# D7 Round 3 Wiki

## 1AC

### 1AC – Market Fundamentalism

#### The current configuration of antitrust law represents a political choice regarding the proper relationship between the government and the economy – it’s sutured by a neoliberal orthodoxy of market fundamentalism.

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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>.

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 ideology is rooted in the ideas that markets work and governments don’t – guarantees massive crises unless we provide a coherent alternative model in academic spaces

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Isabel Sawhill, former Vice President of Brookings, Capitalism and the Future of Democracy, The Brookings Institution, 2019, <https://www.brookings.edu/wp-content/uploads/2019/07/Sawhill_Capitalism-and-the-Future-of-Democracy-.pdf>

America is a mess. So are many other Western nations. Populism is on the rise because our existing system of a market-based liberal democracy is falling short of producing what citizens need and want.1 The argument made by Francis Fukayama in 1993 that liberal democracy has won in the competition for ideas now seems quaint. History has by no means ended. Its next phase is, to many people, extremely worrying. Some of the problems are economic: rising inequality, stagnant wages, lack of employment, lower intergenerational mobility, disappointing levels of health and education in the U.S. despite their large costs, rising levels of public and private debt, growing place-based disparities. Some are political: hyper partisanship, influence-buying and corruption at the highest levels, paralysis, and declining trust in government. Some are cultural: resentment of migrants and growing tensions over race and gender in America. These problems are interrelated. We can no longer address them in isolation from one another. A failure in one domain creates failures in the others. Economic and cultural anxieties elected Trump. Trump and his ilk in other countries are using these anxieties to gain and maintain power and further erode confidence in our institutions. Government paralysis is undermining efforts to deal with economic disparities and those left behind. Underlying these discontents at a deeper level is a mindset that has treated markets as the ultimate arbiter of human worth – a mindset I will label “capitalism” or “market fundamentalism” for short. The basic idea is that markets work, governments don’t. This ideology has been especially strong in the U.S. in recent decades. This essay argues that this mindset has led to ever-rising inequality and a government that has been captured by business interests and the wealthy. It is creating a spiral that can only end in crisis unless the intellectual foundations of the current system are better understood and challenged. 2 Three Types of Societies Most modern societies are made up of three sectors: the state, the market, and civil society. Most political philosophies contain an implicit bias toward one of these three sectors. Socialists tilt toward the state. They believe that government bears primary responsibility for improving the lives of its citizens. To this end, state ownership of the means of production is favored. A softer version of this model, which I will call democratic socialism, sees some role for markets given the past failure of planned economies, but a bigger role for government than currently exists in many European countries and especially in the U.S. The Nordic countries come closest to embodying this philosophy and left-leaning politicians in other countries point to their example as one that is worth copying. Capitalists believe that free markets are the best way to organize a society. Markets, they argue, are not only the most efficient way to allocate resources but also preserve individual freedom in the process. Markets produce good outcomes precisely because, when unfettered, they optimize growth, efficiency, and a distribution of income that is acceptable because it is assumed to reflect each person’s contributions to the economy. 2 A softer version of capitalism, that we might call liberal democracy or the mixed-economy model, accepts the importance of markets but recognizes the need for government to correct market failures and address distributional questions. This type of a “mixed economy” prevailed in the three decades following World War II in the U.S. and was championed in a weaker way by Third Way leaders such as Tony Blair and Bill Clinton in the 1990s and Obama in the 2000’s. Social capitalists believe that the good society is built on a foundation of respect for tradition and authority, and for the civic virtues or morals that enable us to fulfill various responsibilities to one another. That society is based on private property but also on “the little platoons” of family, church, and voluntary associations. It celebrates virtuous social norms and habits that shape how people behave. I call this social capitalism, not because of its emphasis on private property (although that institution is celebrated) but because of its emphasis on the little platoons that in the aggregate create “social capital.” These three models are archetypes. In most societies all three of these sectors – the state, the market, and civil society – play a role. The question is not whether there is a role for each. The question is what’s the right balance or mix. If we got the mix right we might have a Goldilocks economy and a well-woven society – one in which all three sectors play a prominent role but in which they complement each other and provide a kind of checks and balances against the weaknesses of each. Right now, the predominant paradigm in the U.S. is market fundamentalism. But it is being challenged on both the left and the right, by both left-leaning Democrats (e.g., Elizabeth Warren and Bernie Sanders) and some conservative intellectuals (e.g. David Brooks and Yuval Levin). 3 How Market Fundamentalism Became an Ideology3 [Footnote 3] 3 In an earlier version of this essay, I used the term “neoliberalism” as a synonym for market fundamentalism. But the term is used to mean different things to different people, so I abandoned it. [End Footnote] Advocates of the mixed economy model argue that we don’t need to disparage the market; we just need a more capacious understanding of its strengths and weaknesses, of where government needs to intervene to improve overall welfare. As taught in most upper-level university courses, we can rely on markets to allocate resources, but that won’t resolve distributional questions or a variety of market failures. As Paul Collier puts it, “capitalism needs to be managed, not defeated.” 4 In practice, most ordinary citizens are never exposed to this more sophisticated and nuanced version of capitalism. Instead, conservatives have transformed it into a caricature of its academic self. 5 They have created a narrative about markets that supports tax cuts, deregulation, and limited government. They argue that safety nets create hammocks when what we need is trampolines. They have celebrated free trade with little concern for its adverse effects on local workers and communities. I will argue that the ideological mindset that the capitalist model has engendered, the attitudes it has fostered among well-intentioned leaders and citizens, and the kind of policy regimes it supports have damaged the social fabric, and with it, the strength of democracy – especially in the U.S. The free market model has had an outsized influence on the policy debate and has produced such progeny as supply-side economics that has dominated policymaking at least since the Reagan-Thatcher years. Supply-side economics has spawned supply-side (donor-dominated) politics with very troubling consequences for the survival of democracy. I am not the first or only person to voice these concerns. Larry Kramer, the President of the Hewlett Foundation, has called for a longer-term effort to create a new paradigm to replace what he calls neoliberalism.6 The Niskanen Center has been thinking creatively about these issues, 7 along with Eric Liu and Nick Hanauer on the left and Oren Cass and Abby McCloskey on the right.8 My colleagues, Homi Karas, Geoff Gertz, and Kemal Dervis are rethinking the so-called Washington Consensus.9 The Economist magazine celebrated its 175th anniversary by reviewing the history of liberalism (in the classical British sense) and called for newer and much bolder thinking.10 Economists, as members of the discipline most associated with capitalism and market primacy, are branching out to form groups such as the Center for Equitable Growth, the Institute for New Economic Thinking, and Economics for Inclusive Prosperity. They are becoming more empirical, less wedded to abstract models with no institutional detail, and more willing to join with those from other disciplines to study economic and social behavior. Political scientists have also tackled the issue. In their comprehensive and impassioned book, American Amnesia, Jacob Hacker and Paul Pierson tell the story of how a marketbased ideology – what they call Randianism (after author, Ayn Rand) – led to the undermining of the earlier mixed economy model in the U.S.11 The mixed economy had married the nimble fingers of the market with the powerful, but much clumsier thumb of 4 government to produce widespread prosperity from the early 1940s to the mid-1970s. 12 Capitalism played a major role but democratic government added the key ingredients that enabled its success. Starting earlier in the twentieth century, we saw the creation of the Federal Reserve, the income tax, antitrust laws, the regulation of food and drugs, social insurance, collective bargaining rights, the GI bill, the interstate highway system, and the 1960s War on Poverty. All of these added the guiding hand of government to the dynamism of the market during this period. After about 1980, according to Hacker and Pierson, this “constructive balance shattered under the pressure of an increasingly conservative Republican party and an increasingly insular, parochial, and extreme business leadership,” – the latter exemplified by the Business Roundtable, the Chamber of Congress, and the Koch brothers. By starving the public sector of the resources and support it needed to be effective, the market purists have created a self-fulfilling prophecy. Government has become less effective in meeting a variety of challenges, new and old, and this, in turn, has sowed public distrust and loss of confidence in public institutions, creating a vicious circle. Business leaders went from recognizing the need to partner with government and to take constructive positions on a broad array of policy concerns, as exemplified by the Committee for Economic Development during the 1950s and 1960s, to later opposing almost all government intervention and focusing only on their own narrow interests. The shift wasn’t all about partisanship either. After all, it was President Eisenhower who created the interstate highway system and President Nixon who called for a guaranteed income while President Clinton talked about “ending welfare as we know it” and went on to say, “the era of big government is over.” Government went from being seen as good to being seen as bad. Liberal became a pejorative word. At the same time, markets grew in esteem and began to be celebrated as having almost magical powers. In the words of Hacker and Pierson, “the siren song of ‘free markets’ is simple and catchy. The anthem of market failure is not so hummable, made up of a series of rich but complicated themes.”13 As I will argue below, the siren song was seductive, its intellectual pedigree strong, and its composers and populizers all too powerful. Or as Hacker and Pierson put it, “Ideas were crucial [and] they intersected with and guided powerful economic interests.” 14 Warren Buffet put it even more succinctly: “There’s a class war and my class is winning.” In the U.S. political context, we are hearing a lot of talk now about a revival of socialism. Some politicians, such as Bernie Sanders and Alexandria Ocasio Cortez, are self-described socialists, and President Trump and many Republicans are having a field day trashing ideas such as the Green New Deal, Medicare for All, or a national jobs guarantee program. Whatever one thinks of these ideas, they do not fit the usual definition of socialism, which entails government ownership of the means of production. Still, they have moved the discourse way to the left and are challenging the more moderate “mixed-economy” version of capitalism that calls for markets and governments to work together to achieve a variety of goals. The good news is that this wide-ranging discussion about alternatives to capitalism has paved the way for new understandings and possibly new politics, making it a good time to 5 debate their intellectual foundations. Between market fundamentalism on one end of the spectrum to a Nordic-style welfare state on the other, there are many choices. Challenges to the Market Paradigm Old paradigms give way to new ones when some combination of actual events and new ways of understanding those events appear on the scene. Then the ice begins to crack. More and more people question the status quo and come to embrace new ways of thinking and new directions for policy. Right now, cracks in the ice are appearing for three reasons: 1) the disruptive effects of trade and technology on individual lives and communities, 2) virtually unprecedented levels of inequality and the possibility that ever-rising inequality is baked into a market economy, and 3) the failure of supply-side economics to deliver on its promises along with some deeper questioning of its goals.15

Effects of Trade and Technology Free trade and technology are believed by many to have led to a loss of jobs and stagnant wages among less-skilled Americans. In the academic version of capitalism, the overall benefits of trade and technology far exceed the costs, but many people and places are hurt in the process. It is assumed that the winners can and will compensate the losers. It’s assumed that those living in declining communities can and will move to areas that are thriving.16 But that’s like assuming a can opener and it hasn’t happened. The winners are riding high and the losers have seen their jobs disappear, their communities decline, their neighbors die from opioids or suicide, and their trust in government and in elites plummet. They handed an electoral victory to President Trump in 2016 because he promised to fix both trade and immigration, not with the kind of adjustment assistance called for by most economists, but with tariffs and a wall. To be sure, there was a large element of cultural alienation or status anxiety mixed in with the economics. These grievances have produced a populist moment with all of its attendant effects on political norms, respect for the truth, and other democratic values. But in crisis lies opportunity. The reaction to Trumpism is now leading to a counter-reaction, most decidedly on the left but spreading to thoughtful people on the right as well. 6 Ever-rising Inequality Inequality has been increasing now for many decades. It partly reflects technological advances that have raised the wages of skilled workers, but that can’t explain most of the trend, especially at the top. And even if it does reflect the fact that the demand for skills has outpaced the supply, it doesn’t explain why the supply has not adjusted to meet that demand over many decades. In the neoclassical economic model, such adjustments are expected to happen more rapidly than that. Even more troubling is the prospect of a never-ending trend of rising inequality. Inequality, unless counteracted by government policy or other extra-market forces, tends to feed on itself. The rich save more than the poor, causing an accumulation of capital at the top, and that accumulation automatically produces more inequality as the rich reap unearned gains from an ever-growing stock of financial assets. That prospect was the essence of Thomas Piketty’s book, Capital, 17 as he argued when the rate of return to capital, r, is higher than the growth rate of the economy, g, asset holders will amass ever more income to add to their existing assets, and capital’s share of national income will grow.1 Since most of the people with significant amounts of capital are in the upper ranks, those ranks will grow as well. Piketty explains that the period from about 1950 to 1980 when inequality declined in the U.S. was an anomaly caused by the destruction of capital, or lower rates of return on that capital, as the result of war and depression along with government policies that recognized the importance of unions, minimum wages, and social insurance. What we are seeing now, he argues, is a reassertion of the inherent contradiction in a capitalist society, which is its tendency to produce ever-rising inequality and to spawn political tensions and a threat to democracy in the process. Consistent with his thesis were declines in inequality in the early post World War II decades, followed by huge increases since then, especially at the very top of the distribution. That, in turn, has arguably led to the torqueing of the rules of the game to favor capital – everything from less antitrust enforcement, financial deregulation, excessive patent protection, and other anticompetitive measures. Piketty ends up calling for a very high tax on top incomes (80 percent) and a global tax on capital. Elizabeth Warren is calling for something similar, a 2 percent tax on wealth over $50 million and 3 percent on wealth over $1 billion. While the political feasibility of such proposals is slim, the fact that they are even being discussed makes the point that we may be near a tipping point in the battle between market capitalism as philosophy and its alternatives. If one buys the Piketty story, there is no alternative to government intervention to ensure that incomes at the top don’t get even more out of line. Distributional outcomes of the sort we have been experiencing in recent decades are not self-correcting, nor can they be addressed by modest tweaks in current polices as I document in my book, the Forgotten Americans. 7 The Failure of Supply-side Economics Despite rising inequality, economic growth continues to motivate much policy making on both right and left. On the left, the agenda has included a call for more investment in education, research, and infrastructure. On the right it has included such supply-side policies as lower taxes, less regulation, and more fiscal responsibility (granted that adherence to the latter goal is now in tatters). While right and left may have disagreed about the means of achieving more growth and how it should be distributed, they have shared a belief in the ability of growth to improve people’s lives. Economic growth has many benefits. It makes it easier to tackle a host of social and environmental problems. If broadly distributed, it makes everyone better off and it has been the single most important reason for the reduction in global poverty and improvements in health and longevity. But here again, the ice is cracking. And it is cracking for two reasons: first, because supplyside policies have mostly failed to deliver more growth; and second, because the objective itself is under greater scrutiny. Given a choice, for example, between more growth and a healthier environment, many people would choose the latter. With the purported aim of raising the growth rate, supply-side policies were implemented under Reagan, under George W. Bush, and under Trump. There is little evidence that they have produced the promised increase in long-run growth. Tax cuts can lead to a sugar-high for the usual Keynesian reasons, but they have not necessarily put the economy on a higher long-term growth path. Indeed, because most of these tax cuts have been financed by adding to the national debt, many economists believe that in the long-run, growth may be impaired. Rising debt eventually leads to higher borrowing costs for both the public and the private sector and since much of the money is being borrowed from foreigners, any increase in U.S production and incomes will need to be earmarked in large part to repay foreign lenders with interest.18 While the new 2017 tax law could have a small effect, no serious economist predicts it will raise long-term growth rates by the one percentage point predicted by President Trump. Credible estimates from both liberal and conservative economists suggest an increase one-tenth as large at best.19 This underscores Charles Schultze’s statement that there is nothing wrong with supply-side economics that dividing by ten doesn’t solve. But it is not just the failure of supply side economics that is causing increased doubts about economic growth. The objective itself is being questioned – and not just on the left. The Manhattan Institute’s Oren Cass argues in his book, The Once and Future Worker, that the focus on economic growth has led us down the wrong path. He likens GDP to a pie and the ideology surrounding growth as “economic piety.” That piety has not produced the kind of jobs and wages that support strong families and communities. 20 8 Another articulation of this theme from a center-right intellectual can be found in a National Affairs essay by Abby McCloskey entitled “Beyond Growth.” She argues that growth alone has left too many workers behind, frayed our social fabric, and caused people to lose a sense of purpose, dignity, and connection to one another. 21 Former Fed Chair Ben Bernanke has also chimed in. In a speech called “When Growth is Not Enough,” he notes that “the credibility of economists has been damaged by our insufficient attention, over the years, to the problems of economic adjustment and by our proclivity toward top-down, rather than bottom-up, policies.” Stagnant wages, declining mobility, social dysfunction, and political alienation have been the result.22 In my own book, The Forgotten Americans, I make a similar argument. Everyone likes to promise more growth but actual understanding of what fuels the growth process is quite limited. My metaphor for growth is that it is like a car. It’s engine – or what moves it forward – remains something of a mystery. Its speedometer (the GDP) is a flawed measure of welfare. Finally, and most importantly, even when we get to our destination, we may not be much happier. More material prosperity in an advanced country like the U.S. has not led to greater life satisfaction.23 In fact, when it is accompanied by rising inequality, deteriorating communities, a lack of decent jobs, and environmental degradation, it may lead to dysfunction and even so-called “deaths of despair.” New efforts by the United Nations, the World Bank, and others to create broader measures of national welfare are showing little correlation between GDP and other metrics of well-being. The problem with making economic growth a priority is that it makes it far harder to achieve other goals. For example, if one’s goal is to provide a safety net for the poor but that undermines their willingness to work and thus grow, we will end up being stingy. If we think raising the minimum wage reduces hiring of the most disadvantaged even though it makes the vast majority of workers better off, we may opt not to raise it. Too much contemporary debate is about the costs in lower efficiency or less growth caused by policies aimed at achieving other goals. Of course, policies should be designed to mitigate such costs but not necessarily to avoid them entirely. As the former French Prime Minister Lionel Jospin put it, we can “say yes to a market economy but say no to a market society”. Another way to think about economic growth is as a by-product of a healthy society, not the other way around. Political stability and responsiveness, a well-educated population, new scientific advances and access to knowledge, lack of corruption, and the rule of law establish a platform for growth which then happens spontaneously once the conditions are right. Bill Gates and Mark Zuckerberg weren’t thinking about marginal tax rates or regulatory barriers when they began activities that have transformed our society. Declining marginal utility further reduces the value of growth. At an every-day level, we are all aware of the many things we buy that we don’t really need. Some of my favorite examples are an egg tray that syncs with your phone to alert you to buy more eggs, a snow sauna that creates artificial snow for those pining for a winter wonderland in Florida, prepeeled bananas in plastic wrap, and neuticals (artificial testicles) for dogs whose owners are worried about their self-esteem (really! I didn’t make this up). 24 Granted what seems like a luxury in one generation becomes a necessity in another but most people don’t miss what 9 they don’t have, especially if they can’t even imagine having it because it doesn’t yet exist. I don’t think the baby boom generation that grew up without cell phones felt deprived as a result.

In sum, these three developments – stagnant wages and employment for a large portion of the population, rising income inequality, and new skepticism about the overriding importance of economic growth – may finally be creating a counter-reaction to the market fundamentalism that has dominated policy making in recent decades. At the same time, new ideas have been bubbling up from below – ideas that strike at the intellectual foundations of a pure market economy and further widen the cracks in the ice. I turn now to those ideas. Intellectual Challenges to the Neoclassical Model Economics students are taught that markets are, under certain assumptions, the most efficient way to allocate scarce resources. But the story is highly stylized and the assumptions too rarely hold. We must assume that there is perfect competition, that economies of scale are rare, that information is costless and equally available to all, that individuals are rational, far-seeing, and know how to maximize their own well-being, that one person’s well-being doesn’t depend on the well-being of others, that individual behavior doesn’t impose costs or provide benefits to others (no “externalities”), that wages and prices are flexible – responding to any changes in demand or supply almost immediately, thereby assuring that markets clear and that full employment will be achieved. There is nothing wrong with this stylized picture except that it doesn’t exist in the real world. Its logic and its elegance, including its mathematical precision, are extraordinarily seductive. Despite its simplifying assumptions (or because of them), it has influenced countless generations of students, produced thousands of articles in peer-reviewed journals, and arguably had more influence on public policy than almost any other discipline. As Keynes famously wrote “Practical men who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”25 Professional economists are well aware of the shortcomings of the basic model. The problem is not so much with the “academic scribblers” as it is with the way the “Madmen in authority” have used these scribblings to create a market-based ethic that is not always consistent with human welfare. Here I briefly discuss three key weaknesses in the neoclassical paradigm: neglect of the business cycle, neglect of the institutional determinants of wages, and the challenge posed by behavioral economics.

