# Fullertown Round 5 Wiki

## 1NC

### CP Private Action

#### Text: The United States federal government should allow relevant agencies to sue to enjoin an end to serial criminality by domestic financial institutions and recover single damages.

#### Counterplan avoids private enforcement---private suits are an inextricable part of antitrust liability---public enforcement is sufficient

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

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

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

Private antitrust damages actions in the US

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

The treble damages remedy

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

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

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

Discovery and evidence

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

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

Contingent fees

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

Class actions

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

State indirect purchaser actions

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

Huge jury verdicts and settlements

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

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

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

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

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

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

EU antitrust laws and enforcement

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

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

The green paper

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

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

Amount of damages

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

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

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

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

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

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

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

### K Anti domination

#### The affirmatives drive toward antitrust intervention adopts neoliberal assumptions of politics and economics where the role of the government is to get out of the markets way

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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>.

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

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

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

A. Markets Cannot Be Divorced from Politics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry.

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.

#### Focusing on a politics of anti-domination reorients power to the people which allows collective mobilizing against existential threats

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

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

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

### CP Section 5

#### The United States federal government should

#### resolve that serial criminality by domestic financial institutions is an unfair method of competition prohibited by the FTCA

#### issue cease and desist letters to companies engaging in serial criminality, stating that their conduct constitutes a violation of Section 5 of the FTC Act.

#### Broad FTC authority means the counterplan solves

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau

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

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

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

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

#### Maintains incentives for innovation

Dagen 10 – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

d. Efficiency Considerations Weigh in Favor of Use of Section 5 Enforcement, but Not Sherman Act

Critics might argue that Section 5 enforcement has resulted in at least one firm leaving a standard-setting organization. Rambus’s counsel advised Rambus of the risks of equitable estoppel well before the Dell decision, yet Rambus continued to participate in JEDEC.260 It was very soon after Dell that Rambus withdrew from JEDEC.261 Thus, if the FTC enforces equitable estoppel principles, a firm with an intent to engage in “bad” conduct may leave.262 But this is not an undesirable thing – particularly in the case of Rambus, which gained valuable information during SSO deliberations but provided none.

Section 5 enforcement might increase the likelihood that potential hold-up victims participate in standard setting. Enforcement would encourage “innocent” firms to participate because they would be less likely to suffer from opportunistic behavior. The net would be an increase in standard setting.

Conversely, finding the negligent IP holder liable for treble damages under Section 2 could significantly deter firms from participating in standard setting or cause overinvestment in patent tracking. Treble damages for negligence (over and above an injunction) will generally exceed any patent law remedy.

If treble damages were available, unintentional conduct could be penalized significantly more than under laches. Rather than risking treble damages in addition to the loss of IP, firms might choose not to participate in standard setting.

In summary, monopoly gained through conduct that is within the control of the monopolist and not on the merits resembles monopolization, as the term is used by courts and in common parlance, rather than historic accident or luck. Such conduct is proscribed by patent law defenses and other external norms. Where external norms already exist, the incentive to engage in that conduct is already affected. The existence of a patent law defense, in conjunction with relief that is similar in nature to the patent law defense, mitigates any risk of harm to incentives. Using these defenses as one potential limiting principle ensures that no skill, foresight, or business acumen is involved. The deadweight social welfare loss associated with monopoly can be eliminated with minimal concern for false positives. The use of Section 5 in this way is consistent with Supreme Court precedent.263

### CP Advantage

#### The United States federal government should, without changing the scope of its antitrust laws:

#### Remove regulations which are barriers to competition

#### Substantially increase criminal penalties against serial criminality by domestic financial institutions, at least including imposing larger penalties and prison sentences.

#### Increased penalties solve – the issue is that the current system doesn’t punish existing criminal acts, NOT that the law itself is insufficient

**1AC Slawotsky 15** (Joel Slawotsky – lecturer in several law and business schools, including IDC Radzyncr Law School (Herzilya, Israel); Academic Center for Law and Business (Ramat Gan, Israel); Colman Business School MBA program; and the Haim Striks Law School (Rishon L'Tzion, Israel), AV peer review rated attorney and former law clerk to the Honorable Charles H. Tenney (United States District Judge for the Southern District of New York) and litigator at Sonnenschein Nath & Rosenthal (now Dentons) representing clients in state and federal courts at both the trial and appellate level. <KEN> “Reining in Recidivist Financial Institutions,” *Delaware Journal of Corporate Law*. Vol. 40. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/decor40&div=8&id=&page=>) \*brackets in original

