peter Shapiro, Senior Director of Drugs and Business Fundamentals at GlobalData.

Across the biologics space, the industry is continually looking for new innovations in upstream and downstream processing, with organisations like the National Institute for Innovation in Manufacturing Biopharmaceuticals (NIMBL) pushing continuous bioprocessing. This is potentially an even bigger breakthrough than in the small molecule space as production costs are significantly higher and any innovation that lowers this will potentially make US manufacturers more competitive domestically and internationally. “Innovation in manufacturing will be required for the production volumes necessary for the widespread use of advanced biologics, as well as the reduction in price of these therapies; just as innovation was previously involved in the popularization of monoclonal antibodies. There are already large market-based incentives for success in increasing the efficiency and volumes of advanced biologic production,” commented Shapiro.

#### Solves inevitable extinction—New scalable tech breakthroughs are key

Millett 17

Piers Millett, Global Fellow in biosecurity at the Wilson Center, former Acting Head of the Biological Weapons Convention Implementation Support Unit of the UN, researcher and expert on the prevention of bioweaponization with a range of international organizations, and Andrew Snyder-Beattie, Director of Research at the Future of Humanity Institute, Existential Risk and Cost-Effective Biosecurity, *Health Security* Volume 15, Number 4, 14 August 2017, DOI: 10.1089/hs.2017.0028, http://online.liebertpub.com/doi/pdfplus/10.1089/hs.2017.0028

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios. How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives. Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world’s population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization. A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity’s favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6 While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9 In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21 Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of staterun bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27 Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that ‘‘we can ensure Gaia’s survival only through the extinction of the Humans as a species . we now have the specific technology for doing the job . several different [genetically engineered] viruses could be released’’(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32 What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higherconsequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures.We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

The Impact Spectrum of Various Biothreats Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\* The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.{Biological warfare provides examples \*While noting that the use of bioweapons can have a wide range of other impacts, including sociopolitical and economic, here we consider their impact purely in terms of fatalities. { There is considerable uncertainty involved with the dataset on the historical use of biological weapons, including considerable variation in key terms and assumptions, likely knowledge gaps, and motivations for both claiming natural events as unnatural, and vice versa. The numbers used here are intended as indicative and are used to place boundaries on the likelihood and impact of different types of biothreat. As noted elsewhere in this article, the conclusions drawn are considered by orders of magnitude, which helps to address these uncertainties. RISKS AND COST-EFFECTIVENESS OF BIOSECURITY 374 Health Security of events and disasters. These historical examples provide indicative data on likelihood andimpact thatwe can thenfeedinto a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we usemultiple datasets to corroborate our numbers, but ultimately the ‘‘true rate’’ of bioweapon attacks is highly uncertain. Biocrimes and Bioterrorism Historically, risks of biocrime{ and bioterrorismx have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub. com/doi/suppl/10.1089/hs.2017.0028). Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths. Biological Warfare Academic overviews of biological warfare{{ detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1). The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/ doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare. We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017. 0028). The second data set came from disease events that were Figure 1. A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34 { Biocrimes can be considered to be ‘‘the use of a biological agent to kill or make ill a single individual or small group of individuals, motivated by revenge or the desire for monetary gain by extortion, rather than by political, ideological, religious or other beliefs.’’35 x Bioterrorism can be considered to be ‘‘the deliberate release of viruses, bacteria or other agents used to cause illness or death in people, but also in animals or plants. It is aimed at creating casualties, terror, societal disruption, or economic loss, inspired by ideological, religious or political beliefs.’’35 \*\*A number of other biocrimes involved deliberately infecting another individual with HIV, the results of which were not evident and have not been included in this analysis. {{Biological warfare can be considered to be the ‘‘ability to use biological agents in warfare.’’35 MILLETT AND SNYDER-BEATTIE Volume 15, Number 4, 2017 375 alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000. For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.{{ Global Catastrophic and Existential Risk Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure. Model 1: Survey of 2008 Global Catastrophic Risk Conference An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an ‘‘engineered’’ pandemic would lead to extinction by 2100.42 The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.xx Table 1. The duration of state-run offensive biological weapons programs detailed in key historical reviews up to 1945 and from 1945 to 2000.5,6 State Duration (Review up to 1945) Duration (Review from 1945-2000) Canada 1925-1945 1945-1969 France 1921-1926 and 1935-1940 1947-1972 Germany 1915-1918 — Hungary — 1938-1944 Iraq — 1974-1990 Japan 1931-1945 — Poland — 1945-1960? South Africa — 1981-1994 Soviet Union 1920-1945 1945-1992 United Kingdom 1925-1945 1945-1957 United States 1942-1945 1945-1969 {{Whilst there are no documented examples, it is possible that if an attack similar to the one that caused the plague epidemic in China were to be carried out in a modern mega-city, even relatively low infectivity and case fatality rates could result in disasters or even crises. For example, the population of Dhaka, Bangladesh, is approaching 20 million. A disaster would require around 0.5% of its population to die, and a crisis would equate to 5% of the city’s population. xxA more rigorous survey examined the probability of a bioweapons attack in a 10-year timeframe with more than 100 illnesses43 and found that opinions varied widely between 1% and 100%, with a mean of 57.5%. While this survey had a superior methodology to the one we cite in model 1, it did not focus on attacks that could result in global catastrophic risk. RISKS AND COST-EFFECTIVENESS OF BIOSECURITY 376 Health Security Model 2: Potentially Pandemic Pathogens Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub .com/doi/suppl/10.1089/hs.2017.0028). The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wildtype influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 · 10–8 and 8 · 10–7. {{{ Model 3: Naive Power Law Extrapolation Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.{{{ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers. Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bioattacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 · 10–6). We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War— constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 · 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks. Why Uncertainty Is Not Cause for Reassurance Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 [Footnote] For example, let’s say our best guess for a risk is 0.01%, and that we are highly uncertain about this. Even just a 10% chance of underestimating the risk by an order of magnitude will double the risk—with a revised best guess of around 0.02%—while it would take a full 90% chance of overestimating the risk by an order of magnitude to cut the risk in half to around 0.005%. Model uncertainty with respect to low-probability, high-consequence risks is therefore typically additional cause for concern. See Ord et al48 for a more in-depth analysis of this problem. [End footnote] Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge. How Bad Would Human Extinction Be? Human extinction would not only end the 7 billion lives in our current generation, but also cause the loss of all future generations to come. To calculate the humanitarian cost associated with such a catastrophe, one must therefore include the welfare of these future generations. While some have argued that future generations ought to be excluded or discounted when considering ethical actions,50 most of the in-depth philosophical work around the topic has concluded that future generations should not be given less inherent value.51-55 Therefore, for our calculations, we include future lives in our cost-effectiveness estimate.\*\*\*\* The large number of future generations at stake mean that reducing existential risk even by a small amount may have very large expected value. The Earth is thought to be habitable for roughly another billion years;56 our closest relative, homo erectus, lasted over 1.6 million years,57 and the typical mammalian species also lasts on the order of 1 to 2 million years.58 Following Matheny,29 if we were to assume that humanity would otherwise maintain a global population of 10 billion for the next 1.6 million years, human extinction would jeopardize on the order of 1.6 · 10^16 life years. Cost-Effective Biosecurity How should we balance speculative risks of human extinction in a biosecurity portfolio? Here we turn to costeffectiveness analysis, which is one method of prioritizing public projects.29 Cost-effectiveness analysis is helpful if our goal is to maximize the effect of our resources to achieve a measurable aim (such as life-years saved or cases of disease averted). Here we compare the cost-effectiveness of reducing risks in the categories of incidents, events, disasters, and existential risks. Calculating Costs The US federal government was projected to spend almost $13 billion on health security–related programs in 2017.59 To our knowledge, there has not been a quantitative assessment of how this spending has reduced the chances of bioterrorism, biowarfare, or even naturally occurring pandemics. However, the World Bank estimates that it would cost $1.9 billion to $3.4 billion per year over 5 years to bring all human and animal health systems up to minimal international standards, and it suggests that these measures would prevent at least 20% of pandemics.60{{{{ Many countries do not currently have healthcare systems that meet international standards—for example, in 2014 only 33% of countries reported their national arrangements met those required under the International Health Regulations.61 These mitigation measures would be adopted to be effective regardless of whether a disease outbreak originates naturally, accidentally, or deliberately.{{{{ The ability to rapidly detect and characterize the agent involved helps fast-track public health and R&D responses. Acting promptly enables basic public health measures that might decrease the likelihood of spread (such as social distancing) and track its emerging epidemiology (providing critical input for tailoring the responses). Even if we lack existing or candidate vaccines or therapeutics, having the capacity to treat symptoms can have a dramatic impact on case fatality rates.xxxx We therefore assume that strengthening healthcare systems to meet international standards would have an impact on mitigating all types of disease risk, ranging from incidents and events to existential risks.\*\*\*\*\* [Footnote] \*Given the zoonotic nature of many emerging diseases and the recognized importance of adopting a One Health approach when addressing epidemic and pandemic risk, it will be important that both public health and animal health systems are strengthened to meet international standards. [End footnote] We extend the World Bank’s assumptions to include bioterrorism and biowarfare—that is, we assume that the healthcare infrastructure would reduce bioterrorism and biowarfare fatalities by 20%. We conservatively assume that existential risks will be reduced by only 1%, since any potential existential risk would likely be deliberately designed to overcome medical countermeasures. We calculate that purchasing 1 century’s worth of global protection in this form would cost on the order of $250 billion, assuming that subsequent maintenance costs are lower but that the entire system needs intermittent upgrading.{{{{{ To calculate the cost per life-year saved, we use the equation C/(N · L · R), where C is the cost of reducing risk, N is the number of biothreats we expect to occur in 1 century, L is the number of life-years lost in such an event, and R is the reduction in risk achieved by spending a given amount (specified by C). For nonextinction risks, we increase L 50 times over to denote 50 lifeyears saved per life. The denominator N · L · R denotes the total number of life-years saved. [Footnote] We evaluate the first order effects of these interventions and ignore second order spillover effects (such as any economic benefits of innovation that could come with the biosecurity spending). This could be an important oversight, as even short-term and small-scale biosecurity spending could have ramifications for humanity’s long-term future (eg, preventing a moderate bioterrorist attack could in turn prevent large wars that escalate or the erosion of norms in civil society, which in turn could evolve into existential risks). [End footnote] In a subsequent model we also apply a discount rate to represent policymakers concerned only about lives in the short term. Results Including future generations into our cost-effectiveness calculations demonstrates that reducing existential risks, even if they are improbable, can be incredibly cost-effective in expectation (Table 2). Depending on the model used, we estimate that we can purchase 1 quality adjusted life-year in expectation for 10s of dollars (with outliers suggested around 12 cents to $1,600). Even with the most conservative estimates of existential risk, reducing the risk of human extinction is at least 100 times more cost-effective than standard biosecurity interventions, and possibly up to 1 million times more cost-effective. It is important to note that this result does not depend on the $250 billion figure—if we found a cheaper intervention that reduced all risks by a similar amount, cost-effectiveness of all the interventions would increase, but the relative merits of reducing existential risk would remain the same.xxxxx There are certainly cheaper ways to reduce the low-level risks of biocrime and bioterrorism, and so our estimates of cost-effectiveness could be far too pessimistic. Examples of cheaper interventions might include dramatically increasing resources for specialized law enforcement prevention and interdiction, or increased surveillance on potential perpetrators. However, there are likely also far cheaper ways of reducing the more extreme risks that threaten extinction, and there is no reason to think similar efficiency gains could not be made in this area as well. Despite the vast resources spent on counterterrorism, governments may have neglected low-probability, high-impact risks.65,66 This therefore constitutes a critically underdeveloped area of research, for which there is likely low-hanging fruit. Even if the humanitarian case for reducing existential risk is clear, most policymakers will be responsible primarily for the interests of a more limited constituency comprising only the current generation and near future.\*\*\*\*\*\* It is therefore instructive to evaluate how well these cost-effectiveness results hold up when we largely ignore the benefits to future generations. We therefore repeat the cost-effectiveness estimates with a discount rate imposed on the benefits and costs borne in future years, and we find that the merits of reducing existential risk still hold. If we ignore distant future generations by discounting, the benefits of reducing existential risk fall by between 3 and 5 orders of magnitude (with a 1% to 5% discount rate), which is still far more cost-effective than measures to reduce small-scale casualty events. Under our survey model (Model 1), the cost per life-year varies between $1,300 and $52,000 for a 5% discount rate and between $770 and $30,000 for a 1% discount rate. These costs are even competitive with first-world healthcare spending, where typically anything less than $100,000 per quality adjusted life-year is considered a reasonable purchase.29 This suggests that even if we are concerned about welfare only in the near term, reducing existential risks from biotechnology is still a cost-effective means of saving expected life if the future chance of an existential risk is anything above 0.0001 per year. Our conservative models (with much lower risk) suggest that existential risk prevention is not cost-effective when compared to basic healthcare spending: Model 2 results in a cost per life-year between $330,000 and $16 million for a 5% discount rate and $190,000 and $9.7 million for a 1% discount rate, while Model 3 results in a cost per life-year of between $190,000 and $500,000 for a 5% discount rate and between $110,000 and $310,000 for a 1% discount rate. These conservative numbers would suggest that healthcare spending is a better purchase than marginal biosecurity funding, but even these numbers still support the notion that we are better off focusing on low-probability, high-impact risks rather than low-casualty biosecurity risks. For a biosecurity portfolio, even policy with limited time horizons is likely better off investing in measures that prevent the worst-case scenarios. Conclusions Although the probability of human extinction from bioweapons may be extremely low, the expected value of reducing the risk (even by a small amount) is still very large, since such risks jeopardize the existence of all future human lives. An initial attempt to estimate the cost-effectiveness of reducing these risks finds that it takes likely between 10 cents and 10s of dollars to save 1 life-year, assuming we value future human lives. Although this result is striking, it is not unprecedented. Similar analysis done by Matheny found that spending $1 billion on an asteroid deflection system would have a similar cost-effectiveness, at about $2.50 per life-year.29 Although preventing existential risks might be a far more cost-effective way to save lives than many existing biosecurity measures, this does not imply that we ought to devote all of our resources to protecting against existential risks. Many actions that fall under the rubric of standard health spending also likely reduce existential risk, and many of the resources spent reducing existential risk would in turn help address less extreme risks. Moreover, occasionally there are other opportunities that might be particularly cost-effective—for example, smallpox eradication cost less than $300 million (roughly $1.5 billion in 2017 dollars) and likely saved millions of lives.68 The conclusion is thus not that we should abandon all other health interventions for the sake of saving future lives, but rather that on balance we should increase investments that reduce these lowprobability, high-stakes risks. We propose several steps forward. Given the high uncertainty around our estimates, we can expect a high value of information for additional research, implying that resources should be allocated to further assessment of these risks before large sums are directly allocated on the basis of unreliable evidence. Areas for basic research could include examining existential risk using the tools of technological horizon scanning, red-teaming, ecosystem and epidemic modeling, analyzing historical epidemic death tolls, and examining past species that have gone extinct due to disease, among others. And if existential risk could be as important as we claim, more work should be done to assess possible existential risks and countermeasures. Many actions that would reduce existential risk are already being pursued by those in biosecurity and public health. But there are also measures that would be particularly important in the context of existential risk—including measures that may be unduly neglected without a special focus on existential risk. One particularly inexpensive measure would be to invest in contingency plans for worst-case scenarios. Countering a pandemic does not typically require a large fraction of worldwide economic output, so there is not a clear path forward for rapidly pivoting to a total war footing in which a large percentage of worldwide GDP is spent on countermeasures. Running small experiments with easily scalable interventions could be a cheap way to explore avenues for rapidly turning resources into protection (examples of such experiments might include paying bounties to individuals or companies to avoid flu infection for a year while conducting essential services, such as power and sanitation).{{{{{{ Countering existential risks could also result in reprioritizing current approaches—for example, favoring broadspectrum diagnostics and countermeasures, as opposed to those tailored to a single pathogen. The worst possible attacks could come from built-up arsenals of multiple pathogens, possibly designed with long incubation periods and traits to overcome vaccination or medical treatment. Platform technologies that allow customizable countermeasures (eg, phages for bacteria, generalized vaccine templates) or pathogen-blind diagnostics (eg, distributed sequencing and improved software to interpret novel pathogens before symptoms occur) will stand a better chance against such threats. An existential risk focus also would place extraordinary weight on avoiding arms races or the widespread weaponization of biotechnology. The near collapse of the 8th Review Conference of the Biological Weapons Convention in December 2016 demonstrates how fragile this regime is and how far current instruments are from the ideal. Strengthening the global norm against biological weapons might go a long way toward reducing the risks associated with state actors. The current 3-person Implementation Support Unit costs less than $1 million per year to support.71 In comparison, the 2017 budget for the work of the Organization for the Prohibition of Chemical Weapons is around $77 million (and provides for more than 450 fixed-term posts).72 Increasing the human capacity currently focusing on biological weapons risks by several orders of magnitude would be notably cheaper than the costs associated with building core capacities in public and animal health. More generally, any action that reduces the chance of arms races or great power conflict could substantially reduce the probability of existential risk from biotechnology in the century to come.