#### Neoclassical economics hinges on the idea of the natural and self-regulating market – that’s a ruse because the state constructed “free” markets, and it can readily construct alternative institutional arrangements

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The slipperiness and contradictions of neoliberalism has been reflected in the practice-informed accounts of ‘actually-existing neoliberalism’ (Hardin, 2014: 210). Foundational to this practice-based literature is a critique of what has been termed the idealist, or ideational, view of neoliberalism. In its ideational form, neoliberalism can be summed as a faith in market provision and a lack of faith in state provision. Intellectually, it relies on a (odd) mixture of neoclassical and Austrian economic thought, and the widely-promoted view of economics as a scientific, technical and value-free discipline (Chang, 2010: 32). Rhetorically, it is advanced through claims to freedom and liberty – that the freer the market, the freer the society. In the hands of its most skilled rhetoricians, neoliberalism becomes synonymous with freedom of the individual, cosmopolitan globalism, and a dynamic meritocratic society. These ideas have successfully been advanced around the world, and now neoliberal concepts represent ‘the ruling ideas of the time’ (Harvey, 2005: 36).

In terms of stated policy goals on a national level, neoliberalism has advanced deregulation, non-intervention, privatization, lower taxes, and a reduction in the size of the state. These policies have been implemented around the world, starting first in Chile under Pinochet and garnering more attention when they were applied to the UK and USA under Thatcher and Reagan respectively – with these two latter countries often considered as being the most neoliberalized states around the world (Connell and Dados, 2014: 122). In addition, on an international level the neoliberal agenda has been forwarded through the promotion of greater interconnectedness through trade facilitated by a reduction of barriers to trade. It is these policy areas – deregulation, non-intervention, privatization, lower taxes, smaller states, and free trade – that can be seen as a definitive core of neoliberalism. However, the ideational view of neoliberalism has, and the discourse around these core polices have, been deeply misleading for both proponents and critics alike, as Cahill (2014: viii) writes

Many commentators mistakenly believed the capitalist world economy had come to resemble the free market, small government laissez-faire vision of such neoliberal thinkers and think tanks... . Such an understanding reflects an idealist, or ideas-centred, conception of reality ... [that offers] an unhelpful portrayal of the dynamics of neoliberalism in practice.

Similarly, as Bruff (2017) notes, because critics have tended to take the rhetoric of neoliberalism too seriously ‘the unspoken assumption is that the fight against neoliberalism is synonymous with the fight against free markets.’ Taking the rhetoric of neoliberalism literally has obscured key features of the politico-economic transformation that has occurred over the last 40 years. In particular, the demise of small, entrepreneurial firms and the concurrent rise of oligopolistic transnational corporations are difficult to discuss in the same breath as free, competitive markets (Cahill and Konings, 2017: 98).

Even when ideas-centred scholars have not been seduced by the rhetoric of neoliberalism, their accounts have paid insufficient attention to the translation and implementation of neoliberal ideas. For example, in the work of Mirowski (2013) – the foremost historian of neoliberal thought – ideas were generated in the ‘neoliberal thought collective’ (which had the Mont Pelerin Society at its core) and then transmitted down into society. The relationship presented is hierarchical and works with an implicit assumption that the author of an idea maintains some control over the idea as it spreads out into society. Such an account underplays the significance, or even possibility, of interest-based transformation of ideas during the process of translation of ideas into practice, and the subsequent capability of this transformation of practice to inform later understandings of an idea: that is to say, that while ideas influence practice, practice also influences ideas, and powerful interests within society will work to influence both.

Neoliberalism in practice, then, is an entirely different beast to how it is portrayed. This point is not new, and there have been various responses to neoliberalism’s contradictory character. Gill (1995: 405) uses the term ‘oligopolistic neoliberalism’, which for him involves ‘oligopoly and protection for the strong and a socialisation of their risks, market discipline for the weak.’ Similarly, more recently Bruff (2017) has termed it ‘authoritarian neoliberalism’, which is about the ‘about the coercive, non-democratic and unequal reorganization of societies’. These understandings of the contradictory character of neoliberalism are grappling with the central problem of neoliberalism, which is that between its discourse and its practice, as Peck (2010: 65) notes, ‘it can live neither with, nor without, the state.’ The core contradiction of neoliberalism is that its project of removing the state from the economic sphere is simply impossible, because the economic sphere is created by the state. The state creates the market through, for example, the provision of private property rights, of company law, and of contract law, and through using the coercive power of the state to enforce such rights and laws.

This point is generally societally obscured due to the dominance of neoclassical economic thought, which operates with an idea that the market is natural and eternal (Chang, 2002). Neoliberal practitioners have echoed this naturalist view of the market, holding to ‘the idea that the market has a nature of its own, has its own laws and mechanisms, and constitutes an autonomous reality which left to its own has the capability to provide for the wellbeing of its people’ (Zuidhof, 2014: 161). Yet, at the same time, neoliberalism has been about the construction of markets; alongside market naturalistic rhetoric, there is competing practical logic of market constructivism. Neoliberal market constructivism is about the extension of the economic sphere and the imposition of a ‘market logic’ to a greater range of activities. As Zuidhof (2014: 162–163) notes, neoliberalism ‘turns the market into a norm for government action, dictating market-like forms of government ... [whereby] social problems are best governed by creating markets or market-like institutions.’ Hence, traditionally non-economic institutions – such as prisons, schools, and even the military – have faced privatization, outsourcing, and the attempted creation of quasi-market structures during the neoliberal period (Schnyder and Siems, 2013).

There is thus a dual approach to markets whereby intellectually and rhetorically a naturalist view prevails, while practically markets are being constructed. The power of this layered thinking between rhetoric and practice is that it shuts down debate within society about political economy, about market institutional arrangements, and about a whole range of basic yet important questions such as ‘what is a market?’, ‘what is competition?’ ‘where does the economic sphere end?’, while society is transformed. If it was recognized that a market can take a variety of institutional forms, then the market constructivist logic is revealed and ‘there is no alternative’ collapses. In such a situation the neoliberal project of ‘depoliticization through economization’ (Madra and Adaman, 2014) would fail.

Neoliberalism, then, is at first glance easily-recognizable, with a clear set of core policies. However, the central contradiction of neoliberalism’s relationship to the state, the impossibility of a free market, and its dual constructivist-naturalist understanding of the market reveals neoliberalism more as a bricolage of ideas and practices (Ferguson, 2010: 183), rather than a unified, coherent and consistent political ideology that informs a uniform set of practices which can be rolled out across the world to produce cookie-cutter neoliberal states. As is demonstrated below within this bricolage of practices and ideas the general construction of neoliberal regimes, and the practice of neoliberal global governance, has empowered corporations.

#### The left urgently requires a new framework of economic thought, and a concrete plan to actualize it. Anything short of an economic Apollo program structurally guarantees horrific inequality, alienation, and eco-collapse.

Monbiot 16

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Imagine if the people of the Soviet Union had never heard of communism. The ideology that dominates our lives has, for most of us, no name. Mention it in conversation and you’ll be rewarded with a shrug. Even if your listeners have heard the term before, they will struggle to define it. Neoliberalism: do you know what it is?

Its anonymity is both a symptom and cause of its power. It has played a major role in a remarkable variety of crises: the financial meltdown of 2007‑8, the offshoring of wealth and power, of which the Panama Papers offer us merely a glimpse, the slow collapse of public health and education, resurgent child poverty, the epidemic of loneliness, the collapse of ecosystems, the rise of Donald Trump. But we respond to these crises as if they emerge in isolation, apparently unaware that they have all been either catalysed or exacerbated by the same coherent philosophy; a philosophy that has – or had – a name. What greater power can there be than to operate namelessly?

So pervasive has neoliberalism become that we seldom even recognise it as an ideology. We appear to accept the proposition that this utopian, millenarian faith describes a neutral force; a kind of biological law, like Darwin’s theory of evolution. But the philosophy arose as a conscious attempt to reshape human life and shift the locus of power.

Neoliberalism sees competition as the defining characteristic of human relations. It redefines citizens as consumers, whose democratic choices are best exercised by buying and selling, a process that rewards merit and punishes inefficiency. It maintains that “the market” delivers benefits that could never be achieved by planning.

Attempts to limit competition are treated as inimical to liberty. Tax and regulation should be minimised, public services should be privatised. The organisation of labour and collective bargaining by trade unions are portrayed as market distortions that impede the formation of a natural hierarchy of winners and losers. Inequality is recast as virtuous: a reward for utility and a generator of wealth, which trickles down to enrich everyone. Efforts to create a more equal society are both counterproductive and morally corrosive. The market ensures that everyone gets what they deserve.

We internalise and reproduce its creeds. The rich persuade themselves that they acquired their wealth through merit, ignoring the advantages – such as education, inheritance and class – that may have helped to secure it. The poor begin to blame themselves for their failures, even when they can do little to change their circumstances.

Never mind structural unemployment: if you don’t have a job it’s because you are unenterprising. Never mind the impossible costs of housing: if your credit card is maxed out, you’re feckless and improvident. Never mind that your children no longer have a school playing field: if they get fat, it’s your fault. In a world governed by competition, those who fall behind become defined and self-defined as losers.

Among the results, as Paul Verhaeghe documents in his book What About Me? are epidemics of self-harm, eating disorders, depression, loneliness, performance anxiety and social phobia. Perhaps it’s unsurprising that Britain, in which neoliberal ideology has been most rigorously applied, is the loneliness capital of Europe. We are all neoliberals now.

The term neoliberalism was coined at a meeting in Paris in 1938. Among the delegates were two men who came to define the ideology, Ludwig von Mises and Friedrich Hayek. Both exiles from Austria, they saw social democracy, exemplified by Franklin Roosevelt’s New Deal and the gradual development of Britain’s welfare state, as manifestations of a collectivism that occupied the same spectrum as nazism and communism.

In The Road to Serfdom, published in 1944, Hayek argued that government planning, by crushing individualism, would lead inexorably to totalitarian control. Like Mises’s book Bureaucracy, The Road to Serfdom was widely read. It came to the attention of some very wealthy people, who saw in the philosophy an opportunity to free themselves from regulation and tax. When, in 1947, Hayek founded the first organisation that would spread the doctrine of neoliberalism – the Mont Pelerin Society – it was supported financially by millionaires and their foundations.

With their help, he began to create what Daniel Stedman Jones describes in Masters of the Universe as “a kind of neoliberal international”: a transatlantic network of academics, businessmen, journalists and activists. The movement’s rich backers funded a series of thinktanks which would refine and promote the ideology. Among them were the American Enterprise Institute, the Heritage Foundation, the Cato Institute, the Institute of Economic Affairs, the Centre for Policy Studies and the Adam Smith Institute. They also financed academic positions and departments, particularly at the universities of Chicago and Virginia.

As it evolved, neoliberalism became more strident. Hayek’s view that governments should regulate competition to prevent monopolies from forming gave way – among American apostles such as Milton Friedman – to the belief that monopoly power could be seen as a reward for efficiency.

Something else happened during this transition: the movement lost its name. In 1951, Friedman was happy to describe himself as a neoliberal. But soon after that, the term began to disappear. Stranger still, even as the ideology became crisper and the movement more coherent, the lost name was not replaced by any common alternative.

At first, despite its lavish funding, neoliberalism remained at the margins. The postwar consensus was almost universal: John Maynard Keynes’s economic prescriptions were widely applied, full employment and the relief of poverty were common goals in the US and much of western Europe, top rates of tax were high and governments sought social outcomes without embarrassment, developing new public services and safety nets.

But in the 1970s, when Keynesian policies began to fall apart and economic crises struck on both sides of the Atlantic, neoliberal ideas began to enter the mainstream. As Friedman remarked, “when the time came that you had to change ... there was an alternative ready there to be picked up”. With the help of sympathetic journalists and political advisers, elements of neoliberalism, especially its prescriptions for monetary policy, were adopted by Jimmy Carter’s administration in the US and Jim Callaghan’s government in Britain.

After Margaret Thatcher and Ronald Reagan took power, the rest of the package soon followed: massive tax cuts for the rich, the crushing of trade unions, deregulation, privatisation, outsourcing and competition in public services. Through the IMF, the World Bank, the Maastricht treaty and the World Trade Organisation, neoliberal policies were imposed – often without democratic consent – on much of the world. Most remarkable was its adoption among parties that once belonged to the left: Labour and the Democrats, for example. As Stedman Jones notes, “it is hard to think of another utopia to have been as fully realised.”

It may seem strange that a doctrine promising choice and freedom should have been promoted with the slogan “there is no alternative”. But, as Hayek remarked on a visit to Pinochet’s Chile – one of the first nations in which the programme was comprehensively applied – “my personal preference leans toward a liberal dictatorship rather than toward a democratic government devoid of liberalism”. The freedom that neoliberalism offers, which sounds so beguiling when expressed in general terms, turns out to mean freedom for the pike, not for the minnows.

Freedom from trade unions and collective bargaining means the freedom to suppress wages. Freedom from regulation means the freedom to poison rivers, endanger workers, charge iniquitous rates of interest and design exotic financial instruments. Freedom from tax means freedom from the distribution of wealth that lifts people out of poverty.

As Naomi Klein documents in The Shock Doctrine, neoliberal theorists advocated the use of crises to impose unpopular policies while people were distracted: for example, in the aftermath of Pinochet’s coup, the Iraq war and Hurricane Katrina, which Friedman described as “an opportunity to radically reform the educational system” in New Orleans.

Where neoliberal policies cannot be imposed domestically, they are imposed internationally, through trade treaties incorporating “investor-state dispute settlement”: offshore tribunals in which corporations can press for the removal of social and environmental protections. When parliaments have voted to restrict sales of cigarettes, protect water supplies from mining companies, freeze energy bills or prevent pharmaceutical firms from ripping off the state, corporations have sued, often successfully. Democracy is reduced to theatre.

Another paradox of neoliberalism is that universal competition relies upon universal quantification and comparison. The result is that workers, job-seekers and public services of every kind are subject to a pettifogging, stifling regime of assessment and monitoring, designed to identify the winners and punish the losers. The doctrine that Von Mises proposed would free us from the bureaucratic nightmare of central planning has instead created one.

Neoliberalism was not conceived as a self-serving racket, but it rapidly became one. Economic growth has been markedly slower in the neoliberal era (since 1980 in Britain and the US) than it was in the preceding decades; but not for the very rich. Inequality in the distribution of both income and wealth, after 60 years of decline, rose rapidly in this era, due to the smashing of trade unions, tax reductions, rising rents, privatisation and deregulation.

The privatisation or marketisation of public services such as energy, water, trains, health, education, roads and prisons has enabled corporations to set up tollbooths in front of essential assets and charge rent, either to citizens or to government, for their use. Rent is another term for unearned income. When you pay an inflated price for a train ticket, only part of the fare compensates the operators for the money they spend on fuel, wages, rolling stock and other outlays. The rest reflects the fact that they have you over a barrel.

Those who own and run the UK’s privatised or semi-privatised services make stupendous fortunes by investing little and charging much. In Russia and India, oligarchs acquired state assets through firesales. In Mexico, Carlos Slim was granted control of almost all landline and mobile phone services and soon became the world’s richest man.

Financialisation, as Andrew Sayer notes in Why We Can’t Afford the Rich, has had a similar impact. “Like rent,” he argues, “interest is ... unearned income that accrues without any effort”. As the poor become poorer and the rich become richer, the rich acquire increasing control over another crucial asset: money. Interest payments, overwhelmingly, are a transfer of money from the poor to the rich. As property prices and the withdrawal of state funding load people with debt (think of the switch from student grants to student loans), the banks and their executives clean up.

Sayer argues that the past four decades have been characterised by a transfer of wealth not only from the poor to the rich, but within the ranks of the wealthy: from those who make their money by producing new goods or services to those who make their money by controlling existing assets and harvesting rent, interest or capital gains. Earned income has been supplanted by unearned income.

Neoliberal policies are everywhere beset by market failures. Not only are the banks too big to fail, but so are the corporations now charged with delivering public services. As Tony Judt pointed out in Ill Fares the Land, Hayek forgot that vital national services cannot be allowed to collapse, which means that competition cannot run its course. Business takes the profits, the state keeps the risk.

The greater the failure, the more extreme the ideology becomes. Governments use neoliberal crises as both excuse and opportunity to cut taxes, privatise remaining public services, rip holes in the social safety net, deregulate corporations and re-regulate citizens. The self-hating state now sinks its teeth into every organ of the public sector.

Perhaps the most dangerous impact of neoliberalism is not the economic crises it has caused, but the political crisis. As the domain of the state is reduced, our ability to change the course of our lives through voting also contracts. Instead, neoliberal theory asserts, people can exercise choice through spending. But some have more to spend than others: in the great consumer or shareholder democracy, votes are not equally distributed. The result is a disempowerment of the poor and middle. As parties of the right and former left adopt similar neoliberal policies, disempowerment turns to disenfranchisement. Large numbers of people have been shed from politics.

Chris Hedges remarks that “fascist movements build their base not from the politically active but the politically inactive, the ‘losers’ who feel, often correctly, they have no voice or role to play in the political establishment”. When political debate no longer speaks to us, people become responsive instead to slogans, symbols and sensation. To the admirers of Trump, for example, facts and arguments appear irrelevant.

Judt explained that when the thick mesh of interactions between people and the state has been reduced to nothing but authority and obedience, the only remaining force that binds us is state power. The totalitarianism Hayek feared is more likely to emerge when governments, having lost the moral authority that arises from the delivery of public services, are reduced to “cajoling, threatening and ultimately coercing people to obey them”.

Like communism, neoliberalism is the God that failed. But the zombie doctrine staggers on, and one of the reasons is its anonymity. Or rather, a cluster of anonymities.

The invisible doctrine of the invisible hand is promoted by invisible backers. Slowly, very slowly, we have begun to discover the names of a few of them. We find that the Institute of Economic Affairs, which has argued forcefully in the media against the further regulation of the tobacco industry, has been secretly funded by British American Tobacco since 1963. We discover that Charles and David Koch, two of the richest men in the world, founded the institute that set up the Tea Party movement. We find that Charles Koch, in establishing one of his thinktanks, noted that “in order to avoid undesirable criticism, how the organisation is controlled and directed should not be widely advertised”.

The words used by neoliberalism often conceal more than they elucidate. “The market” sounds like a natural system that might bear upon us equally, like gravity or atmospheric pressure. But it is fraught with power relations. What “the market wants” tends to mean what corporations and their bosses want. “Investment”, as Sayer notes, means two quite different things. One is the funding of productive and socially useful activities, the other is the purchase of existing assets to milk them for rent, interest, dividends and capital gains. Using the same word for different activities “camouflages the sources of wealth”, leading us to confuse wealth extraction with wealth creation.

A century ago, the nouveau riche were disparaged by those who had inherited their money. Entrepreneurs sought social acceptance by passing themselves off as rentiers. Today, the relationship has been reversed: the rentiers and inheritors style themselves entre preneurs. They claim to have earned their unearned income.

These anonymities and confusions mesh with the namelessness and placelessness of modern capitalism: the franchise model which ensures that workers do not know for whom they toil; the companies registered through a network of offshore secrecy regimes so complex that even the police cannot discover the beneficial owners; the tax arrangements that bamboozle governments; the financial products no one understands.

The anonymity of neoliberalism is fiercely guarded. Those who are influenced by Hayek, Mises and Friedman tend to reject the term, maintaining – with some justice – that it is used today only pejoratively. But they offer us no substitute. Some describe themselves as classical liberals or libertarians, but these descriptions are both misleading and curiously self-effacing, as they suggest that there is nothing novel about The Road to Serfdom, Bureaucracy or Friedman’s classic work, Capitalism and Freedom.

For all that, there is something admirable about the neoliberal project, at least in its early stages. It was a distinctive, innovative philosophy promoted by a coherent network of thinkers and activists with a clear plan of action. It was patient and persistent. The Road to Serfdom became the path to power.

