# 1NC

## 1

Section 5 CP

#### The Federal Trade Commission should:

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

#### --issue cease and desist letters to companies violating worker welfare that falls under rule of reason stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitve practices under section 5 – the CP solves best

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.

## 2

#### The 1AC’s antitrust paradigm is underpinned by assumptions imported from neoclassical economics that naturalize corporate domination. Recognizing the political nature of antitrust and working to define its content is key to counter corporate power.

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.

#### That approach is part of a broader legal proceduralism that puts power in the hands of conservative courts instead of democratic agencies---that guts effective governance and makes tackling existential threats impossible.

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 is unsustainable and triggers cyclical economic collapses and environmental destruction. Defense doesn’t apply – interrelated crises and backsliding into authoritarianism make progressive restructuring or regulation impossible absent the alternative

**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.

#### An anti-domination approach to the political economy counters neoclassical assumptions that prevent effective regulation---restoring popular sovereignty ensures agencies will carry out democratic lawmaking.

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.

## 3

#### 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.

#### Large firm dynamism key to tech leadership vs China – 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.

## 4

#### Text: The fifty states and all relevant United States territories should prohibit private sector business practices that violate an antitrust worker welfare standard.

#### States can create and enforce antitrust law without federal preemption

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

## 5

FTC tradeoff

#### The plan forces tradeoffs in FTC enforcement efforts---they’re in a merger tsunami and barely staying afloat

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 shortages, they’re effectively regulating hospital mergers---the plan reverses that.

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.

#### High healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch---no alt causes

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.

#### Healthcare driven budgetary overstretch causes global instability.

Brown, PhD, Professor of Practice and Vice Chair, Public Administration and International Affairs at Syracuse, worked as an economist at the International Monetary Fund and as Chief Economist for Eastern Europe, Africa, and the Middle East at BNP Paribas, ‘13

(Stuart S., “Global Power: Key Issues,” in *The Future of US Global Power: Delusions of Decline*, Palgrave, p. 57-58)

In the first instance, structural26 budget deficits are more likely to be symptoms of incipient overstretch then prima facie evidence of national decline. Overstretch suggests a need to realign commitments and resources, hence spending and revenues. In principle, persistently large deficits demand adjustments that need not materially impact the underlying drivers of longer-term prosperity. In contrast, if fiscal imbalances prove sufficiently chronic, they can eventually trigger growth-inhibiting alterations in microeconomic incentives. In such cases, incipient overstretch can mutate into a more primary threat to the system's underlying dynamism.

In its classical formulation, “imperial overstretch” refers to unrestrained and exorbitant foreign military campaigns. The latter can be said to redound to the detriment of great powers by crowding out more productive capital investments. Yet in contrast to widespread impression, the US fiscal challenge does not primarily reflect out-of-control defense spending and the burden of foreign entanglements. If this were the case, then the feasibility of financing an ever-expanding global power projection would be brought into question. This neither minimizes the sizable resources the US commits to military-related spending nor denies that cutbacks in such spending can help facilitate overall fiscal adjustment. Rather, the point is that an endemic failure to rein in explosive economy-wide health care costs with the latter's implications for public sector health insurance programs – the real fiscal challenge – will do more to endanger macroeconomic stability and eventually erode the material foundation of US power (see chapter 8).

By viewing (health-care driven) fiscal deficits as a necessary manifestation of overstretch is misguided for a more basic reason. The root of the US fiscal problem involves unsustainable commitments – particularly in the area of health expenditure – made by government to its citizens. It is decidedly not a question of any dearth of national resources to adequately meet the health needs of the population at large. As the richest country in the world, the US possesses more than enough resources to achieve this goal. The relevant political and social question is whether the population’s basic health requirements are best met via ever-expanding entitlements requiring increasingly higher levels of taxation.

## Case

### Inequality

#### The aff won’t change market dynamics – agencies and courts are too pro-business which makes antitrust ineffective

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

Sandeep Vaheesan, “Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages,” Maryland Law Review, 2019, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3832&context=mlr

Breaking with the mid-twentieth century approach to antitrust, the federal courts and antitrust enforcers, since the late 1970s, have once again interpreted—indeed reinterpreted—antitrust law to expand the autonomy of big capital and restrict the freedom of workers. The executive branch and judiciary have minimized concerns about the power of corporations. They have replaced congressional (and once-judicially validated) economic and political objectives with an “efficiency” or “consumer welfare” goal. In the area of mergers, the Court has taken a generally hands-off approach, meaning that the federal antitrust agencies have become the principal policymakers and used their power to handicap their own ability to stop mergers. 21 Except for horizontal mergers in highly concentrated markets that threaten to leave a market with four or fewer players, the DOJ and the Federal Trade Commission (“FTC”) today generally do not stop or even remedy most horizontal mergers.22 This lax approach to mergers has yielded multiple waves of consolidation across the economy and contributed to a highly concentrated industrial structure. Along with the agencies’ permissive approach to mergers, the Supreme Court has narrowed the scope of anti-monopoly law and restricted the ability of plaintiffs to challenge predatory pricing and refusals to deal.24 The federal antitrust agencies have done little to resist this doctrinal retrenchment and have not brought a significant anti-monopoly case arguably since the lawsuit against Microsoft in 1998.25

This general deference toward large businesses has been paired with vigilance toward collective action by labor. The federal antitrust agencies, especially the FTC, repeatedly challenged union-like organization by workers and professionals. The FTC also consistently called on states to scale back occupational licensing rules that can help consumers and workers. With this pro-capital, anti-labor orientation, the antitrust laws in the new Gilded Age resemble antitrust in the original Gilded Age.26 Laws intended to challenge the privileges of monopoly and preserve space for workers to organize are once again being used to preserve the existing power structure and under- mine attempts by labor to strike a more equitable bargain with capital.27

Through congressional, executive, and judicial action, the antitrust laws can be reinterpreted to honor their original legislative intent and to create a more just and equitable society. This reinterpretation and revival of antitrust law would neither be easy nor be immediate. It would require new legislation and a radical change in personnel both at the federal antitrust agencies and on the federal bench and the erasure of decades of accumulated pro-monopoly and pro-oligopoly precedent. Yet, the conservative coup against the historical understanding of the antitrust laws beginning in the 1970s28 reveals the malleability of these statutes. At a minimum, the antitrust agencies and courts should reorient the antitrust laws to advance the congressional intent expressed in the Sherman, Clayton, and FTC Acts. The Congresses that passed these statutes sought to limit the power of large-scale capital over consumers and producers, competitors, and citizens and, at the same time, were near-unanimous in stating that these laws should not interfere with the joint action of workers. The federal antitrust agencies and the courts should rediscover these legislative histories. In this current era of deep economic and political inequality, the policy objectives expressed by Congress in 1890 and 1914 remain as important as ever to ordinary Americans. Persisting with the current antitrust paradigm would only uphold an unjust and increasingly unpopular status quo.

#### Authoritarian regimes exploit interdependence to weaponize misinformation and propaganda which and delegitimizes democratic regimes and collapses soft power – turns advantage 1 and 3

**Chang and Yang 20** – Postdoctoral Fellow at the Graduate Institute of East Asian Studies at National Chengchi University [1]

Professor at the Graduate Institute of East Asian Studies at National Chengchi University and Executive Director of the Taiwan-Asia Exchange Foundation [2]

Chia-Chien Chang and Alan H. Yang, “Weaponized Interdependence: China's Economic Statecraft and Social Penetration against Taiwan,” Orbis Volume 64 Issue 2, 3/4/20, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102596/

Second, openness is the prerequisite for developing soft power, while sharp power is based on opacity, censorship, and barriers to free flows of information. Ultimately, soft power hinges on legitimacy, and no one can sustain legitimacy without transparency. A country is likely to lose its international legitimacy, as well as soft power, if it continues to rely on covert operations or secret diplomacy, or if its actions are opaque or have a hidden agenda. In contrast, opacity facilitates manipulation through disinformation and is thus conducive to sharp power. Liberal democracies historically countered sharp power by promoting open information and transparency of state behaviors. However, information and communication technologies have created the opportunities for authoritarian regimes to exploit the openness and interdependence of global networks.

Today, authoritarian regimes like Russia and China regularly spread fake news worldwide to sabotage democratic societies while raising barriers to fact-checking. They use international propaganda machines and cyber techniques to dump disinformation externally so as to crowd out the global information markets and drive out other news providers or media companies. At the same time, they further tighten domestic censorship. China, for instance, has launched several censorship programs, like the “Great Firewall” and “Great Cannon” among others, which guarantee that the Chinese state-own news media can monopolize its domestic marketplace of information (ideas, news, knowledge, etc.).

One central goal behind the use of sharp power is to delegitimize democracies, as well as to decrease democratic soft power. Dictatorships manipulate the information and destabilize democratic societies in order to show that democratic institutions and values, such as freedom and universal human rights, are no better than authoritarian ones in solving domestic disputes. Furthermore, they combine sharp power with economic statecraft to propagate the argument that authoritarianism (dictators often calling it “strong nation”) could be an alternative model, perhaps a better one, for development.

#### Interdependence exports a state’s economic crises in the global economy which causes resurgent nationalism and global instability – turns the advantage

**Ba 20** – Professor of International Relations and International Political Economy at University of Missouri

Heather Ba, “Hegemonic instability: complex interdependence and the dynamics of financial crisis in the contemporary international system,” European Journal of International Relations, 10/30/20, https://journals.sagepub.com/doi/full/10.1177/1354066120967048

Building on this innovative research, I propose a theory of how America’s national financial capabilities interact with its central position within the international banking network to disproportionately influence the global supply of financing, ultimately driving the incidence of financial crises in both developed and developing countries. Complex interdependence implies that production, consumption, and investment all occur across borders, as households, firms, and governments interact and exist transnationally. Changes among actors’ interactions in one part of the system can quickly spread to actors in other parts of the system through real and financial linkages. The structure of complex interdependence also determines the patterns of stability and volatility experienced by countries that participate in it. More specifically, in hierarchically organized systems, like our contemporary international economy, the conditions of the largest and most centrally located economy, the United States, will spill over to other economies

and bring about a synchronization of financial market conditions (Claessens et al., 2011; Strohsal et al., 2019). When US credit and private debt are expanding and asset prices are rising, US investors and banks increase lending abroad as they become optimistic regarding the state of their portfolios and balance sheets, and become willing to take larger risks abroad to earn higher returns. The increased supply of credit in peripheral economies applies downward pressure to the market interest rates in the recipient countries and pushes them below the natural rate implied by the productivity of the real of economy. This increases the demand for financial products and generates a boom in asset prices, thereby facilitating credit and asset price bubbles that lead to crisis (Borio and Disyatat, 2010).

I support this narrative with a time series analysis applied to quarterly cross-sectional data.3 I present evidence that changes in US financial sector conditions, which economists term the US financial cycle, correlate with gross capital inflow surges, capital inflow stops, and financial crises.

These dynamics have several implications for the contemporary international distribution of power, which I elaborate in the conclusion. But most importantly, these dynamics present a critical challenge for US global leadership of the liberal economic order 75 years on. Instability within the international financial system is one of globalization’s great discontents and is one plausible contributing factor to the current resurgence of protectionism, populism, and nationalism. After more than 30 years of increasing volatility, culminating in the second largest financial crisis in history, promoting international financial stability is one of the greatest challenges to US leadership in the 21st century. A robust, stable financial system is critical to making a liberal, capitalist economy function. A growing economy reinforces and promotes liberal political values and institutions (Friedman, 2006, 2010). Financial instability, on the other hand, exacerbates inequality and sows uncertainty, fomenting political discontent (Ahlquist et al., 2020) that may take a politically repressive form.