Large financial institutions have demonstrated a systemic disregard for U.S. laws and international sanctions, repeatedly engaging in severe illegal conduct. In 2014 alone, in addition to numerous "lesser" settlements, BNP paid nearly $9 billion and Bank of America paid nearly $17 billion to resolve various investigations. The criminal conduct admitted to by these financial institutions includes violating international law, rigging interest rates, enabling tax evasion, engaging in market fraud, manipulating currencies, and bribing officials. These activities have caused numerous primary adverse results, such as human rights violations, terrorism, tremendous economic losses, and even possible contribution to the global financial crisis. Secondary negative results include loss of faith and confidence in American political institutions, democracy, and fair play, as well as a sense that a double standard exists wherein large corporations can commit crimes with impunity.

Some financial institutions have become serial lawbreakers, violating not only civil, but also criminal laws. Many of the institutions are subject to multiple investigations, and some of them previously assured prosecutors and regulators that criminal activity would not be repeated after they were involved in what was widely considered a historic settlement. Financial corporations' systemic violation of the law reveals that financial institutional misconduct is widespread, deeply embedded, and broad based.

Despite the imposition of large monetary fines, regulatory and prosecutorial efforts have largely failed to stem large final institutions' criminal activities. The government ensures that waivers are granted so that the financial institution suffers no loss in its ability to conduct commerce. Essentially, the financial institutions are welcomed back immediately after paying a fine. Market reaction is generally positive as reputational harm is nonexistent, and business continues as usual. No prison sentences are meted out for managers or officers, and the corporation's guilty plea is seen as the cost of pursuing a profitable course of action.

Neither government fines nor penalties seem to have a meaningful effect on the misconduct. A new approach is therefore needed that will serve as an adequate punishment and deter such wrongdoing. This article proposes that, under certain circumstances, the law should provide for the extraordinary punishment of breaking up a corporation by selling units to rival entities. This punishment would be reserved for outrageous misconduct that endangers national security, imperils financial markets, or is undertaken by a serial wrongdoer. Moreover, only misconduct directly or indirectly approved or ratified by managers or directors would be subject to this punishment. Actions taken by a rogue employee would not qualify. Additionally, the level of misconduct would track the standard for punitive damages and not be the result of ordinary negligence.

[Table of Contents Excluded]

I. INTRODUCTION

Vibrant and trustworthy financial markets are the cornerstone of American economic prosperity.' As titanic financial institutions wielding immense power and influence, financial services corporations, investment houses, and banks are at the epicenter of these markets. 2 Financial institutions that engage in criminal behavior weaken the United States because law-abiding financial institutions are also crucial for upholding American international relations and foreign policy.3 Exemplifying this crucial link between finance and American international relations, "U.S. foreign policy is increasingly targeting financial activity by criminals, enemy states and individuals in sanctioned regimes."4

Unfortunately, financial institutions have demonstrated a systemic disregard for U.S. laws and international sanctions, repeatedly engaging in severe illegal conduct.5 Numerous financial institutions have become serial lawbreakers,6 violating not only civil, but also criminal laws.7 The fact that well-known financial institutions-the global leaders of capitalism-are repeat offenders speaks volumes to the entrenchment of such criminal behavior.8

Recently announced settlements and fines reveal that financial institutional misconduct is widespread, deeply embedded, and broad based.9 For example, in June 2014 a global bank, BNP, plead guilty to criminal charges that resulted in a huge penalty-nearly $9 billion-for violations of U.S. sanctions against rogue states.' 0 In August 2014, Bank of America agreed to pay almost $17 billion to resolve mortgage fraud claims that are alleged to have caused or contributed to the 2008 financial crisis.