Neoliberalism’s triumph also reflects the failure of the left. When laissez-faire economics led to catastrophe in 1929, Keynes devised a comprehensive economic theory to replace it. When Keynesian demand management hit the buffers in the 70s, there was an alternative ready. But when neoliberalism fell apart in 2008 there was ... nothing. This is why the zombie walks. The left and centre have produced no new general framework of economic thought for 80 years.

Every invocation of Lord Keynes is an admission of failure. To propose Keynesian solutions to the crises of the 21st century is to ignore three obvious problems. It is hard to mobilise people around old ideas; the flaws exposed in the 70s have not gone away; and, most importantly, they have nothing to say about our gravest predicament: the environmental crisis. Keynesianism works by stimulating consumer demand to promote economic growth. Consumer demand and economic growth are the motors of environmental destruction.

What the history of both Keynesianism and neoliberalism show is that it’s not enough to oppose a broken system. A coherent alternative has to be proposed. For Labour, the Democrats and the wider left, the central task should be to develop an economic Apollo programme, a conscious attempt to design a new system, tailored to the demands of the 21st century.

#### The system’s hurtling toward violent collapse, but we’re already living in the apocalypse. Accepting existing structures as immutable, or politics as individual, only serves to lock that in. Instead, we must directly consider how to radically restructure the economy and society.

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Robert B. Reich, also former U.S. Secretary of Labor, *The System: Who Rigged It, How We Fix It*, pub. 2020, Ch. 13, p. E-book

HISTORY SHOWS that oligarchies cannot hold on to power forever. Oligarchies are inherently unstable. This was as true in ancient Rome as it was in America’s antebellum South, where fewer than four thousand families owned about a quarter of America’s capital in the form of enslaved human beings. For a time, oligarchies maintain themselves through sheer brute force. They have a monopoly on militias and weapons. But when a vast majority of people come to view an oligarchy as illegitimate and an obstacle to its own well-being, oligarchies become vulnerable to subversion, social unrest, terrorism, wars, and revolutions.

This is why oligarchies depend on ways other than brute force to hold power. The three most common are: (1) systems of belief—religions, dogmas, and ideologies—intended to convince most people of the righteousness of the oligarchy’s claim to power; (2) bribes to the most influential people to gain their support and thereby legitimize the oligarchy; and (3) manufactured threats—supposed foreign enemies or “enemies within,” as well as immigrants and minority populations—to divert attention from the oligarchy so the diverse elements within the majority won’t join together against it.

Today’s American oligarchy deploys all three.

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Among the oldest methods to maintain control are belief systems that portray wealth and power in the hands of a few as natural and inevitable. King James I of England and France’s Louis XIV, among other monarchs, asserted that kings received their authority from God and were therefore not accountable to their earthly subjects. The doctrine of divine right of kings ended with England’s Glorious Revolution in the seventeenth century and the American and French revolutions in the eighteenth.

The modern equivalent of the divine right of kings might be termed “market fundamentalism,” a creed that has been promoted by the American oligarchy with no less zeal than the old aristocracy advanced divine right. It holds that if the free market has caused a few at the top to aggregate vast wealth and power, the result must be right and good because it is natural and inevitable. One of market fundamentalism’s founders was the philosopher Ayn Rand. Former Fed chair Alan Greenspan was a follower of Rand, and, as we’ve seen, his doctrinaire views almost sank the American economy. Today’s oligarchs are not as rigidly doctrinaire, but they still regard the economy as a holy grail.

As I’ve said, the oligarchy wants Americans to view the system as a neutral meritocracy in which anyone can make it with enough guts, gumption, and hard work. The standard platitudes of market fundamentalism are that people “pull themselves up by their bootstraps” and that America is a nation of “self-made men” (and women), both of which translate into a moral code: People deserve whatever they earn in the market. Income and wealth are measures of worth. If you amass a billion dollars, then you must deserve it because that’s what the market awarded you. If you barely scrape by, then you have only yourself to blame. It is assumed that the system, and how power is allocated within it, plays no role whatsoever.

Of course, the oligarchy doesn’t want Americans to see its mounting wealth as the engorged winnings of a game whose rules it has decided on. It wants everyone to believe the oligarchy deserves what it has accumulated, even as it denies much of the rest of society the opportunities it enjoys. As the theologian Reinhold Niebuhr has written, “The most common form of hypocrisy among the privileged classes is to assume that their privileges are the just payments with which society rewards specially useful or meritorious functions,” while accusing the underprivileged of “lacking what they have been denied the right to acquire.”

The truth is that in America today your life chances depend largely on where your parents fit in the system—how much they earn, how much education they have, who they know. The phrase “pulling yourself up by the bootstraps” dates back to an eighteenth-century fairy tale, a metaphor for an impossible feat of strength. In fact, it’s more difficult for poor and working-class kids in America to rise economically through their working careers than it is for poor and working-class kids to rise in any other advanced nation. Over 40 percent of American children born into poor families will be poor as adults. Roughly the same share of children who are born into the richest fifth of families will remain in the richest fifth as adults.

Consider the intensifying competition to get into elite colleges, largely because of potentially huge incomes awaiting their graduates. According to data from the Department of Education, ten years after starting college, the highest-earning 10 percent of graduates from all universities have a median salary of $68,000. The top 10 percent from the ten most prestigious universities are raking in $220,000. In 2019, the Justice Department indicted dozens of wealthy parents for using bribery and fraud to get their children admitted to elite colleges. Yet the real scandal is not bribery by a few wealthy parents but how commonplace it has become for almost all wealthy parents to shell out big bucks for essay tutors, testing tutors, admissions counselors, and “enrichment” courses designed to get their kids into the college of their choice.

Elite colleges are doing their part to accelerate the trend. At a time when the courts have all but ended affirmative action for black children seeking college admission, high-end universities provide preferential admission to the children of wealthy alumni—legacies, as they’re delicately called. Some prestigious colleges have even been known to make quiet deals with wealthy non-alums—admission for their kids with the expectation of a large donation to follow. Jared Kushner’s father reportedly pledged $2.5 million to Harvard just as Jared was applying. The young man gained admission despite rather mediocre grades.

The most brazen affirmative-action program for children of the wealthy is the preference baked into elite admissions for graduates from private prep schools. While only 2.2 percent of American students graduate from nonsectarian private high schools, preppies account for 26 percent of students at Harvard and 28 percent of students at Princeton. All told, about 40 percent of the children of the richest 0.1 percent of American families now attend an Ivy League or other elite university. At some upscale campuses—including Dartmouth, Princeton, Yale, Penn, and Brown—more students now come from the richest 1 percent of American families than from the bottom 60 percent put together. By contrast, less than one-half of 1 percent of children from the bottom fifth of American families attend an elite college. Fewer than half attend any college at all.

A worse scandal is K–12 education, where geographic segregation by income is leaving poor school districts—partly reliant on local property taxes, which don’t generate much revenue—with fewer resources per pupil than richer districts. Race is clearly involved. School districts that are predominantly white get $23 billion more funding each year than districts that serve predominantly students of color. When it comes to early childhood education—which experts agree is vital to the future life chances of the very young—the gap has become a chasm. Wealthy parents spare no expense stimulating infant and toddler brains with happy human interactions through words, music, poetry, games, and art. Yet all too often the offspring of poorer parents have little to do other than sit long hours in front of a television.

As I have noted, we now have an education system in which the oligarchy can effectively buy college admission for its children, a political system in which the oligarchy can buy Congress, a health-care system in which it can buy care others can’t, and a justice system in which the oligarchy can buy its way out of jail. Consider the Wall Street executives who defrauded America in the years leading up to the 2008 financial crisis, yet went unpunished. An even more flagrant example is Ethan Couch, a Texan teenager who killed four people and severely injured another while driving drunk in June 2016. Prosecutors sought a twenty-year prison sentence, but a psychologist who testified in Couch’s defense argued that the teenager suffered from “affluenza,” a psychological affliction said to result from growing up with wealth and privilege. Couch served a 720-day sentence. Most poor and working-class kids accused of committing a crime can’t afford a high-priced attorney. They often plead guilty in exchange for a shorter sentence than they’d get had they gone to trial and been represented by an overworked public defender. This means some end up serving far more than 720 days in prison for committing no crime at all.

In September 2019, actress Felicity Huffman was sentenced to fourteen days in jail for shelling out $15,000 to rig her daughter’s SAT scores so she could get into a top university. In 2011, Kelley Williams-Bolar, a single black mother living in public housing in Akron, Ohio, was charged with multiple felonies and sentenced to two five-year sentences for using her father’s address to enroll her daughters in a better public school. That same year, Tanya McDowell, a homeless black mother living in Bridgeport, Connecticut, was sentenced to five years in prison for enrolling her five-year-old son in a neighboring public school.

The myth of rugged individuals making it on their own has helped mask all of this. It has allowed the oligarchy to dismantle unions, unravel safety nets, and slash taxes on itself. And it has deterred average Americans from demanding what the citizens of every other advanced country receive—paid family and medical leave, access to child care, good schools for all, affordable health care and drugs, workable transportation and communications systems, and policies that lift every family out of poverty. As long as most Americans are convinced that they alone are responsible for their fates, they won’t call for basic systemic changes—making corporations responsible to all their stakeholders, breaking up monopolies, strengthening unions, and protecting the economy from financial plundering—that would empower them to receive all these things and more.

Like the divine right of kings, market fundamentalism relies on faith rather than experience. It pretends that power has nothing to do with who wins and who loses. It proselytizes beliefs that are belied by recent history—that everyone gains from boosts in productivity and efficiency even though the oligarchy has received the lion’s share; that national competitiveness increases American wages even though it has mainly increased the profits of global corporations headquartered in the United States; that the stock market is the best measure of progress even though the unbridled pursuit of profits is putting our democracy under siege and threatening the very existence of life on Earth, and most of the stock market gains since the late 1980s have come out of the paychecks of workers.

Just as with the divine right of kings whose power was thought to come from God, those who embrace market fundamentalism want Americans to ignore how a powerful few have shaped the system for their own benefit. The creed doesn’t acknowledge that the rules of the free market come from government officials whose jobs increasingly depend on an oligarchy that benefits from those decisions. It doesn’t accept that laws are routinely violated by corporations and CEOs that treat fines as a cost of doing business. Adherents to market fundamentalism don’t see the ruthless profit-seeking behind the smooth public relations con of corporate social responsibility. They reject “socialism” without acknowledging how the oligarchy has cushioned itself against downside losses and insulated itself from personal accountability. They even view climate change as a problem of costs and inefficiencies rather than what it is—an existential threat to the future of humanity. A report issued in March 2019 by Morgan Stanley tallied $650 billion in climate-related disasters over the past three years, and predicted $54 trillion in damages worldwide by 2040. “We expect the physical risks of climate change to become an increasingly important part of the investment debate for 2019,” the bank’s strategists dryly write.

Market fundamentalism is as self-deluding and self-perpetuating as the divine right of kings, and with much the same result. “One of man’s oldest exercises in moral philosophy,” observed economist John Kenneth Galbraith, “is the search for a superior moral justification for selfishness. It is an exercise which always involves a certain number of internal contradictions and even a few absurdities. The conspicuously wealthy turn up urging the character-building value of privation for the poor.”

#### The elite capture underpinned by market fundamentalism will make rapid societal transformation impossible. Only radical democratic reclamation of the instrumentalities of governance can avert inevitable, impending extinction.

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

#### Broad scientific consensus both that climate change will cause extinction if we stay on present course, and that it’s not too late to dramatically limit the scale of harm.

Bradshaw et al 21 – Matthew Flinders Professor of Global Ecology at Flinders University, where he leads the Global Ecology Laboratory. He is joined in this paper by 16 other climate scientists.

Corey J. A. Bradshaw, Paul R. Ehrlich, Andrew Beattie, Gerardo Ceballos, Eileen Crist, Joan Diamond, Rodolfo Dirzo, Anne H. Ehrlich, John Harte, Mary Ellen Harte, Graham Pyke, Peter H. Raven, William J. Ripple, Frédérik Saltré, Christine Turnbull, Mathis Wackernagel, and Daniel T. Blumstein, “Underestimating the Challenges of Avoiding a Ghastly Future,” *Frontiers in Conservation Science*, 13 January 2021, https://www.frontiersin.org/articles/10.3389/fcosc.2020.615419/full.

We report three major and confronting environmental issues that have received little attention and require urgent action. First, we review the evidence that future environmental conditions will be far more dangerous than currently believed. The scale of the threats to the biosphere and all its lifeforms—including humanity—is in fact so great that it is difficult to grasp for even well-informed experts. Second, we ask what political or economic system, or leadership, is prepared to handle the predicted disasters, or even capable of such action. Third, this dire situation places an extraordinary responsibility on scientists to speak out candidly and accurately when engaging with government, business, and the public. We especially draw attention to the lack of appreciation of the enormous challenges to creating a sustainable future. The added stresses to human health, wealth, and well-being will perversely diminish our political capacity to mitigate the erosion of ecosystem services on which society depends. The science underlying these issues is strong, but awareness is weak. Without fully appreciating and broadcasting the scale of the problems and the enormity of the solutions required, society will fail to achieve even modest sustainability goals.

Introduction

Humanity is causing a rapid loss of biodiversity and, with it, Earth's ability to support complex life. But the mainstream is having difficulty grasping the magnitude of this loss, despite the steady erosion of the fabric of human civilization (Ceballos et al., 2015; IPBES, 2019; Convention on Biological Diversity, 2020; WWF, 2020). While suggested solutions abound (Díaz et al., 2019), the current scale of their implementation does not match the relentless progression of biodiversity loss (Cumming et al., 2006) and other existential threats tied to the continuous expansion of the human enterprise (Rees, 2020). Time delays between ecological deterioration and socio-economic penalties, as with climate disruption for example (IPCC, 2014), impede recognition of the magnitude of the challenge and timely counteraction needed. In addition, disciplinary specialization and insularity encourage unfamiliarity with the complex adaptive systems (Levin, 1999) in which problems and their potential solutions are embedded (Selby, 2006; Brand and Karvonen, 2007). Widespread ignorance of human behavior (Van Bavel et al., 2020) and the incremental nature of socio-political processes that plan and implement solutions further delay effective action (Shanley and López, 2009; King, 2016).

We summarize the state of the natural world in stark form here to help clarify the gravity of the human predicament. We also outline likely future trends in biodiversity decline (Díaz et al., 2019), climate disruption (Ripple et al., 2020), and human consumption and population growth to demonstrate the near certainty that these problems will worsen over the coming decades, with negative impacts for centuries to come. Finally, we discuss the ineffectiveness of current and planned actions that are attempting to address the ominous erosion of Earth's life-support system. Ours is not a call to surrender—we aim to provide leaders with a realistic “cold shower” of the state of the planet that is essential for planning to avoid a ghastly future.

Biodiversity Loss

Major changes in the biosphere are directly linked to the growth of human systems (summarized in Figure 1). While the rapid loss of species and populations differs regionally in intensity (Ceballos et al., 2015, 2017, 2020; Díaz et al., 2019), and most species have not been adequately assessed for extinction risk (Webb and Mindel, 2015), certain global trends are obvious. Since the start of agriculture around 11,000 years ago, the biomass of terrestrial vegetation has been halved (Erb et al., 2018), with a corresponding loss of >20% of its original biodiversity (Díaz et al., 2019), together denoting that >70% of the Earth's land surface has been altered by Homo sapiens (IPBES, 2019). There have been >700 documented vertebrate (Díaz et al., 2019) and ~600 plant (Humphreys et al., 2019) species extinctions over the past 500 years, with many more species clearly having gone extinct unrecorded (Tedesco et al., 2014). Population sizes of vertebrate species that have been monitored across years have declined by an average of 68% over the last five decades (WWF, 2020), with certain population clusters in extreme decline (Leung et al., 2020), thus presaging the imminent extinction of their species (Ceballos et al., 2020). Overall, perhaps 1 million species are threatened with extinction in the near future out of an estimated 7–10 million eukaryotic species on the planet (Mora et al., 2011), with around 40% of plants alone considered endangered (Antonelli et al., 2020). Today, the global biomass of wild mammals is <25% of that estimated for the Late Pleistocene (Bar-On et al., 2018), while insects are also disappearing rapidly in many regions (Wagner, 2020; reviews in van Klink et al., 2020).

Freshwater and marine environments have also been severely damaged. Today there is <15% of the original wetland area globally than was present 300 years ago (Davidson, 2014), and >75% of rivers >1,000 km long no longer flow freely along their entire course (Grill et al., 2019). More than two-thirds of the oceans have been compromised to some extent by human activities (Halpern et al., 2015), live coral cover on reefs has halved in <200 years (Frieler et al., 2013), seagrass extent has been decreasing by 10% per decade over the last century (Waycott et al., 2009; Díaz et al., 2019), kelp forests have declined by ~40% (Krumhansl et al., 2016), and the biomass of large predatory fishes is now <33% of what it was last century (Christensen et al., 2014).

With such a rapid, catastrophic loss of biodiversity, the ecosystem services it provides have also declined. These include inter alia reduced carbon sequestration (Heath et al., 2005; Lal, 2008), reduced pollination (Potts et al., 2016), soil degradation (Lal, 2015), poorer water and air quality (Smith et al., 2013), more frequent and intense flooding (Bradshaw et al., 2007; Hinkel et al., 2014) and fires (Boer et al., 2020; Bowman et al., 2020), and compromised human health (Díaz et al., 2006; Bradshaw et al., 2019). As telling indicators of how much biomass humanity has transferred from natural ecosystems to our own use, of the estimated 0.17 Gt of living biomass of terrestrial vertebrates on Earth today, most is represented by livestock (59%) and human beings (36%)—only ~5% of this total biomass is made up by wild mammals, birds, reptiles, and amphibians (Bar-On et al., 2018). As of 2020, the overall material output of human endeavor exceeds the sum of all living biomass on Earth (Elhacham et al., 2020).

Sixth Mass Extinction

A mass extinction is defined as a loss of ~75% of all species on the planet over a geologically short interval—generally anything <3 million years (Jablonski et al., 1994; Barnosky et al., 2011). At least five major extinction events have occurred since the Cambrian (Sodhi et al., 2009), the most recent of them 66 million years ago at the close of the Cretaceous period. The background rate of extinction since then has been 0.1 extinctions million species−1 year−1 (Ceballos et al., 2015), while estimates of today's extinction rate are orders of magnitude greater (Lamkin and Miller, 2016). Recorded vertebrate extinctions since the 16th century—the mere tip of the true extinction iceberg—give a rate of extinction of 1.3 species year−1, which is conservatively >15 times the background rate (Ceballos et al., 2015). The IUCN estimates that some 20% of all species are in danger of extinction over the next few decades, which greatly exceeds the background rate. That we are already on the path of a sixth major extinction is now scientifically undeniable (Barnosky et al., 2011; Ceballos et al., 2015, 2017).

Ecological Overshoot: Population Size and Overconsumption

The global human population has approximately doubled since 1970, reaching nearly 7.8 billion people today (prb.org). While some countries have stopped growing and even declined in size, world average fertility continues to be above replacement (2.3 children woman−1), with an average of 4.8 children woman−1 in Sub-Saharan Africa and fertilities >4 children woman−1 in many other countries (e.g., Afghanistan, Yemen, Timor-Leste). The 1.1 billion people today in Sub-Saharan Africa—a region expected to experience particularly harsh repercussions from climate change (Serdeczny et al., 2017)—is projected to double over the next 30 years. By 2050, the world population will likely grow to ~9.9 billion (prb.org), with growth projected by many to continue until well into the next century (Bradshaw and Brook, 2014; Gerland et al., 2014), although more recent estimates predict a peak toward the end of this century (Vollset et al., 2020).