### Democracy

#### Court legitimacy bad – causes overturn of Roe v. Wade – Court will only overturn major precedents if it gets a greenlight to move the court in a controversial direction

Stohr 20 – Supreme Court reporter for Bloomberg News. JD from Harvard.

Greg Stohr, “Roberts faces moment of truth on abortion issue at Supreme Court,” *Bloomberg News*, 28 February 2020, https://www.bloomberg.com/news/articles/2020-02-28/roberts-faces-moment-of-truth-on-abortion-issue-at-supreme-court.

For U.S. Chief Justice John Roberts, the moment of truth on abortion is coming.

The Supreme Court on Wednesday will hear its first abortion case since Roberts became the pivotal vote on the issue. Four years after invalidating a Texas law requiring clinic doctors to have hospital admitting privileges, the court will consider whether to switch directions and uphold a similar law in Louisiana.

The argument will test Roberts’s appetite for rolling back abortion-rights precedents and could foreshadow a fight over the landmark 1973 Roe v. Wade ruling. The justices will rule by the end of June, potentially making abortion and the court itself central issues in the November election. President Donald Trump’s administration is supporting the Louisiana law.

Opponents say the law would leave the state with only one clinic, in New Orleans, and just one abortion doctor to serve the 10,000 women who seek to end a pregnancy every year in the state.

“Roe becomes meaningless if there is no access to abortion,” said Kathaleen Pittman, director of the Hope Medical Group for Women, a Shreveport clinic that says it would have to close if the measure took effect. “These women that we work with now do not have the means to travel, to fly out of state, to go to other places for their care.”

Conservative states have been moving to sharply restrict abortion rights in recent years. States enacted 58 new abortion restrictions alone, including a total ban by Alabama, according to the Guttmacher Institute, a research organization that backs reproductive rights. Many of those laws are on hold.

Supporters of the Louisiana measure, which carries criminal penalties, say the state is trying to protect women from unscrupulous and incompetent abortion providers. Among other arguments, they are urging the court to say that Hope and two unidentified doctors lack the legal right to challenge the law on behalf of their patients.

“We need to be listening to women, not to abortion businesses,” said Catherine Glenn Foster, president of Americans United for Life.

Roberts — now back at the court full-time after presiding over Trump’s impeachment trial — dissented from the 2016 ruling that struck down the Texas rules and gave abortion-rights supporters reason to think the issue was resolved. The 5-3 decision said the state’s law “provides few, if any, health benefits for women” and “poses a substantial obstacle to women seeking abortions.”

That was before the court’s composition changed with the addition of Trump appointees Neil Gorsuch and Brett Kavanaugh. The latter succeeded Justice Anthony Kennedy, who had been the court’s swing vote on abortion and voted with the majority to throw out the Texas law.

Those changes have left Roberts, a 2005 appointee of Republican President George W. Bush, squarely in the middle. Last year he joined the four Democratic-appointed justices to put the Louisiana law on hold while the court considered whether to intervene. Kavanaugh and Gorsuch both voted to let the law take effect, hinting they were at least open to upholding it.

Roberts’ vote might suggest he has questions about the federal appeals court ruling that upheld the Louisiana law. The 2-1 decision said the impact wasn’t as great as in Texas, and the majority blamed Louisiana doctors for not making good-faith efforts to get the required privileges.

But Roberts gave no explanation for his vote, and he may view the Louisiana law differently now that the court is directly considering it.

If he votes to throw out the Louisiana law, “it will be an indication that he wants to move slowly on abortion and does not want to expose the court to a lot of criticism, at least at this point,” said David Strauss, a constitutional law professor at the University of Chicago Law School who signed a brief urging the court to strike down the law.

If Roberts votes to uphold the Louisiana statute, “that will suggest that he’s willing to be more aggressive, although a lot will depend on how the opinion is written,” Strauss said.

Roberts steered the court toward restricting abortion rights in a 2007 ruling he could use as a template. That decision, issued during Roberts’ second term as chief justice, upheld a federal ban on a rarely used late-term abortion procedure that opponents called “partial-birth abortion.”

The decision, written by Kennedy, didn’t overturn a 2000 ruling that struck down a similar Nebraska ban. Instead, Kennedy said the federal statute was clearer in describing what procedures were outlawed and how doctors could ensure they wouldn’t be prosecuted.

Roberts is far more reluctant to overturn precedents than his conservative colleagues. He said in his 2005 Senate confirmation hearing that overruling a precedent is a “jolt to the legal system.”

In that testimony, he called the 1992 Planned Parenthood v. Casey abortion-rights ruling a “precedent of the court entitled to respect under principles of stare decisis,” the policy that the court generally won’t disturb its settled rulings.

In the hospital-privileges case, abortion-rights advocates say the Texas and Louisiana rules are identical. Louisiana says there are enough differences that the court need not rule the same on both, but the state says the court should overturn the Texas ruling if necessary.

#### Reproductive rights key to solve overpopulation and systemic death

Schlanger 14

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

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

No Food, No Water

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

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

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

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

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

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

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

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

The Big Taboo

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

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

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

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

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

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

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

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

Leaving Half the Population Behind

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

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

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

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

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

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

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

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

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

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

‘God Will Provide’

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

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

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

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

The Great Girl Bounce

What would happen if contraception suddenly became a universal right?

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

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

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

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

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

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

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

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

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

# Block

## K

#### Turns case and o/w’s - Agency flex is key to every impact – quick responses check emerging risks

Bagley 19 – Professor of Law, UMich

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

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

#### D) The aff’s approach to antitrust is misguided – failing to question the ideologies and assumptions that shape our antitrust doctrine makes market concentration inevitable and effective antitrust enforcement impossible

**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.

#### E) It’s impossible to objectively weigh the consequences of the plan against the alt because neoliberalism as an ideology acts to discursively shield capitalists from the political consequences of their acts – examining how the aff reproduces that ideology is key

Guardino 18 – Associate Professor at Providence College. His research focuses on how discourse and information flows affect democracy and political power.

Matt Guardino, “Neoliberal populism as hegemony: a historical-ideological analysis of US economic policy discourse,” *Critical Discourse Studies*, 28 February 2018, [http://sci-hub.tw/https://www.tandfonline.com/doi/full/10.1080/17405904.2018.1442361](http://sci-hub.tw/https:/www.tandfonline.com/doi/full/10.1080/17405904.2018.1442361)

Concrete neoliberal tax, regulatory and social welfare policies in the USA have promoted and supported corporate prerogatives, economic inequality and, ultimately, capitalist class power (Harvey, 2005).While these policies have withdrawn or constrained the state in some contexts, and enabled and empowered the state in others, they have been publicly promoted and justified through a discursive formation generally emphasizing market individualism, personal freedom and self-interest. This distinction between policy and discursive dimensions is crucial. The neoliberal discursive formation, even in the limited US national context, is multifaceted and operates differently on different levels. Still, this formation in all its particular modes operates ideologically, in that it selectively depicts (thus, mystifies) complex policies that do not reduce to a straightforward withdrawal of the state from the market. While neoliberalism in policy and practice is not synonymous with the free market, public political actors have often justified neoliberal policies by associating them with the ‘free market.’ My central focus is a particular dimension of the neoliberal discursive formation, neoliberal populism, that has been positioned to accomplish this ideological work by cultivating consent for neoliberal policies among broad US public constituencies. Thus, neoliberalism is ‘a deeply political phenomenon’ (Venugopal, 2015, p. 174), but its political character is ideologically deflected through its discourses, including the discourse of neoliberal populism.

While it projects a stridently anti-statist and individualist public discourse, neoliberalism in practice has reserved a significant role for government coercion on behalf of corporate prerogatives and market norms that support those prerogatives. My textual analysis of Reaganite neoliberal populism tracks Peck and Tickell’s (2002) conceptualization of neoliberal policy, in which the early phase focused on a ‘rolling back’ of the state as a market regulator and social service provider, while the second phase (from the early 1990s) saw the state ‘rolled out’ to take a more explicit and active part in enforcing business imperatives. Still, because the neoliberal political-economic project in the United States has never been defined by a simple retreat of the state, I argue that the shift from ‘rolling back’ to ‘rolling out’ in the US context has marked a change in emphasis and degree, rather than a fundamental qualitative shift.

The intellectual and ideological rationale for many neoliberal policies holds strong affinities with the laissez-faire philosophy of the Republican Party from the Civil War through the 1920s. Consequently, the neoliberal project was first and more fully embraced by that party, although by the 1990s major Democratic Party figures had entered its orbit (Harvey, 2005, p. 51). At the same time, despite clear differences vis-à-vis the role of the state between neoliberal policy, on the one hand, and eighteenth-/nineteenth-century liberalism, on the other, neoliberal public discourse draws key elements from this classical liberalism associated with the American founding, whose notions of negative liberty, personal independence and suspicion of central government have long been reflected in political culture.

In the US tradition, populism may be broadly defined as an elevation of ‘ordinary people’ in opposition to oppressive political-economic elites. Populism historically has taken a wide variety of ideological forms in the United States, often with distinct or contradictory political programs (Grattan, 2016; Kazin, 1995). Populism as manifested in the USA and elsewhere has been conceived as a strategy of political mobilization, a style of leadership, a mode of governance, a series of substantive political movements, and much else (Grattan, 2016, pp. 8–9). My concern is with populism as a public discursive formation whose elements have been selectively appropriated to ideologically justify the neoliberal political-economic project.

Populist discourse entails several interrelated themes that transcend the ideological and political distinctions that have characterized US populism in its other historical manifestations (Kazin, 1995). These themes include elites vs. ordinary people, opposition to centralized authority, opposition to unfair economic arrangements, anti-intellectualism and appeals to tradition (Brewer, 2016, emphasis added). Such constructs are available to be ideologically adapted not only because they are culturally resonant, but because they are fluid, generalized and abstract. I argue that elements of this historically multivalent and multivocal populist discourse have been connected to elements of neoliberal discourse to publicly legitimize particular economic and social welfare policies.

Populism’s complex historical roots may be traced from the American Revolution through Jacksonian Democracy (Kazin, 1995, pp. 16–21), to late-nineteenth-/early-twentieth-century left-leaning agrarian/worker movements (Grattan, 2016, 47–90; Postel, 2007), to the 1960s and 1970s presidential campaigns of George Wallace (Kazin, 1995, pp. 221– 242). Even culturally exclusive and socially authoritarian variants of this tradition have often endorsed downwardly redistributive (and, sometimes, anti-corporate) economic policies. Moreover, when populism as a political movement or policy program has found a home in the US two-party system, historically it has been embraced by Democrats as much as by Republicans (Grattan, 2016, pp. 49–90).

These differing historical roots and political commitments reflect apparent ideological tensions between the embrace of national community and a collective ethos grounded in a moralized, emotionally laden construction of ‘ordinary Americans’ in populist discourse, on the one hand, and the valourization of ‘rational’ contractual relations between individual market actors, and defense of limited government in support of private property rights in neoliberal discourse, on the other. Populism and neoliberalism, then, would seem unlikely to merge into a new, culturally plausible and politically effective discourse. I argue, however, that neoliberal policy owes much of its striking political success in the USA precisely to its discursive ‘trans-coding’ (Hall, 2011, p. 711) with a form of right-leaning populism.