The BNP and Bank of America settlements are merely two examples of numerous multi-billion dollar fines imposed on large financial institutions.' 2 In addition to multi-billion dollar settlements, there have been a host of "lesser" fines and settlements for illegal activity encompassing a broad range of culpable conduct, including purposeful evasion of sanctions against rogue regimes,' 3 intentional fraudulent market manipulation of key interest ratesl 4 and foreign exchange rates, money laundering for drug traffickers and terrorists,' 6 providing private wealth management to dictators to enable despots to loot their national treasures,' 7 and fraudulent conduct with respect to market rigging.' 8

Deeply troubling is that, despite lawless behavior and the extensive fines imposed nearly a decade ago, financial institutions have repeatedly engaged in illegal conduct.' 9 Many of the same financial institutions fined recently were among the firms sanctioned in the previous "[h]istoric settlement" hailed as imposing substantial penalties and which was going to reform financial institutions. 20 Indeed, only ten years ago, regulators assured investors that wide-scale fraud was being severely punished and would not reoccur.2 which those who reaped enormous benefits from the trust of investors profoundly betrayed that trust." 22 As former New York Attorney General Eliot Spitzer ("Spitzer") stated, "[t]his global settlement is one of the largest effected by securities regulators to date. It fulfills our promise to help restore integrity to the marketplace and investor confidence in our system."23 However, as will be discussed below, the very same financial institutions purportedly chastened by the "historic settlement" continued to engage in illegal behavior in the years immediately following their "chastening." 24

Thus, the existing regime of punishment and deterrence of outrageous criminal fraud is malfunctioning, and the fraud and deceptive dealings are not being deterred.25 Senator Elizabeth Warren has commented on the current system's failure: "When big financial institutions are not deterred from breaking the law-when, in fact, they have a financial incentive to break the law-then that's what they will do." 26 Similar to a hypothetical traffic violator who causes road accidents but continues to drive and rack up monetary fines, financial institutions serially violate the law and simply pay a fine. 27

The current prosecutorial and regulatory regime relevant to financial institutional misconduct is broken. New revelations of wrongdoing are exposed on a rather frequent basis.28 Even after a "prolonged" period of relative quiet, government regulators and prosecutors eventually discover and investigate new wrongdoing of financial institutions. 2 9 Promises of "vigorous enforcement" are followed by settlement discussions that result in "substantial" monetary penalties. 30 Incredibly, despite the substantial penalties imposed, some recidivist financial institutions do not take long to revert to their criminal activities: both Barclays and UBS are being investigated for violating recent agreements with U.S. prosecutors, conduct befitting racketeers, not corporations.

The actors in this surreal drama seem to have a vested interest in continuing the saga. 32 Financial institutions are apparently not sufficiently punished, as the public experiences repeated fraud. There is an apparent reluctance to truly punish these financial institutions. A former SEC litigator criticized the agency for its lack of enthusiasm in prosecuting financial institutional misconduct. 34 According to the attorney, senior regulators at the SEC "were more focused on getting high-paying jobs after their government service than on bringing difficult cases."35 The recurring misconduct of financial institutions indicates insufficient punishment relative to their profits, resulting in a lack of incentive to change behavior. Inertia and an unwillingness to amend the broken system are evident.37

The current regulation and government policy have led to a system wherein financial institutions commit crimes and are not meaningfully punished, which naturally builds public distrust.3 Fines, which are essentially paid by the shareholders rather than the directors or officers, are ineffectual. 39 Apparently, the current system is encouraged to continue because it provides significant benefits to the principal actors involved: regulators, prosecutors, government coffers, and the institutions whose profits dwarf the penalties imposed.4 However, a tipping point has either been reached or will soon be attained. A growing number of Americans perceive that large financial institutions are corrupt and that the government is complicit in their unethical behavior. 4 1 There is a deep sense that financial institutions fail to play by the existing rules.42 The American public perceives such corporations as wielding undue influence that effectively immunizes them from punishment. 4 3 Free market capitalism and shareholder valuebased corporate governance, which has led to great prosperity in the United States, is under considerable criticism.4

#### Solves adv 2 – that advantage is about why courts are good. The plan uses the court system as the aff but changes the penalties involved.

### DA Innovation

#### There’s a wave of M&A now – companies doubt rule changes will affect them now

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

#### Large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Failure to beat China in tech incentivizes escalatory nuclear postures that make extinction inevitable

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

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

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

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

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

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

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

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

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

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

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

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

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

### Jail Adv

#### No motivation or capabilities for nuclear terror

Mueller 18

John Mueller, Adjunct Professor of Political Science and Woody Hayes Senior Research Scientist at Ohio State University and a Senior Fellow at the Cato Institute, “Nuclear Weapons Don’t Matter But Nuclear Hysteria Does,” Foreign Affairs. November/December 2018.