Large population size and continued growth are implicated in many societal problems. The impact of population growth, combined with an imperfect distribution of resources, leads to massive food insecurity. By some estimates, 700–800 million people are starving and 1–2 billion are micronutrient-malnourished and unable to function fully, with prospects of many more food problems in the near future (Ehrlich and Harte, 2015a,b). Large populations and their continued growth are also drivers of soil degradation and biodiversity loss (Pimm et al., 2014). More people means that more synthetic compounds and dangerous throw-away plastics (Vethaak and Leslie, 2016) are manufactured, many of which add to the growing toxification of the Earth (Cribb, 2014). It also increases chances of pandemics (Daily and Ehrlich, 1996b) that fuel ever-more desperate hunts for scarce resources (Klare, 2012). Population growth is also a factor in many social ills, from crowding and joblessness, to deteriorating infrastructure and bad governance (Harte, 2007). There is mounting evidence that when populations are large and growing fast, they can be the sparks for both internal and international conflicts that lead to war (Klare, 2001; Toon et al., 2007). The multiple, interacting causes of civil war in particular are varied, including poverty, inequality, weak institutions, political grievance, ethnic divisions, and environmental stressors such as drought, deforestation, and land degradation (Homer-Dixon, 1991, 1999; Collier and Hoeer, 1998; Hauge and llingsen, 1998; Fearon and Laitin, 2003; Brückner, 2010; Acemoglu et al., 2017). Population growth itself can even increase the probability of military involvement in conflicts (Tir and Diehl, 1998). Countries with higher population growth rates experienced more social conflict since the Second World War (Acemoglu et al., 2017). In that study, an approximate doubling of a country's population caused about four additional years of full-blown civil war or low-intensity conflict in the 1980s relative to the 1940–1950s, even after controlling for a country's income-level, independence, and age structure.

Simultaneous with population growth, humanity's consumption as a fraction of Earth's regenerative capacity has grown from ~ 73% in 1960 to 170% in 2016 (Lin et al., 2018), with substantially greater per-person consumption in countries with highest income. With COVID-19, this overshoot dropped to 56% above Earth's regenerative capacity, which means that between January and August 2020, humanity consumed as much as Earth can renew in the entire year (overshootday.org). While inequality among people and countries remains staggering, the global middle class has grown rapidly and exceeded half the human population by 2018 (Kharas and Hamel, 2018). Over 70% of all people currently live in countries that run a biocapacity deficit while also having less than world-average income, excluding them from compensating their biocapacity deficit through purchases (Wackernagel et al., 2019) and eroding future resilience via reduced food security (Ehrlich and Harte, 2015b). The consumption rates of high-income countries continue to be substantially higher than low-income countries, with many of the latter even experiencing declines in per-capita footprint (Dasgupta and Ehrlich, 2013; Wackernagel et al., 2019).

This massive ecological overshoot is largely enabled by the increasing use of fossil fuels. These convenient fuels have allowed us to decouple human demand from biological regeneration: 85% of commercial energy, 65% of fibers, and most plastics are now produced from fossil fuels. Also, food production depends on fossil-fuel input, with every unit of food energy produced requiring a multiple in fossil-fuel energy (e.g., 3 × for high-consuming countries like Canada, Australia, USA, and China; overshootday.org). This, coupled with increasing consumption of carbon-intensive meat (Ripple et al., 2014) congruent with the rising middle class, has exploded the global carbon footprint of agriculture. While climate change demands a full exit from fossil-fuel use well before 2050, pressures on the biosphere are likely to mount prior to decarbonization as humanity brings energy alternatives online. Consumption and biodiversity challenges will also be amplified by the enormous physical inertia of all large “stocks” that shape current trends: built infrastructure, energy systems, and human populations.

It is therefore also inevitable that aggregate consumption will increase at least into the near future, especially as affluence and population continue to grow in tandem (Wiedmann et al., 2020). Even if major catastrophes occur during this interval, they would unlikely affect the population trajectory until well into the 22nd Century (Bradshaw and Brook, 2014). Although population-connected climate change (Wynes and Nicholas, 2017) will worsen human mortality (Mora et al., 2017; Parks et al., 2020), morbidity (Patz et al., 2005; Díaz et al., 2006; Peng et al., 2011), development (Barreca and Schaller, 2020), cognition (Jacobson et al., 2019), agricultural yields (Verdin et al., 2005; Schmidhuber and Tubiello, 2007; Brown and Funk, 2008; Gaupp et al., 2020), and conflicts (Boas, 2015), there is no way—ethically or otherwise (barring extreme and unprecedented increases in human mortality)—to avoid rising human numbers and the accompanying overconsumption. That said, instituting human-rights policies to lower fertility and reining in consumption patterns could diminish the impacts of these phenomena (Rees, 2020).

Failed International Goals and Prospects for the Future

Stopping biodiversity loss is nowhere close to the top of any country's priorities, trailing far behind other concerns such as employment, healthcare, economic growth, or currency stability. It is therefore no surprise that none of the Aichi Biodiversity Targets for 2020 set at the Convention on Biological Diversity's (CBD.int) 2010 conference was met (Secretariat of the Convention on Biological Diversity, 2020). Even had they been met, they would have still fallen short of realizing any substantive reductions in extinction rate. More broadly, most of the nature-related United Nations Sustainable Development Goals (SDGs) (e.g., SDGs 6, 13–15) are also on track for failure (Wackernagel et al., 2017; Díaz et al., 2019; Messerli et al., 2019), largely because most SDGs have not adequately incorporated their interdependencies with other socio-economic factors (Bradshaw and Di Minin, 2019; Bradshaw et al., 2019; Messerli et al., 2019). Therefore, the apparent paradox of high and rising average standard of living despite a mounting environmental toll has come at a great cost to the stability of humanity's medium- and long-term life-support system. In other words, humanity is running an ecological Ponzi scheme in which society robs nature and future generations to pay for boosting incomes in the short term (Ehrlich et al., 2012). Even the World Economic Forum, which is captive of dangerous greenwashing propaganda (Bakan, 2020), now recognizes biodiversity loss as one of the top threats to the global economy (World Economic Forum, 2020).

The emergence of a long-predicted pandemic (Daily and Ehrlich, 1996a), likely related to biodiversity loss, poignantly exemplifies how that imbalance is degrading both human health and wealth (Austin, 2020; Dobson et al., 2020; Roe et al., 2020). With three-quarters of new infectious diseases resulting from human-animal interactions, environmental degradation via climate change, deforestation, intensive farming, bushmeat hunting, and an exploding wildlife trade mean that the opportunities for pathogen-transferring interactions are high (Austin, 2020; Daszak et al., 2020). That much of this degradation is occurring in Biodiversity Hotspots where pathogen diversity is also highest (Keesing et al., 2010), but where institutional capacity is weakest, further increases the risk of pathogen release and spread (Austin, 2020; Schmeller et al., 2020).

Climate Disruption

The dangerous effects of climate change are much more evident to people than those of biodiversity loss (Legagneux et al., 2018), but society is still finding it difficult to deal with them effectively. Civilization has already exceeded a global warming of ~ 1.0°C above pre-industrial conditions, and is on track to cause at least a 1.5°C warming between 2030 and 2052 (IPCC, 2018). In fact, today's greenhouse-gas concentration is >500 ppm CO2-e (Butler and Montzka, 2020), while according to the IPCC, 450 ppm CO2-e would give Earth a mere 66% chance of not exceeding a 2°C warming (IPCC, 2014). Greenhouse-gas concentration will continue to increase (via positive feedbacks such as melting permafrost and the release of stored methane) (Burke et al., 2018), resulting in further delay of temperature-reducing responses even if humanity stops using fossil fuels entirely well before 2030 (Steffen et al., 2018).

Human alteration of the climate has become globally detectable in any single day's weather (Sippel et al., 2020). In fact, the world's climate has matched or exceeded previous predictions (Brysse et al., 2013), possibly because of the IPCC's reliance on averages from several models (Herger et al., 2018) and the language of political conservativeness inherent in policy recommendations seeking multinational consensus (Herrando-Pérez et al., 2019). However, the latest climate models (CMIP6) show greater future warming than previously predicted (Forster et al., 2020), even if society tracks the needed lower-emissions pathway over the coming decades. Nations have in general not met the goals of the 5 year-old Paris Agreement (United Nations, 2016), and while global awareness and concern have risen, and scientists have proposed major transformative change (in energy production, pollution reduction, custodianship of nature, food production, economics, population policies, etc.), an effective international response has yet to emerge (Ripple et al., 2020). Even assuming that all signatories do, in fact, manage to ratify their commitments (a doubtful prospect), expected warming would still reach 2.6–3.1°C by 2100 (Rogelj et al., 2016) unless large, additional commitments are made and fulfilled. Without such commitments, the projected rise of Earth's temperature will be catastrophic for biodiversity (Urban, 2015; Steffen et al., 2018; Strona and Bradshaw, 2018) and humanity (Smith et al., 2016).

Regarding international climate-change accords, the Paris Agreement (United Nations, 2016) set the 1.5–2°C target unanimously. But since then, progress to propose, let alone follow, (voluntary) “intended national determined contributions” for post-2020 climate action have been utterly inadequate.

Political Impotence

If most of the world's population truly understood and appreciated the magnitude of the crises we summarize here, and the inevitability of worsening conditions, one could logically expect positive changes in politics and policies to match the gravity of the existential threats. But the opposite is unfolding. The rise of right-wing populist leaders is associated with anti-environment agendas as seen recently for example in Brazil (Nature, 2018), the USA (Hejny, 2018), and Australia (Burck et al., 2019). Large differences in income, wealth, and consumption among people and even among countries render it difficult to make any policy global in its execution or effect.

A central concept in ecology is density feedback (Herrando-Pérez et al., 2012)—as a population approaches its environmental carrying capacity, average individual fitness declines (Brook and Bradshaw, 2006). This tends to push populations toward an instantaneous expression of carrying capacity that slows or reverses population growth. But for most of history, human ingenuity has inflated the natural environment's carrying capacity for us by developing new ways to increase food production (Hopfenberg, 2003), expand wildlife exploitation, and enhance the availability of other resources. This inflation has involved modifying temperature via shelter, clothing, and microclimate control, transporting goods from remote locations, and generally reducing the probability of death or injury through community infrastructure and services (Cohen, 1995). But with the availability of fossil fuels, our species has pushed its consumption of nature's goods and services much farther beyond long-term carrying capacity (or more precisely, the planet's biocapacity), making the readjustment from overshoot that is inevitable far more catastrophic if not managed carefully (Nyström et al., 2019). A growing human population will only exacerbate this, leading to greater competition for an ever-dwindling resource pool. The corollaries are many: continued reduction of environmental intactness (Bradshaw et al., 2010; Bradshaw and Di Minin, 2019), reduced child health (especially in low-income nations) (Bradshaw et al., 2019), increased food demand exacerbating environmental degradation via agro-intensification (Crist et al., 2017), vaster and possibly catastrophic effects of global toxification (Cribb, 2014; Swan and Colino, 2021), greater expression of social pathologies (Levy and Herzog, 1974) including violence exacerbated by climate change and environmental degradation itself (Agnew, 2013; White, 2017, 2019), more terrorism (Coccia, 2018), and an economic system even more prone to sequester the remaining wealth among fewer individuals (Kus, 2016; Piketty, 2020) much like how cropland expansion since the early 1990s has disproportionately concentrated wealth among the super-rich (Ceddia, 2020). The predominant paradigm is still one of pegging “environment” against “economy”; yet in reality, the choice is between exiting overshoot by design or disaster—because exiting overshoot is inevitable one way or another.

Given these misconceptions and entrenched interests, the continued rise of extreme ideologies is likely, which in turn limits the capacity of making prudent, long-term decisions, thus potentially accelerating a vicious cycle of global ecological deterioration and its penalties. Even the USA's much-touted New Green Deal (U. S. House of Representatives, 2019) has in fact exacerbated the country's political polarization (Gustafson et al., 2019), mainly because of the weaponization of ‘environmentalism' as a political ideology rather than being viewed as a universal mode of self-preservation and planetary protection that ought to transcend political tribalism. Indeed, environmental protest groups are being labeled as “terrorists” in many countries (Hudson, 2020). Further, the severity of the commitments required for any country to achieve meaningful reductions in consumption and emissions will inevitably lead to public backlash and further ideological entrenchments, mainly because the threat of potential short-term sacrifices is seen as politically inopportune. Even though climate change alone will incur a vast economic burden (Burke et al., 2015; Carleton and Hsiang, 2016; Auffhammer, 2018) possibly leading to war (nuclear, or otherwise) at a global scale (Klare, 2020), most of the world's economies are predicated on the political idea that meaningful counteraction now is too costly to be politically palatable. Combined with financed disinformation campaigns in a bid to protect short-term profits (Oreskes and Conway, 2010; Mayer, 2016; Bakan, 2020), it is doubtful that any needed shift in economic investments of sufficient scale will be made in time.

While uncertain and prone to fluctuate according to unpredictable social and policy trends (Boas et al., 2019; McLeman, 2019; Nature Climate Change, 2019), climate change and other environmental pressures will trigger more mass migration over the coming decades (McLeman, 2019), with an estimated 25 million to 1 billion environmental migrants expected by 2050 (Brown, 2008). Because international law does not yet legally recognize such “environmental migrants” as refugees (United Nations University, 2015) (although this is likely to change) (Lyons, 2020), we fear that a rising tide of refugees will reduce, not increase, international cooperation in ways that will further weaken our capacity to mitigate the crisis.

Changing the Rules of the Game

While it is neither our intention nor capacity in this short Perspective to delve into the complexities and details of possible solutions to the human predicament, there is no shortage of evidence-based literature proposing ways to change human behavior for the benefit of all extant life. The remaining questions are less about what to do, and more about how, stimulating the genesis of many organizations devoted to these pursuits (e.g., ipbes.org, goodanthropocenes.net, overshootday.org, mahb.stanford.edu, populationmatters.org, clubofrome.org, steadystate.org, to name a few). The gravity of the situation requires fundamental changes to global capitalism, education, and equality, which include inter alia the abolition of perpetual economic growth, properly pricing externalities, a rapid exit from fossil-fuel use, strict regulation of markets and property acquisition, reigning in corporate lobbying, and the empowerment of women. These choices will necessarily entail difficult conversations about population growth and the necessity of dwindling but more equitable standards of living.

Conclusions

We have summarized predictions of a ghastly future of mass extinction, declining health, and climate-disruption upheavals (including looming massive migrations) and resource conflicts this century. Yet, our goal is not to present a fatalist perspective, because there are many examples of successful interventions to prevent extinctions, restore ecosystems, and encourage more sustainable economic activity at both local and regional scales. Instead, we contend that only a realistic appreciation of the colossal challenges facing the international community might allow it to chart a less-ravaged future. While there have been more recent calls for the scientific community in particular to be more vocal about their warnings to humanity (Ripple et al., 2017; Cavicchioli et al., 2019; Gardner and Wordley, 2019), these have been insufficiently foreboding to match the scale of the crisis. Given the existence of a human “optimism bias” that triggers some to underestimate the severity of a crisis and ignore expert warnings, a good communication strategy must ideally undercut this bias without inducing disproportionate feelings of fear and despair (Pyke, 2017; Van Bavel et al., 2020). It is therefore incumbent on experts in any discipline that deals with the future of the biosphere and human well-being to eschew reticence, avoid sugar-coating the overwhelming challenges ahead and “tell it like it is.” Anything else is misleading at best, or negligent and potentially lethal for the human enterprise at worst.

#### Immense structural suffering and crackdowns on ability to effectively mobilize are inevitable so long as economic and political power remains concentrated.

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

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

In spite of this suffering and sacrifice, the future for predominantly white corporate monopolists has never been brighter. Excessive and unrestrained capitalism has enriched a small group of wealthy elite corporations and individuals by concentrating the nation’s economic and political power under their control—a mutually reinforcing, vicious cycle. Between March 18 (the unofficial beginning of the pandemic in the US) and November 24, 2020, 644 billionaires increased their combined wealth by $931 billion dollars (from $2.95 trillion to $3.88 trillion, or a rise of 31.6 percent).2 This occurred even as poverty deepened and the October unemployment rate hit nearly double its pre-pandemic low. Some in this elite class of corporations and individuals have used their accumulated power to concentrate markets that are fundamental to human thriving (e.g., technology, agriculture, financial services, and health care) by forming massive corporate monopolies.

Corporate monopoly is bad for workers, consumers, and for our democracy. Our nation’s founders were keenly aware of the danger of monopoly. In fact, the US revolution was sparked by anger directed at the monopolistic power of the British Crown. Though popularly taught as being about unjust taxation, the Boston Tea Party was actually a rebellion ignited by rage directed at the East Indian Trading Company, a monopoly chartered by the British monarchy.3 Additionally, in 1787, Thomas Jefferson wrote to James Madison that the proposed US Constitution should include a Bill of Rights that explicitly excluded monopolies.4 Though the language did not make it into the final Constitution, this letter demonstrates that the distrust of monopoly is justified and runs deep in our nation’s ethos.

Efforts to rein in the “robber barons” of the Gilded Age (i.e., Andrew Carnegie, J.D. Rockfeller, Cornielius Vanderbelt, and J.P. Morgan) are monumental in the history of anti-monopoly government action in the US. Victories following this period include government action to break up several large monopolies in the railroad and oil and gas industries. Additionally, this period normalized many worker protections that we take for granted today, such as a 40-hour workweek and overtime pay.

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

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

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

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

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

SECTION 1 Monopoly Power Is Corporate Power Magnified and Maximized

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

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

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

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

How Corporate Monopolies Show Up in Today’s World

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

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

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

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

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

Big Tech

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

Big Pharma

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

Big Agriculture

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

Big Banks

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

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

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

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

#### The government’s guiding telos should be to counter domination – our politics reclaims the lost promise of Reconstruction by rejecting negative, libertarian conceptions of freedom in favor of a positive guarantee of substantive freedom.

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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.

A. Reconstituting Economic Structures to Curb Domination

From the standpoint of domination and power, one of the central problems of today's political economy is the increasingly concentrated power of corporations. From too-big-to-fail banks to the battles over net neutrality and anxieties about private power of firms like Google in the information economy, we live in an era marked by new forms of what Brandeis famously called "the curse of bigness." 64 As in Brandeis's time, powerful firms increasingly control the terms of access and distribution for major social services. Some of these firms are monopolies in the conventional sense, following waves of major mergers and consolidations in industries like agriculture, food production, and telecom. 65 But some of these firms exhibit a different form of "platform power," centralizing control over key conduits of economic activity, from Amazon's control of its logistics and marketplace infrastructure to Uber's platform for matching riders and drivers to Comcast's control over the underlying infrastructure linking Internet content to end users. 66

Just as Progressive Era political thought points towards a normative diagnosis of these problems as rooted in domination, the reform politics of the Progressive Era suggests avenues for redressing such private power, specifically by radically restructuring the dynamics of the modern economy. While we are accustomed to viewing the Progressive Era as the rise of ideals of regulatory expertise in areas like consumer protection and worker safety, the more far-reaching innovations of this period came from attempts to radically restructure the dynamics of the market economy and the powers and capacities of corporations themselves. These efforts sought to curb private power and subject it to more direct public oversight.

Consider for example the rise of corporate governance as a field of law. In 1932, Adolf Berle and Gardiner Means argued in their seminal Modern Corporation and Private Property that the rise of large corporations owned by many diffuse shareholders represented a new form of property right where the owners of the corporation, the shareholders, lacked the power to command the corporation's actions. 67 This fact meant the creation of a new form of corporate power characterized by this separation of ownership (by shareholders) from control (by managers). 68 Today, Berle and Means are often cited as a starting point for modern corporate governance literature and for the emphasis on shareholder rights as a driving framework for justifying financial markets, mergers and takeovers, and corporate law more generally. 69 But for Berle and Means, the driving concern was not shareholder theories of the firm so much as it [\*1347] was the antecedent diagnosis of the problem of quasi-sovereign, concentrated private power exercised by corporations over workers and society as a whole, absent the kinds of checks and balances that accompany the exercise of public power in republican governance. 70 Indeed, attempts to shift corporate governance today could become vehicles not for maximizing growth or efficiency but rather for creating modes through which stakeholders, not just shareholders, can contest and hold accountable such exercises of concentrated private power. 71

The emergence and potential of antitrust law can be understood in a similar vein. The antitrust movement was a major political and intellectual force, seeking ways to redress the concentration of economic power among monopolies, trusts, and large corporations from Standard Oil to the railroads to finance. While modern antitrust is understood in a more narrow context of prioritizing consumer welfare, antitrust for these reformers was a fundamentally political project, seeking to undo concentrations of economic power and limit the ways in which large firms could exercise undue and unchecked influence on prices, economic opportunity, and the political process itself. 72 Antitrust is thus best understood as an antidomination strategy, a battle not over consumer welfare but rather private power. In contrast to modern day antitrust law, Progressive Era politics saw antitrust as critical to the maintenance of liberty against such private power. Their disagreements emerged not over whether to regulate such power but over how best to do it.