### 1NC – FTC Tradeoff DA

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch – no alt causes – restoring competition in hospital markets is key to reduce costs

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Sustained economic depression triggers world war

Walt 20 – Stephen M. Walt is a columnist at Foreign Policy and the Robert and Renée Belfer professor of international relations at Harvard University.

Stephen Walt, May 13 2020, “Will a Global Depression Trigger Another World War?” Foreign Policy, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

## Cartels Adv

### AT: Cartels

#### Cartels are deterred – most recent evidence prices in aff arguments and concludes that cartels are on the decline.

Verbeke & Buts 08-17 – Professor of International Business and Strategy, McCaig Chair in Management, University of Calgary; Professor at the department of applied economics of the Vrije Universiteit Brussel

Alain Verbeke, Caroline Buts, “The Not So Brilliant Future of International Cartels,” Management and Organization Review, Cambridge University Press, August 2021, https://www.cambridge.org/core/journals/management-and-organization-review/article/not-so-brilliant-future-of-international-cartels/363CC718A5FD54F8BB390B9AB22150B7

A NOT SO BRILLIANT FUTURE OF INTERNATIONAL CARTELS?

As explained in the previous section, we do not dispute the possibility that international cartels could become more important in the future under carefully defined conditions. We are doubtful, however, even when accepting B&C’s broad definition of this governance mode, that international cartels will gain ground more generally, vis-à-vis other forms of governance in international business, when multinational enterprises face increased political risk.

A key element, and perhaps a surprising one, explaining our doubt about the bright future of cartels is four clear trends in cartel regulation that are now creating significant political risk for international cartel members (admittedly not covering B&C’s benevolent cartels). First, competition policy is now a priority for policy makers around the world, as reflected in the progress made in detecting, investigating, and prosecuting cartels (OECD, 2020; OECD, 2021b). Recently published data indicate that 68% of global cartels (with members from at least two different continents) have been prosecuted by multiple jurisdictions, with average cartel fines being very high at €19.3 million (OECD, 2020).