This trans-coding occurs through the distinctive answers neoliberal-populist discourse supplies to the two central questions posed in any form of populist politics: ‘Who are the people? And how should the people enact their power in politics?’ (Grattan, 2016, p. 10). Neoliberal-populist discourse constructs ‘the people’ as those who follow ‘traditional’ and ‘American’ norms and practices (including key market-centric norms and practices), and who demand ‘traditional’ and ‘American’ economic policies which are ideologically signified as laissez-faire. Defying conventional distinctions of economic class, these ‘people’ encompass anyone deemed ‘productive’ in the market, a category which is further associated with private, for-profit sector workers from the lowest to the highest levels of income and wealth. In neoliberal populism the people are constructed as enacting their politics primarily through conventional vehicles of representative democracy, including voting, public opinion polls and direct, individualized contacts with elected leaders. Indeed, these two elements of neoliberal-populist discourse are nearly tautological: Promoting the ‘free market’ is, by definition, following the popular will, but in order for that will to be authentically popular, it must constitute identities, affinities and behaviors consistent with market individualism.

As such, neoliberal populism constitutes an instance of ‘interdiscursivity’ (Fairclough, 2015, p. 38), where discourses with largely independent and sometimes antagonistic sources combine in novel ways to create a culturally resonant and ideologically potent fusion. Just as neoliberal discourse itself was produced by trans-coding semantic components of eighteenth-/nineteenth-century liberalism with other elements (Hall, 2011, p. 711), neoliberal-populist discourse is a trans-coding of neoliberal and populist elements, each with distinctive roots in political culture. Thus, neoliberal-populist discourse is a particular reflection of neoliberalism’s remarkable ‘intersections with extant cultures and political traditions, and … convergences with and uptakes of other discourses and developments.’ (Brown, 2015, p. 21).

Indeed, discursive fragments open to assimilation by neoliberal-populist discourse are evident in US political culture stretching back two centuries or more. Both eighteenth-/ nineteenth-century classical liberalism (Hartz, 1955), on the one hand, and the populist appeals of Jeffersonian and Jacksonian democracy, and the late nineteenth-/early twentieth-century People’s Party (Kazin, 1995, pp. 17–46), on the other, contribute discursive material that was later reformulated to support the neoliberal political-economic project. However, it was in the late 1970s and early 1980s that neoliberal populism cohered as a distinctive US political discourse. It was largely through neoliberal-populist discourse that neoliberal policies and their underlying power relations found a means of ideological legitimation that could forge the measure of public political consent necessary to support themselves. While neoliberal populism has been stronger on the right side of the political spectrum, it is also a major element in the language and imagery of the elites who have led the Democratic Party in recent decades. This is seen, for example, in President Bill Clinton’s (1996) triumphal claim that ‘the era of big government is over,’ and President Barack Obama’s (2012) skepticism of the state and defense of his education and health care policies emphasizing ‘competition’ and the ‘private market.’ Thus, neoliberal populism has constituted a discursive currency broadly deployed across the US elite.

Previous work on connections between neoliberalism and populism has primarily focused on non-US settings, and has not conceptualized neoliberal populism as a distinctive public political discourse (Bozkurt, 2013; Weyland, 2003). The little work that has analysed neoliberal populism in US political culture has been highly abstract (Konings, 2012). In contrast, I understand neoliberal populism in the United States as a materially embedded discourse that works at the micro level to mediate and construct ways of seeing the world that support political-economic power relations. Hall (1985b) identified ‘authoritarian populism’ as an ideologically laden discourse that has played an important role in the neoliberal political project (see also Hall, 2011, pp. 714–715). Similarly, political economists have focused on broad contradictions and tensions between the neoliberal regime’s ideological discourse of ‘freedom’ and its authoritarian governance mechanisms (Bruff, 2014; Harvey, 2005, pp. 66–67, 79–80). I build on this work to conceive neoliberal populism as a particular public discourse in itself that has associated neoliberal policies with images of democracy. This discourse provides a key to the historical roots of the current political-economic conjuncture, as it has been an important means through which the material implications of the neoliberal project in the USA are obscured**.**

Neoliberal-populist discourse: concepts, method, texts

Neo-Gramscian concepts provide a flexible and nuanced framework through which to understand the interaction of discourse and power in the neoliberal political-economic project. The discursive dimension of hegemony comprises the production and circulation of cultural material that facilitates (though never guarantees) public consent by constructing power relations as natural, normal, inevitable and/or universally beneficial. The specific elements of any ideologically and politically effective hegemonic discourse, however, must be connected (or articulated) with each other, and to concrete political projects, as well as circulated widely in cultural forms that resonate with central elements of prevailing belief, or popular common sense (Gramsci, [1973] 2005; Hall, 1988). Hegemony encourages popular consent for political projects through which power and resources accrue to a minority of elites. These elites, however, lead coalitions whose lesser members receive real (if limited, vulnerable and often short-term) benefits to secure their active or passive acceptance of conditions that obstruct more equal and humane social relations. Because it recognizes these tensions and unevenness in relations of domination, a neo-Gramscian analysis avoids simplistically defining the concept of neoliberalism as ‘loose shorthand for a prevailing dystopian zeitgeist’ (Venugopal, 2015, p. 168), an ‘all-purpose denunciatory category’ (Flew, 2014, p. 51), or a ‘synonym for “evil.”’ (Ferguson, 2010, p. 174) While the benefits and harms of neoliberal policies are unequally parceled among fractions of its hegemonic coalition, the neoliberal-populist discourse that supports them shrouds those complexities by depicting such policies as in the best interest of all.

Because hegemonic processes are contingent and open-ended, they must be grasped through ‘concrete practical analysis of ideological formations within cultures.’ (Turner, 2003, p. 181; see also Gramsci, 1985, pp. 388–389) My concrete practical analysis of neoliberal-populist discourse relies on the method of critical semiotics, which defines discourse as a system of signs whose connotations emerge in reference to cultural fragments of common sense that take on historical associations with social power relations (Barthes, 1957/1972). Hegemonic meanings emerge through signification. Signification produces signs by connecting signifiers (e.g. concrete words) to signifieds, or concepts drawn from common sense. Because there is no logically or historically fixed, one-to-one correspondence between signifier and signified, signification is linguistically, culturally and politically produced. Signs are cognitively and affectively linked with each other, and with particular materially embedded social groups and political projects, through articulation (Hall, 1985a). Signification and articulation are hegemonic when these processes support power relations that maintain or intensify inequality and exploitation, which often (though not always) occurs through political discourse produced by dominant groups. Thus, critical semiotics entails explicating how: (1) particular signifiers in discourse connotatively connect with particular signifieds in common sense, (2) the signs thereby produced are articulated with each other, and (3) such signs are further articulated with particular political actions/power relations in particular socio-historical contexts. My textual analysis focuses on how those connections between specific fragments of abstract cultural meaning and the concrete policies of early Reaganism have been ideologically forged.

In neo-Gramscian semiotic analysis, the identification of relations between discourse and unequal or undemocratic power relations is central to empirical description and explanation: Normative evaluation occurs through an analytic process grounded in reason and evidence, while that process by definition focuses on critiquing power dynamics that impede emancipatory social relations. Consequently, in mapping neoliberal-populist signifying processes at their emergence, I seek to inform contemporary discursive struggles against the neoliberal project. While counter-hegemonic efforts must be embedded in contemporary political-economic, social and cultural conditions, clarifying neoliberal populism’s initial semiotic architecture can provide a foundation for understanding how it might be undermined today. Analytical critique is a necessary – though not a sufficient – move in the broader processes by which dominant discourses can be politically contested. Explaining how new discourses might effectively undermine neoliberal-populist ideological claims is outside the scope of this article. However, producing any alternative discourse that can advance an effective politics in support of greater equality and democracy requires critical understanding of the historical-ideological contours of the discourse it seeks to challenge.

#### 1)- False assumptions about antitrust should be outright rejected – fully divesting from the 1AC’s neoliberal assumptions is the only way to address corporate domination

**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.

#### The alt solves and is anti-authoritarian - Critique of domination is key to fundamental changes to the distribution of economic and political power

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

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

IV. Constitutional Political Economy and Fourth-Wave Legal Realism

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

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

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

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

There is an important reason why we might want to understand constitutionalism in this way - as values and as basic structure. Reconceptualizing constitutionalism and constitutional political economy in this vein helps pull the high politics of constitutionalism outside of its narrow province in the courts and in constitutional theory, deemphasizing the primacy of courts, doctrine, and text. It also helps to elevate legislation, regulation, public philosophy, and social movements as sites of law, politics, and contestation that implicate our most critical normative values and shape our most foundational economic and political structures. These are not merely domains of "ordinary politics" or technical public policy. Imbuing them with the stature of constitutionalism appropriately elevates the moral and structural concerns that are at stake in these domains.

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

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

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

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

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

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

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

#### Antitrust is a problem of domination and democratic agency rather than simply “state and labor power” – we must both challenge corporate power through economic redistribution and redesign institutions to facilitate popular sovereignty

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

K. Sabeel Rahman, “Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism,” *Texas Law Review*, vol. 94, 2016, pp. 1338-1352, https://texaslawreview.org/wp-content/uploads/2016/09/Rahman.pdf.

The dramatic changes to the American economy a century ago catalyzed a diverse and highly mobilized movement of reformers and thinkers. Confronted by corporate entities of unprecedented scope and power - from railroad monopolies, trusts like Standard Oil, and financial elites like J. P. Morgan - and troubled by the violence of industrialization apparent in recurring strikes, financial panics, and economic dislocation, a number of Progressive Era thinkers developed a rich critique of market capitalism. 30 This context produced a broad intellectual movement, what Barbara Fried and Herbert Hovenkamp have referred to as the "first law and economics movement." 31 Approaching the problem from diverse methodologies including law, philosophy, sociology, and economics, they pioneered a compelling critique of American political economy. Among these more radical Progressive Era thinkers, from the legal realists to institutional economists and philosophers, there emerged a critique of capitalism focused not on efficiency or distribution so much as a more fundamental problem of domination and power. The problem of the market, for these thinkers, was, at root, a problem of disparate economic and political power - power that had to first be identified and unmasked before it could be contested and checked through collective action and reform politics. This conceptual framework can be distilled and understood as comprising of two elements: first, a critique of economic domination, and second, a turn to expanded democratic agency of citizens, movements, and democratic institutions as a response. This view of "democracy against domination" offers a compelling starting point for conceptualizing an alternative democratic political economy.