Today, we might seek a renewed push for antitrust enforcement to address these concentrations of economic power in an effort to restructure markets to be more open to competition and economic opportunity. As a number of journalists and scholars have increasingly argued, we are in a new era of private power and monopoly, as firms in industries from agriculture to food production to finance have concentrated power to shape market dynamics and to influence politics and public policy. 73 The antitrust ethos that has been steadily deconstructed over the course of the twentieth century may have relevance again in the twenty-first. 74

A third reform strategy among Progressive Era activists involved a different kind of economic restructuring: through the creation of public utilities. Where corporate governance sought to redress private power through changes to the internal dynamics of firms and antitrust remedied private power by breaking up large corporations, the public utility model represented an approach whereby Progressive reformers could accept economies of scale in some instances, but still ensure that the good or service would be provided fairly and at reasonable rates. 75 Reformers established utilities in industries as wide-ranging as ice, milk, transportation, communications, fuel, banking, and more. 76 Today we think of public utilities as natural monopolies with increasing returns to scale (such as electricity or water provision). 77 But Progressives saw public utilities as required where a good was of sufficient social value to be a necessity and where the provision of this necessity was at risk of subversion or corruption if left to private or market forces. 78 Indeed, many Progressive reformers experimented with the "municipalization" of key sectors like electricity production and water, founding the first public utilities. 79 As William Novak has argued, "for progressive legal and economic reformers, the legal concept of public utility was capable of justifying state economic controls ranging from statutory police regulation to administrative rate setting to outright public ownership of the means of production." 80 The central goal was accountability and oversight, but they also saw the need to balance oversight with maintaining efficiency of actual production. In practice, these thinkers saw the need to make context-specific judgments about the degree of public oversight and ownership on an industry-by-industry basis, rather than advocating outright nationalization across the board.

The concept of the public utility suggests another avenue through which we might restructure the modern economy as a way to combat domination, by regulating firms that provide critical necessities to ensure equal access, fair pricing, and that public needs are more directly met. The public utility framework has already been revived in the net neutrality effort to ensure common-carriage-type obligations for Internet service providers, preventing extractive discrimination of content by the firms controlling the [\*1350] backbone infrastructure of the Internet. 81 Public utility obligations may offer a way to reassert public oversight and direction over electrical utilities to better combat climate change, 82 or to create a "public option" for banking to better provide fair, cheap, and accessible access to basic financial services, 83 or to ensure fair dealing and better labor conditions among online "platforms" like Uber or Amazon. 84 The public utility approach provides both a limit on private power and a greater access to core goods and services - public goods, in a moral and social sense rather than an economistic one. This shifts economic power in both directions, limiting the potential for domination by private actors controlling these goods, and expanding the independence of individuals by ensuring equal and fair access to foundational goods and services.

B. Political Agency and Democratic Institutions

The creation of new regulatory institutions to implement these economic policies and to govern the modern economy points to another set of strategies employed by Progressive Era thinkers to counteract domination: changes to the structure of the political process. The creation of regulatory agencies and commissions at state, local, and national levels offered reformers the hope of an effective new tool for managing the increasingly complex modern economy, asserting the public good against powerful private actors such as trusts or corporations, and sidestepping the problems of political corruption and capture within legislatures. To expand democratic agency to counteract economic domination, these reformers effectively reinvented the fundamental structure of the political process itself, creating new channels for the expression of popular sovereignty. Thus reformers succeeded in institutionalizing ballot, recall, initiative, and referendum procedures in many state constitutions from 1890 to 1912. 85 Others established, for the first time, home rule powers for local government bodies as a way to expand participation and bypass the corruption of state legislatures and party machines. 86

In a similar vein, today we might address the problem of disparate political power by seeking alternative vehicles for democratic collective action through which to build the power of ordinary citizens and communities. The battle for reviving democratic accountability and responsiveness is not exhausted by a sole focus on campaign finance reform or voting rights, though of course both are critical to rebalancing political power. There are other forms of building democratic political power. Today, we see a similar revival of interest in cities as spaces for policy experimentation, as offering smaller-scale footholds where reformers can put into practice alternative economic arrangements, with an eye towards larger national debate and eventual policy change. 87

Regulatory agencies, though often understood in technocratic, expertise-oriented terms, might similarly become spaces for democratic action, participation, and accountability. Recent developments in legal history document the ways in which regulatory agencies have served as critical spaces in which democratic politics have taken place, and modern policy regimes and normative understandings of rights have been forged out of contestation between different stakeholders and policymakers. 88 Administrative agencies are therefore routinely in the forefront of developing novel applications of moral and political claims that we might otherwise think are the province of legislatures and courts, from the administration of welfare benefits to the implementation of fair-housing principles. 89 Such "administrative constitutionalism" involves the creative interpretation and evolution of legal norms and moral-rights claims by bureaucrats faced with pressure from social movements, often operating beyond or even despite the commands of the President, Congress, or the courts. 90

Agencies can be reformed to provide more direct forms of stakeholder representation. 91 In both cities and regulation, we also see attempts to create more participatory policymaking processes that can help redress disparities of influence and power, from participatory budgeting to technology-facilitated modes of voice and citizen monitoring of government actions. 92

Finally, across both of these domains of economic and political restructuring, a key driver of redressing power comes from the mobilization and organization of social movements. If the reform politics of the Progressive Era and the critique of domination were interrelated with the emergence of the antitrust movement, labor republicanism, populism, and urban reformism, the prospects for economic and political restructuring today depend crucially on new forms of civic power developed by movements and civil society organizations. 93 Many activists and reformers in this period sought to mobilize citizens through political association as a way to create a more equitable balance of political power. 94

#### Giving effect to that vision specifically requires using the federal government to crack down on trusts.

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

Jeremie Greer and Solana Rice, “Anti-Monopoly Activism: Reclaiming Power Through Racial Justice,” *Liberation in a Generation*, March 2021, pp. 39-56, https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism\_032021.pdf.

Fans of literature and movies will recognize a popular character in American storytelling: the villain turned hero. The villain-turned-hero storyline is attractive because it allows for the villain’s influential power to be redirected away from causing harm and toward healing pain. In our fight to rein in monopoly power, the government—particularly the federal government—could be our stories’ reformed hero. Grassroots leaders of color are uniquely positioned to convert government power, which has largely been complicit in the expansion of monopoly power, into a force for good that reins in the devastation caused by corporate monopolies.

Similar to organizers, our government has a distinct role to play to directly challenge monopoly power. This is especially true of the federal government. The federal government has the constitutional authority to set the rules that govern our entire economy, including the rules that govern monopolies. In fact, the federal government is the entity with the greatest amount of money and authority to match monopoly power. Through what can and should be democractic systems of government, it is also the principal entity, directly accountable to workers, consumers, and communities instead of shareholders and CEOs. The question, then, is not if our government can curb monopoly power, but if it is willing to fulfill its responsibility to do so.

As discussed in the introduction, the federal government took strong and decisive action against monopoly power in the late 19th and early 20th century. During this time, Congress passed the Sherman Act, Clayton Act, and the Federal Trade Commission Act. The Federal Trade Commission (FTC) was formed in 1914, and the federal courts took decisive action to break up the massive monopolies that dominated critical industries, such as railroad and oil industries. However, in the second half of the 20th century, the federal government (and thus the federal courts) not only rolled back its actions against monopoly power, but it actually empowered corporate monopolies to grow larger and more powerful.

#### Therefore, Ethan and I affirm the following demand:

#### The United States federal government should substantially increase prohibitions on private sector business practices harmful to substantive political equality, at least expanding the scope of the core antitrust laws to crack down on concentrations of political and economic power.

#### Ensuring substantive political equality is the proper telos for the federal government.

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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-administravist10 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.

#### Specifically, the plan reclaims a radically progressive reading of the core antitrust laws, tearing up the structure of U.S. political economy root and branch.

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Sandeep Vaheesan, “Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages,” *Maryland Law Review*, vol. 78, no. 4, 2019, pp. 816-825, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3832&context=mlr.

IV. How Remaking Antitrust Law Could Help End the New Gilded Age

Congress, the antitrust agencies, and federal courts should restore the original anti-monopoly, pro-worker vision for the antitrust laws. For much of their history, these laws had a pro-capital, anti-worker orientation. Notwithstanding this record, these laws can be reoriented to police capital and accommodate labor in accord with the intent of Congress. In passing these laws, Congress aimed to curtail the power of capital and also preserve space for workers to organize. 392 The antitrust agencies and federal courts should reject the ahistorical and deficient efficiency paradigm and embrace the political economy framework of the sponsors of the antitrust laws. Specifically, they need to reinterpret antitrust to restore competitive market structures and limit the power of large businesses over consumers, producers, rivals, and citizens. Along with imposing checks on the power of large businesses, Congress, the agencies, and the courts must preserve freedom of action for workers acting in concert.

New statutes and executive and judicial reinterpretation of antitrust law, in accord with congressional intent, would help remedy many economic and political injustices in the United States today. Monopoly and oligopoly appear to contribute to a host of societal ills. These include increased inequality, 393 diminished income for workers 394 and other producers, 395 and declining business formation. 396 At the same time, protecting workers' collective action against antitrust challenges would create more space for workers to organize and claim a fairer share of income and wealth. 397 Restoring antitrust law to its original goals would likely produce a more just and equitable society. Although by no means a panacea for what ails the United States, antitrust law should be part of a broader social democratic agenda that reduces the yawning inequalities in wealth and power today. 398

#### That constitutes a repudiation of the technocratic, legalist register that eviscerated the emancipatory potential of governance—in antitrust, but also in the civil rights movement, and in the administrative state generally.

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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.

## 2AC

### K

#### The Ward ev says that slavery is an ongoing structure – however, antiblackness is a constructed progress – we can and should deconstruct it through interventions like the aff

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 75.

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

#### The existence of incalculable debt doesn’t justify the alt – political commitments are an ethical imperative – it is impossible to tell in advance whether we will succeed or fail, but refusing to act at all is disastrous

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Lewis Gordon, “2: Re-Imagining Liberations,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 29.

Concluding Considerations

A crucial feature of political commitment is that it is an existential paradox. Unlike moral commitment, which involves doing the “right thing,” political commitment affords no advanced notice or assured principle of verification. Her actions could have produced an arrogant child who is shortly thereafter killed, or a fighting, committed spirit who suffers the same fate. Political commitment requires acting without knowing the outcome and acting for those whom one ultimately will never know. A six-months’ glimpse into the life of the child is not the same as knowing the man he was to become. This insight is similar with regard to political action. No political act offers guarantees save one: it will affect others whom one would ultimately never know. What, then, could one hope for with such action?

The first thing to consider hits the heart of critical diversity. Those who benefit from our actions may be so radically different from us that we may even recoil at the discovery of whom they turn out to be.

Second, those who suffer from our actions may be those beyond our expectations.

Third, the first and second considerations lead to the realization that the epistemic act of trying to imagine the recipients of our actions collapses into the first desire of love, which would be an affirmation of the self. Put differently, it would involve simply positing versions of ourselves into a future whose condition of possibility requires the emergence of people who are both not us and also, possibly, not like us.

Fourth, this means acknowledging, through political commitment, the production of freedom that transcends us. This act of political commitment is simultaneously a manifestation of the second form of love. It offers the paradox of loving, by virtue of action, anonymous generations to come.29

The fourth kind raises the question of building a future, even in the face of circumstances that do not guarantee our having one. In effect, the message, politically understood, is this: learn we hope, but try we must.

#### Their critique of “progress narratives” falls into the same trap of optimism – it presumes a uniform arc of history, which is just an excuse to avoid taking responsibility for changing the world we inhabit

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 77-78.

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

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

#### The Wehilye evidence says that black people are excluded from the realm of the human – that denies black agency by rendering black people as objects of white control

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 75-76.

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

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

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

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

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

#### That’s best – their theory shouldn’t be a substitute for political commitment – acting as though it is homogenizes black life

Kline, Ph.D. candidate in the Department of Religion at Rice University, ‘17

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

Political Ontology and the Limitation of Social Analysis and Legitimate Praxis

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

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

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

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

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

(LaCapra 2009, 168)

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

#### Their theory implicitly presumes that all orientations towards the law produce the same ends – that’s demonstrably false – past cases prove that differing configurations of law are significant in combatting structural racism

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(John, “Racist Antitrust, Antiracist Antitrust,” The Antitrust Bulletin, Sagepub)

But a change in goals does not always yield an immediate change in implementation-put another way, choice of an end does not necessarily dictate the choice of means. The pair of cases discussed below frame the 1980s, a decade in which antitrust's end was fairly static, yet its means were still in flux. The first, Knights of the Ku Klux Klan ("KKK"), stands as one of the clearest, most admirable examples of antiracist antitrust in U.S. history. The second, Superior Court Trial Lawyers Association ("SCTLA"), is its opposite: the Sherman Act being deployed against an attempt to ensure adequate legal representation for indigent defendants, most of them being people of color.

Taken together, these two cases represent divergent paths. Which has the contemporary antitrust enterprise chosen to follow? The Supreme Court's most recent substantive decision, Ohio v. American Express ("AmEx"), suggests both room for hope and reason for concern. With the latter in mind, the essay concludes by offering four recommendations for how antitrust can retake the high road. By avoiding overemphasis on categorical labels or particular types of effects, and by recentering a focus on power, the antitrust enterprise can play a vital part in addressing-and avoid exacerbating-structural inequality.

A. Knights of the KKK: Antiracist Antitrust

After the U.S. military exited Vietnam in 1975, millions of Vietnamese, Laotian, and Cambodian people fled the region. 12 Rapid congressional action facilitated emigration to the United States for many of these displaced persons. 13 Many settled in coastal Texas, a designated resettlement site that offered a familiar opportunity for sustenance: fishing and shrimping. 14 Unsurprisingly, the refugees' integration into the local economy was met with hostility on the part of incumbents. One antiimmigrant tactic was political: at the behest of the Texas Shrimp Association, the state legislature passed a bill in early 1981 that imposed a 2-year ban on issuing new shrimping licenses. 15

But in the towns and cities along the Gulf coast, nativist locals were unsatisfied with what they perceived to be a half-measure by the state legislature. Boat merchants began charging premium prices to Vietnamese immigrants. 16 Bait shops refused to sell to them. 17 Rumors flew, with some locals suggesting the new shrimpers were being subsidized by the U.S. Government. 18 Incumbents suggested the new entrants were overfishing and underpricing. 19 A shaky cease-fire agreement was drawn up but quickly fell apart after the Federal Trade Commission warned that it violated the Sherman Act. 20 In January 1981, one of the nativist locals met with Louis Beam, a Grand Dragon of the Knights of the KKK, 21 to present the concerns of"a group of American fishermen." 22 The Klan moved swiftly. At a rally held on Valentine's Day in Santa Fe, Beam warned the crowd that it "may become necessary to take laws into our own hands." 23 The Grand Dragon went on to invite attendees to train at Klanorganized "military camps," inveighing that it would be necessary to "fight, fight, fight" and see "blood, blood, blood" for the salvation of the country. 24 Beam vowed to give the newcomers "a lot better fight here than they got from the Viet Cong. "25 The crowd watched a demonstration of how to bum a boat and later a cross.2 6 On a clear day in March, a shrimp boat owned by one of the long-term residents was seen carrying men garbed in the traditional white robes and pointed hats of the KKK. Most were visibly armed, and the boat had been fitted with-and was firing-a cannon. 27 Locals reported receiving threats that those who did business with Vietnamese immigrants would be viewed as "enemies." 28 A woman who had allowed an immigrant-owned fishing boat to use her docks was issued a warning: "You have been paid a 'friendly visit' do you want the next one to be a 'real one. "' 29 Klansmen burned crosses in the yards of immigrant shrimpers, 30 set their fishing boats ablaze, and firebombed a home. 31

Meanwhile, in Alabama, the cofounders of the Southern Poverty Law Center had been closely monitoring the Klan's activities. 32 In April 1981, Morris Dees and Joseph Levin filed a wide-ranging lawsuit in federal court, seeking to enjoin the Klan's reign of terror. Judge Gabrielle l(jrk McDonald, the first African American judge in the state of Texas, was assigned to hear the case. 33 The defendants called for her disqualification, referring to her supposed prejudice against the Klan. Beam publicly called her a racial slur. 34 Throughout the entire proceedings, Judge McDonald and her family received death threats and one-way tickets to Africa. 35

Among the fourteen counts pleaded were violations of Sherman Act   1 and   2. 36 The   1 claim formed the core of the antitrust case: plaintiffs alleged that the defendants-the Knights of the KKK, Beam, various anonymous members of the Klan, the "American Fishermen's Coalition," and several individual fishermen-had conspired "to force the Vietnamese fishermen class to terminate or at the very least curtail their commercial fishing business in the Galveston Bay area" and to try to "intimidate them into selling off sixty percent of their shrimping boats." 37 The conspiracy's goal, per the complaint, was to "eliminate or reduce competition" for incumbent fisherman in the area. 38 After granting class certification, Judge McDonald issued a preliminary injunction ordering the defendants to cease their campaign of violence, threats, and intimidation. The imbalance of societal and material power was subtly-and effectively---emphasized throughout Judge McDonald's opinion. Facts were presented without embellishment; they spoke for themselves. The reader learns, for example, of a Vietnamese shrimp seller who testified that "six weeks ago two American men drove up in a truck and pointed a gun at her" and that "her husband will not take out their shrimp boat on May 15, 1981 because she is afraid that he will be killed." 39

The antitrust analysis is notable for its clarity and brevity-indeed, to the contemporary observer, it is perhaps most remarkable for what it does *not* say. Although Judge McDonald began by stating that "the anti-trust laws" forbid a "lessening of competitive conditions in the relevant market," she went on to explain that plaintiffs could prove such a "lessening" by demonstrating an actual marketplace effect. 40 No formal market definition was required. Nor did the opinion engage in a protracted attempt to fit the defendants' conduct into a particular analytical category before deciding on the appropriate legal treatrnent. 41 Again, proof of actual harmful effects was sufficient, at least to receive a preliminary injunction. In August, the court made the injunction permanent and ordered it to be posted publicly in the Gulf Coast area. 42

B. FTC v. SCTL.A

SCTLA was another antitrust lawsuit targeting coordinated activity, but the similarities began-and ended-there. While Knights of the KKK was championed by civil-rights attorneys, SCTLA was the brainchild of a hard-right-wing economist. 43 In fact, the latter was filed against a group of publicinterest attorneys. Knights of the KKK exemplifies antitrust being used to counter coordinated power on behalf of displaced persons enduring personal and structural racism. SCTLA, on the other hand, exemplifies an antitrust enterprise oblivious to power imbalances and structural racism. James C. Miller III, President Reagan's first appointee to chair the Federal Trade Commission, was the first nonlawyer ever to hold that position. 44 Miller's doctoral studies were completed at the University of Virginia's economics department under James Buchanan, dubbed by some "the Architect of the Radical Right." 45 Buchanan had a controversial track record on racial issues-his academic center, formed amid Virginia's "Massive Resistance" to federally mandated school desegregation in the 1950s, was pitched as a means for preserving the state's "social order" and stymieing the "increasing role of government in economic and social life." 46