Second, the consequences of being caught as a cartel member have gradually become more severe and far-reaching, both for the orchestrating and the participating companies, and for the employees involved (Ordóñez-De-Hano, Borrell, & Jiménez, 2018). Depending on the jurisdiction, a wide array of sanctions is now being deployed, including personal fines, trade prohibitions, and prison sentences (these have increased sevenfold over a recent five-year period, OECD, 2020). After a finding of cartel-behavior from the competition authority, the legal battle usually continues in the form of lawsuits for damages whereby victims file claims and may also coordinate their actions, e.g., to recover cartel overcharges (Burke, 2019).

Third, cartel investigations have also become more sophisticated. Leniency policies – providing immunity from fines for the first player who admits to the existence of a cartel and discloses information on its functioning – are on the rise. This powerful tool serves both detection and deterrence purposes in the realm of anticompetitive behavior (Margrethe & Halvorsen, 2020; Marvão & Spagnolo, 2018; Miller, 2009). It incentivizes cartel members to become whistle blowers. Companies will be less likely to join a cartel if they know that its members may be enticed to disclose cartel operations, (Brenner, 2009; Vanhaverbeke & Buts, 2020).

A larger number of agencies than before now also have the mandate to conduct ‘dawn raids’, in order to collect evidence of cartel behavior and they can even enter private premises of employees during their search for incriminating material. In addition, sophisticated econometric analyses have become standard practice to provide evidence of coordinated conduct in industry and to calculate cartel overcharges (Parcu, Monti, & Botta, 2021).

Fourth, competition authorities have invested more in outreach, communicating competition rules through dedicated events, online campaigns, and competition networks. Compliance programs have also been on the rise with an increasing number of mainly large companies investing in compliance training to abide by competition rules (De Stefano, 2018).

The increased efforts to fight anticompetitive agreements in industry are now deterring and destabilizing cartels. Following a substantial increase in the number of cartels that have been ‘caught’, the average life span of these cartels is now going down rapidly (OECD, 2020). The fight against illegal, anticompetitive behavior will intensify further in the near future, rather than governments shifting their focus to contemplate potential benefits. At the same time, the beneficial effects have been widely acknowledged of international collaboration forms that are legally allowed by various competition policy regimes (and are therefore not considered cartels), see for instance Martínez-Noya and Narula (2018) on international R&D cooperation.

#### AND, the aff can’t solve – simply increasing the likelihood of penalization cannot establish deterrence – every empiric goes neg.

Violante 17 – Bachelor of Criminology (Florida State University), Juris Doctor (American University, Washington College of Law) Attorney at Nelson, Bryan, and Jones

Keith Violante, “Making Deal with the Devil: Are Current Antitrust Sanctions Deterring Cartel Behaviour,” International Trade and Business Law Review, Vol. 20, 2017, HeinOnline

There is no indication that the drastic increase in criminal and civil penalties under the ACPERA has caused a significant decline in antitrust violations.92 Civil fines are unlikely to effectively deter antitrust violations committed by an individual when the corporation is able to completely internalise the entire fine imposed against the business.93

According to a recent study, average antitrust conspiracies last six years.94 This study suggests that these conspiracies persist for so long because price-fixing is more profitable than was previously thought,95 which in turn suggests the need for greater sanctions. Put simply, this study argues that the decision to commit antitrust violations is driven by a rational cost/benefit analysis. Under this theory, a business will continue to commit antitrust violations so long as it remains profitable.

Critics of this argument suggest that sanctions exist that can prevent antitrust violations.96 Judge Richard Posner proposed that price-fixing is ultimately punished exclusively through corporate fines, and 'only when a company is unable to pay an optimal fine should imprisonment be imposed as a last resort and only if the individuals are unable to pay the fine'. Other practitioners argue that criminalisation of price-fixing offences would be a better deterrence. One argument suggests the 'publicity about severe sentences for price fixing may help educate other corporate executives about the true individual and corporate legal risks of being caught while also contributing to the effectiveness and cost of corporate antitrust compliance programs'.98

However, civil fines, or at least the implementation of them, do not seem to adequately deter antitrust violations. The fluctuation of a corporation's stock price after a firm is indicted for committing an antitrust violation also suggests civil fines provide an inadequate deterrence.99 A well documented empirical regularity is that share values in indicted firms initially fall significantly but the stock price of an overwhelming majority of indicted firms returns to preindictment levels within one year.100 These results are consistent with firms indicted between 1962 and 2000.101 Given the substantially greater corporate fines that were imposed during the latter half of that period, the consistency of the stock price recovery across that time suggests increased sanctions do not significantly deter antitrust violations.102

#### A number of issues make deterrence structurally impossible in antitrust – even after altering what is considered anticompetitive, effective enforcement is impossible.

Baer et al. 20 – Visiting fellow in governance studies at The Brookings Institution, former assistant attorney general of the Antitrust Division, former acting associate attorney general of the U.S. Department of Justice, former director of the Bureau of Competition at the Federal Trade Commission

Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, Tim Wu, “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” Washington Center for Equitable Growth, November 2020, https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/

Antitrust enforcement faces a serious deterrence problem, if not a crisis. Deterrence is central to most civil and criminal law enforcement programs because catching every lawbreaker is either implausible or would require an immense enforcement apparatus. The antitrust laws, by their very nature, will always lack some of the deterrent clarity characteristics of other legal regimes.30 Yet there is reason to fear we have reached an extreme. Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.31

Antitrust enforcement’s current reactive posture has contributed to this problem. Enforcers typically respond to cases and complaints that come before them.32 Reactive enforcement works well when anticompetitive conduct is rare and is the exception across the U.S. economy.33

But reactive enforcement is unlikely to address wide-ranging competition problems, and may even exacerbate them, when it spreads limited resources broadly, making it difficult to tackle major competitive problems when powerful interests will expend substantial resources to defend their actions. A reactive approach also may largely accept existing legal precedents and try to operate within that reality. The combination can create a ratchet: Court decisions that limit enforcement tend to circumscribe later enforcement. There are no countervailing forces to convince courts to develop rules based on sound economics that will strengthen enforcement.

#### Specifically, budget shortages wreck deterrence and make corporations more likely to pursue anticompetitive conduct.

Baer et al. 20 – Visiting fellow in governance studies at The Brookings Institution, former assistant attorney general of the Antitrust Division, former acting associate attorney general of the U.S. Department of Justice, former director of the Bureau of Competition at the Federal Trade Commission

Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, Tim Wu, “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” Washington Center for Equitable Growth, November 2020, <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/>

The need for more resources

The agencies lack the resources to fulfill their mission after a decade in which they have seen their budgets largely frozen. Increasing resources alone will not solve today’s manifest market power problems, but substantially increasing resources is an important part of the solution.

The agencies require a significant increase in appropriations to begin the process of more effectively deterring anticompetitive conduct and mergers. Agencies strapped for resources are less likely to investigate complex cases and more willing to accept flawed settlements. Corporations are more likely to pursue questionable mergers or undertake potentially anticompetitive conduct if they think the agencies have little or no capacity to bring additional enforcement actions.

#### No impact to protectionism – growth drives trade regardless

McDonald 9/1/16

(Joe McDonald, The Associated Press, “G20 governments endorse trade but tighten controls”, CTV, September 1, 2016 <http://www.ctvnews.ca/business/g20-governments-endorse-trade-but-tighten-controls-1.3053581>)

So far, protectionist measures don't appear to be to blame for the latest trade slump, said Andrew Kenningham of Capital Economics. It is due mostly to the end of an era of rapid growth driven by China's integration into the global economy and manufacturing supply chains.

"Admittedly, there has been an increase in the absolute number of trade-distorting measures implemented," said Kenningham in an email. "However, they have affected only a very small fraction of products traded."

In May, the EU parliament passed a resolution calling for controls on Chinese imports in the event Beijing is declared a market economy, a status that makes it harder to pursue trade cases.

"Politicians on the right or on the far left are talking about closing our market," said Joerg Wuttke, president of the European Union Chamber of Commerce in China. "This would be terrible."

China has massive surplus production capacity in industries including steel, cement and coal that mushroomed in size during the economic boom. That has prompted complaints Beijing is trying to clear a backlog by subsidizing exports.

"While so much attention is focused on tariffs targeting dumped steel, in fact, state incentives to promote steel exports are a far larger systemic problem," said Evenett and Fritz.

Envoys in Hangzhou plan to discuss how to reduce global production capacity for steel, according to Wally Adeyemo, Obama's deputy national security adviser for international economics.

Beijing issued plans in February to reduce the size of its steel and coal industries. Plans for other industries including aluminum, glass and solar panels have yet to be announced.

## Harmonization Adv

### AT: harmonization

#### No alignment – data flows are a sticking point.

Rough 9-28 – Senior fellow at Hudson Institute in Washington, D.C.

Peter Rough, “A digital divide is threatening the transatlantic economy,” The Hill, September 2021, https://thehill.com/opinion/technology/574045-a-digital-divide-is-threatening-the-transatlantic-economy

Against this backdrop, the U.S. is seeking to win over Europe for the technological competition with China. This week, the U.S. and European Union (EU) are set to meet at the ministerial-cabinet level in Pittsburgh to inaugurate the much-heralded Trade and Technology Council (TTC), the product of President Biden’s June meeting with European Commission President Ursula von der Leyen. However, for the second time in three months, a crucial sticking point in the transatlantic economy will not make it onto the agenda: the status of transatlantic data flows. This poses a real danger to the health of both economies.

The story goes back over a year, when the European Court of Justice (ECJ) overturned the U.S.-EU Privacy Shield, a five-year old agreement that governed transatlantic data flows. Privacy Shield was itself a successor to the painstakingly negotiated Safe Harbor Agreement, which the ECJ invalidated in 2015. The legal uncertainty unleashed by the latest ruling has forced companies transferring data across the Atlantic to fall back onto standard contractual clauses, which the EU updated in June to reflect the stringent data protections in its General Data Protection Regulation (GDPR).

The nub of the matter is that EU authorities worry that the personal data of European citizens acquired by U.S. firms could be transferred to U.S. intelligence agencies.