A. The Problem of Economic Domination

Louis Brandeis captured this concern with large corporations, monopolies, and trusts. Brandeis argued that the immense profits of large corporations juxtaposed with the below-subsistence wages they offered revealed a disparity in political power akin to slavery, where workers were "absolutely subject" to the will of the corporation. 32 Even if corporations acted in the interests of consumers and laborers, this would be at best a "benevolent absolutism," leaving in place the root problem that "within the State [there is] a state so powerful that the ordinary social and industrial forces existing are insufficient to cope with it." 33 The Knights of Labor and the labor movement similarly framed the problem of corporate power in such terms of seeking liberation from the arbitrary power of the master within the workplace. 34 Even Herbert Croly, whose faith in democracy was considerably less than other contemporaries like John Dewey, warned of the problems of rent extraction arising from monopoly and "economic privilege," which, if sufficiently "hostile to the public interest," would require a "shifting of the responsibility" away from these private actors. 35

But problematic exercises of economic power were not limited to large trusts and monopolies; the entire system of market exchange posed similar problems of unequal power. Legal realists like Robert Hale argued that unequal income distributions were a result not of natural forces but of disparities in power: "the relative power of coercion which the different members of the community can exert against one another." 36 Economist Walton Hamilton similarly argued that tyranny constraining individual liberty now took the form of the "bondage" of being dependent on wages [\*1340] for subsistence, subjected to the "tyranny of the system of prices," and to the dictates of large-scale economic development. 37

This diagnosis of unequal economic power recasts the problem of modern capitalism as one not of income inequality but rather one of domination - the accumulation of arbitrary, unchecked power over others. 38 Domination, as suggested by these Progressive Era critics, could manifest in both the concentrated form of corporate power and the diffuse form of the market system itself. Domination captures a wide range of the moral harms in an economically unequal society: the subjugation of workers to corporations, the subrogation of the public as a whole to monopolies and "too-big-to-fail" banks, and the ways in which diffuse patterns of discrimination or market structures might constrain individual and collective freedom. The problems of our unequal society are not just matters of distributive justice and income. To overcome these challenges we must do more to ensure that all Americans have real, meaningful freedom to shape their own lives - and that means have a real voice, a real share of power in economic, social, and political realms. The freedom that domination threatens - the freedom we must seek to realize - is not the libertarian freedom of consumer choice and market transaction; it is the richer freedom to live lives we each have reason to value - a freedom that is expanded with our capacities and capabilities to have real agency in the world. In short, it is the freedom of being an agent, capable of authoring one's own life and coauthoring collectively our shared political, social, and economic life. This is the freedom that is constrained by the accumulation of unchecked power, whether by the state, the corporation, or the market itself.

B. Democratic Agency and Popular Sovereignty

The domination-based critique of capitalism also points to a different account of the remedies to this problem of unaccountable, unchecked power: the need to rebalance the terms of economic and political power in society, whether by checking concentrations of private power on the one hand, or by expanding the democratic agency of citizens and communities on the other.

Indeed, this imperative to open up the seemingly natural and private domain of the market to the demands of democratic legitimation is what lies behind the critique the legal realists advanced of the public-private distinction. While this critique is often noted as a central element of the move away from formalism, 39 it served a much broader function of linking economic power to the same demands for democratic justification, legitimacy, and accountability normally expected of exercises of "public" power. If the exercise of power was not in fact limited to the coercive force of the state but rather omnipresent throughout the seemingly private domain of market transactions, then such private power should be subject to the same kinds of moral and prudential policy considerations that are applied to determining valid exercises of public state power. The free market itself was thus a regulatory system subject to state control and broader policy debate. 40

Thus, philosopher Horace Kallen warned that exercises of private power were often cloaked beneath appeals to liberty and laissez-faire economics, tainting the ideal of freedom "to vindicate tyranny and injustice." 41 Morris Cohen described property rights as a form of sovereign power, compelling obedience in the commercial economy just as state power compelled obedience in politics. 42 As a result, "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government." 43

But this still leaves a further problem. Private power in the form of large corporations and market power in the form of the market system share another trait: they seem to defy the capacities of individual citizens to hold them accountable. Corporations exercise a vast power over workers, consumers, and politicians, far beyond the ability of any one person to counteract. 44 Similarly, the market as a system is so diffuse as to render it inactionable. 45 The challenge, then, lies in creating new vehicles and channels for democratic agency - institutions that can enable citizens to engage in more effective and empowered forms of collective action through which economic power can be contested and reshaped.

This need to create alternative modes of democratic agency is well exemplified by the thought of philosopher John Dewey. Dewey saw the libertarian resort to free markets as fundamentally misconstruing the nature of the modern economy; the market mechanism, with its disparities of economic and political power, was simply one system of allocating power - a particularly inequitable one - that had to be replaced by a "more equal and equitable balance of powers that will enhance and multiply the effective liberties of the mass of individuals." 46 The challenge, however, was that the lay public was too weak to counteract the pressures of an inequitable market economy. The purpose of political institutions, for Dewey, was to make it so a "scattered, mobile and manifold public may so recognize itself as to define and express its interests." 47 Without such public institutions, social and economic arrangements would seem obscured or otherwise beyond the scope of effective citizen action. 48 Dewey defined the public as the domain of "all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for." 49 State institutions served a dual purpose: in addition to making and implementing policies, these institutions were also key "structures which canalize action," providing a "mechanism for securing to an idea [the] channels of effective operation." 50

According to Dewey, the current inability of lay citizens to be effective and knowledgeable policymakers was not evidence against the value of democracy. Rather, these limitations were products of the existing institutional structure which had to be reformed to enable greater educative public discourse and more regular forms of citizen participation in governance, through which they could become more effective participants in self-rule over time. 51 Achieving such expanded citizen political agency and participation required institutional structures that could foster, house, and incubate such political agency. In particular, it would require institutions that went beyond traditional appeals to elections, legislatures, or the separation of powers. As Dewey argued, there was "no sanctity" to particular received "devices" of democratic elections. 52 Instead,

The old saying that the cure for the ills of democracy is more democracy is not apt if it means that the evils may be remedied by introducing more machinery of the same kind as that which already exists, or by refining and perfecting that machinery. But the phrase may also indicate the need of returning to the idea itself, of clarifying and deepening our apprehension of it, and of employing our sense of its meaning to criticize and remake its political manifestations. 53

The link between democratic agency and domination is well exemplified by Brandeis. Consider one of Brandeis's famous dissents in Louis K. Liggett Co. v. Lee, 54 where the Supreme Court struck down a Florida anti-chain store tax provision on Fourteenth Amendment grounds. 55 While this dissent may be seen more narrowly as a defense of federalism, the opinion is driven more centrally by Brandeis's concern with economic domination and with his commitment to combating such private power by expanding the democratic capacities of the people themselves. The opinion begins with a lengthy discussion of the threat corporate power poses to individual liberty. The Florida legislators, in Brandeis's view, were appropriately motivated by the "fear of encroachment upon the liberties and opportunities of the individual[;] fear of the subjection of labor to capital[;] and fear of monopoly." 56 The tax provision represented an attempt to defuse this threat and expand economic opportunity for small businesses and towns under the domination of large corporate chains. 57 Florida's action is important less because of an intrinsic value to states' rights, and more as a vehicle for citizens to experience meaningful [\*1344] democratic agency: "Only through participation by the many in the responsibilities and determinations of business," wrote Brandeis, "can Americans secure the moral and intellectual development which is essential to the maintenance of liberty." 58

Similarly, in New State Ice Co. v. Liebmann, 59 Brandeis dissented again from a majority ruling striking down Oklahoma's chartering of a public utility on Fourteenth Amendment grounds. 60 Like in Liggett, Brandeis's dissent was motivated less out of deference to Oklahoma on federalist grounds, and more as a vital expression of democratic agency of the people seeking to secure equal access to the necessities of life in the face of the extreme hardship, inequality, and insecurity of the Great Depression, which, Brandeis notes in his dissent, represented an "emergency more serious than war." 61 In the face of this structural economic collapse, such democratic agency and experimentation was essential. Predicting an ideal alternative form of economic planning would require "some measure of prophecy," for "man is weak and his judgment is at best fallible." 62 As a result, Brandeis argued, there was no choice but to allow for social learning through the actual experience of policy innovation, development, and experimentation. 63 The Court, as a result, had to be extremely wary of unduly limiting the capacities of citizens to engage in such experimentation.

It is telling that in both cases, Brandeis does not attempt to flip the majority's Fourteenth Amendment argument in favor of a more egalitarian view of substantive due process. But he also does not call for the kind of mechanical judicial deference to political branches that is the conventional Holmesian critique of Lochner-type decisions. Instead, Brandeis couches this deference to the democratic political process of state legislation in a substantive (but not necessarily constitutionally rooted) moral account of the problem of domination that motivates this turn to democratic action in the first place. Brandeis's opinion does not, therefore, exhibit a neutrality of process or a simple appeal to antiformalism. It is a morally substantive, non-neutral critique of private power and an appeal to democratic values. But it is a vision of democracy that places the Court in the position of protecting and thickening, rather than displacing or usurping, the democratic capacities of citizens to counteract domination through political action.

III. Antidomination as a Political Economic Reform Agenda

Taken together, the problem of domination and the value of democratic agency thus offer a valuable normative framework for conceptualizing the challenges of an unequal political economy. This conceptual focus also provides a starting point for imagining the kinds of legal, regulatory, and reform politics needed to rebalance these disparities of economic and political power. The historical examples of Progressive Era reform are not meant to suggest a literal blueprint for reform policies today; we need not directly reapply Progressive Era policies to the modern economy. But they are valuable for revealing an underlying ethos, for showing what kinds of approaches might be useful for combating domination, and for expanding democratic agency.

We can see a hint of what this approach to curbing domination might look like in practice through the reform politics of the Progressive Era itself. In their response to this problem of domination, the reform politics of the Progressive Era represented a large-scale, structural attempt to redress this problem of domination in two respects: first, by restructuring the market system to curb private power; and second, by restructuring the political system to expand popular sovereignty. These reforms sought to both reduce the threat of domination and expand the capacities of the democratic citizenry to better hold economic actors accountable.

#### The alt solves - Critique of domination is key to fundamental changes to the distribution of economic and political power – it deemphasizes the centrality of judicial review in favor of regulation and social movement advocacy

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

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

IV. Constitutional Political Economy and Fourth-Wave Legal Realism

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

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

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

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

There is an important reason why we might want to understand constitutionalism in this way - as values and as basic structure. Reconceptualizing constitutionalism and constitutional political economy in this vein helps pull the high politics of constitutionalism outside of its narrow province in the courts and in constitutional theory, deemphasizing the primacy of courts, doctrine, and text. It also helps to elevate legislation, regulation, public philosophy, and social movements as sites of law, politics, and contestation that implicate our most critical normative values and shape our most foundational economic and political structures. These are not merely domains of "ordinary politics" or technical public policy. Imbuing them with the stature of constitutionalism appropriately elevates the moral and structural concerns that are at stake in these domains.

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

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

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

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

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

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

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

#### Administrative state is key to every progressive goal – it counters political hierarchies and forces institutions to operate in the public interest

Rahman 18 – Associate professor of law at Brooklyn Law School and former visiting professor of law at Harvard Law School.

K. Sabeel Rahman, “Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,” *Harvard Law Review*, vol. 131, 2018, pp. 1682-1689, https://harvardlawreview.org/wp-content/uploads/2018/04/1671-1712\_Online.pdf.