As for nuclear terrorism, ever since al Qaeda operatives used box cutters so effectively to hijack commercial airplanes, alarmists have warned that radical Islamist terrorists would soon apply equal talents in science and engineering to make and deliver nuclear weapons so as to destroy various so-called infidels. In practice, however, terrorist groups have exhibited only a limited desire to go nuclear and even less progress in doing so. Why? Probably because developing one’s own bomb from scratch requires a series of risky actions, all of which have to go right for the scheme to work. This includes trusting foreign collaborators and other criminals; acquiring and transporting highly guarded fissile material; establishing a sophisticated, professional machine shop; and moving a cumbersome, untested weapon into position for detonation. And all of this has to be done while hiding from a vast global surveillance net looking for and trying to disrupt such activities.

Terrorists are unlikely to get a bomb from a generous, like-minded nuclear patron, because no country wants to run the risk of being blamed (and punished) for a terrorist’s nuclear crimes. Nor are they likely to be able to steal one. Notes Stephen Younger, the former head of nuclear weapons research and development at Los Alamos National Laboratory: “All nuclear nations take the security of their weapons very seriously.”

The grand mistake of the Cold War was to infer desperate intent from apparent capacity. For the war on terrorism, it has been to infer desperate capacity from apparent intent.

#### Current U.S. policy already triggers dollar circumvention – Russian, Iranian and current Chinese sanctions pound

Economist 2020 – The Economist is an international weekly newspaper printed in magazine-format and published digitally that focuses on current affairs, international business, politics, and technology.

The Economist, January 18 2020, “America’s aggressive use of sanctions endangers the dollar’s reign,” https://www.economist.com/briefing/2020/01/18/americas-aggressive-use-of-sanctions-endangers-the-dollars-reign

Ever since the dollar cemented its role as the world’s dominant currency in the 1950s, it has been clear that America’s position as the sole financial superpower gives it extraordinary influence over other countries’ economic destinies. But it is only under President Donald Trump that America has used its powers routinely and to their full extent, by engaging in financial warfare. The results have been awe-inspiring and shocking. They have in turn prompted other countries to seek to break free of American financial hegemony.

In 2018 America’s Treasury put legal measures in place that prevented Rusal, a strategically important Russian aluminium firm, from freely accessing the dollar-based financial system—with devastating effect. Overnight it was unable to deal with many counterparties. Western clearing houses refused to settle its debt securities. The price of its bonds collapsed (the restrictions were later lifted). America now has over 30 active financial- and trade-sanctions programmes. On January 10th it announced measures that the treasury secretary, Steven Mnuchin, said would “cut off billions of dollars of support to the Iranian regime”. The State Department, meanwhile, said that Iraq could lose access to its government account at the Federal Reserve Bank of New York. That would restrict Iraq’s use of oil revenues, causing a cash crunch and flattening its economy.

America is uniquely well positioned to use financial warfare in the service of foreign policy. The dollar is used globally as a unit of account, store of value and medium of exchange. At least half of cross-border trade invoices are in dollars. That is five times America’s share of world goods imports, and three times its share of exports. The dollar is the preferred currency of central banks and capital markets, accounting for close to two-thirds of global securities issuance and foreign-exchange reserves.

The world’s financial rhythm is American: when interest rates move or risk appetite on Wall Street shifts, global markets respond. The world’s financial plumbing has Uncle Sam’s imprint on it, too. Most international transactions are ultimately cleared in dollars through New York by American “correspondent” banks. America has a tight grip on the main cross-border messaging system used by banks, swift, whose members ping each other 30m times a day. Another part of the us-centric network is chips, a clearing house that processes $1.5trn-worth of payments daily. America uses these systems to monitor activity. Denied access to this infrastructure, an organisation becomes isolated and, usually, financially crippled. Individuals and institutions across the planet are thus subject to American jurisdiction—and vulnerable to punishment.