This places an enormous burden on the 5,380 companies — 75 percent of which are small-to-medium enterprises — that relied on Privacy Shield and now face the prospect of legal limbo. In 2019, the U.S. exported more than $245 billion and imported over $133 billion in digitally-enabled services to and from Europe, for a surplus of $112 billion.

And last year, more than ever, the coronavirus pandemic highlighted the importance of U.S. technology companies for stabilizing economies on both sides of the Atlantic. It is no exaggeration to say that digital services constitute one of the most dynamic sectors in international trade today.

Although negotiations continue, hopes for a speedy resolution to this impasse have proven illusory. After failing to elevate the issue onto the agenda of the president’s summit with the EU in June, the U.S. again sought to raise it in the context of the TTC. The EU successfully resisted both efforts, however, adding that a deal could slip to next year despite the “enhanced” privacy solutions offered by American negotiators.

By all accounts, Brussels is feeling bullish after achieving many of its goals in the negotiations leading up to the TTC, and clearly does not wish to be embarrassed by yet another ECJ invalidation. But Europe would be wise to extract what it can from the Americans and strike a deal on data flows. By now it is clear that congressional action to bring U.S. law into explicit statutory alignment with the ECJ is unlikely to be forthcoming. For the foreseeable future, Congress will be preoccupied with other legislative priorities, most notably the president’s signature plans to remake the American economy.

#### Resource scarcities cause peace – cost-effectiveness, resources are transnational and non-politicized – spills up to broader political stability

Anais Dresse et al ’16, \*Dresse: Researcher at The Integrative Research Institute on Transformations of Human-Environment Systems (IRI THESys), \*\*Jonas Ostergaard Nielsen: Faculty of Mathematics and Natural Sciences, Humboldt University Berlin, Research Group Leader, IRI THESys, \*\*\*Dimitrios Zikos: Project coordinator, Resource Economics, Univesrity of Humboldt, “Moving beyond natural resources as a source of conflict: Exploring the human-environment nexus of environmental peacebuilding,” *THESys Discussion Paper*, No. 2016-2, pgs. 9-13, http://edoc.hu-berlin.de/series/thesysdiscpapers/2016-2/PDF/2.pdf

2.2.Natural resources as potential peace vectors

Although comprehensive research on the issue remains limited, an evolving trend is observed in the literature since the beginning of the 21st century, focusing on the biophysical environment as a potential conflict transformation and resolution tool, rather than a conflict irritant (Pachauri et al., 2009, Fröhlich, 2010). Challenging the existing theories of “environmental wars”, the research not only highlights the fact that conflict and cooperation can coexist, but also insists on the transformative potential of environmental cooperation (Giordano et al., 2005). Indeed, the complex, uncertain, and long-term nature of environmental issues seems to create “functional interdependencies” between trans-border communities that can, as above-mentioned, bring them to conflict, but also to dialogue and eventually cooperation (Conca and Dabelko, 2002). The “environmental peacemaking” framework was initially adopteded by Conca and Dabelko (2002). This approach is the most prevalent in the scientific literature, although the paradigm has somewhat mutated since then, and is also commonly referred to as environmental peacebuilding, peace ecology, or environmental peace. Conca and Dabelko (2002) identify two main pathways for environmental peacemaking. First, the biophysical environment can be used to improve intergovernmental relations and create linkages between communities across political borders. Second, it can create interdependence between these transboundary communities and potentially contribute to forging a regional identity. Beyond stabilising interstate relations, environmental cooperation can thus contribute to fostering trans-societal relations and lay the ground for a “shared collective identity” (Conca, 2002) or a “shared social identity” (Zikos et al., 2015) between former or potential conflict parties.

Following this initial research, the environmental peacemaking framework has gradually evolved from a conflict resolution tool to a more comprehensive, transformative peacebuilding approach. Environmental peacemaking activities are commonly classified into three categories (Maas et al., 2013, Conca et al., 2005, Carius, 2007).

The first and most direct type of environmental peacemaking consists of activities that are aimed at preventing environmental conflicts. As pointed out by the scarcity school, when natural resources are not sufficient for all groups exploiting them, tensions and violent conflicts might erupt. Therefore, limiting human pressure on these resources, coupled with strengthening of the institutions in charge of their management, is one way to alleviate these pressures and the associated conflict risks (Carius, 2007, Conca et al., 2005). This is especially true in situations of power asymmetry between groups, where access to natural resources and their economic benefits is determined by ethnic, economic or other socio-cultural differentiations (Zeitoun, 2008, Conca et al., 2005, Carius, 2007).

The second approach aims at building “peace through cooperative responses to shared environmental challenges” (Conca et al., 2005). This approach tries to bring conflict parties together to stimulate dialogue through environmental cooperation, in order to foster trust between former conflict parties, paving the way for conflict de-escalation, political cooperation, social transformation, and eventually reconciliation (Carius, 2007). Through regular interaction and dialogue, competing parties gradually evolve from a narrative of resource scarcity that is characterised by uncertainty and security concerns (Ide and Scheffran, 2008), in order to identify sustainable, win-win solutions to shared environmental problems – such as transboundary pollution. These dialogues and collaborations can, in turn, contribute to restoring trust between former conflict parties, and lay the foundations for durable reconciliation (Carius, 2007, Wolf, 2007, Matthew et al., 2009, Jensen and Lonergan, 2013). As an example, Ali (2007) cites the case of Darfur, where an ethnic-political conflict could be deescalated through the common challenge of desertification. The benefits of environmental cooperation are of a special nature, making it seem that environmental peacebuilding has the potential to bring together conflict parties even while violence is ongoing. Water negotiations between Israel and Jordan illustrate this (Wolf et al., 2005, Jägerskog, 2013). Another example of environmental cooperation as a tool for dialogue is the 1960 Indus Waters Treaty and subsequent creation of an Indus Commission, which survived several wars between India and Pakistan (Wolf et al., 2005, Swain, 2002).

Finally, dialogue on environmental issues can lay the foundations for future cooperation in other domains. It does so by creating a climate of cooperation and political cooperation and negotiations, which can result in institutionalised forms of interactions between conflicting parties (Conca and Dabelko, 2002, Carius, 2007). Environmental cooperation can thus create opportunities for interstate bargaining and can lead the way to political and institutional forms of cooperation and, in turn, “lasting peace by promoting conditions for sustainable development” (Conca et al., 2005, Carius, 2007). Ultimately, by treating the root-causes of conflicts, environmental peacebuilding has the potential to deter future conflicts between competing parties, rendering the use of violence as unimaginable (Conca and Dabelko, 2002).

In sum, environmental issues present multiple opportunities to promote dialogue and cooperation between former, current, or possible future conflict parties. The critical nature of environmental problems for human survival is key to this potential and renders environmental cooperation an important potential component of peacebuilding (FoEME, 2008). Natural resources that are shared by conflicting parties are, thus, a good entry point for dialogue and negotiation, which can later extend beyond environmental issues, laying the roots for peace and reconciliation. This process is captured in Figure 2.

Despite this, there is no unified model or definition of the concept, and little empirical research on the topic has been carried out. There is, for example, a lack of studies which assess the effect of environmental cooperation, and the quantitative data which are available sometimes show contradictory findings on environmental issues and their correlation with either conflict or peace (Ide and Scheffran, 2008).

3. Discussion

Environmental cooperation is identified by an increasing number of researchers as a potential tool for peacebuilding. However, as aforementioned, there is a lack of empirical evidence to corroborate the existence of a direct relationship between the biophysical environment and either conflict or peace. Indeed, environmental peacebuilding is not a “coherent theoretical school”, nor a “distinct set of practical activities”, but is instead “an umbrella term that covers a wide range of aspects on the relationships between environment, conflict, and peace” (Maas et al., 2013). The difficulty to test this link between environmental issues and peacebuilding is partly due to the absence of adequate indicators to measure environmental cooperation (Conca and Dabelko, 2002). Another difficulty is the fact that several elements of this emerging framework are still unclear. The upcoming discussion focuses on three particular aspects of the environmental peacebuilding framework, in order to move it forward: Firstly, the terminology of the concept is clarified, arguing that the interchangeable use of peacemaking and peacebuilding is problematic because these two terms refer to two distinct set of objectives and activities. Secondly, the specific qualities of environmental cooperation as a peacebuilding tool, in contrast to other domains, are discussed. Thirdly, the main actors which are implicated in environmental peacebuilding activities and their respective roles as reconciliation agents are debated.

3.1.Environmental peacemaking or peacebuilding?

Many authors use environmental peacemaking and peacebuilding interchangeably. This is partly because the timeframe to which each of these terms refers is unclear. While Carius (2007) notes that environmental cooperation is predominantly implemented during periods of low violence intensity, there is no clear-cut separation between conflict and peace, especially in the case of protracted conflicts where periods of acute violence alternate with latent phases. This might explain the confusion between peacemaking, which is traditionally seen as activities that are implemented to end a conflict, and post-conflict peacebuilding.

However, there is an important difference in the objectives that are pursued by peacemaking and peacebuilding, respectively, as well as the types of activities they imply. The two notions are thus not interchangeable. According to Galtung (1996), the central aim of peacebuilding is not to eliminate all forms of conflict, because conflict is a natural part of life. Instead, peacebuilding aims at creating the conditions under which conflicts can be solved non-violently, a state referred to by Galtung as “positive peace”. As such, positive peace goes beyond the absence of conflict, and is defined as the capacity to resolve conflicts in a non-violent way (Galtung, 1996). While peacemaking aims at deescalating the violence level (negative peace), peacebuilding aims to secure lasting (positive) peace. In other words, the objective pursued by peacemaking is the absence of violent conflict, while that of peacebuilding is sustainable peace and reconciliation between former conflict parties. This is achieved by solving the root causes of the violence. Hence, conflicts and change will continue to occur, but will be dealt with in a peaceful and cooperative way. What differentiates environmental peacebuilding from environmental peacemaking is, thus, not the conflict stage at which they both occur, but rather their ultimate objectives and the nature of the activities which are implemented in order to achieve them.