A. Privatization and the Challenge of Contesting Economic and Social Structure

The regulatory state did not simply come into being because of the complexity of modern governance; rather, in its key moments of institutional innovation and development, the rise of modern administration has always been closely tied to substantive aspirations to counteract inequalities, hierarchies, and disparities of power generated by a changing social and economic order. As Michaels writes, the socioeconomic upheavals of industrialization led an "increasingly inclusive and mobilized public" to demand "greater protection from the vagaries, deceptions, and dangers of the marketplace" (p. 41). As a result, a "State newly tasked with these weighty and extensive responsibilities (and newly attuned to the disciplining effects of a more demanding, empowered, and diverse electorate) could no longer get away with being small or amateurish" (p. 41). The outcome of these demands was a burst of institutional innovation and state formation that created the explosion of new administrative bodies, commissions, and bureaucrats in the Progressive Era, accelerating with President Roosevelt's New Deal. While Michaels is certainly right to highlight the ways in which the professionalization and proceduralization of these new administrative powers were central to their legitimation, the rise of the modern regulatory state -- and its political and normative valence -- has to be understood in context of these substantive aspirations and concerns arising from the industrial economy.

The upheavals of industrialization generated more than simple economic dislocation; they provoked a deep political crisis. 26 Late nineteenth-century thinkers, lawyers, and reformers saw industrial capitalism as a fundamental threat to existing institutions and political ideals. Industrialization produced widespread immiseration, dislocation, and precarity. 27 But it also produced very clear and threatening new forms of economic power: the power of managers over workers and the rise of new corporate titans like J.P. Morgan, the Vanderbilts, and the Rockefellers, whose corporate control over finance, rail, oil, and other foundational goods and services placed whole towns and business sectors at their mercy. 28 At the same time, political institutions themselves were already viewed as captured, corrupt, or otherwise incapable of meeting these challenges: legislative corruption was a widespread concern, and a conservative judiciary posed a threat to basic state police powers aimed at protecting workers, health, and safety -- and curbing these new forms of corporate power. 29 This context generated social movements across the country, from the Farmers' Alliance (which would become the widespread Populist movement), to the largely urban, middle-class Progressive movement, to the growing organized labor movement. 30

While these movements were themselves highly diverse and heterogeneous in their members and demands, they shared a common set of ideas: that the industrial economy was a highly unequal one shaped by new forms of domination and power, and that for economic and political liberty to survive industrialization, new institutions would have to be created to empower the public and check the excesses of industrialization. First, the problem of industrial capitalism was not just one of income inequality or maldistribution. More critically, it was a problem of economic power. 31 For antitrusters and crusaders like Louis Brandeis, a key problem was that a variety of private actors, from monopolies and trusts, to finance, to corporations more broadly, had accumulated a degree of quasi-sovereign control over the economic vitality and well-being of individuals and communities -- yet were not subject to the kinds of checks and balances and norms of public justification that would have accompanied equivalent exercises of public power. 32 This problem of economic power also appeared in Progressive Era critiques of the market system itself. On this view, as thinkers like Robert Hale and John Dewey suggested, what might appear as impersonal "market forces" that, for example, drove wages down or prices up, were in fact the cumulative result of thousands of microscale transactions and bargains, each of which took place under (legally determined) disparities of power. Law constructed markets -- and thus shaped market forces themselves. 33

Second, if the problem of capitalism was really a problem of power, then the remedy required the construction of new forms of civic capacity empowered to contest such private and market power. Thus, for Progressive Era reformers, a key challenge was the challenge of action-ability. 34 As Dewey put it in his influential book, The Public and Its Problems, the problem of the modern public was that it was too scattered, diffuse, and disorganized, incapable of asserting its interests in the face of the pressures of the industrial economy. 35 By its very nature, economic inequality in an industrializing economy could not be counteracted at an individual level; the background disparities of power were systemic and could be altered only by equally systemic changes to the background rules of the marketplace itself. Indeed, this was one of the central insights of legal realist scholars and progressive economists like John Commons, Robert Hale, Richard Ely, and others, who saw the prospects for economic equity as requiring expansive efforts to restructure the background rules of the market itself. 36 By creating new institutions like regulatory bodies, reformers made it more possible to act on these seemingly powerful and diffuse forces; by situating these bodies in a larger context of public-oriented, democratic politics, these agencies could fairly be seen as agents of the public good. Thus, private power would be made contestable and governable by democracy. 37

These are the kinds of aspirations that fueled the experimentation with the expansion of the administrative state: starting at the state and local level with the efforts by cities to municipalize private utility companies and by state governments to create railroad oversight commissions and agencies to address labor, poverty, and public health, and then reaching the federal level as the Progressive Era Administrations of Presidents Theodore Roosevelt and Woodrow Wilson began to experiment with antitrust and economic regulatory oversight. 38 As Professor William Novak has convincingly argued, this proliferation of state and local regulatory experiments shaped a generation of legal scholars and policymakers, giving rise to the modern techniques of administrative governance and making the later New Deal creation of the modern administrative state possible. 39 The rise of administration, then, was inextricably related to the rise of democracy, in two related senses: first, the building of state regulatory capacity provided the democratic public as a whole with new tools through which to make a vision of socioeconomic order possible; second, these tools were at the outset oriented, at least in part, toward a substantive vision of democratic accountability and equality, not just of governmental actors, but perhaps even more importantly, of private economic actors whose unchecked private and market power posed a threat to democratic opportunity.

This relationship between democratic political agency and capacity, substantive ideals of democratic equality, and the administrative state also animated important episodes of regulatory institutional development and innovation in the mid- and late twentieth century. As the growing literature on "administrative constitutionalism" suggests, the frontline battles for economic, racial, and gender equality often involved the building and deploying of bureaucratic capacity, and internal battles between social movements and bureaucrats. 40 It was through the creation of regulatory institutions that labor rights, nondiscrimination protections, and access to federal welfare programs from Medicare to poverty assistance were made possible. Furthermore, it was through the pressures exerted on these bureaucracies by social movements that these regulatory tools were gradually repurposed toward enforcing and implementing equity- and inclusion-enhancing programs.

Consider, for example, Professor Karen Tani's recent work on the administration of welfare rights. As Tani documents, the development of a modern welfare rights regime involved a hard-fought shift away from a view of welfare as charitable support for the needy to welfare as a right that was an entitlement owed to members of the polity. 41 This shift had to be negotiated and was driven in large part by bureaucrats within the Social Security Administration, who asserted their specific vision of welfare as entitlement over the resistance of local welfare system administrators. To make the idea of welfare rights a reality, these bureaucrats experimented with implementing greater process protections for claimants. 42 These federal officers also developed new approaches to training and hiring bureaucrats, socializing them into a way of doing their day-to-day work that took as an axiom this more robust commitment to welfare as entitlement. 43 The success or failure of this effort turned not so much on the role of judicial interpretations of constitutional doctrine or presidential directives, but rather on more bureaucratic concerns: jurisdictional turf battles between local and state administrators more hostile to expanded welfare benefits and federal agencies seeking to expand access, difficulties of sourcing enough trained personnel who shared this larger mission, and the like. 44

A similar story can be told about the construction of equal access to Medicare. As Professor David Smith details in his historical account, it was the politics of regulation that constructed the reality of equal access to Medicare as a universal entitlement. 45 This outcome was neither obvious, nor predetermined. Rather, it was the contingent result of a complex interplay of bureaucratic innovation, social movement pressure, and regulatory policymaking. As Smith argues, in the early days of Medicare, there was a very real threat that the program would be administered in racially discriminatory and exclusionary ways. 46 The health system emerging in the mid-twentieth century reflected the legacy of racial exclusion and hierarchy in the Jim Crow South, marked by segregated and geographically concentrated hospital systems, and driving vastly divergent health outcomes and mortality rates between whites and African Americans. 47 Civil rights movement groups like the NAACP, Southern Christian Leadership Conference, Student Nonviolent Coordinating Committee, and Congress of Racial Equality, made the integration of hospitals and the healthcare system a key focal point -- taking the lead from African American health professionals who drove these campaigns. 48 Pressure from civil rights leaders led to a major shift in Department of Health, Education, and Welfare leadership and culture. By December 1965, the agency issued a new internal memo that declared its mission to include the compliance with an enforcement of civil rights goals, through the administering of Medicare funding for hospital systems. 49 The agency created an Office of Equal Health Opportunity in February 1966 to enforce Title VI compliance for any hospital receiving Medicare payments. 50 This new office in turn hired teams of investigators, coordinating with civil rights groups to train them and to identify hospitals that might be violating civil rights requirements. 51

The rise of the administrative state was thus not a politically neutral endeavor. The checks and balances that legitimate administrative authority in essence make possible (but do not guarantee) the contestation of deep forms of economic and social inequality, subordination, or hierarchy. This is not to say that administrative authority is always equality or inclusion promoting -- hardly. But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place. The dismantling of administrative institutions, then, is similarly nonneutral. Scholars of the administrative process have long warned of the dangers of special interest capture of regulatory agencies, which would cause administrative authority to be redirected to serve some interests over others. 53 But agencies can also be captured and neutered through inaction -- through what political scientists call "drift," where highly resourced and sophisticated players are able to produce substantive policy change simply by holding existing rules in place in the face of changing external conditions. 54 Dismantling agencies altogether would be an even more extreme form of opposition to these potential uses: rather than trying to capture or simply neuter the agency, more radical efforts to deconstruct regulatory institutions cut off the very possibility by eliminating the regulatory capacity itself, a kind of complete and total capture through deconstruction.

This substantive valence of administrative power and its potential deconstruction adds an important layer to Michaels's critique of privatization. Michaels alludes to the ways in which privatization risks permanently dismantling institutional tools and capacities that are difficult to rebuild. As Michaels warns, under privatization, "we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized" (p. 12). He rightly notes that privatization emerged as a "pivot[]" strategy in the Reagan era, a "second-best" to dismantling regulatory bodies themselves (p. 97). This is a problem in particular because "the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. . . . It is the world of Schumpeter and Coase, not Montesquieu or Madison" (p. 5). Private corporate governance, meanwhile, cannot replicate the kinds of checks and balances that the separation of powers principles require (p. 164).

Dismantling administration and returning to private ordering is therefore troubling for democracy in three senses. First, given prior background structural patterns of exclusion and disparities of wealth, power, and opportunity, a return to private economic and social ordering is by definition a return to economic inequality, social hierarchy, and exclusion. Second, the dynamics of market competition or of corporate governance cannot replicate or replace public institutions of democracy or of checks and balances. They operate fundamentally differently and are not substitutes. Third, a dismantling of regulatory institutions removes some of the most vital and effective mechanisms through which we as a democratic public seek to contest and reshape these background structural inequities and exclusions: without tools of general administrative policymaking and enforcement, these structural inequities are harder to overcome and reshape.

#### A strong state has to supervise emerging tech – leaving it to markets guarantees cyberattacks, rouge AI, and collapse in global competitiveness + national security + biotech development

**Tajdeh 21** – Senior Editor for National Defense Magazine

Yasmin Tajdeh, “Commission: AI Dominance Requires Bold Action,” National Defense, 3/16/21,

https://www.nationaldefensemagazine.org/articles/2021/3/16/commission-ai-dominance-requires-bold-action

The United States must pump billions of dollars into artificial intelligence research if the nation wants to be “AI-ready” by 2025 and successfully compete with great power competitors China and Russia, according to new findings from a congressionally chartered panel.

The National Security Commission on Artificial Intelligence — which was established under the fiscal year 2019 National Defense Authorization Act to examine ways to advance the development of AI for national security and defense purposes — recently released its final report to Congress in March after two years of work.

“To win in AI, we need more money, more talent [and] stronger leadership,” said Chairman Eric Schmidt, the former head of Google’s parent company Alphabet.