America began to flex its financial muscles after the terrorist attacks of September 11th 2001. It imposed huge fines on foreign banks for money-laundering and sanctions-busting; in 2014 a $9bn penalty against bnp Paribas shook the French establishment. Mr Trump has taken the weaponisation of finance to a new level (see chart). He has used sanctions to throttle Iran, North Korea, Russia, Turkey (briefly), Venezuela and others. His arsenal also includes tariffs and legal assaults on companies, most strikingly Huawei, which Mr Trump accuses of spying for China. “Secondary” sanctions target other countries’ companies that trade with blacklisted states. After America pulled out of a nuclear deal with Iran in 2018, European firms fled Iran, even as the eu encouraged them to stay. swift quickly fell into line when America threatened action if it did not cut off Iranian banks after the reimposition of sanctions in 2018.

Using the dollar to extend the reach of American law and policy fits Mr Trump’s “America first” credo. Other countries view it as an abuse of power. That includes adversaries such as China and Russia; Russia’s president, Vladimir Putin, talks of the dollar being used as a “political weapon”. And it includes allies, such as Britain and France, who worry that Mr Trump risks undermining America’s role as guarantor of orderliness in global commerce. It may eventually lead to the demise of America’s financial hegemony, as other countries seek to dethrone its mighty currency.

The new age of international monetary experimentation features the de-dollarisation of assets, trade workarounds using local currencies and swaps, and new bank-to-bank payment mechanisms and digital currencies. In June the Chinese and Russian presidents said they would expand settlement of bilateral trade in their own currencies. On the sidelines of a recent summit, leaders from Iran, Malaysia, Turkey and Qatar proposed using cryptocurrencies, national currencies, gold and barter for trade. Such activity marks an “inflection point”, says Tom Keatinge of rusi, a think-tank. Countries that used merely to gripe about America’s financial might are now pushing back.

Russia has gone furthest. It has designated expendable entities to engage in commerce with countries America considers rogue, in order to avoid putting important banks and firms at risk. State-backed Promsvyazbank pjsc is used for trade in arms so as to shield bigger banks like Sberbank and vtb from the threat of sanctions.

Russia has also been busy de-dollarising parts of its financial system. Since 2013 its central bank has cut the dollar share of its foreign-exchange reserves from over 40% to 24%. Since 2018 the bank’s holdings of American Treasury debt have fallen from nearly $100bn to under $10bn. Russia’s finance ministry recently announced plans to lower the dollar share of its $125bn sovereign-wealth fund. “We aren’t aiming to ditch the dollar,” Mr Putin has said. “The dollar is ditching us.”

Elvira Nabiullina, Russia’s central-bank governor, says the move was partly motivated by American sanctions (which were imposed after Russia’s annexation of Crimea in 2014), but also by a desire to diversify currency risk. “I see a global shift in mood,” she says. “We are gradually moving towards a more multi-currency international monetary system.” Ms Nabiullina echoes Mark Carney, the governor of the Bank of England, who said in August that the dollar-centric system “won’t hold”.

Russia’s debt is being de-dollarised, too. New issuance is often in roubles or euros, and the government is exploring selling yuan-denominated bonds. Russian companies have shrunk their foreign debts by $260bn since 2014; of that, $200bn was dollar-denominated. Conversely, Russian firms and households retain a fondness for dollars when it comes to holding international assets: they have $80bn more than they did in 2014. Dmitry Dolgin of ing, a bank, finds this “puzzling”, but suspects it could be that the interest rates on dollar assets, higher than on euro equivalents, outweigh the perceived risk from sanctions.

Dasvidaniya, dollar

ing expects 62% of Russia’s goods and services exports to have been settled in dollars in 2019, down from 80% in 2013. Its trade with China was almost all in dollars in 2013; now less than half is. Trade with India, much of it in the sanctions-sensitive defence sector, shifted from almost all dollars to almost all roubles over that period. One reason for this shift, say Russian officials, is that it speeds trade up, since dollar payments can be delayed for weeks as financial intermediaries run sanctions checks.

Energy and commodities firms are among Russia’s most active de-dollarisers. The greenback is the global benchmark currency for oil trading, and escaping its grip is hard. “The key thing to understand is that risk management, the entire derivatives complex, is in dollars,” explains the boss of a global energy firm. “So if you want to have risk management—as an oil trader, buyer or producer—you have to have contact with the dollar system.”

Nonetheless Rosneft, a state-backed producer that accounts for over 40% of Russia’s crude output, has denominated its tender contracts in euros. Surgutneftegas, another producer, still prices in dollars but has added a clause to contracts saying they can be switched to euros at its request—“a back-up plan in case Trump throws shit at the fan”, says a trader. Last March Gazprom priced a natural-gas shipment to western Europe in roubles for the first time. The cost of switching out of dollars is modest, says an executive at a global oil-trading firm: “an extra person in the finance department and a bit more currency risk.”