We have seen that conflicts are complex, multifaceted processes, and there is a need for a more comprehensive approach to conflict transformation than that which is envisioned by the environmental peacemaking framework. The definition of environmental peacemaking as “a continuum ranging from the absence of violent conflict to the unimaginability of violent conflict” (Conca and Dabelko, 2002) should thus be nuanced, as the second part refers to peacebuilding as we understand it. This does not mean that environmental peacemaking does not exist, but simply that it refers to a more limited framework than that of peacebuilding. When environmental cooperation is used as a means to foster trust and dialogue between communities, thereby deterring future conflicts and impacting sustainable development, we argue that this corresponds to environmental peacebuilding. Accordingly, environmental peacebuilding measures should be implemented when relevant: in the pre-conflict phase to prevent an escalation of latent violence, during a conflict to support a smooth transition to peace, and in the post-conflict phase to ensure sustainable peace (Conca et al., 2005).

3.2.Why the environment?

Natural resources are just one of many other issues around which peacebuilding can be articulated. Other issues include, for example, business initiatives, justice, or health. Nonetheless, the biophysical environment has distinctive qualities which potentially strengthen peacebuilding efforts and offers a broad range of types of actions. There is indeed a variety of activities that can bring different communities to collaborate non-violently using the natural environment. Environmental cooperation can, for instance, take the shape of transboundary water agreements, joint research projects, education, or peace parks which promote biodiversity conservation and eco-tourism. It appears from the literature, however, that some types of natural resources are more likely to result in cooperation than others, and that some types of cooperation are easier to implement than others. Depending on the local needs and socio-economic context, the environment and natural resources can thus be a more or less suited peacebuilding tool. However, more detailed quantitative and qualitative data are needed to further investigate which type of environmental cooperation is best suited and in what contexts.

One of the main assets of the biophysical environment as a cooperation incentive is the interdependence created by transboundary natural resources that are shared between actors at various spatial scales, from local communities to nation-states and global organisations. Indeed, environmental problems (and benefits) do not stop at political borders (Carius, 2007). Instead, natural resources spread across territories, creating “bioregions” (Kyrou, 2007). This interdependence can exacerbate existing tensions, but also creates cooperation opportunities. It calls for cross-border regional forms of management (FoEME, 2008).

Moreover, environmental cooperation is often more cost-effective than conflict for all parties (Kramer et al., 2013, Wolf, 2007). Regarding the latter, Wolf et al. (2005) note that a main reason why riparian countries are pushed towards negotiation instead of conflict is “to ensure access to this essential resource and its economic and social benefits”. The interdependencies created by shared natural resources, coupled with the cost-effectiveness of cooperation over conflict, thus create an incentive for cooperation. The ability to find arrangements to manage shared natural resources can even provide new income sources, supporting post-conflict economic recovery and the peacebuilding process (Matthew et al., 2009). Nonetheless, it has also been noted that environmental cooperation can contribute to durable peace, regardless of whether the environment caused the conflict in the first place (Ali, 2007). The environmental peacebuilding framework can also be seen as an entry point for broader cooperation in other areas, ultimately restoring peaceful relationships (Matthew et al., 2009, Amster, 2015). In regard to this, Maas, Carius, and Wittich (2013) claim that “environmental issues are often lower on the political agenda” and may as such “provide a good entry point for dialogue and cooperation”.

#### Human rights leadership fails – pressure doesn’t work and other factors prevent spillover

Posner, professor – University of Chicago Law School, 12/4/’14

(Eric, “The case against human rights”, The Guardian)

Brazil, one of the largest democracies in the world, is rarely considered to be among the major human rights-violating countries. But every year more than a thousand killings by police – very likely summary executions, according to Human Rights Watch – take place in Rio de Janeiro alone. The prohibition of extrajudicial killings is central to human rights law, and it is a rule that Brazil flagrantly violates – not as a matter of official policy, but as a matter of practice. **Brazil is hardly the only country where this takes place**; others include India, the world’s largest democracy, South Africa, the Dominican Republic and Iran. These countries all have judicial systems, and most suspected criminals are formally charged and appear in court. But the courts are slow and underfunded, so police, under pressure to combat crime, employ extrajudicial methods, such as torture, to extract confessions.

We live in an age in which most of the major human rights treaties – there are nine “core” treaties – have been ratified by the vast majority of countries. **Yet it seems that the human rights agenda has fallen on hard times**. In much of the Islamic world, women lack equality, religious dissenters are persecuted and political freedoms are curtailed. The Chinese model of development, which combines political repression and economic liberalism, has attracted numerous admirers in the developing world. Political authoritarianism has gained ground in Russia, Turkey, Hungary and Venezuela. Backlashes against LGBT rights have taken place in countries as diverse as Russia and Nigeria. The traditional champions of human rights – Europe and the United States – have floundered. Europe has turned inward as it has struggled with a sovereign debt crisis, xenophobia towards its Muslim communities and disillusionment with Brussels. **The** United States, **which used torture in the years after 9/11 and continues to kill civilians with drone strikes, has** lost much of its moral authority. Even age-old scourges such as slavery continue to exist. A recent report estimates that nearly 30 million people are forced against their will to work. It wasn’t supposed to be like this.

At a time when human rights violations remain widespread, the discourse of human rights continues to flourish. The use of “human rights” in English-language books has increased 200-fold since 1940, and is used today 100 times more often than terms such as “constitutional rights” and “natural rights”. Although people have always criticised governments, it is only in recent decades that they have begun to do so in the distinctive idiom of human rights. The United States and Europe have recently condemned human rights violations in Syria, Russia, China and Iran. Western countries often make foreign aid conditional on human rights and have even launched military interventions based on human rights violations. Many people argue that the incorporation of the idea of human rights into international law is one of the great moral achievements of human history. Because human rights law gives rights to all people regardless of nationality, it deprives governments of their traditional riposte when foreigners criticise them for abusing their citizens – namely “sovereignty” (which is law-speak for “none of your business”). Thus, international human rights law provides people with invaluable protections against the power of the state.

And **yet** it is hard to avoid the conclusion that **governments continue to violate human rights with impunity**. Why, for example, do more than 150 countries (out of 193 countries that belong to the UN) engage in torture? Why has the number of authoritarian countries increased in the last several years? Why do women remain a subordinate class in nearly all countries of the world? Why do children continue to work in mines and factories in so many countries?

The truth is that human rights law has failed to accomplish its objectives. There is little evidence that human rights treaties, on the whole, have improved the wellbeing of people. The reason is that human rights were never as universal as people hoped, and the belief that they could be forced upon countries as a matter of international law was shot through with misguided assumptions from the very beginning. The human rights movement shares something in common with the hubris of development economics, which in previous decades tried (and failed) to alleviate poverty by imposing top-down solutions on developing countries. But where development economists have reformed their approach, the human rights movement has yet to acknowledge its failures. It is time for a reckoning.

Although the modern notion of human rights emerged during the 18th century, it was on December 10, 1948, that the story began in earnest, with the adoption of the Universal Declaration of Human Rights by the UN general assembly. The declaration arose from the ashes of the second world war and aimed to launch a new, brighter era of international relations. It provided a long list of rights, most of which are the familiar “political” rights that are set down in the US constitution, or that have been constructed by American courts over the years. The declaration was not dictated by the United States, however, and showed the influence of other traditions of legal thought in its inclusion of “social” rights, such as the right to work.

The weaknesses that would go on to undermine human rights law were there from the start. The universal declaration was not a treaty in the formal sense: no one at the time believed that it created legally binding obligations. It was not ratified by nations but approved by the general assembly, and the UN charter did not give the general assembly the power to make international law. Moreover, the rights were described in vague, aspirational terms, which could be interpreted in multiple ways, and national governments – even the liberal democracies – were wary of binding legal obligations. The US did not commit itself to eliminating racial segregation, and Britain and France did not commit themselves to liberating the subject populations in their colonies. Several authoritarian states – including the Soviet Union, Yugoslavia and Saudi Arabia – refused to vote in favour of the universal declaration and instead abstained. The words in the universal declaration may have been stirring, but no one believed at the time that they portended a major change in the way international relations would be conducted; nor did they capture the imagination of voters, politicians, intellectuals or anyone else who might have exerted political pressure on governments.

Part of the problem was that a disagreement opened up early on between the US and the Soviet Union. The Americans argued that human rights consisted of political rights – the rights to vote, to speak freely, not to be arbitrarily detained, to practise a religion of one’s choice, and so on. These rights were, not coincidentally, the rights set out in the US constitution. The Soviets argued that human rights consisted of social or economic rights – the rights to work, to healthcare, and to education. As was so often the case during the cold war, the conflict was zero-sum. Either you supported political rights (that is, liberal democracy) or you supported economic rights (that is, socialism). The result was that negotiations to convert the universal declaration into a binding treaty were split into two tracks. It would take another 18 years for the United Nations to adopt a political rights treaty and an economic rights treaty. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights finally took effect in 1976.

As the historian Samuel Moyn has argued in his book The Last Utopia, it was not until the late 1970s that human rights became a major force in international relations. President Jimmy Carter’s emphasis on human rights seems to have been a reaction to Vietnam and the gruesome realpolitik of the Nixon era, but Carter himself was unable to maintain a consistent line. Allies such as Iran and Saudi Arabia were just too important for American security, and seen as a crucial counterweight to Soviet influence. Still, something changed with Carter. His five successors – Republicans and Democrats alike – have invoked the term “human rights” far more frequently than any president before him. It is not that presidents have become more idealistic. Rather, it is that they have increasingly used the language of rights to express their idealistic goals (or to conceal their strategic goals).