Buchanan was, according to Miller, one of his chief intellectual influences in the field of economics. 4 7 One of Miller's first actions as FTC chairman was to request a budget cut and a 10% reduction in personnel. 48 Unsurprisingly, the Agency's enforcement activity also plummeted. In just two years, antitrust actions dropped by nearly one-third, and consumer protection actions by more than onehalf. 49 But one particular type of litigation bucked the downward trend. Miller spearheaded an enforcement initiative aimed at professional associations-and he "particularly liked the idea of bringing some cases against lawyers." 50 The District of Columbia in the 1970s was a majority-minority city; over 70% of residents identified as Black. 51 More than 100,000 D.C. residents fell below the poverty line, with poverty rates exceeding 30% in some census tracts. 52 In a 1963 decision, the U.S. Supreme Court had held indigent defendants in criminal cases are constitutionally entitled to adequate representation. 53 D.C., like many jurisdictions, complied with this mandate via a dual system comprising a government-funded public defender's office and court-appointed private lawyers. 54 The District's public defenders handled just 8%-10% of indigent defendants, leaving court-appointed lawyers to take up the considerable slack, a situation "unique among major urban jurisdictions." 55 Despite the pressing need for quality representation-and despite runaway inflation rates throughout much of the 1970s-statutory rates for court-appointed work in the District stayed flat for more than sixteen years. 56 The D.C. Bar and the Judicial Conference of the D.C. Circuit released two reports finding that low compensation rates forced existing courtappointed lawyers to take on too many cases and dissuaded other attorneys from taking on any cases. 57 As the first report explained, "[A] system which is heavily weighed against the indigent defendant in terms of the compensation that [their] attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do." 58 Fed up with the situation, a group of court-appointed lawyers formed the SCTLA as a means of exerting political pressure. After initially casting about for the right tactical strategy, the Association was inspired to launch a strike by a suggestion from the dean of Howard University Law School: "[Y]ou will have to raise hell about this to attract somebody's attention." 59 The D.C. Governmentostensibly the intended "victim" of the planned stoppage-was supportive. At a meeting with Association lawyers, Mayor Marion Barry tacitly encouraged the strike, as he was "very sympathetic" to the cause. 60 And, once launched, the strike yielded rapid results: the City Council voted to increase

funding, thereby improving the "quantity and quality of representation received by ... indigent

clients. "61

Meanwhile, the Miller-helmed FTC had also been busy, opening an investigation into the Trial Lawyers Association before the strike had even begun. 62 On December 16, months after the strike had concluded, the Commission proceeded with a complaint against the lawyers' association and its four individual leaders. No practicable remedy was sought. 63 The local government had already voted to increase funding and, despite being the ostensible "victim," had neither asked the FTC to intervene nor sought to enjoin the boycotters under its own local antitrust authority. 64 Rather strikingly, FTC staff internally recognized that the Association's lawyers could not possibly have wielded market power. The Superior Court had the legal authority to order any member of the D.C. Bar to represent indigent defendants. 65 In fact, it had done just that during a prior strike in 1974. 66 Thus, the target of the strike could have simply ordered the attorneys to resume representation, ordered nonstriking attorneys to take on indigent clients, or both. The "victim" wielded all of the power. 67 Nonetheless, the FTC pursued the case all the way to the U.S. Supreme Court, which roundly censured the strike. (Justice Marshall, the only Black member of the Court, joined Justice Brennan in dissenting from much of the majority opinion. 68 ) The majority's reasoning was formalistic: categorize, then condemn. To the majority, the strike was a "price-fixing agreement, a 'naked restraint' on price and output." 69 Once categorized as such, the strike was deemed, ipso facto, illegal per se. 70 The fact that the boycotters clearly wielded no market power was irrelevant. The fact that the supposed "victim" had actively encouraged the strike was irrelevant. The fact that the strike benefited indigent defendants, many of whom were people of color who had endured decades of structural racism, was irrelevant. This was not antitrust's finest hour.

C. Which Path Have We Taken? The Promise and Pitfalls of Ohio v. Arn Ex These bookends of the 1980s-Knights of the KKK and Superior Court Trial La Jlers-suggest divergent approaches to the question of how to administer the antitrust laws. Which path has the contemporary antitrust enterprise pursued? The highest profile case of the past decade, Ohio v. AmEx, suggests both room for hope and reason for concern. AmEx began as a suit by the U.S. Department of Justice Antitrust Division against the three largest creditcard companies, Visa, AmEx, and MasterCard. 71 The suit sought to enjoin "no-steering" rules contractually imposed by networks on all card-accepting merchants. 72 In general, the challenged rules forbid merchants from presenting any particular credit network in a unique or differentiated way to their customers. Thus, for example, merchants cannot offer discounts for using a particular brand of card, tell customers "We prefer" a certain card, or inform customers of the costs associated with each brand. 73 Visa and MasterCard quickly settled, but AmEx-which charged the highest merchant fees-fought to keep its rules in place. 74 At trial, the Antitrust Division proved that AmEx's no-steering rules had stifled competition and increased card acceptance prices across all networks. 75 Merchants, in turn, passed along whatever costs they could to their customers via across-the-board retail price increases. 76 To its credit, the Division brought to the trial court's attention one of the most unusual-and most pernicious-effects of AmEx's rules. Because merchants cannot treat higher-cost cards differently, they must raise retail prices to all of their customers, including those who pay with cash, checks, money orders, and food stamps. 77 Such customers tend to be far less wealthy than credit-cardholders, especially AmEx cardholders. 78 AmEx passes some, though not all, of its supracompetitive merchant fees through to its own cardholders in the form of cardmember rewards. In other words, AmEx' s rules force the least wealthy members of society to fund lavish travel points and perks for the most affluent. 79 In a careful, well-reasoned decision, the trial court held that AmEx's rules were unreasonable restraints of trade. Judge Garaufis's opinion resisted easy formalizing and conclusory reasoning. The agreements at issue were between trading partners, not direct competitors. Yet, as Garaufis explained, AmEx 's rules did not "fit neatly into the standard taxonomy" of vertical versus horizontal restraints. 80 The challenged agreements themselves may have been "vertical," but the effects on competition were horizontal. 81 AmEx' s rules prevented its rivals from attracting additional business by offering lower prices or higher quality, as Discover learned in the 1990s. 82 As to effects, the court did not insist on a showing of any particular type of harm. Instead, it found that AmEx's rules cause a wide variety of harms, including higher card acceptance costs for merchants, higher retail prices for consumers, and stifled innovation. The court also found the regressive forcedsubsidization effect to be anticompetitive: [A] lower-income shopper who pays for his or her groceries with cash or through Electronic Benefit Transfer ... is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base in the form of higher retail prices. The court views this extemality as another anticompetitive effect of Defendants' [rules]. 83 This particular effect technically occurred outside the relevant market ("general-purpose credit and charge card network services"). Again, however, the court refused to allow an artificial constructmarket definition-to distract from actual analysis of real-world effects.

The AmEx litigation thus yielded two bright spots: the Antitrust Division's decision to bring the case and Judge Garaufis's sophisticated decision. Both closely attended to structural power and inequity. Like Knights of the KKK, these were examples of antitrust directly confronting a power imbalance and seeking to redress its harmful effects.

But that success was short-lived. On appeal, the Second Circuit issued a sloppily reasoned decision for the defendant. (During oral arguments, one of the judges implied that the relevant market must also include cardholders because he personally received frequent credit card applications in the mail. 84 ) A disappointed Antitrust Division decided not to pursue the case further. A group of states led by Ohio, however, proceeded to appeal to the U.S. Supreme Court.

The majority opinion in Ohio v. AmEx carries all of the hallmarks of bad antitrust analysis, and poor-quality appellate review more generally. 85 It placed enormous weight on the "vertical vs. horizontal" dichotomy without appearing to recognize the horizontal nature of the restraints' effects. 86 Instead of analyzing the factual record before it, the majority simply ignored-and sometimes outright changed-inconvenient truths. 87 Instead of evaluating the relevant effects, the majority insisted on proof of one particular type of effect: an output reduction. 88 As to the regressive forced-subsidization effect-which was, again, part of the factual record-the majority opinion was silent. Instead, the majority conjured up a novel effect, positing without support the idea that AmEx's restraints were actually beneficial for "low-income customers. " 89

Today, the widely felt and regressive effects of AmEx's rules continue unabated. Given the racialized nature of wealth and income inequality in the United States, 90 those effects contribute to historically rooted structural inequity. A case that had begun so promisingly ended in ignominy-after something of a zenith at the trial-court level, AmEx now stands as a nadir of modem antitrust.

D. A Path Forward

As bookends for the turbulent 1980s, Knights of the KKK and SCTLA represent two paths for antitrust. AmEx offers a contemporary view of what traveling each of those paths can look like. The antitrust enterprise might take a flexible approach, cognizant of real-world power structures, always seeking to protect the relatively powerless against the more powerful. On the other hand, antitrust might ossify, placing more weight on assigning categorical labels than on assessing actual effects and narrowing the analytical lens until concentrated power-antitrust law's raison d'etre 91-becomes largely irrelevant.

Cases like SCTLA and *AmEx*, though troubling, may nonetheless offer useful insights. Set upon the right path, antitrust can serve as a useful tool in moving toward a more just society. Toward that end, four normative suggestions follow.

First, do not place undue weight on the "horizontal versus vertical" distinction. Some horizontal restraints are harmful, but not every horizontal agreement deserves hasty condemnation. The SCTLA majority allowed a label ("horizontal") to obscure a lack of power. Similarly, Justice Thomas's defendant-friendly reasoning in AmEx hinged in part on his statement that "vertical restraints are different" from horizontal ones. 92 But such broad pronouncements elide the fact that vertical restraints-like the ones at issue in AmEx-can cause effects identical to those caused by harmful horizontal restraints. 93

Second, do not place undue weight on categorizing conduct as "price-fixing," "a restraint on output," and the like. A classification system can offer value. But, like any other tool, it can be pushed far beyond its usefulness. Labeling the lawyers' strike "price-fixing" ( or, alternatively, a "naked restraint on output") was essentially the beginning and end of the SCTLA Court's analysis. Yet not all price-setting agreements are equally likely to cause harm, as most of those very same Justices had previously recognized. 94 A strike functions by temporarily disrupting the internal workings of a specific buyer of labor, 95 whereas the archetypical price-fixing cartel agreement functions by indefinitely controlling the market for a product. 96 From an economic perspective, it makes little sense to treat the two as analytically identical. Classification systems can obscure important nuance, in addition to posing the obvious risk of misclassification. 97

Third, do not artificially narrow the analytical lens by insisting on proof of a particular type of effect. Leading treatises, 98 law-school casebooks, 99 amicus briefs, 100 and journal articles 101 suggest that all of antitrust can be boiled down to simple analysis of output effects. 102 As Bork put it, "The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental. " 103 Antitrust law's output obsession may well have played a role in the SCTLA decision-recall the majority's characterization of the strike as a "naked restraint on price and output." The AmEx majority clearly fell into this trap, insisting that the plaintiffs demonstrate an output reduction despite abundant evidence of actual anticompetitive effects. This makes little analytical sense. Output reductions can be harmful or beneficial to consumers. Conduct can simultaneously push the output of multiple products in different directions. And anticompetitive conduct can be harmful without affecting output levels at all. 104 All of this counsels against overreliance on a single type of effect.

Like most disciplines, antitrust has developed a variety of labels and heuristics. But when analytical tools begin to consume the analysis, antitrust can sight of its target. An analytical tool is just that: a tool, to be used when it is helpful and set aside when it is not. To be clear, this is not a call for the abandonment of economic methodology. It is instead a call for better economics, tailored to suit the task at hand. And what is that?

Fourth, antitrust analysis must center the overarching purpose of the law itself: countering concentrated power. 105 Amid the complexity of contemporary markets, it can be easy to lose sight of that goal. This may help to explain the SCTLA and AmEx opinions, both of which were regressive in nature. It may also help to explain the federal enforcement agencies' otherwise-puzzling decisions to weigh in against efforts by rideshare drivers-disproportionately people ofcolor 106 -to organize. 107 Through a narrow lens, collective organizing by workers can be viewed as "horizontal price-fixing" or "outputreducing," as it was in SCTLA. 108 But, stepping back for a moment, is there any reason to worry that rideshare drivers will exercise dominance over Uber and Lyft, even if they receive limited collective bargaining rights? Keeping antitrust's goal in view is appropriate not only on deontological grounds but also on utilitarian ones: It allows scarce enforcement resources to be more helpfully allocated.

Divergent paths lay open. The first leads to ossification and erroneous outcomes. 109 When antitrust analysis is overly constricted, it risks exacerbating systemic inequality and becomes prone to harming those whom the laws were meant to protect. The alternative is a more flexible, robust approach attuned to economic realities, one that allows enforcers and judges to maintain focus on furthering the law's fundamental purpose. If-but only if-the antitrust enterprise does so, it can play a vital role in helping to correct structural imbalances of power.

#### The aff is a reconstitution of the state – the Ward evidence assumes that legal institution’s are calcified, but the aff’s vision of a positive role for the state is key to solve

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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. 1334-1337, https://texaslawreview.org/wp-content/uploads/2016/09/Rahman.pdf.

I. Lochnerism and Laissez-Faire Political Economy

The invocation of Lochner, while a potent charge against the Roberts Court, risks obscuring the ways in which Lochner-style constitutionalism exacerbates disparities of economic and political power. What unites the Lochner era with the constitutional political economy of the Roberts Court is not a pattern of raw partisan or ideological adjudication, but something more subtle and far-reaching: an underlying faith in markets as a system for aggregating preferences and promoting welfare efficiently, fairly, and on the basis of (at least one particular notion of) equality. On this view, equality and freedom are best secured by nominally fair and voluntary transactions.

In the economic arena, this approach suggests that voluntary transactions are, by definition, fair and equal - and therefore regulatory efforts that disturb these transactions face a higher justificatory bar. Consider cases like Directv v. Imburgia 12 and AT&T v. Concepcion, 13 where the Roberts Court upheld the validity of mandatory arbitration clauses and undermined the scope for class action litigation. 14 These decisions represent a variation on the Lochner-ian freedom of contract. While these cases were not substantive due process cases, they nevertheless exhibit a preference for the purportedly equal and fair market agreements, as in consumer contracts, disfavoring efforts to rebalance the terms of economic power between consumers and large companies through either class actions or access to Article III courts. But the preference for arbitration mechanisms outside of the traditional judicial process systematically favors the interests of corporations over consumers. 15 While consumers nominally enter into these contracts voluntarily, arbitration clauses are often uncontestable clauses. 16 The end result is to valorize the apparently equal nature of voluntary contract at the expense of other legal efforts to balance underlying disparities of economic power in the marketplace.

The same intellectual framework explains the Court's controversial political law. 17 So long as voters retain the freedom of choice over their ballot, the political process may be considered fair. This is arguably what lies beneath the Roberts Court's political-process jurisprudence. The gutting of campaign finance regulations in Citizens United does not necessarily represent a knee-jerk rejection of ideals of political equality. Rather it understands political equality and the democratic process in market-like terms. Candidates, campaigns, and Super PACs are all offering products and advertising on the open market; so long as voters have the freedom to choose their preferred candidate voluntarily - akin to a consumer's ability to choose a preferred product - there is no violation of political equality. Citizens United, like Lochner, seeks to preserve a seemingly neutral, prepolitical baseline of political equality - but in so doing rejects efforts that seek to rebalance the terms of political power by redressing underlying disparities in power and influence. 18 This same pattern helps explain the Roberts Court view of racial discrimination. The Court's dismantling of the Voting Rights Act in Shelby County 19 can be understood as an argument that underlying structural political inequalities that may have justified preclearance are no longer present, and thus ordinary political competition, like market competition, is sufficient to ensure freedom of choice and basic political equality. 20

The problem with this approach to constitutionalism is that what looks on the surface like the fairness and equality of market ordering in effect overlooks, and thus perpetuates, underlying disparities in power, capacity, and opportunity that shape these transactions. 21 Thus, in each of these areas, we see the Court perpetuating structural inequalities - in the economic, political, and social realms - out of an argument that market-style mechanisms of voluntary choice and open competition are sufficient to ensure freedom and equality. The underlying problem in each of these cases is a rejection of any notion of unequal power that may need some kind of systemic redress coupled with an overly optimistic faith in the ability of market systems to operate neutrally and fairly to all individuals.

#### That narrative is proven by the failed legacy of post-Civil-War Reconstruction – the use of federal power to fight white supremacy offered a revolutionary break from slavery’s past, but it failed because of strategies like the alt that stymie the state’s power to combat structural antiblackness

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Aziz Rana, “Freedom Struggles and the Limits of Constitutional Continuity,” *Maryland Law Review*, vol. 71, no. 4, 2012, pp. 1026-1045, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2493&context=facpub.

The South African experience raises a basic question for Americans committed to constitutional continuity: whether Du Bois and others may have been correct. Would there have been an earlier and to date more complete elimination of colonial and racial subordination if a similarly explicit constitutional rupture occurred in the United States? In the following Parts, I will return to the Civil War and Reconstruction period to argue that faith in our constitutional tradition has historically embodied one important roadblock to a more thoroughgoing redemptive politics. This argument, and indeed the invocation of Du Bois and James, is about more than antiquarian curiosity. It suggests that if the commitment to constitutional continuity has at key moments undermined progressive political principles, we today should be wary of seeing constitutionalism as the privileged path to redemption. Indeed, the lesson for progressives might be to deemphasize constitutional faith and to develop more politically instrumental approaches to the value of constitutionalism.

III. The Emancipation Proclamation and the Prize Cases

In thinking historically about the practical consequences of constitutional continuity, it is worthwhile to assess those points in American life when colonial practices of subordination faced profound internal pressure. Perhaps the greatest such moment in the early republic occurred during the Civil War and concerned Abraham Lincoln's Emancipation Proclamation, which on January 1, 1863, unilaterally freed all slaves in secessionist territory still in rebellion. As Sandy Levinson reminds us, "the Proclamation is a most peculiar document," leaving the institution untouched in Union slave states and "parts of the ostensibly secessionist states that had been brought under Union control." 58 Despite its limitations, the Proclamation nonetheless spoke to the collapsing nature of the institution of slavery. Moreover, the Proclamation occurred alongside growing efforts to recruit black soldiers, including newly freed slaves in the South. If the 1776 Declaration of Independence listed as one of its grievances the decision by Virginia Governor Dunmore to emancipate slaves willing to join British forces, 59 then Lincoln now was engaged in precisely the same practice - one long perceived as a threat to the safety and internal identity of the republic. Taken together, the freeing and arming of the black population directly challenged the settler basis of American society. These wartime practices also implicitly raised questions concerning the future status of freed blacks, namely the extent to which individuals who fought on the Union side would be incorporated as social members regardless of race. 60

Among the most compelling features of the decision to pursue emancipation was the issue of its constitutionality. As Levinson has discussed, the legality of the Proclamation was deeply questioned at the time, with none other than Benjamin Curtis - the former Supreme Court Justice who dissented in Dred Scott - issuing a pamphlet condemning it as an overreach of executive power. 61 According to Curtis, whose stand against Roger Taney garnered him the esteem of many in Republican circles, the Proclamation not only failed to adequately distinguish loyal from disloyal citizens in the seceding states, but also entailed a theory of presidential war power so capacious as to suggest no meaningful limits: "If the President … may by an executive decree, exercise this power to abolish slavery in the States, because he is of the opinion that he may thus "best subdue the enemy,' what other power … may not be exercised by the President." 62 In fact, for Curtis, since Lincoln himself rejected the idea that the rebellion was legal, the domestic laws of those states remained valid and its citizens still enjoyed their constitutional rights. These laws and rights could not be made "null and void" merely through presidential fiat. 63

Given the constitutional uncertainty, Lincoln very well could have responded to these critics by embracing the extra-legality of his decision, which he explicitly did on occasion during the Civil War. 64 Certainly, in Levinson's view, the legitimacy of the Proclamation today ultimately rests not on constitutional fidelity but on its substantive justice - the manner in which the Proclamation signalled an institutional rupture from existing modes of racial bondage. 65 In fact, in the mid-nineteenth century, there existed a longstanding political tradition of what John Locke had called "prerogative power," in which the executive in extraordinary times contravened the law in the name of necessity or justice and then accepted the political consequences of such illegality. 66 Locke saw the use of prerogative as a decidedly political rather than a constitutional act; its legitimacy came from a public judgment after the fact that such pure discretion was warranted. In discussing the Louisiana Purchase, Thomas Jefferson similarly invoked this vision of extra-legal and discretionary political action, one that could only be authorized by post-fact popular acceptance. In his words, "The Executive … [has] done an act beyond the Constitution. The Legislature in … risking themselves like faithful servants, must … throw themselves on their country for doing for them unauthorized what we know [the people] would have done for themselves had they been in a situation to do it." 67