Will China follow the trail blazed by Russia? Mr Trump has exposed China’s profound vulnerability to the dollar-centric financial system. America’s ability to blacklist or hobble Chinese tech firms, such as Huawei, ultimately rests on punishing suppliers and other counterparties who do business with them through the dollar-based banking and payments system. An American legal case against a senior Huawei executive, who is fighting extradition from Canada, reportedly relies in part on evidence from an American-appointed overseer at hsbc, an Asia-centric bank run from London. In October America sanctioned eight cutting-edge Chinese tech firms for alleged human-rights abuses in Xinjiang province. The administration has threatened to block listings by Chinese firms in New York and restrict purchases by American investors of Chinese shares.

China’s first attempt to bypass the dollar was bungled. After the financial crisis in 2007-09 it promoted the international use of the yuan and pressed for it to become part of the imf’s “Special Drawing Rights”, in effect receiving the fund’s imprimatur as a reserve currency. China set up currency swap deals with foreign central banks (it has done over 35). There was heady talk of the yuan challenging the dollar for the top spot by 2020. Then came a stockmarket panic in 2015 and the government clumsily tightened capital controls. The yuan’s share of global payment by value has stayed at about 2% for several years. Zhou Xiaochuan, a former governor of China’s central bank, has said that yuan internationalisation, which he promoted while in office, was “a premature baby”.

America’s display of financial firepower and new technologies are changing the calculus again. China has some of the building blocks to become more autonomous. It has its own domestic payments and settlement infrastructure, called cips. Launched in 2015, it has so far complemented swift (which it uses for interbank messaging). It is tiny, processing less in 2018 than swift does each day. But it simplifies cross-border payments in yuan, giving banks lots of nodes for settlements. Reports suggest that China, India and others may be exploring a jointly run swift alternative.

A will and a Huawei

Parts of the world’s consumer-finance system are coming under China’s sway thanks to its digital-platform firms, which have globalised faster than its conventional banks. Payments through Alibaba (and its affiliate Ant Financial) are accepted by merchants in 56 countries. The Alipay logo is, in some places, as common as Visa’s. In capital markets, in 2018 China introduced a yuan-denominated crude-oil futures contract on a Shanghai exchange. Known as the “petroyuan”, it is seen by some as a potential rival to the dollar in pricing oil. China has encouraged important firms listed in America to list their shares closer to home as well. On November 26th Alibaba, China’s most valuable company, which in 2014 floated in New York rather than in Hong Kong or Shanghai, completed a $13.4bn additional listing in Hong Kong (the funds were raised in Hong Kong dollars). “As a result of the continuous innovation and changes to the Hong Kong capital market, we are able to realise what we regrettably missed out on five years ago,” said Daniel Zhang, Alibaba’s chief executive.

China’s central bank is reported to be working on a new digital currency, though details are sparse. Some speculate that it wants to get a head-start on America in building whatever international system emerges for managing payments in central bank-issued digital currencies. It discussed creating a common cryptocurrency with other brics countries (Brazil, Russia, India and South Africa) at a recent summit. China may end up doing Bitcoin with an authoritarian twist: instead of anonymity it may want all data to be trackable and centrally stored.

That America’s geopolitical rivals want to escape the dollar’s dominance is no surprise. Perhaps more striking is that its allies are flirting with it, too. In her manifesto for 2019-24, Ursula von der Leyen, the new president of the European Commission, said: “I want to strengthen the international role of the euro.” Jean-Claude Juncker, her predecessor, has called the dollar’s dominance in European energy trade an “aberration” (when just 2% of imports come from America). The commission is working on a new action plan, part of which involves encouraging eu countries to eliminate “undue reference” to the dollar in payments and trade invoicing, according to a staffer.

So far the eu’s main initiative has involved Iran. It has tried to create a way for its banks and firms to trade with it, while shielding them from America’s wrath. But Instex, a clearing house created for this purpose by Britain, France and Germany, with the commission’s support, is crude and limited. It is essentially a barter mechanism and does not cover oil sales (it is limited to non-sanctioned humanitarian trade). It was structured to allow firms to engage in commerce without resort to the dollar or swift. But they have stayed away for fear of incurring secondary sanctions.