Despite the horrifying genocide in Rwanda in 1994, and the civil war in Yugoslavia, the 1990s were the high-water mark for the idea of human rights. With the collapse of the Soviet Union, economic and social rights lost their stigmatising association with communism and entered the constitutional law of many western countries, with the result that all major issues of public policy came to be seen as shaped by human rights. Human rights played an increasingly important role in the European Union and members insisted that countries hoping to join the EU to obtain economic benefits should be required to respect human rights as well. NGOs devoted to advancing human rights also grew during this period, and many countries that emerged from under the Soviet yoke adopted western constitutional systems. Even Russia itself made halting movements in that direction.

Then came September 11, 2001 and the “war on terror”. **America’s recourse to torture was a** significant challenge **to the international human rights regime**. The United States was a traditional leader in human rights and one of the few countries that has used its power to advance human rights in other nations. Moreover, the prohibition on torture is at the core of the human rights regime; **if that right is less than absolute, then surely the other rights are as well**.

The rise of China has also undermined the power of human rights. In recent years, China has worked assiduously behind the scenes to weaken international human rights institutions and publicly rejected international criticism of the political repression of its citizens. It has offered diplomatic and economic support to human rights violators, such as Sudan, that western countries have tried to isolate. Along with Russia, it has used its veto in the UN security council to limit western efforts to advance human rights through economic pressure and military intervention. And it has joined with numerous other countries – major emerging powers such as Vietnam, and Islamic countries that fear western secularisation – to deny many of the core values that human rights are supposed to protect.

#### No governance – Populist backlash makes ILaw failure inevitable

Posner 17

Eric Posner, law prof @ Chicago, PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 606, January 2017, “Liberal Internationalism and the Populist Backlash”, https://papers.ssrn.com/sol3/papers2.cfm?abstract\_id=2898357

Abstract. A populist backlash around the world has targeted international law and legal institutions. Populists see international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people. This turn of events exposes the hollowness at the core of mainstream international law scholarship, for which the expansion of international law and the erosion of sovereignty have always been a forgone conclusion. But international law is dependent on public trust in technocratic rule-by-elites, which has been called into question by a series of international crises.

An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War.2 In Russia, Vladimir Putin has drawn on Russian nationalism to consolidate his control, allowing him to engage in violent foreign adventures in Georgia, Ukraine, and Syria. The European Union has been shaken by a debt crisis and a migration crisis, which have accelerated trends toward disintegration. In Hungary and Poland, nationalist governments with authoritarian aspirations have come to power. In the Netherlands, France, Germany, and other European countries, nationalist political parties have achieved high levels of popularity and political influence, while British voters have voted to exit the European Union. In Turkey, the government has launched a ferocious crackdown on the press and the political opposition. In the United States, Donald Trump has criticized numerous international organizations, including NATO, NAFTA, and the United Nations. His election reflects increasing isolationist sentiment among Americans. Trump, like populists in Europe and other countries, has criticized international institutions and norms, and seems likely to repudiate certain international norms and possibly treaties in the areas of trade, security, climate change, and the laws of war. In the Philippines, populist President Rodrigo Duterte has embarked on a scheme of extrajudicial killings in order to combat crime and consolidate his power. In China, President Xi Jinping’s grip on government has strengthened, symbolized by the Central Committee’s recent decision to name him “core leader” of the Party. In India, Prime Minister Narendra Modi preaches Hindu nationalism at the expense of the country’s vast Muslim minority.

Specific causes and circumstances vary across countries but the common theme is a challenge to the “establishment” or “elites” by outsiders on behalf of the common people or, in some cases, by insiders who claim a mandate from the common people.3 The establishment is portrayed as some combination of the following institutions and individuals: the traditional parties and their leadership; the government bureaucracy; business and labor leaders; and international bodies and their memberships. The populist leader argues that the establishment is “corrupt,” meaning that it either enriches itself at the expense of the people, or shows greater concern for foreigners or minorities than for the common citizen. In the most virulent cases, where populism verges on authoritarianism, the populist leader claims the mandate of the nation and denies that a legitimate political opposition exists or can exist.

Not all of the populist leaders have attacked international law. Xi and Modi, for example, have pursued conventional foreign policies—though China’s expansion in the South China Sea, which has involved numerous violations of international law, has sparked tensions with its neighbors and the United States. But this has less to do with populism than with traditional notions of state interest. Populism poses a threat to international law and order because international law is rule by technocracy, and relies on trust and mutual goodwill, while populists see corruption and advantage-taking all around them, and direct their ire at the experts. We see this in the rhetoric of populists, who frequently blame foreign influences and international institutions for the nation’s problems. In recent years, populists have targeted the European institutions, the International Monetary Fund, and the International Criminal Court, and they have mocked and belittled international legal norms, including human rights law and the laws of war, and the quasi-legal principle of humanitarian intervention.

# Block

## T

### 2NC – violation

#### There’s a substantial difference between the two – rule of reason’ and ‘per se’ have precise meanings AND access literature with completely different base assumptions.

Donald L. Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law. March. CURRENT TOPIC IN ANTITRUST: "What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality., 38 Hastings L.J. 471

In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis.

The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason."

The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement.

#### Prohibit means to forbid a given practice – that’s distinct from restrictions

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### “Prohibitions” aren’t rejections---a prohibition must be issued prior to and separate from administrative determinations regarding specific issues.

Sweet 03 – Judge, United States District Court, New York Southern

Robert W. Sweet, Am. Nat'l Fire Ins. Co. v. Mirasco, Inc., 249 F. Supp. 2d 303, United States District Court for the Southern District of New York, March 2003, LexisNexis

In any case, even if the word "embargo" does not stretch so far, there is no doubt that the restriction against the importation of all IBP goods constitutes a "prohibition" under Clause D. HN15 "Prohibition" is defined by Black's Law Dictionary to be "a law or order that forbids a certain action." Black's Law Dictionary 1228 (7th ed. 1999). The dictionary definition is similar: "a declaration or injunction forbidding some action." Webster's New International Dictionary, Unabridged 1978 (2d ed. 1944). The common understanding of the word "prohibition" has similar connotations, with one exception. As Mirasco points out, any governmental action -- including the rejection on which insurance coverage is based -- could potentially be deemed a prohibition under the definitions above as a declaration forbidding the entry of goods. Therefore, a prohibition must be qualitatively different from a rejection. That difference is that the prohibition occurs prior to the government's dealing with the specific cargo at issue and is of a more sweeping nature

## PIC

### 2NC – impx – private enforcement bad

#### 1. Margins—no reason the aff is net better—the system is already overdeterrent, adding another layer only has downside for innovation

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”16 but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.17

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”18 Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”19

#### 2. “Toxic cocktail” of procedural benefits—magnifies unpredictable negative effects

Briggs, partner in the law firm of Axinn, Veltrop & Harkrider, and co-chair of the firm’s Antitrust and Competition Group, Managing Partner of the firm's Washington, DC office, and an Adjunct Professor of International Competition Law at The George Washington University Law School. He is also a former Chair of the American Bar Association's Section of Antitrust Law, ‘18

(John Deq., “Re-Designing the American Antitrust Machine Part I: Treble Damages, Contribution and Claim Reduction,” <http://awa2018.concurrences.com/IMG/pdf/re-designing_the_american_antitrust_machine.pdf>)

Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

#### 3. Settlements—private suits lead to tons of costly settlements, but don’t result in judgements which means companies can keep doing the bad practice

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### 4. Kills solvency—private litigation conflicts with and undermines public enforcement so both fail

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘19

(Daniel A., “Toward a Realistic Comparative Assessment of Private Antitrust Enforcement,”

*In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, edited by Damien Gerard, and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019)

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.30

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”31 and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.32 The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.33 Particularly if private enforcement in particular areas comes to significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point if ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,34 to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.35 His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.36 But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”37 The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s en banc Microsoft decision, the monopolization law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

#### 5. Frivolous litigation—private companies stick their competitors with the cost, turns case

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

### 2NC – PIC turns aff solvency

#### Only judgements really matter for actually stopping bad action—the plan just results in huge costs

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

There are two other ways that private antitrust lawsuits might mete out negative sanctions on corporate managers prior to judgment day. First, antitrust litigation is extremely expensive and the costs are often borne disproportionately by defendants. 100 CEOs, CFOs, and particularly general counsels care a great deal about legal fees, but the divisional managers who often make the decisions that ensnare a firm in an antitrust suit may not care. A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole.' 0' For accounting purposes, legal fees are often treated as operating expenses of the firm as a whole. Therefore, legal fees may not come directly out of a divisional manager's budget or count against her revenues for the purposes of divisional financial reporting and incentive compensation. The threat of having to pay legal fees during a protracted and expensive lawsuit may have relatively little deterrent effect on the key decisionmakers who consider whether to engage in anticompetitive tactics.

A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts, which are a sort of privately negotiated and accelerated judgment day. But with the exception of government case tag-along suits, which are discussed below, large settlement payouts in private cases usually do not occur until the eve of trial. Corporate managers and boards are usually unwilling to open up their coffers for more than nuisance value settlements until the threat of an adverse judgment is imminent. Thus, private settlements may accelerate judgment day by shortcircuiting appeals, but the average time from the planning of anticompetitive conduct to the payment of any substantial settlement amount still probably exceeds five years.

#### Takes too long to create a clear signal

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, it had been nine years since the lawsuit was filed and fifteen years since the alleged misconduct began. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, then it was spun off as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct-assuming that there was any-had long since moved on.