Lincoln, however, made a conscious choice to avoid justifying the Proclamation as a discretionary act of extra-legal justice, whose legitimacy was not bound to constitutionalism per se. He sought instead to read the Proclamation as consistent with a project of constitutional continuity. This meant arguing that the President's commander-in-chief authority (as well as powers implied by the executive oath) sanctioned emancipation as an expedient of military emergency. 68 In a letter to Albert Hodges, a Kentucky journalist who opposed both the Proclamation and the arming of freed blacks, Lincoln emphasized that he was not motivated by antislavery ideology and acted in accordance with constitutional fidelity:

I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand however, that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government - that nation - of which that Constitution was the organic law. 69

In response to other potential skeptics, Lincoln reiterated how both emancipation and the arming of freed slaves were matters of military judgment, constitutionally justified by the executive's commander-in-chief powers. In a letter to be read on his behalf at a public rally in Lincoln's hometown of Springfield, Illinois, he wrote of these policies:

I know … that some of the commanders of our armies in the field who have given us our most important successes, believe the emancipation policy and the use of the colored troops constitute the heaviest blow yet dealt to the Rebellion, and that at least one of these important successes could not have been achieved when it was, but for the aid of black soldiers. Among the commanders holding these views are some who have never had any affinity with what is called Abolitionism or with the Republican party politics but who held them purely as military opinions. 70

In many ways, Lincoln's arguments on behalf of the constitutionality of the Proclamation were among the best that could be marshaled from within the constitutional tradition. In Balkin's language, they spoke to an effort (however halting) to make a redemptive political enterprise consistent with faith in the Constitution, especially faith in its discursive capacity to serve as a language for emancipation. 71 Yet, with the benefit of hindsight, one might well argue that the decision to tie the Proclamation to a commitment to constitutional continuity came at its own real cost. First, by focusing on military necessity, it deemphasized the radical significance of Lincoln's policies and the extent to which the Proclamation - as well as the arming of freed blacks - embodied a fundamental transformation from preexisting structures. 72 And second, by framing the legitimacy of emancipation in terms of presidential emergency power, the practical legal precedent of Lincoln's approach was to embed within the constitutional system justifications for unchecked executive authority. 73

Both consequences are exemplified by the Prize Cases, 74 the Supreme Court decision that - while not directly addressing the Proclamation - profoundly impacted its perceived constitutionality for the remainder of the conflict. 75 In the Prize Cases, the Court assessed the legality of Lincoln's decision, in the days following the attack on Fort Sumter, to pursue a naval blockade of the South even though Congress remained in recess. As a textual matter, Lincoln's unilateral action appeared to violate the express language of the Constitution, which gave to Congress alone the power both to "declare war" and to "make rules concerning captures on land and water" during wartime. 76 Yet, not only did a sharply divided five-to-four Court uphold the blockade, it went further and presented a sweeping theory of presidential authority. 77

According to Justice Robert Grier's majority opinion, the executive enjoyed a unilateral emergency power "to resist force by force." 78 This meant that even if Congress had not provided legislative sanction to presidential action, in times of invasion or attack inherent authority existed within the presidency "to meet the [emergency] in the shape it presented itself, without waiting for Congress to baptize it with a name." 79 Furthermore, whether to use force in the face of "armed hostile resistance" and how much force to employ were executive judgments solely. Such questions were questions "to be decided by him [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands.'" 80

What also made the Prize Cases significant for Lincoln's broader wartime policies was a connected argument about the very nature of the Civil War. Justice Grier asserted that while Congress "alone has the power to declare a national or foreign war," no clause in the Constitution gave it the authority to "declare war against a State, or any number of States." 81 This was critical because ordinarily the President's war powers (such as under the commander-in-chief clause) were only triggered once Congress had sanctioned the use of force, legally initiating the start of armed hostilities. But in this context, following the attack on Fort Sumter, the Union clearly found itself facing a massive insurrection and thus a de facto state of war. Moreover, Congress did not have the constitutional authority to declare war against rebelling states and thereby give the conflict its de jure legislative approval. Justice Grier concluded that although this Civil War could not be "declared" through traditional means, as a matter of common sense a war still existed and still triggered the full panoply of the President's Article II powers:

The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States … . He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. 82

In effect, the President enjoyed independent constitutional authority to employ military action to defeat the rebellion, even if Congress could not declare war in the normal manner. This focus on the unusual legal status of the Civil War was quite suggestive, especially for how to view presidential power after Congress finally met in session on July 4, 1861. Although Grier never addressed the issue, his reasoning raised the possibility that the President may still have had a legitimate constitutional basis - grounded in defensive emergency powers - to pursue unilateral action throughout the conflict, given its insurrectionary and undeclared character.

One should note that these arguments, with their focus on inherent and broad presidential authority, were hardly necessary for reaching a conclusion that the blockade alone was legal. The Court had many potential theories at its disposal. For example, the Court could have conceded that Congress's power to declare war operated even in a conflict with seceding states and that the President could not act in the absence of explicit legislative authorization. 83 Nonetheless, Justice Grier might have contended that the blockade was justified due to the truly unprecedented nature of the particular factual circumstances. As Congress had been in recess during the attack on Fort Sumter, it was unable to provide ex ante legislative sanction and the executive had no choice but to act unilaterally in order to put down a surprise rebellion. 84 Additionally, the Court could have centered its ruling on the argument that because Congress eventually ratified the blockade, this post hoc ratification legally validated the executive decision. 85

Yet the majority did not appear interested in a narrow holding, one that while justifying the blockade presented the likelihood of future piece by piece struggles over the legality of Lincoln's wartime policies. 86 Three of the five Justices (Samuel Miller, David Davis, and Noah Swayne) were recent Lincoln appointees and Republican Party stalwarts. 87 And, in effect, the Grier majority produced an opinion expansive enough to provide discursive cover to the broad range of Lincoln's practices, perhaps none more symbolically prominent than the recent Emancipation Proclamation. 88 Indeed, the status of the proclamation had hung heavy over the case, with oral arguments occurring only six weeks after Lincoln had issued the emancipation order. Given the fact that both the blockade and emancipation were unilateral acts that denied southerners their property rights, as legal scholars Thomas Lee and Michael Ramsay note, "even a narrow ruling against the President … might [have] called into question the constitutional basis of emancipation." 89

As a purely legal matter, a competent lawyer could still distinguish between the facts surrounding the Prize Cases and those of the Proclamation. The issue posed by the former was whether seizures taken before Congress sat in special session and asserted its legislative war power were valid prizes. 90 The problem of how far the President's unilateral authority extended, and thus whether Lincoln could on his own initiative pursue a blockade or emancipate slaves even after Congress passed relevant legislation, was not directly at stake. In fact, in oral arguments before the Court, U.S. Attorney Richard Henry Dana, Jr., consciously sought to limit the scope of the government's position, maintaining that the only subject concerned "the power of the President before Congress shall have acted, in case of a war actually existing." 91 Nonetheless, the decision's language - with its vision of an assertive commander-in-chief, its rejection of Congress's ability to declare war on states, and its interpretative space for a broader reading of unilateral executive action throughout the entirety of the Civil War - made clear to observers the likely fate of any future challenge to Lincoln's emancipation. 92 For the New York Times, Justice Grier's claim that the President had the right under the laws of war "not only to coerce the [enemy belligerent] by direct force, but also to cripple his resources by the seizure or destruction of his property" 93 settled the question - if not as a legally dispositive matter certainly for all practical purposes. In its editorial on the ruling, the pro-war Times declared:

It is very difficult to see why the very broad language of the Court in respect to the proclamation of the blockade does not involve the constitutional validity of the proclamation against slave property… . It is our firm conviction that the Supreme Court would indorse … every important act of the Executive or of Congress thus far in the rebellion. 94

Although the constitutionality of unilateral executive emancipation may have provided a central backdrop for the decision, it is not surprising that the Court never referenced the Proclamation. Due to the legal posture of the Prize Cases, as Dana remarked in oral arguments, all that needed to be discussed directly was the legality of presidential actions during the congressional recess. Still, this silence underscores a key dimension of constitutional discourse - its capacity at times to obscure real political stakes. In a sense, the dominant framing of the Proclamation as a question of constitutional war powers allowed the practical legality of black freedom to be answered, albeit implicitly, in a case about the seizure of foreign vessels. 95 Here, the language of constitutionalism, rather than making explicit questions of racial subordination, operated to conceal from view the very politics of race. Indeed, today, this contested backdrop for the ruling is almost never raised by legal scholars or practitioners when discussing the decision. If anything, by cloaking the racial implications of the Prize Cases, constitutional narratives have had the paradoxical (even perverse) effect of casting slavery's defenders as model civil libertarians. While Justice Grier's majority opinion has been employed by government lawyers in the post-9/11 context to defend a notion of the Constitution as legitimizing nearly any act of presidential judgment, it is the dissent that appears respectful of constitutional principles and rule of law values. 96

To appreciate this last point, it is useful to explore Justice Samuel Nelson's dissent as well as the members of the dissenting faction more closely. If the majority opinion embraced expansive executive authority, Justice Nelson's opinion spoke instead about the separation of powers and the liberty of citizens. 97 For those in the dissent, allowing the President the unilateral power to initiate a blockade prior to a congressional declaration of war fundamentally imperiled the rights of free citizens and inverted the Framers' original constitutional vision for governing warfare and emergency. The majority's holding opened the door to future Presidents invoking claims of crisis or threat in order to gain wartime authorities and thus subject political opponents to abuse and infringements of their rights. 98

However prescient the sentiment, one should still note precisely which Justices signed onto Nelson's dissent. All four men were Democrats, three of whom (Roger Taney, John Catron, and Nelson) had been part of the Dred Scott majority 99 and the fourth (Nathan Clifford) was a proslavery politician who had previously served as James Polk's attorney general. Each was also widely believed to be suspicious of Lincoln's emancipation, and indeed some worried, as hinted above, that if Chief Justice Taney could gain a fifth vote against the legality of the blockade it may well signal judicial defeat in the future for the Proclamation. As Taney biographer Carl Brent Swisher writes, the Chief Justice certainly rejected the Proclamation's constitutionality and many suspected that if he could muster the votes he would press "the Supreme Court [to] declare the proclamation unconstitutional at the first opportunity." 100

For abolitionists, the stirring arguments about checks and balances by the Taney faction on the Court served the very real purpose of protecting the property rights and colonial status of thousands of slaveholders. According to one Washington newspaper, in a column published a few months after the decision in the Prize Cases, it was absolutely unacceptable for "the proclamation of 1863 … to be filtered through the secession heart of a man whose body was in Baltimore and whose soul was in Richmond… . God help the negro who depended on Roger B. Taney for his liberty." 101 According to such abolitionists, Nelson's and Taney's calls for presidential constraint during wartime functioned in practice to undermine federal efforts to challenge the institution of slavery and to alter the racial structure of American life. They sought to remove from the Union's toolkit a key mechanism for ending black servitude - a strong and unitary executive.

The foregoing discussion clearly affirms Levinson's view that the moral power of the Proclamation rests on its substantive justice rather than the arguments for legality suggested by Lincoln or Grier - particularly given the post-9/11 purposes to which these arguments have been employed. 102 But beyond this, it also highlights how the redemptive political meaning of the Proclamation persists not because of - but truly in spite of - its attachment during the Civil War to a language of constitutional continuity. The discourse of constitutionalism in practice operated to occlude the anti-colonial power of emancipation and to promote arguments about executive power that in our own time have justified profoundly coercive measures. 103 None of this is to suggest that Lincoln or his Republican supporters on the Court did not firmly believe in the moral rightness of presidentially directed emancipation or in its compatibility with constitutional values and fidelity. Yet it does underline the real tensions between a self-consciously redemptive political agenda and the desire to speak in constitutionally respectful terms. During perhaps the first great American period of fundamental colonial rupture, the constitutional tradition did not act to heighten the transformative potential of the political moment. Its primary effect was to rearticulate questions of racial bondage as those of presidential power and to re-present the proponents of slavery as civil libertarian defenders of limited government. And as the next Part explores, at a decisive time of potential re-founding - early Reconstruction - the invocation of a shared constitutional tradition did more than merely occlude redemptive possibilities, it actually directly impeded change.

IV. Milligan: Redemption or Constitutional Faith?

Today, the Supreme Court's 1866 decision in Ex parte Milligan 104 is embraced as a powerful vindication by the judicial branch of civil libertarian values and constitutional constraints on wartime excess. As famed Court historian Charles Warren once wrote, the case "has been long recognized as one of the bulwarks of American liberty." 105 According to current civil libertarians, where the Prize Cases suggested a Court far too deferential to executive say-so, Milligan indicates the heroic capacity of the judiciary to serve as a check on the political branches and as a voice for the protection of individual rights.

The case itself concerned Lambdin Milligan, a prominent Indiana Democratic critic of the war effort. 106 In late 1864, Milligan was arrested by military officials and brought before a military tribunal in Indianapolis where he was tried on charges of planning to lead an armed uprising in Indiana to seize weapons, liberate Confederate soldiers, and kidnap the state's governor. 107 The tribunal found him guilty and sentenced Milligan to hang. 108 But on appeal to the Supreme Court, the Court unanimously ruled in favor of Milligan, declaring that the military tribunal did not have the jurisdiction to prosecute him. 109

The Justices, however, differed internally and dramatically over the actual rationale for the ruling. Both the five-person majority opinion, authored by Justice David Davis, and the four-person concurrence, written by Chief Justice Salmon Chase, agreed that Milligan's military tribunal had exceeded the bounds of what Congress authorized. 110 As Justice Davis maintained, Congress indeed passed a statute in March 1863 partially suspending habeas corpus. This partial suspension allowed the President to arrest a "suspected person" and to detain that person militarily for "a certain fixed period." 111 This period, however, lasted only until an actual grand jury indicted the individual on criminal charges in civil court or terminated its session without an indictment. At that point, the President enjoyed no further statutory authorization to hold the detainee in military custody, let alone to try him or her by a military tribunal. 112

For Chief Justice Chase, in concurrence, the lack of authorization in this case did not mean that Congress had no power to provide for the military trial of American civilians. 113 Congress, depending on the circumstances, could well issue a more comprehensive suspension of the writ. As he declared, "it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety." 114 At its root, as Samuel Issacharoff and Richard Pildes have highlighted, the constitutional problem for Chief Justice Chase was the fact that the executive was operating unilaterally, rather than on the basis of clear congressional support. 115

Yet Justice Davis's majority opinion fundamentally rejected this focus in the concurrence on inter-branch cooperation. The majority went much further, arguing that even Congress was constrained in its ability to curtail the due process rights of civilians. 116 According to the decision, regardless of congressional authorization, it was unconstitutional for civilians to be tried by a military court unless the locale was a "theatre of active military operations" and the civil courts were "actually closed." 117 For Justice Davis, efforts to depart from the due process guarantees of the Constitution transformed a republic of limited government into nothing less than military despotism: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." 118 In sweeping civil libertarian language that is often quoted to this day, Justice Davis concluded that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 119

Issacharoff and Pildes correctly read the disagreement between Justice Davis and Chief Justice Chase as one concerning whether the Court should emphasize a rights-based or "institutional-process oriented view" of the Constitution during an emergency. 120 But they never fully locate this debate in Reconstruction politics 121 and so miss the heat that made the disagreement (and especially Justice Davis's internal victory on the Court) so critical. Just as the colonial backdrop to the Prize Cases is today largely unacknowledged, so too have we lost sight of Milligan's significance for the very real post-Civil War possibility of comprehensive anti-colonial rupture. 122 Even more directly than with the Prize Cases, the Milligan decision embodies a moment in which the language of a shared constitutional tradition and the commitment to legal continuity were employed to stymie a redemptive agenda.

In order to appreciate this point, it is necessary to see the decision through the eyes of the most intensely egalitarian among the Radical Republicans, Pennsylvania Congressman Thaddeus Stevens. For Stevens, the end of the Civil War was only the beginning of what he hoped would be a comprehensive social transformation, one that re-founded the republic on principles that uprooted wholesale all the settler exclusivities of American life. 123 In his view, such a redemptive aspiration entailed more than simply the abolition of slavery, it also required a long-term project of federal supervision to eliminate those existing modes of socio-economic subordination that sustained racial domination in the South (and indeed across the country). 124 Stevens envisioned a new collective order that extended beyond providing formal legal protections and voting rights to former slaves. 125 His plan went so far as to redistribute slave plantation land among freed blacks and poor whites, providing historically marginalized communities with the economic independence and material power to enjoy meaningful self-rule. 126 According to Du Bois, writing decades later in Black Reconstruction in America, figures like Stevens and Senator Charles Sumner of Massachusetts understood that creating a truly democratic system required "land and education for black and white labor." 127 Stevens himself remarked of newly freed slaves in December 1865, "This Congress is bound to provide for them until they can take care of themselves. If we do not furnish them with homesteads, and hedge them around with protective laws; if we leave them to the legislation of their late masters, we had better have left them in bondage." 128

For Stevens, the commitment to universal equality and the goal of complete anti-colonial rupture were not simply desirable, they were matters of essential justice dictated by God. 129 Indeed, Stevens took these beliefs so seriously that he chose to be buried in a black cemetery in Lancaster as a statement of principle given the segregated character of all the white cemeteries. 130 For him, Reconstruction offered a revolutionary opportunity in which, through concerted political action, the sins of American life could be extirpated and the country redeemed. 131 Moreover, such redemption entailed not only a total anti-colonial break, but a break from both the existing legal framework and, if need be, the very values of constitutionalism. In Stevens's view, in moments of tension, faith in the American constitutional tradition had to give way to a deeper political one. Stevens expressed this sentiment by calling for the long-term application of martial law in the South and by defending the employment of the federal military even in non-secessionist land. According to him, Reconstruction, precisely as an epochal moment of re-founding on egalitarian economic and political grounds, required the congressional use of discretionary power - enforced coercively by the strong arm of the military - in the service of political justice. 132 Once more capturing the essence of Stevens's approach, Du Bois wrote of this need to privilege racial transformation over constitutional continuity: "Rule-following, legal precedence and political consistency are not more important than right, justice and plain commonsense. Through the cobwebs of such political subtlety, Stevens crashed and said that military rule must continue in the South until order was restored, democracy established, and the political power built on slavery smashed." 133

In many ways, Milligan highlighted the fractured nature of the Republican Party, which as early as 1866 was increasingly hesitant to pursue fundamental social change as comprehensively as Stevens desired. 134 Justice Davis and Chief Justice Chase were both close allies of Lincoln (the former his 1860 presidential campaign manager, the latter his Treasury Secretary). 135 Justice Davis's sweeping civil libertarian language and curtailment of congressional authority were understood by Radical Republicans as a direct assault, by a member of their own party no less, on the federal government's capacity to pursue racially emancipatory ends. 136 Stevens excoriated the Milligan majority, declaring:

That decision, although in terms perhaps not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. That decision has taken away every protection in every one of these rebel States from every loyal man, black or white, who resides there. 137

Shortly after Stevens's speech, the Republican magazine Harper's Weekly further underscored the perceived connection between Milligan and Taney's infamous ruling, headlining its piece on Milligan, The New Dred Scott. 138 Elaborating the parallel, the article declared, "The Dred Scott decision was meant to deprive slaves taken into a Territory of the chances of liberty under the United States Constitution. The Indiana decision operates to deprive the freedmen, in the late rebel States whose laws grievously outrage them, of the protection of the freedmen's Courts … ." 139 These "freedmen's Courts," referred to in the article, embodied a separate court system established by the Freedmen's Bureau during the early days of Reconstruction to address white crimes against blacks. Such courts were seen by Radical Republicans as necessary due to the overwhelming prevalence of racial animus in ordinary civil proceedings in the South. 140 The article's author worried that since the regular courts were open and functioning, Milligan would operate to undermine the legality of the Bureau's courts and to condemn former slaves to the vagaries of a legal system controlled by their ex-masters.