The 700-plus page report includes recommendations to the Biden administration and Congress that will require sweeping changes to better posture the nation for competition with other AI-enabled nations, such as China and Russia.

The technology will impact the United States profoundly in the coming years, but despite some “exciting experimentation” and a few small programs, “the U.S. government is a long way from being ‘AI-ready,’” according to the report. The Defense Department and intelligence community must be AI-ready by 2025 to avoid falling behind, the commissioners said.

Reaching that goal will require the government to create a Technology Competitiveness Council akin to the National Security Council, said former Deputy Secretary of Defense Robert Work.

“The U.S. has no mechanism to organize for a tech competition,” he said. The National Security Council was created at the beginning of the Cold War to manage a long-term competition with the Soviet Union, he noted.

“We need the same type of approach [for the current era of great power competition] at the White House level by establishing the Technology Competitiveness Council, [which] we believe should be chaired by the vice president and includes all the cabinet secretaries to develop and oversee a strategic national approach to emerging technologies like AI,” he added during a public meeting where the commission voted on the report before transmitting it to the Biden administration and Capitol Hill.

The government will also need to make major investments in research to spur domestic AI innovation, Schmidt said. “We do need more money, particularly in AI R&D, so that by 2026 we get to $32 billion per year,” he said.

Schmidt has previously said that China is rapidly catching up to the United States in AI, noting that the nation is only a year or two ahead of Beijing.

China has made “a massive investment in this area with many, many, many smart people working on it. We have every reason to think that the competition with China will increase,” Schmidt said during the meeting.

The commission’s report is split into two parts: “Defending America in the AI Era” and “Winning the Technology Competition.”

The first focuses on implications and applications for AI for defense and national security, Schmidt said. The second recommends actions that the government must take to promote AI innovation to improve national competitiveness and protect critical U.S. advantages in the bigger strategic competition with China.

The report features four pillars of action including leadership, talent, hardware and innovation.

“If I’ve learned anything in studying the way the government works, leadership — especially from the top — is critical to get the bureaucracy to move to the next challenge and the next opportunity,” Schmidt said.

Meanwhile, there is a “huge talent deficit” in the federal workforce, he said.

“We need to build new talent and expand existing programs in government,” Schmidt said. “We need the world’s best to come and stay to cultivate homegrown talent.”

One key recommendation of the report is to scale up digital talent within the government. This includes establishing new talent pipelines, including a U.S. Digital Service Academy to train current and future employees. The commissioners also called for a civilian National Digital Reserve Corps to recruit skilled employees including industry experts, academics and college graduates. Additionally, there needs to be a Digital Corps, which would be modeled on the Army Medical Corps.

When it comes to hardware, it is critical the nation stays ahead, Schmidt said. However, it is very close to losing its edge when it comes to microelectronics — which underpin some of the Defense Department’s key capabilities including artificial intelligence, advanced manufacturing and space systems — because of the United States’ reliance on Taiwan.

“We need to revitalize domestic semiconductor manufacturing and ensure that we’re two generations ahead of China,” he said.

Work noted that Taiwan is potentially vulnerable. If “China absorbed Taiwan — which is the source of many of the world’s hardware — that would really be a competitive problem for us,” he said.

Fostering domestic innovation will come with a high price, Schmidt said.

“AI research is going to be incredibly expensive,” he said. “We need the government to help set up the conditions for accessible domestic AI innovation.”

The commission worked on its report with a great sense of urgency, Work said. Each of the 15 commissioners believe that AI-enabled systems will pose a threat to free and open societies in the future.

“AI tools will be weapons of first resort, particularly between great powers,” he said.

The U.S. armed services’ competitive military technical advantage could be lost within the next decade if the nation does not accelerate the adoption of artificial intelligence and other advanced technologies across its missions, Work said.

“Our major military rivals are really all-in on military AI applications,” he said. “Defending against AI-capable adversaries without employing AI is an invitation to disaster. AI-enabled applications will operate at machine speeds and humans simply will not be able to keep up with them without help from their own algorithms and their own AI.”

Speaking during a plenary meeting discussing a draft version of the report in January, commissioner Chris Darby, president and CEO of In-Q-Tel, an independent, non-profit strategic investor for the CIA and the broader U.S. intelligence community, said the United States faces five AI-related threats which illustrate a new society level of conflict that the United States must organize and defend against.

The first is AI-enabled information operations.

“AI applications and associated technologies will increase the magnitude, the precision [and] persistence of maligned information ops,” he said. The government should create a joint interagency task force within the Office of the Director of National Intelligence to lead and integrate public-private efforts to counter foreign-sourced maligned information.

The second is targeted data harvesting, Darby said. Information security and integrity must be viewed through a national security lens. The government must protect its own data from adversarial interference or theft by defending against attacks.

The third threat is AI-enhanced cyber capabilities.

“Though the threats are still developing, in the future, AI-automated and enabled malware could make compromises such as the SolarWinds cyber attack orders of magnitude more effective, delivering greater precision, tailoring speeds, stealth and persistence at scale,” he said, referring to a massive hack that rocked the government and was discovered in December. Government agencies have pointed the blame at Russia, and it is believed that the breach went undetected for many months.

To close gaps in the nation’s cyber defenses, the United States should continue to adopt recommendations suggested by the U.S. Cyberspace Solarium Commission, which last year released a major report to Congress, Darby said.

The document — which featured 80 recommendations to lawmakers — broke its recommendations into six pillars, including: reform the U.S. government’s structure and organization for cyberspace; strengthen norms and non-military tools; promote national resilience; reshape the cyber ecosystem; operationalize cybersecurity collaboration with the private sector; and preserve and employ the military instrument of national power.

Additionally, to head off future threats and accelerate countermeasures to current threats, the government should develop and deploy AI-enabled information sharing, anomaly detection and malware mitigation across its networks, Darby said.

A fourth threat the United States must be aware of is adversarial AI against U.S. platforms, Darby said. These types of acts are here today and already impacting commercial machine learning systems, he added.

“Among other moves to improve AI assurance, the government should create government-wide red teams to attack and harden our own AI applications,” Darby said.

The fifth threat is more troublesome against the backdrop of the COVID-19 pandemic: AI-enabled biotechnology. New technologies such as clustered regularly interspaced short palindromic repeats — more commonly known as CRISPR — enable gene editing and make biology programmable, he said.

“Biotech, sadly, can also have a dark side,” Darby side. “AI may enable the engineering of genetically targeted pathogens or the mental and physical bio-enhancement of … adversary combatants.”

To address this, the government should increase the profile of biosecurity issues within U.S. national security agencies, as well as update the National Biodefense Strategy to include a wider vision of biothreats, Darby said.

Commissioner Katharina McFarland, chair of the National Academies of Science Board of Army Research and Development, said the application of biotechnology can protect the United States against some threats as well as create new ones.

“As we see the democratization of biotechnology and the expansion of … dual-use applications, we need to be of course sensitive to ... nations that don’t share our values, but work with the nations that do share our values to strengthen our ability to use these technologies appropriately and defend against when they’re not used appropriately,” she said.

Commissioner Safra Catz, CEO of Oracle Corp., said the report is meant to be a wake-up call for the government.

“There are some very, very bold actions we’re asking for,” she said. “This is pretty much the critical moment for our country and the investment that’s necessary.”

Jim Shaw, executive vice president of engineering at the Crystal Group, a Hiawatha, Iowa-based manufacturer of high-performance computers, artificial intelligence systems and rugged computing platforms, said the commission’s report is a good start, but more work needs to be done.

“We’re late to the game,” he said. “That’s one of the things that we probably need to just recognize right away. This is becoming an urgent need for us to spend resources to gain skill sets and talent … through universities and industry to try to, frankly, catch up with China and Russia.”

The Pentagon and Congress should get on board with the commission’s recommendations, and take them even further, he said.

“My hope is that it will snowball into quite a bit of activity,” Shaw said. “That’s essential for us to preserve” the nation’s edge.

## Case

### Inequality

#### Interdependence is unsustainable – overreliance on concentrated suppliers make global economic collapse more likely and causes states to engage in escalatory trade wars

**Farrell and Newman 20** – Stavros Niarchos Foundation Agora Institute professor at the Johns Hopkins School of Advanced International Studies [1]

Professor in the government department and the Walsh School of Foreign Service at Georgetown University [2]

Henry Farrell and Abraham Newman, “This Is What the Future of Globalization Will Look Like,” Foreign Policy, 7/4/20, https://foreignpolicy.com/2020/07/04/this-is-what-the-future-of-globalization-will-look-like/

Globalization—the vast increase in flows of money, goods, information, and people over the last 30 years—was supposed to make the world less vulnerable to disruptive economic shocks. How did we get it so badly wrong?

In part, we were blinded by the mythology that pundits like Thomas Friedman wrapped around the real workings of globalization. These arguments depicted globalization as the triumph of market efficiency over retrograde national politics. Businesses and consumers could search the globe for better and cheaper suppliers. If one supplier proved unreliable, greedy, or recalcitrant, they could be easily substituted or replaced. The geopolitics of the Cold War would fade away as states too were subjected to the ruthless discipline of a world market that had escaped their control and become their master. Finally, while global interdependence might create new problems—pandemics, global warming, pollution, overfishing—these difficulties could be solved by markets with a little help from liberal international institutions.

These mutually reinforcing claims underpinned an apparent golden age for multinational business. Manufacturing was transformed from something that happened mostly inside countries to something that happened across them, supported by a fantastical gossamer of global supply chains and just-in-time delivery. Global economic networks rapidly conducted information and money around the world. Governments bought into the myth, fearing that capital would flee their economies if they broke with the iron disciplines of neoliberalism.

Governments also provided the foundation for global institutions that facilitated economic cooperation and prioritized openness as their organizing ambition. Everyone seemed to agree that more trade was a good thing. The General Agreement on Tariffs and Trade was transformed into the World Trade Organization (WTO), which tore down barriers to global trade and settled disputes among states. Other institutions such as the World Bank and the International Monetary Fund pushed the famous Washington Consensus, a set of principles for economic reform that emphasized liberalization and deplored government interventions that might impede market processes. Governments implemented reforms that reflected these new principles—willingly or because they had to.

But behind the soothing stories about the benefits of the global marketplace, globalization was quietly becoming more fragile and riddled with vulnerabilities. In some sectors, suppliers had become concentrated in geographically dense clusters, while in others the demand for efficiency drove companies to rely on just one supplier that could provide a necessary component. Apparent flexibility disguised the development of new rigidities.

The last decade provides painful evidence of the fragility of a globalized economic system that promoted efficiency and the power of markets. The 2008 financial crisis was the product of an interconnected banking system that rewarded short-term thinking, created risky new financial products, and was badly regulated at the national and global levels. Because so many firms were too big to fail, globalization itself had to fail. A few key suppliers became bottlenecks, and systemic risks increased dramatically—including the possibility of pandemics—but global institutions had not kept pace. Instead, states have exploited whatever vulnerabilities they can as they try to protect their own populations and pursue their broader geostrategic interests.