#### Treble damages undermines industry dealmaking

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

### 2NC – PIC solves

#### Public enforcement with SINGLE damages is enough

Italianer, Director-General for Competition, European Commission, ‘13

(Alexander, “Fighting cartels in Europe and the US: different systems, common goals,” October 9, <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>)

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### That achieves optimal deterrence because agencies can sue to stop bad stuff, without creating huge liability, the only function of private suits is to compensate

Juška, PhD candidate, Leiden Law School, Leiden University, Leiden, ‘18

(Žygimantas, “The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pages63–93)

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.

### 2NC – AT: PCP

#### Expansion of the antitrust laws necessarily allows for private suits—CP is germane because it’s a distinct model

Kenneth Ewing, JD, Steptoe & Johnson LLP, Private anti-trust remedies under

US law, 2007, <https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf>

One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

Monetary damages.

Court injunctions to order potentially far-reaching changes in anti-trust defendants’ conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys’ fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

## Trade adv

### 2NC – no alignment

#### Supply chain relocation is inevitable – COVID and U.S.-China strategic rivalry ensure it.

**Suzuki 21** – Visiting fellow with the Japan Chair at the Center for Strategic and International Studies

Hiroyuki Suzuki, “Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region,” CSIS, February 2021, https://www.csis.org/analysis/building-resilient-global-supply-chains-geopolitics-indo-pacific-region

Covid-19 Has Accelerated Supply Chain Restructuring

During the era of globalization over the last two decades, companies of all sizes have been building domestic and international supply chains that prioritize efficiency. However, rising labor costs in emerging economies, including China, and growing geopolitical uncertainty due to U.S.-China strategic rivalry, including the strengthening of protectionist policies in the United States, forced a reassessment of global business models—such as multinational corporations announcing plans to relocate their manufacturing operations to Vietnam and Mexico in 2018–19. The Covid-19 pandemic has greatly accelerated this trend and reaffirmed the importance of protecting citizens’ livelihoods by strengthening supply chains. In particular, the impact on essential commodities such as food and medicines and on social infrastructure, coupled with political tensions, provided an opportunity to promote policies of homeland security in many countries.

In response to an increasingly complex global economic environment, global corporations are taking the following measures to reduce supply chain risk:

▪ Reshoring

In short, this is a strategy to redirect manufacturing operations back to the home market. This trend has been evident since 2019, particularly in the United States due to tariff increases in the wake of the U.S.-China trade conflict that have caused the U.S. manufacturing import ratio (imports as a percentage of total domestic manufacturing output) to fall for the first time in almost a decade. In addition, the Covid-19 pandemic has increased awareness in the United States of the vulnerability of supply chains for critical items such as health care products and food, further encouraging policies that allow companies to repatriate their supply chains back to their home countries. However, in the case of developed countries, reshoring entire supply chains is not practical due to additional labor and overhead costs, so it is important to focus on strategic sectors for reshoring from a national security and industrial policy viewpoint.

#### BUT large scale restructuring is impossible.

Brown 20 – News Writer for MIT Sloan

Sara Brown, “Reshoring, restructuring, and the future of supply chains,” MIT Sloan, June 2020, https://mitsloan.mit.edu/ideas-made-to-matter/reshoring-restructuring-and-future-supply-chains

Companies are unlikely to completely abandon China

The new coronavirus has put a spotlight on the world’s reliance on Chinese manufacturing, and prompted speculation that supply chain restructuring might start with pulling out of China.

But “this is really not happening,” said Sheffi, the director of the MIT Center for Transportation and Logistics, at the EmTech Next conference last month. While some companies have been leaving China over the last decade as costs go up, Sheffi said most can’t, and won’t, move their supply chains out of the country completely.

China is a sophisticated supplier of many parts, he said, pointing out that clothing manufacturers who have left China for other countries are still buying Chinese textiles. Proof in point: While China’s share of clothing manufacturing has fallen over the last five years, its export of raw textiles, which are made with sophisticated large machinery, has gone up.

Even if sewing and parts of some other industries leave, “big industries invested decades in building up a whole ecosystem in China,” Sheffi said. “It will take decades and untold money to move out of China, so I don’t see it happening very quickly.”

Sheffi said none of the executives he’s interviewed for an upcoming book expressed plans to move out of the country entirely.

“They just can’t,” he said. Even if costs are high, China offers capability, speed, and sophistication — an entire ecosystem that can’t easily be replicated or replaced.

### 2NC – impx d

No I/L or thumped

## Harmonization adv

### 2NC – deterred now

#### A number of issues make deterrence structurally impossible in antitrust – even after altering what is considered anticompetitive, effective enforcement is impossible.

Baer et al. 20 – Visiting fellow in governance studies at The Brookings Institution, former assistant attorney general of the Antitrust Division, former acting associate attorney general of the U.S. Department of Justice, former director of the Bureau of Competition at the Federal Trade Commission

Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, Tim Wu, “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” Washington Center for Equitable Growth, November 2020, https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/

Antitrust enforcement faces a serious deterrence problem, if not a crisis. Deterrence is central to most civil and criminal law enforcement programs because catching every lawbreaker is either implausible or would require an immense enforcement apparatus. The antitrust laws, by their very nature, will always lack some of the deterrent clarity characteristics of other legal regimes.30 Yet there is reason to fear we have reached an extreme. Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.31

Antitrust enforcement’s current reactive posture has contributed to this problem. Enforcers typically respond to cases and complaints that come before them.32 Reactive enforcement works well when anticompetitive conduct is rare and is the exception across the U.S. economy.33

But reactive enforcement is unlikely to address wide-ranging competition problems, and may even exacerbate them, when it spreads limited resources broadly, making it difficult to tackle major competitive problems when powerful interests will expend substantial resources to defend their actions. A reactive approach also may largely accept existing legal precedents and try to operate within that reality. The combination can create a ratchet: Court decisions that limit enforcement tend to circumscribe later enforcement. There are no countervailing forces to convince courts to develop rules based on sound economics that will strengthen enforcement.

### 2NC – aff doesn’t solve

#### Studies prove – even assuming companies are caught, fines are insufficient to deter price-fixing.

Violante 17 – Bachelor of Criminology (Florida State University), Juris Doctor (American University, Washington College of Law) Attorney at Nelson, Bryan, and Jones

Keith Violante, “Making Deal with the Devil: Are Current Antitrust Sanctions Deterring Cartel Behaviour,” International Trade and Business Law Review, Vol. 20, 2017, HeinOnline

Regardless of the amount of the fine, it seems civil sanctions do not have more than a transitory impact upon the profitability of a business. Another recent study also suggests that civil sanctions have little to no deterrent value. The study identified several companies that average one or more antitrust civil judgements annually between 1990-2015.103

1 The world's leading recidivist for corporations that commit antitrust violations.104

[table omitted]

Evaluating this data, the study concludes:

Monetary sanctions imposed [upon companies who commit antitrust violations] have been the highest in antitrust history. ... extensive recidivism implies that present ... sanctions are inadequate to deter [antitrust violations].105

The study further found that:

Even under the most optimistic assumptions about discovery, leniency and prosecution rates, corporations have found price fixing schemes to be profitable... [T]o ensure optimal deterrence, total financial sanctions should be greater than four times the expected profit one would expect from a price fixing scheme to optimally deter antitrust violations. 106

Put simply, for a civil fine to adequately deter antitrust violations, the fine must certainly take the profit out of committing antitrust violations.

#### The rise of digital technology means antitrust uncertainty is inevitable.

Wheeler et al. 20 – Visiting fellow in Governance Studies at The Brookings Institution

Tom Wheeler, Phil Verveer, Gene Kimmelman, “The need for regulation of big tech beyond antitrust,” Brookings Institution, September 2020, https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/

Enforcement of the antitrust statutes is an important tool for the protection of competitive markets. Yet, it is a blunt instrument unable to reach many nuanced competition and consumer protection issues created by the digital economy. It is inherently uncertain in outcome, reliably lengthy in process, and an after-the-fact response rather than a broad-based set of rules.

Without a doubt, Big Tech has delivered wonderous new capabilities. However, the “move fast and break things” mantra of Silicon Valley has meant that digital companies move fast and make their own rules. Antitrust statutes reflect a time when markets were relatively stable because technology was relatively stable. Today, the rapid pace of digital technology means companies can move rapidly to advantage themselves by exploiting consumers and eliminating potential competition.

## K

### 1NR – K

**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.

#### The perm wrecks the alt’s strategy—the aff’s understanding of antitrust serves to disseminate myths that reify the hold of corporations.

**Vaheesan 19** – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Profound Nonsense of Consumer Welfare Antitrust,” The Antitrust Bulletin, 2019, <https://journals.sagepub.com/doi/pdf/10.1177/0003603X19875036>

Consumer welfare antitrust is built on three profound falsehoods. First, it is based on false history. Congress, in enacting the primary antitrust statutes, had broader aims than protecting “consumer welfare.” Second, it is based on a false conception of the market. The state constructs and structures the market through legal rules: The market is not a force of nature as the law and economics ideology underpinning antitrust presumes. Third, it is based on false economics. Extensive empirical research has shown, for example, that mergers do not promote consumer welfare and that predatory pricing is real. Despite this evidence, the federal antitrust agencies and courts continue to evaluate mergers and predatory pricing claims relying on simplistic toy models of the world.

These myths have freed corporations from antitrust rules and supercharged their power over the economy, politics, and society. First, antitrust enforcers and federal judges have rewritten legislative intent to focus exclusively on one manifestation of corporate power and downplay or outright ignore other aspects of it. Second, they have naturalized corporate prerogatives and omitted their foundation in law and policy. Third, they have developed and disseminated theories that depict the enhancement and exercise of corporate power as generally beneficial to consumers. Jointly, the three myths function as a potent punch for entrenching corporate privilege.