Indeed, for Stevens and others, the embrace of martial law was not simply a defense of political discretion over rule-of-law principles for its own sake. According to Radical Republicans, the problem in the South was that an entire colonial infrastructure still existed, one that sustained racial subordination and related economic hierarchies. 141 This infrastructure was epitomized by the traditional legal system, whose purpose - in Stevens's mind - was to preserve a framework of white supremacy. 142 Moreover, ex-masters were now innovating new non-slave methods for maintaining a coerced labor supply, through laws like the Black Codes, and for rehabilitating the structure of colonial domination shaken by the Civil War. Part of this process of innovation was the use of extreme violence by white supremacists as a tool of black intimidation and control - violence that the regular courts, for obvious reasons, were uninterested in addressing. In such circumstances, extra-legal discretion and federal military imposition, in the name of political justice, were essential for the fulfillment of equal freedom for all. In effect, political necessity suggested that, at this moment of historical upheaval, substantive commitments to egalitarian redemption on the one hand, and commitments to a discourse of constitutionalism on the other, were conflicting ends in which one could be achieved, but not both simultaneously.

Today's historians often argue that Justice Davis's majority opinion in Milligan ultimately had minimal long-term impact on Reconstruction. 143 Congress moved quickly to pass legislation that both reaffirmed the legality of military tribunals and that curtailed "the Court's jurisdiction to hear cases involving military law." 144 Moreover, rather than heighten the confrontation with Congress, the Supreme Court in Ex parte McCardle, an opinion this time authored by Chief Justice Chase, retreated from Justice Davis's judicial assertiveness and validated Congress's act of jurisdiction stripping. 145 As a result, military tribunals remained commonplace during Reconstruction with upwards of 1,400 such trials between 1865 and 1870. 146

Still, the immediate consequences of the Milligan decision should not be ignored. In fact, they were not far off from Radical Republican fears or, for that matter, the hopes of status quo Democrats. Referring to Stevens and others as possessed by "fanaticism," the Baltimore Sun crowed that such individuals were "feeling the sting of death in the decision." 147 Employing the Milligan ruling as precedent, President Andrew Johnson declared a complete halt to any trial in either military or Freedmen's Bureau courts of civilians. 148 In the process, Milligan and Johnson's use of the case ushered in the initial stages of legal impunity for white violence against blacks in the South, and thus the reformation of white supremacy under new institutional conditions. November 1866 saw the admitted murder by a white Virginia doctor of a local African American man for accidentally causing fifty cents-worth of damage to the doctor's carriage. 149 After the doctor was acquitted by the local civil court, the general in charge of the area used pre-existing congressional authorization for "military jurisdiction over a variety of cases involving freedmen" 150 to order a military trial. Although this trial produced a murder conviction, Johnson, again citing Milligan, stepped in to dissolve the commission and to release the prisoner - taking the local court acquittal as the final word. 151 For Radical Republicans, in the face of such impunity and the rebirth of white supremacy in the South, the only response to Milligan was the swift passage of legislation that reaffirmed military rule and, to the greatest extent possible, repudiated the Davis opinion. 152

In a sense, the Milligan saga reminds us how the American commitment to constitutional faith actually functioned at a time of real potential redemption. Justice Davis was not a pro-slavery fire breather. He had been a member of the majority in the Prize Cases, the very decision that for practical purposes secured the constitutional status of the Emancipation Proclamation. 153 In fact, Justice Davis, like other Republicans, sought a meaningful alteration in American society along tracks more racially egalitarian than that of the antebellum order. 154 What he argued was that any politics of change should maintain faith in the Constitution and in its discursive capacities to fulfill even radical aspirations. In his view, congressional Republicans had to reject the drift toward discretionary action and to abide by "principles of the Constitution." 155 Explaining his opposition to the use of military tribunals, Justice Davis wrote in Milligan, "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded … the dangers to human liberty are frightful to contemplate." 156

For all the wisdom such words denoted, their political effect, not unlike Taney's arguments during the Civil War, was to provide a straitjacket for social transformation. Stevens's ultimately revolutionary embrace of discretion did not embody a "hatred of liberty" or a desire for ambition, but instead articulated a pragmatic calculation that the best - and perhaps only - means to redemption was through discretionary and, if need be, extra-legal political action. For him, at least in this context, the commitment to transformation required pursuing actual constitutional rupture in ways that no doubt challenged the very legitimacy of the Constitution and its narrative framings. 157 In the end, one might well ask whether the victory of continuity over an explicit discourse of political justice and constitutional break helped discursively to suppress more wide-ranging social change. As Reconstruction receded and political "fanaticism" declined, frameworks of constitutional construction provided a critical means for suggesting egalitarian progress while substantively cloaking the reality of persistent and systematic subordination.

#### The alt’s separation of distribution from antiblackness calcifies the modern distribution of power – only the aff is attentive to how economic power structures racism

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K. Sabeel Rahman, “Dismantle Racial Capitalism,” *Dissent*, Summer 2020, https://www.dissentmagazine.org/article/dismantle-racial-capitalism.

This system of racial capitalism is a result of policy choices that structure our political economy. Modern systems of precarious work are rooted in histories of extractive labor models, from Jim Crow to undocumented immigrant labor. Many black and brown workers were cut out of the twentieth-century New Deal social contract. Zoning policies have deliberately concentrated poverty and pollution—and therefore poor health—in black and brown neighborhoods while securing economic gains and class advantage for wealthier and whiter communities. The rise of predatory systems of student and consumer debt paper over the erosion of the safety net and fuel returns for financial interests. The racialization of public goods, from healthcare to welfare to food stamps, has helped drive austerity and the dismantling of the safety net.

These policies are sustained by a set of interests and ideologies. Businesses directly benefit from these extractive economic models. But so too do middle- and upper-class constituencies. An alliance between big business, those hostile to racial integration and the civil rights movement, and anxious and self-interested affluent elites is at the heart of the modern conservative coalition. These political arrangements are legitimated by market fundamentalism and color-blind notions of fairness and neutrality that obfuscate the deep unfreedom and racial hierarchy of our economic system.

The COVID-19 crisis exposes the harsh reality of this system. It might also animate a more equitable and inclusive reimagining of our political economy. We need to direct our political energies toward the liberation of black and brown people—and in so doing, secure the liberation for all of us from the inequities of modern capitalism.

Right now, there are four key fights that could shift the balance of power in economic life.

First, we need to dismantle the concentrations of private power that dominate and effectively govern our economy for their own benefit. This means taking on megafirms and monopolies like Amazon and the world of high finance—sectors that will exercise even more control over the allocation of goods, services, jobs, and investment in the post-COVID-19 era. We need a reimagined anti-monopoly policy agenda that encompasses everything from breaking up large corporations to public utility regulations for privately run infrastructures like retail platforms and the financial services that mediate access to basic credit.

Second, we need to build on this moment of labor mobilization—there have been hundreds of strikes during the pandemic—to advocate for workplace democracy, including a voice for workers on corporate boards and sectoral bargaining to set wages and labor standards.

Third, we need to reinvest in public goods and the public provision of basic necessities in everything from healthcare to child care to an expanded safety net. This also means rescuing the U.S. Postal Service, pursuing public banking, and restoring investments in (and accountability for) utilities charged with providing water, electricity, and other critical services. A commitment to genuinely inclusive public provision also requires enforcing equitable access, undoing exclusionary models of zoning and means-testing that work to limit who receives high-quality public goods.

Fourth, these policies need to be backed by a commitment to inclusive political power. We cannot achieve or sustain a liberatory economic democracy without real political democracy. We have to undo racist systems of voter suppression, and we need working-class people to have more direct control and leverage over administrative governance itself, from the local zoning board to the heights of the Federal Reserve.

The COVID-19 crisis has accentuated our existing systems of extraction and exclusion, which already put millions of Americans in physical and economic danger. By dismantling those underlying structures, we can create a political economy premised not on the inequities of racial capitalism, but on democracy.

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### Case

#### Aff alone is politically feasible now – the Reaganite consensus is crumbling in favor of a vision of government that’s more actively involved in shaping markets

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Ganesh Sitaraman, also Chancellor Faculty Fellow and Director of the Program in Law and Government at Vanderbilt University, The Coming Revolution in the American Economy: In the Biden era, the Reaganite consensus is finally breaking down., April 29, 2021, <https://newrepublic.com/article/162211/revolution-american-economy-end-reagan-magic-market>

We are now in the midst of a total rethinking of the Reaganite political economy. Republican Senator Marco Rubio has recently questioned the “25-year orthodoxy in the Republican Party centered around market fundamentalism,” telling The New Yorker that “sometimes the most efficient outcome isn’t the best one for the country.” Rubio has declared that markets should serve human values, called for a reassertion of the common good over market ideology, and explicitly demanded that the United States adopt an industrial policy to further the national interest. At the same time, liberals and the left are advancing a new political economy that encourages the government to shape markets more actively, with an eye toward who has power, how it is exercised, and whether it enhances freedom and equality.

This reassessment is one of the most important political developments today, even if it often feels more suited to a college seminar than the halls of Congress. The last few months have seen the passage of the American Rescue Plan—with its break from 1990s welfare reform and its bold action on child poverty—as well as Republicans’ willingness to embrace direct payments, best exemplified by Senator Mitt Romney’s proposal for a universal child allowance. These breaks from the past are the most acute examples of a much broader shift at work. In arenas that don’t tend to see such swift action—antitrust, industrial policy, trade, and international economics—a number of recent books, essays, and political initiatives are challenging the received wisdom. If it holds, the emerging political economy will shape the thinking of a whole generation of policymakers, just as the magic of the market formed the paradigm for the Age of Reagan.

The field of antitrust has undergone perhaps the most striking transformation. Five years ago, few were talking much about antitrust law and policy. The field remained in the shadow of Robert Bork, whose approach focused on efficiency and lowering consumer prices—and led to weak enforcement. In March 2019, when Senator Elizabeth Warren announced her plan to break up big tech companies, critics assured her that she didn’t know what she was talking about, and that competition was “not a virtue” in itself. (Disclosure: I was formerly an adviser to Warren.) How things have changed. In the last two years, a slew of books have described the dangers of monopoly power and called for change: David Dayen’s Monopolized, Zephyr Teachout’s Break ’Em Up, Barry Lynn’s Liberty From All Masters, Sally Hubbard’s Monopolies Suck, Tim Wu’s The Curse of Bigness, and Matt Stoller’s Goliath.

Just two years since Warren’s plan, the antitrust establishment has largely moved into her camp. The Department of Justice and several states are suing Google for anti-competitive behavior and calling for “structural relief” (in ordinary language: breakups). The Federal Trade Commission and almost every state are suing Facebook and calling for the same thing. The House of Representatives’ Subcommittee on Antitrust has scrutinized competition in digital markets. Nor are these partisan actions. It was the Trump Justice Department that brought the suit against Google. State attorneys general of both parties are involved in lawsuits. On any given day, one can find Senator Josh Hawley and Representative Ken Buck railing against big tech monopolies.

A new book by Minnesota Senator Amy Klobuchar, considered one of the more centrist candidates for the Democratic presidential nomination last year, indicates just how much has changed. Senators rarely write books, and when they do, they tend to be political memoirs. But Klobuchar’s Antitrust: Taking on Monopoly Power From the Gilded Age to the Digital Age is a serious and important contribution that will help build momentum for reform. Stories from nineteenth-century Minnesota illustrate the harsh realities of monopoly capitalism: Klobuchar’s great-grandfather emigrated from Slovenia in the 1880s to work in the Iron Range mines in the far north of the state. Immigrant laborers fueled the railroad boom, and many died young—orphaning their children, who entered the mines, too. The railroads made robber barons rich and powerful. Minnesota’s own James J. Hill built a 36,000-square-foot mansion in St. Paul. As firms consolidated into the railroad, steel, oil, and sugar trusts, they gained a worrying degree of power over workers, other firms, and even over government. The Sherman Antitrust Act of 1890 and the Clayton and Federal Trade Commission Acts, both passed in 1914, were designed to break up these megacorporations and ensure competitive markets.

For many decades, Klobuchar notes, antitrust enforcement successfully regulated some of the most powerful businesses in the country. She weaves memoir into her opening chapters, recalling her early career as an antitrust lawyer in the aftermath of the AT&T breakup in the mid-1980s. But the Reagan administration “dismantled and defunded” antitrust efforts. Relaxing the standards for mergers, it challenged only 33 mergers out of 11,547 between 1982 and 1987. It cut staff from the FTC. It even canceled a program that collected information on business lines and market activity. A generation later, Klobuchar sees a renewed threat in today’s monopolies. In many sectors, including tech, health care, and agriculture, consolidation means that a small number of companies dominate. “One- or two- or three-company control of major industries or technology platforms,” she writes, “is unacceptable.”

Antitrust is primarily a policy book, and Klobuchar spends much of it offering 25 recommendations to increase competition. These range from the very broad (“Take on the Big Tech Companies”) to the extremely specific (“Change the Legal Standard for Predatory Pricing Claims”) to the practical (“Increase Antitrust Enforcement Staff”). Throughout, she references her own proposed legislation on the topic. And as Klobuchar is chair of the Judiciary Committee’s subcommittee on competition policy, antitrust, and consumer rights, her proposals are likely to be one of the starting points for reform.

Industrial policy may have been an even more neglected area than antitrust in recent decades. For years, it seemed that merely whispering the words “industrial policy” at a Washington cocktail party would lead to ostracism so complete that Hester Prynne would have felt beloved. The thinking was that government should act only to solve market failures; that government should be run like a business; and that governments couldn’t—and shouldn’t—invest in or subsidize specific sectors or companies, because only the market is qualified to pick “winners.” Attitudes on this are also changing. There is a growing recognition that government invariably shapes the economy, and that it must. Policy determines every part of how markets work—if government abandons the field, that is a policy choice, too.

This recognition, again, comes from both sides of the aisle. Rubio has explicitly called for the United States to formulate an active industrial policy, in part to compete with China and in part to address crises like Covid-19, which has shown how badly the United States needs to be able to produce its own medical supplies and protective equipment. A number of conservative intellectuals, in the magazine American Affairs and think tank American Compass, have chimed in with proposals. President Joe Biden’s Build Back Better plan and his commitment to an infrastructure bill are the biggest signals of change. Biden has already ordered reviews of supply chains in defense, transportation, public health, agriculture, technology, and energy—both to boost manufacturing jobs and to avoid future shortages of critical materials. Meanwhile an infrastructure bill could include trillions of dollars of spending—not only on roads and bridges, but also on clean energy.

In her new book, Mission Economy: A Moonshot Guide to Changing Capitalism, Mariana Mazzucato makes the case for government investments and their unexpected and transformative effects. An economics professor at University College London, Mazzucato argues that the Reaganite approach to capitalism prevents the next big moon shot—the kind of project0 so ambitious that only a government can launch it, and whose benefits ripple through the rest of society and the economy.

Mazzucato uses the Apollo moon shot as an extended case study of “mission thinking”—that is, of picking a goal and committing whatever resources it takes to achieve it. The government invested heavily in sending a man to the moon: The NASA budget from 1960 to 1973 was $56.6 billion, or $326.8 billion in 2020 dollars; it is difficult to imagine belt-tightening, austerity-driven politicians in the long Reagan Era taking on such a bold and pricey effort.

These investments delivered much more than the initial goal. They resulted in dozens of spillover products, industries, and processes that President Kennedy could never have foreseen when he pledged to send a man to the moon. Major investments in semiconductors and software engineering transformed technology, leading to modern computing. Meanwhile, NASA’s work required inventing materials that could function in space, eventually leading to consumer products like Teflon and CorningWare. The mission-driven approach inspired and motivated people to support something bigger than their narrow self-interest. “The appeal of working for a government agency,” Mazzucato writes, “was that it was not only purpose-driven but also explicitly welcomed risk-taking in the process.” Government had to innovate in order to get to the moon, and that meant trial and error. It is not surprising, then, that young people were excited about the endeavor: The average age of staff at Mission Control during the Apollo 11 moon landing was an astonishing 26 years.

Policymakers in the late twentieth century began to worship “the trade god,” Clyde Prest­owitz writes in his new book, The World Turned Upside Down: America, China, and the Struggle for Global Leadership. What he means is that international economic policy focused single-mindedly on lowering trade and investment barriers. Commentators and policymakers celebrated the go-go era of globalization, assuming that all good things would go together—free trade, economic growth, national prosperity, human rights, and liberal democracy. But as Prestowitz argues, they were wrong.

That view is gaining traction. With the failure of the Trans-Pacific Partnership agreement during the Obama administration and the start of President Trump’s trade war a year later, the decades-long consensus on trade liberalization has come under increasing attack. Globalization boosters assumed that though some people would lose their jobs to free trade, they would soon find new work. But as David Autor, David Dorn, and Gordon Hanson’s recent paper, “The China Shock,” has shown, some regions of the United States were hit so hard with factory closures and layoffs after China entered the World Trade Organization that, even a decade later, they hadn’t improved economically. It is not much help that trade deals have made cheap foreign goods available to U.S. consumers. “It is nice to save a few dollars when buying shoes or a washing machine,” Prestowitz writes. “But that pleasure does not equal the intensity of the complete loss of a job, or of a school system in a factory town when the factory closes.”

Prestowitz bemoans the way liberalization has dampened America’s economic prowess. Since the time of Alexander Hamilton, the United States has used high tariffs to encourage domestic manufacturing; spent public funds on infrastructure; subsidized industries that were essential to economic growth or national security; and invested in public education to foster an educated, innovative workforce. This package of activities constituted an industrial policy. But decades of neoliberal trade policy essentially saw industrial policy dissolve. Supply chains have been offshored, leaving the United States vulnerable to shortages of protective equipment and ventilators during the pandemic. Essential technologies, like semiconductors, are now increasingly manufactured overseas.

The challenges to the American economy are only half of Prestowitz’s subject. The other half is the rise of China. When the foreign policy establishment thought that free trade and globalization would spread liberal democracy, they included China. But this hasn’t happened. Instead of becoming more liberal or democratic as it gained in economic strength, China has remained authoritarian, and has increasingly wielded its economic and political power globally with sticks and carrots. On the one hand, China has pressured companies and individuals to stifle their opinions (recall the firestorm that took place when a manager of the Houston Rockets tweeted support for protesters in Hong Kong). On the other, it has undertaken efforts to help countries out and bring them into its sphere of influence, by investing in infrastructure around the world and, now, exporting millions of doses of Covid vaccines. Economic power is political power, and China has not been afraid to use it to advance its values and develop global relationships.

The principled pursuit of free trade above all else does not account for this more hardheaded reality, which is one of the reasons why views seem to be changing. Today, competition from China is pushing both Republicans and Democrats to rethink offshoring and invest in research and development at home. It will also likely lead them away from the neoliberal emphasis on liberalizing international economics and trade, and instead encourage a greater focus on deepening relationships with close democratic allies.

The intellectual work in some of these areas is more developed than others, and the political uptake has been haphazard. But these efforts share some common themes: All of this work takes as a given that the government must act—and that the failure to act is itself an action. The emerging political economy abandons the myth of the independent marketplace, and it sees policy choices as inescapable. This work also comes at a time of global-sparked anxiety, and the needs of national security and competitiveness are therefore likely to be invoked more and more frequently as a way to increase pressure for domestic economic reforms.

Each of these areas tackles the extraordinary inequalities within the United States—inequalities by race, class, and geography. Antitrust, industrial policy, and trade present fundamental choices—about who has power and who doesn’t, about how to invest and where. Each of these books is awake to the notion that those choices will affect the way the wealth is distributed through society; economic inequality is not a problem for someone else to solve through tax-and-transfer policies. Finally, and critically, the impetus behind the emerging political economy is largely structural, not technocratic. Advocates speak less of imperceptible nudges and tax credits and more of achieving specific goals, such as breaking up big tech, “Buy American” programs, and getting to 100 percent clean energy. These are salient ideas, and they involve clear rules and massive investments.

The simultaneous, sweeping rethinking of these sectors is a major event. Rarely do scholars and policy thinkers on both sides of the aisle fundamentally revise their paradigms in one arena, let alone so many all at once. This is itself exciting, and when combined with efforts among liberals and the left to invest in strengthening social infrastructure and in public goods, there is a real possibility that we might be in the midst of another “present at the creation” moment—a moment in which a new public philosophy is emerging, along with the policies to support it.