Powerful states had always wriggled out of the shackles of market discipline when their security was at stake. Most notably, the 9/11 terrorist attacks and growing U.S.-China competition led U.S. policymakers to realize that they could use their control over businesses that had made themselves irreplaceable in the global economy to hurt adversaries and coerce unwilling firms, organizations, and even states by threatening to exclude them from the global marketplace. The United States, for example, weaponized institutions that play a central role in international banking, such as the Society for Worldwide Interbank Financial Telecommunication, better known as SWIFT, using them to cut Iran out of the global financial system. It similarly used its influence over Qualcomm and other makers of sophisticated semiconductors to hamstring the Chinese telecommunications manufacturer Huawei, which it viewed as a strategic threat. Japan has used its control over specialized chemicals manufacturers to threaten South Korea’s electronics industry.

The main narrative of the globalizers—that of a so-called flat earth—concealed the problems of systemic fragility and state exploitation. Now, both have emerged and threaten to reinforce each other. When powerful states suddenly realize how frail global supply chains are, they are tempted to use their coercive power to redirect supplies to themselves at the expense of others. This tempts other states to retaliate, weakening the entire system. It’s hard to get things done when key parts of the global economy suddenly seize up. It’s even harder when they become key battlegrounds in a tacit economic war.

#### Global interdependence increases Chinese heg – they’re using economic might to increase political leverage around the globe

**Chang and Yang 20** – Postdoctoral Fellow at the Graduate Institute of East Asian Studies at National Chengchi University [1]

Professor at the Graduate Institute of East Asian Studies at National Chengchi University and Executive Director of the Taiwan-Asia Exchange Foundation [2]

Chia-Chien Chang and Alan H. Yang, “Weaponized Interdependence: China's Economic Statecraft and Social Penetration against Taiwan,” Orbis Volume 64 Issue 2, 3/4/20, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102596/

China has exploited global networks in a number of ways. First, as Hirschman reminded us, great powers regularly seek to convert their economic might into political leverage around the world. China is no exception. With the development of global and regional connectivity, China has used its financial muscles to gain control over major natural resources and strategic locations and to influence other states’ stances in disputes. China has provided a substantial amount of aid to African countries to harden its grasp on natural resources. Beijing has also launched comprehensive programs of financial statecraft, known as Belt and Road Initiatives (BRI), to establish its sphere of influence in the Indo-Pacific region and even the whole of Eurasia. China's financial prowess successfully has swayed some states’ stances in many regional disputes. Philippine President Rodrigo Duterte's recent concession on the South China Sea dispute is one notable example. Another salient case is China's successful effort to induce the Solomon Islands to end its diplomatic relationship with Taiwan.

#### China is weaponizing interdependence to weaken the US economy and national security

**Chia 20** – writer and contributor to Thai Enquirer.

Jasmine Chia, “Weaponized Interdependence: The New US-China Financial War,” Thai Enquirer, 6/22/20, https://www.thaienquirer.com/14721/weaponized-interdependence-the-new-us-china-financial-war/

The consequences for globalization are critical. Economic interdependence has always depended on a certain degree of shared vulnerability. Now, certain governments are taking advantage of their control over central nodes within broader networks to exploit this.

This is the developing frontier of weaponized interdependence.

The View from China: From Obscurity to Weaponization

None of this is lost on China. China’s success under Deng Xiaoping’s policy of tao guang yang hui or “hide brightness, nourish obscurity” has always been predicated on selective engagement in networks of interdependence, from the “Great Firewall” to trade protectionism to capital controls.

Despite this, US-China interdependence is so extensive that it borders on “codependency.” The US is China’s largest export market, while China is the US’s third largest. American companies have vast, complex supply chains that largely involve Chinese hubs. The Chinese market has become tremendously important to some American firms. But the US-China trade war has shone new light on the vulnerability of this relationship.

Xi Jinping has made moves to protect China’s national security, with two key priorities: first, to reduce the risks of interdependence by indigenizing supply chains per the “Made in China 2025” goal, and second, to sharpen its own ability to use interdependence as a tool of coercion. The latter has been far more opportunistic in application. Most famously, it was able to punish the NBA after a manager of one of the teams briefly tweeted in solidarity with pro-democracy Hong Kong protestors.

But the nativist move inwards has its limits, as exemplified by SWIFT and its extensive financial network. In 2019, former finance minister Lou Jiwei warned that: “The next step in the frictions between China and the United States is a financial war (金融战).” This is a sentiment shared by many other Chinese academics and government officials, all of whom are girding themselves for a financial war, with the coercion of central nodes and weaponized interdependence at its center.

The sense among such policymakers is that China is trapped, not just by SWIFT but also by the fact that most of world’s currency reserves are held in USD. Since the post-war Bretton-Woods monetary experiment, the asymmetric currency network evolution that followed has made the dollar virtually irreplaceable. Most of China’s Belt and Road Initiative contracts are undertaken in USD. And most of China’s transactions take place on SWIFT.

The moves to mitigate this have been largely unsuccessful, but the Chinese government keeps trying. In 2020, the Chinese government proposed the first nationally backed crypto-currency in the form of a regional ‘stablecoin’ – Hong Kong is the favored jurisdiction for such a ‘node’ given its current interconnectedness with the financial system, and not coincidentally, China’s territorial claims over the island are getting bolder. Meanwhile, China, Russia and India is working on a financial messaging system to bypass SWIFT.

Gone is the cartographic anxiety of the colonial era, the map-making that made or destroyed national self-determination.In the words of Zhou Yu of Shanghai’s Academy of Social Sciences, current national security efforts must prioritize “financial independence and sovereignty.”

The era of weaponized interdependence demands new boundaries for understanding ‘security.’ For states to survive, they need to similarly reconceptualize the boundaries of interdependence and sovereignty.

### Modelling

#### Pirates getting nukes in Asia is not a threat

Porter 14

Dr. Patrick Porter is a reader in War and International Security and Leverhulme Research Fellow at the University of Reading, and a fellow of the UK Chief of the Defence Staff’s Strategic Forum, War on the Rocks, January 28, 2014, "IT’S TIME TO ABANDON THE GLOBAL VILLAGE MYTH", http://warontherocks.com/2014/01/its-time-to-abandon-the-global-village-myth/

Militant jihadists of Southeast Asia have a similar story. The likes of Jemaah Islamiyah thrived during periods of relative openness. But their terror aroused adversaries like the government of Indonesia, which tightened its control of the infrastructure of seaports, highways and railroads that guerrillas rely upon to shift their guns, explosives, and contraband. As Justin Hastings argues, its fighters were forced into the forbidding terrain of jungles, islands and mountains.

#### No nuke terror – no state will sell, loose nukes are a myth, and terrorists can’t develop

CATO ’17 – (CATO HANDBOOK FOR POLICYMAKERS, 8TH EDITION (2017), “Nuclear Weapons: Proliferation and Terrorism” https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/nuclear-weapons)

The possibility that small groups could set off nuclear weapons is an alarm that has been raised repeatedly over the decades. However, terrorist groups thus far seem to have exhibited only limited desire and even less progress in going atomic. Perhaps, after a brief exploration of the possible routes, they have discovered that the tremendous effort required is scarcely likely to succeed.

One route a would-be atomic terrorist might take would be to receive or buy a bomb from a generous, like-minded nuclear state for delivery abroad. That route, however, is highly improbable. The risk would be too great — even for a country led by extremists — that the source of the weapon would ultimately be discovered. Here, the rapidly developing science (and art) of “nuclear forensics” — connecting nuclear materials to their sources even after a bomb has been detonated — provides an important deterrent. Moreover, the weapon could explode in a manner or on a target the donor would not approve — including, potentially, the donor itself. Almost no one, for example, is likely to trust al Qaeda: its explicit enemies list includes all Middle Eastern regimes, as well as the governments of Afghanistan, India, Pakistan, and Russia. And the Islamic State, or ISIS, which burst onto the international scene in 2014, has alienated just about every state on the planet.

Nuclear-armed states are unlikely to give or sell their precious weapons to nonstate actors. Some observers, though, worry about “loose nukes,” especially in post-Communist Russia — meaning weapons, “suitcase bombs” in particular, that can be stolen or bought illicitly. However, as a former director at the Los Alamos National Laboratory notes, “Regardless of what is reported in the news, all nuclear nations take the security of their weapons very seriously.” Careful assessments have concluded that it is unlikely that any nuclear devices have been lost and that, regardless, their effectiveness would be very low or even nonexistent because nuclear weapons require continual maintenance.

Moreover, finished bombs are outfitted with devices designed to trigger a nonnuclear explosion that will destroy the bomb if it is tampered with. Bombs can also be kept disassembled with the component parts stored in separate high-security vaults (a common practice in Pakistan). Two or more people and multiple codes may be required not only to use the bomb, but also to store, maintain, and deploy it.

There could be dangers in the chaos that would emerge if a nuclear state were to fail, collapsing in full disarray. However, even under those conditions, nuclear weapons would still have locks or be disassembled and would likely remain under heavy guard by people who know that a purloined bomb would most likely end up going off in their own territory.

Most analysts believe that a terrorist group’s most promising route would be to attempt to make a bomb using purloined fissile material — plutonium or highly enriched uranium. However, as the Gilmore Commission — the advisory panel on terrorism and weapons of mass destruction — stressed, building and deploying a nuclear device presents “Herculean challenges.” The process requires a lengthy sequence of steps; if each is not fully met, the result is not simply a less powerful weapon, but one that can’t produce any significant nuclear yield at all or can’t be delivered.

First, the terrorists would need to steal or illicitly purchase the crucial plutonium or highly enriched uranium. This would most likely require the corruption of a host of greedy confederates, including brokers and money transmitters, any one of whom could turn on the terrorists or, out of either guile or incompetence, furnish them with material that is useless. Any theft would also likely trigger an intense international policing effort.

Second, to manufacture a bomb, the terrorists would need to set up a large and well-equipped machine shop and populate it with a team of highly skilled and extremely devoted scientists, technicians, machinists, and managers. These people would have to be assembled and retained for the monumental task while generating no consequential suspicions among friends, family, or police about their sudden and lengthy absence from normal pursuits back home. Throughout, the process of fabricating a nuclear weapon would require that international and local security services be kept perpetually in the dark, and that no curious locals, including criminal gangs, get wind of the project as they observe the constant coming and going of outside technicians over the months or even years it would take to pull off.

Physicists who have studied the issue conclude that fabricating a nuclear weapon “could hardly be accomplished by a subnational group” because of “the difficulty of acquiring the necessary expertise, the technical requirements (which in several fields verge on the unfeasible), the lack of available materials and the lack of experience in working with these.” Others stress the “daunting problems associated with material purity, machining, and a host of other issues,” and conclude that the notion that a terrorist group could fabricate an atomic bomb or device “is far-fetched at best.”

Finally, the resulting weapon, likely weighing a ton or more, would have to be moved to a target site in a manner that did not arouse suspicion. Then a skilled crew would have to set off the improvised and untested nuclear device, hoping that the machine shop work has been perfect, that there were no significant shakeups in the treacherous process of transportation, and that the device, after all the effort, isn’t a dud.

The financial costs of such an extensive operation could easily become monumental: expensive equipment to buy, smuggle, and set up and people to pay — or pay off. Any criminals competent and capable enough to be effective allies in the project would likely discover boundless opportunities for extortion and be psychologically equipped by their profession to exploit them.

Khalid Sheikh Mohammed, the designated “mastermind” behind the 9/11 attacks, reportedly said that al Qaeda’s atom bomb efforts never went beyond searching the Internet. Even so, that raises the popular notion that the Internet can be effective in providing operational information. However, that belief seems to be severely flawed. Researcher Anne Stenersen finds that the Internet is filled with misinformation and error and with materials hastily assembled and “randomly put together,” containing information that is often “far-fetched” or “utter nonsense.”