The present state of antitrust demands fundamental reconstruction. A project to strengthen antitrust rules based on empirical economics is worthwhile but wholly inadequate. It would not address the other foundational nonsense on which contemporary antitrust is based. A coherent antitrust requires deeper change and will be built on law and realism, not myths. Going forward, antitrust should be true to congressional intent, acknowledge the legal and political construction of the market, and informed by real-world evidence. Current-day antitrust is built on a bed of nonsense—false history, false concepts, and false economics—that have been useful to powerful corporate interests and deeply damaging for everyone else.

#### We’re better for economic growth – neoliberalism causes upward redistribution, which lowers aggregate demand and slows growth

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.

#### Not going for warming – financialization is existential

**Mazzucato 21** – Professor in the Economics of Innovation and Public Value at University College London (UCL), where she is Founding Director of the UCL Institute for Innovation & Public Purpose (IIPP)

Mariana Mazzucato, “MISSION ECONOMY: A Moonshot Guide to Changing Capitalism,” Penguin Publisher, 1/28/21, https://www.penguin.co.uk/books/315/315191/mission-economy/9780241419731.html

Finance is financing FIRE

The first problem is that the financial sector has largely been financing itself. Most finance goes back into finance, insurance and real estate rather than into productive uses. The acronym for this is FIRE (finance, insurance, real estate) – appropriate in the sense that it is burning the foundations on which long-term economic growth rests. In the USA and the UK, only about a fifth of finance goes into the productive economy (such as companies that want to innovate, infrastructure that needs building). And in the UK, 10 per cent of all UK bank lending helps non-financial firms; the rest supports real estate and financial assets.18 In 1970 real estate lending constituted about 35 per cent of all bank lending in advanced economies; by 2007 the figure had risen to about 60 per cent.19 The current structure of finance thus fuels a debt-driven system and speculative bubbles which, when they burst, bring banks and others begging for government bailouts. Some of these institutions are deemed ‘too big to fail’, as were banks in the 2008–9 financial crisis: if they failed, the entire system would come crashing down with them. So the banks got the bailouts: FIRE profits are private; FIRE losses are public. Bailing out the banks involved ‘moral hazard’ because, being judged too important to fail, they lived with an implicit government guarantee which tempted them to take excessive risks without having fully to face the consequences if their bets went wrong.

Business is focusing on quarterly returns

The second problem is that business itself has become financialized. In recent decades, finance has generally grown faster than the economy and, within non-financial sectors, financial activities and their accompanying attitudes have come to dominate business. An ever greater share of corporate profits has been used to boost short- term gains in stock prices rather than provide long-term investment in areas like new capital equipment, R&D and worker training: skills are insufficiently developed, too many jobs are ‘McJobs’ and insecure, and wages stay low.20 Indeed, one of the reasons for the high level of private debt in the USA and the UK – driven by a form of capitalism that is aimed at maximizing the returns to shareholders, not all stakeholders – is that many workers need to take on debt to maintain their living standards but cannot earn enough to reduce or pay it off.21 But, unfortunately, the problem goes even further in

Scandinavia, where deregulation of the financial sector has also led to a rise in private debt (also due to home equity withdrawal-based consumption) and overinvestment in FIRE sectors.22

By purchasing its own shares, a corporation can artificially boost its stock price and that of its executives, who are paid in these stocks. In just the ten years to 2019, total buybacks by the Fortune 500 (an annual list of the 500 biggest US companies compiled by Fortune magazine, measured by revenues) exceeded nearly $4 trillion, with many companies spending over 100 per cent of their net income on a combination of buybacks and dividend pay- outs, thus raiding their capital reserves. Over the same period, six of America’s biggest airlines spent an average of 96 per cent of their free cash flow on stock buybacks – the aircraft manufacturer Boeing spent 74 per cent of its free cash flow on stock buybacks – which didn’t deter these companies from asking for federal government help when the COVID-19 crisis struck.23

The excuse often heard from business for doing this is that there are no ‘opportunities for investment’. But, given that the greatest buybackers are in industries where opportunities clearly exist – pharmaceuticals and energy – this is unconvincing. Are there really no opportunities for innovation in antibiotics or treatments for tropical diseases that mostly affect poor people in developing countries, not to mention vaccines? (This question became particularly pertinent with the arrival of COVID-19.) Are there really no opportunities for aircraft manufacturers to invest in renewable energy and other green technologies? The chief culprit is a form of corporate governance obsessed with ‘maximization of shareholder value’ – essentially, maximizing stock prices. Even Jack Welch, the late CEO of General Electric, one of America’s biggest companies, later in life called shareholder value ‘the dumbest idea in the

world’. He explained: ‘Shareholder value is a result, not a strategy ... Your main constituencies are your employees, your customers and your products. Managers and investors should not set share price increases as their overarching goal ... Short-term profits should be allied with an increase in the long-term value of a company.’24

In practice, maximizing shareholder value has often involved loading companies with debt – a supposedly efficient model which leverages a company’s capital base – with the risk that the company is dangerously exposed to unexpected turns of events, such as a pandemic or a market downturn. In 2017, for example, the USA suffered a severe retail slump. The long-established US retailer Toys ‘R’ Us went into liquidation. It had been acquired in 2005 by two private equity firms, Bain Capital and Kohlberg Kravis Roberts, and a real estate firm, Vornado Realty Trust. To buy the company they used the usual private equity formula, saddling it with debt to increase the return later.25 Indeed, company debt rose soon after the takeover from $1.86 billion to nearly $5 billion. By 2007 debt interest payments were 97 per cent of the company’s operating profit. The retail slump of the following years was severe, but the high debt burden imposed on Toys ‘R’ Us impaired its ability to adapt and increased its vulnerability to the downturn.26 The excessive financialization of companies and remorseless pursuit of shareholder value has left many other major companies open to similar charges of moral hazard: ingenious financial structures benefit owners more than other stakeholders such as workers, suppliers and customers – let alone the wider communities in which companies operate.

#### Inequality is an existential threat to future generations – their evidence doesn’t account for long-timeframe impacts – those outweigh on magnitude

Schmidt and Juijn 21 – Andreas T. Schmidt is an associate professor of political philosophy at the University of Groningen in the Netherlands. Daan Juijn is a researcher at CE Delft, an environmental research and consultancy firm.

Andreas T. Schmidt and Daan Juijn, “Economic inequality and the long-term future,” *Global Priorities Institute*, May 2021, pp. 2-3, https://globalprioritiesinstitute.org/wp-content/uploads/Inequality-and-the-Long-Term-Future\_Andreas-Schmidt-and-Daan-Juijn-reupload.pdf.

However, such instrumental arguments typically focus on the static properties of income inequality, that is, on the effects inequality would produce during a somewhat limited time-slice. Yet income (in)equality likely has intertemporal consequences too. And it is far from clear whether such consequences will be good or bad. For instance, Tyler Cowen has recently argued that high economic growth should take priority: with a long enough timeframe, the exponential nature of growth ensures that future benefits will outweigh all other considerations (Cowen 2018). Moreover, if equality lowers longer-term growth rates – as some have argued – the dynamic instrumental case would speak against reducing inequality. In response, one might contest that there is a growth-equality trade-off. Or one could argue that equality comes with its own long-term benefits, such as better political institutions.

Such arguments would typically focus on effects within the next hundreds to, maybe, thousands of years. But we could go further and include inequality’s effects on all future well-being. Doing so moves us into the realm of longtermism, an influential idea in the Effective Altruism community. The central idea is that since the future holds the vast majority of potential value, the expected moral value of many actions is almost entirely determined by the action’s effects on the long-term future. Nick Beckstead writes: ‘what matters most (in expectation), is that we do what is best (in expectation) for the general trajectory along which our descendants develop over the coming millions, billions, and trillions of years.’ (Beckstead 2013, 1) Suppose reducing income inequality has non-negligible expected consequences for our far-future descendants. Longtermism would then imply that whether we should reduce economic inequality or not is primarily determined by such long-term effects.

So, we can assess the instrumental character of income inequality in three different ways: we can focus on effects in the short term, the medium term (hundreds to thousands of years), or – adopting longtermism – all its future effects. It is not obvious that these three approaches converge. The lack of work on these questions constitutes a surprisingly large and important gap in the literature. This article makes a start filling this gap. To assess the instrumental benefits of equality/inequality, we use a time-discounted instrumentalist framework. We do not look for an optimal level of inequality. Instead, we consider how, at the margin, reducing or increasing economic inequality in today’s richer countries (roughly, OECD countries) would impact expected aggregate human wellbeing, other things equal. We vary our discount rate to check inequality’s effects along three timeframes, short, medium, and long term. We find a good short and medium-term instrumental case for lower economic inequality. We then argue – somewhat speculatively – that we have instrumental reasons for inequality reduction from a longtermist perspective too, because greater inequality could increase existential risk. We thus have instrumental reasons for reducing inequality, regardless of which time-horizon we take.

We then argue that this pro tanto argument has important implications for how philosophers should think about economic inequality. Performing a ‘moral sensitivity analysis’, we argue that for most consequentialist views, the pro tanto argument also provides all-things-considered reason to reduce inequality. And even across most non-consequentialist views, the argument either provides an all-things-considered or at least a weighty pro tanto reason to reduce inequality.

Our results matter in several ways. First, most people believe we have duties towards future generations. Accordingly, when assessing policies that affect inequality, their impact on future generations should be a relevant dimension (when assessing proposals to reduce inequality, for example (Atkinson 2015)). Second, our longtermist argument makes for a new input into philosophical debates about equality and egalitarianism. While philosophers often focus on noninstrumental reasons against inequality, they acknowledge that instrumental concerns are important too.2 If longtermism is sound and the long-term future often decisive, our instrumental argument should thus matter greatly for debates around egalitarianism. Moreover, because our argument holds across the short, medium, and long term, it is also quite robust. Finally, in philosophy, there has been increasing interest in longtermism and existential risk but no work yet that connects this to economic inequality. Our article makes a start filling this gap.