Some members of al Qaeda may have dreamed about getting nuclear weapons. The only terrorist group to actually indulge in such dreams has been the Japanese millennial group Aum Shinrikyo. However, its experience can scarcely be much of an inspiration to other terrorist groups. Aum Shinrikyo was not under siege or even under close watch, and it had some 300 scientists in its employ, an estimated budget of $1 billion, and a remote and secluded haven in which to set up shop. After making dozens of mistakes in judgment, planning, and execution in a quest for nuclear weapons, it abandoned its efforts.

The rise of ISIS in 2014 does not alter these conclusions. The vicious group is certainly a danger to the people under its control and to fellow Muslims and neighboring Christians. It is actually more visible — that is, easier to find — than al Qaeda in that it seeks to hold and govern physical territory, a task that is increasingly difficult in a hostile world. In the process, it is unlikely to be able to amass the finances, the skills, and the serenity to go atomic.

The notion that terrorists could come up with a nuclear weapon seems remote. As with nuclear proliferation to countries, there may be reason for concern, or at least for interest and watchfulness. But alarm and hysteria are hardly called for.

### Democracy

#### Neoliberalism isn’t compatible with democracy – it concentrates power in the hands of oligarchs and depoliticizes the public

**Allsop 18** – PhD student at the University of Lincoln, studying the impact of neoliberalism on youth political engagement, and writes about youth engagement and student politics.

Bradley Allsop, “Why neoliberal approaches to policy are detrimental to democratic participation,” Democratic Audit UK, 6/12/18, http://www.democraticaudit.com/2018/12/06/why-neoliberal-approaches-to-policy-are-detrimental-to-democratic-participation/

The neoliberal introduction of market principles to the governance of public institutions has eroded faith in more democratic forms of deliberation and decision-making, argues Bradley Allsop. Our response should be to encourage greater workplace democracy and more collective, cooperative forms of local participation.

Neoliberalism. It’s a word that is seemingly everywhere these days, responsible, apparently, for everything from the financial crisis to ecological collapse and rises in the cost of living. But what, exactly, is it?

Neoliberalism, in essence, can be viewed as a governmentality (governing rationality) under which the ‘market becomes the principle upon which the whole rest of society is remodelled’ (see Chris Byrne’s paper for this quote, where he discusses Foucault’s conception of neoliberalism). Gone is the classical liberal assumption of the naturalness of markets, operating as the institutional flourishing of innate human drives, and instead what we have is an ambitious, invasive political project aimed at cultivating markets and market-like systems, and the behaviours they require from individuals, in as many spheres of human activity as possible (extending such logics beyond formal economic spheres into cultural, educational and political ones too). Neoliberalism is most emphatically not what it is often mistaken as – a revival of laissez-faire economics – but something much more subtle and sophisticated.

As a way of approaching governing it has come to infect traditional social democratic parties as well as those on the right – simply painting it as right-wing free-marketeering misses its reach and effect. Whilst the deregulation and privatisation of public services and companies during the Thatcher years are perhaps the most infamous examples of neoliberalism in action, extending market logics does not always have to entail these policies – indeed, creating a new market system often requires an ambitious project of re-regulation, rather than ‘cutting red tape’. A key area where this has been evident in recent years is higher education, where a large and invasive package of reforms introduced over the past eight years in particular has resulted in much more intense competition both between institutions (university vs university in the form of league tables) and within institutions (constant appraisal and incentivising of staff on narrow, quantifiable measures). The debt burden has been shifted from government to students, who are now increasingly treated as consumers or customers, and corporate structures and cultures are more evident in HE governance.

The question becomes no longer whether the state should intervene in the economy but how. Human activity, in as many spheres as possible, is to be remodelled, from the state itself to individual subjectivity; citizens, organisations and institutions are disciplined, nudged and coerced into acting in self-optimising, competitive and individualistic ways, with the state also promoting competition as the universal value by which to order human life and society. As Jeremy Gilbert puts it, ‘neoliberalism, from the moment of its inception, advocates a programme of deliberate intervention by government in order to encourage particular types of entrepreneurial, competitive and commercial behaviour in its citizens’.

In a recent paper with Ben Kisby and Jacqueline Briggs, we theorise that neoliberal policies appear to be eroding faith in many forms of collective decision-making and traditional politics, whilst potentially offering the market as a new site of political contestation. We argue this by looking at the personal experiences of citizens living in a political system shaped by neoliberal policies. We identify declines in internal and external political efficacy – the confidence one has in one’s own political abilities and in the responsiveness of the system respectively – and an increase in individualism as key psychological changes that are triggering changes in our political behaviour.

Neoliberalism brings about these psychological changes about in a number of ways. The obvious, explicit project of marketisation is one: the process of creating markets or market-like systems in new places previously untouched by these logics. Marketisation encourages us to act and think like consumers, and challenges democratic norms of compromise and collective decision-making (the UK higher education sector, discussed above is a perfect example of this process in action). Accompanying this is ‘responsibilisation’, an increased, almost obsessive, self-reliance. This is particularly evident in New Labour’s approaches to state aid, such as the introduction of tuition fees (introducing personal responsibility for your education), as well as additional conditions, workfare requirements and sanctions attached to welfare support. Over the same time period we have seen repressive labour policies, such as a raft of trade union restrictions, that rob us of a source of collective solidarity and feed into a more ‘flexibilised’, precarious work landscape. This makes it harder for people to put down roots as they have to constantly mould, shape and reinvent their skills and very identities in order to continue to compete (i.e. live) in the globalised marketplace.

Spiking inequality is another legacy of neoliberalism, one that has been linked to fragmented societies where trust and civic and political engagement are declining. Linked to this process is the changing character of the state through privatisation and deregulation, directly eroding the number of areas that are under the control of government and so reducing its ability to act and aid citizens.

Finally, we are witnessing increasing areas of ‘expert rule’ whereby markets and competitive systems need experts to create and maintain them, and democracy can be perceived as threatening such systems. In this process, knowledge (particularly narrow, assumption-ridden economic expertise), not citizenship or accountability, becomes the important requirement for decision-making. In the words of the authors of The Econocracy this ‘devalues citizenship’ and leaves many citizens feeling simply unable to engage in the discourse that now surrounds politics. As Aditya Chakrabortty, in his review of their book, argues: ‘By making their discipline all-pervasive, and pretending it is the physics of social science, economists have turned much of our democracy into a no-go zone for the public.’ It also, of course, again removes options from the hands of elected representatives, by narrowing the policy areas they have direct control over.

The result is that there is little scope or hope for collective change – as Wendy Brown states,

‘the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action […]. Correspondingly, a “mismanaged life” becomes a new mode of depoliticizing social and economic powers and at the same time reduces political citizenship to an unprecedented degree of passivity and political complacency […]The body politic ceases to be a body but is rather a group of individual entrepreneurs and consumers’.

A democracy without a properly engaged and empowered citizenry – not to mention accountable decision-making and genuine variety in political choices – is really one in name only. The impact of neoliberal ascendancy has been to require individuals to compete with one another, to constantly become more resilient, more flexible, more inward-looking and less trustful of government and less hopeful in collective action. More and more as market logics encroach into public policy areas, it becomes harder and harder to imagine forms of expression, of organising, of being, that do not conform to them too.

There are, however, plenty of other ways that we can choose to organise our society. Neoliberal politics has led us to the brink: ecological collapse, near-unparalleled inequality, deep democratic crises… a system rooted in growth, competition and selfishness that is clearly unsustainable. Radical democratic experiments that allow for diversity and local decision-making, without the distortions of wealth inherent in market systems, are an alternative way to start to structure society. Greater workplace democracy, strengthened trade unions, local cooperative movements and nationalised key industries – all of these are rooted in collective, cooperative forms of decision-making, allowing us control over and security in our lives. We are what systems make us: craft a system based on competition and individualism and you’ll get people that act accordingly. If we craft a system that allows citizens to act in more cooperative contexts, and to give each mutual respect and support, we might find we also have a more politically engaged culture too.

#### Neoliberalism prevents responsive/effective governments

**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

Governments are tinkering, not leading

The only way to solve these problems is for governments to address them proactively. And this brings us to the fourth problem: governments have bought into the ideology that their role is simply to fix problems, not achieve bold objectives. Mainstream economic theory does not view public actors as creators and shapers, nor does it view markets as serving a purpose that needs to be shaped. Rather, the current ideology assumes that capitalism works through a ‘market mechanism’ that is driven by the natural tendency for individuals to pursue their own self-interest, each maximizing his/her own objective function: consumers maximize their utility, workers maximize their preferences between leisure and work, and companies maximize their profits. The story goes on to say that when markets that emerge from these individual decisions fail to produce ‘efficient’ outcomes, the government must step in – either correcting for positive externalities (like basic research) or negative externalities (like pollution).

This book will argue that markets are not outcomes of individual decision-making but of how each value-creating actor is governed – including government itself. In this sense, markets are ‘embedded’ in rules, norms and contracts affecting organizational behaviour, interactions and institutional designs.30 Government thus cannot limit itself to reactively fixing markets, but must explicitly co- shape markets to deliver the outcomes society needs. It can and should guide the direction of the economy, serve as an ‘investor of first resort’ and take risks. It can and should shape markets to fulfil a purpose.

To a certain extent, government is already doing this; it’s just happening in a random and piecemeal fashion. And the point is not a normative one – even deregulation provides a direction that a government might choose to give. The question is how to design tools that explicitly help achieve directionality with a purpose. Many government actions enable markets to function, or create and/or shape markets through investment in areas like education, research and physical infrastructure; demand generation through procurement; legal codes; and antitrust policies. In this sense, markets are embedded in institutions and norms and are co-created by different actors in both the public and private sectors, as well as by civil-society organizations such as trade unions. But the prevailing ideology either denies this role (for example, banks do not like to be reminded that they operate with an implicit government guarantee) or argues that government should not be acting in this way.

As a result, governments focus on fixing things when they go wrong, rather than on improving the everyday lives of citizens in imaginative ways. In fact, improvement and imagination are notable by their absence, slowness or rigidity. President Obama was right when he said in January 2012 that current methods of government are unfit for the twenty-first century because the most recent major innovations in government, such as how its departments are structured, occurred in the age of black-and-white TV.31 Obama wanted to streamline the federal government to better support America’s economy in an age of global competition.

Part of what’s stopping civil servants from innovating is the fear of doing anything more than putting patches on the system when it starts malfunctioning. Ronald Reagan summed it up when he famously said: ‘The nine most terrifying words in the English language are: “I’m from the government, and I’m here to help.”’32 Reagan echoed the sentiment of the nineteenth-century ‘night watchman’ state without understanding that it creates a self-fulfilling prophecy whereby government does too little, too late. It is always reacting and making running repairs to a sputtering system, like someone constantly patching a worn tyre rather than replacing it with a new one, slowly squandering its capacity to be an active value creator. And the patches have been big, from bailing out the banks to investing where the private sector refuses to put its money. Even ‘public goods’, such as spending to clean the air or to invest in new knowledge, are framed as corrections to markets rather than as true objectives. The problem is not ‘big government’ or ‘small government’. The problem is the type of government: what it does and how.