#### Or, transition away from the dollar is impossible – no alternatives, market incentives and China can’t change the monetary order

Sullivan 20 – Joseph W. Sullivan served at the White House Council of Economic Advisers as the special advisor to the chairman, as well as a staff economist, from 2017 to 2019. Now serving as a senior advisor at the Lindsey Group, he is a graduate of Harvard University.

Joeseph Sullivan, August 21 2020, “Don’t Discount the Dollar Yet,” Foreign Policy, https://foreignpolicy.com/2020/08/21/dollar-global-reserve-currency-yuan-china/

But the economic forces that thwarted any demise of the dollar in the past persist. They continue to render any end to the dollar’s reserve status today unlikely. In fact, there is a new player keeping it on its throne: the Chinese Communist Party. It’s the latest arrival to the motley crew of conspirators serving, unwittingly, to prevent the currency from leaving its seat.

The dollar can’t be displaced with nothing, and mainland China’s currency, the yuan, was once the most-viable something. Global banks planned for it to [“inevitably”](https://business.inquirer.net/57211/experts-see-demise-of-dollar-as-world-currency) replace the dollar. Economists [speculated](https://www.scmp.com/economy/china-economy/article/3039793/chinas-yuan-10-years-ending-us-dollar-hegemony-says-jeffrey) about the timing. The country’s growing economy, after all, is the world’s [second largest](https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN-US). And Beijing is keen to take steps [intended](https://www.nbr.org/publication/chinas-ten-year-struggle-against-u-s-financial-power/) to promote its currency’s use in international trade. Officials in the world’s [third-largest](https://www.ecb.europa.eu/mopo/eaec/html/index.en.html#:~:text=In%20terms%20of%20its%20share,and%20forestry%20is%20relatively%20small.) economy, the European Union, may [voice](https://www.reuters.com/article/us-eu-juncker-euro/eus-juncker-wants-bigger-global-role-for-euro-idUSKCN1LS0BK) similar intentions. But Beijing is not dealing in the currency of a monetary union that, according to research at its own central bank, maybe shouldn’t even exist. “Overall economic structures in euro area countries,” economists at the European Central Bank [concluded](https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op224~2349417aaa.en.pdf) in 2019, “are still not fully commensurate with the requirements of a monetary union.”

Nonetheless, Beijing’s recent actions have eviscerated the yuan’s prospects as a real reserve currency.

For a currency to function as an international reserve, global businesses [need](https://scholar.harvard.edu/files/gopinath/files/TradeInvoicing_GopinathStein_AEA) safe places to put it when it’s not in use. After all, no one wants to sell stuff in exchange for money they’d struggle to safely store. Without safe storage options, like easy-to-access banks or at least low-risk bonds, a currency can become a costly thing with which to do business. The most natural home for these safe assets denominated in mainland China’s currency would be mainland China. But Beijing [imposes](http://www.columbia.edu/~mu2166/fkrsu/) capital controls on flows of money in and out of the mainland. These capital controls stymie the development of liquid, globally accessible capital markets that can offer safe assets. Hence any market for Chinese yuan consistent with a role as a global reserve currency would need to exist outside of mainland China.

The offshore Hong Kong market once seemed like it could facilitate the yuan’s rise as a reserve currency, much as the offshore “eurodollar” market that emerged in 1960s London once [did](https://www.omfif.org/2020/07/eurodollar-lessons-for-hong-kong-renminbi/) for the dollar. But the market for U.S. dollars in London thrived in part because U.S. authorities resisted any desire to try to meddle in these offshore markets. Beijing’s recent changes in how it governs Hong Kong evince an atomically opposite approach. Even the financial institutions of Switzerland, traditionally paragons of political neutrality, are now [poised](https://www.straitstimes.com/world/europe/china-abandoning-path-to-openness-says-switzerland) to scale back operations in Hong Kong as a result.

Any offshore market for yuan, whether in Hong Kong or elsewhere, would [require](https://www.omfif.org/2020/07/eurodollar-lessons-for-hong-kong-renminbi/) interfacing with mainland China’s financial system and ultimately its central bank. This necessarily leaves any offshore yuan market vulnerable to Beijing’s whims. And Beijing acts on its whims; last year, Chinese officials [punished](https://www.latimes.com/sports/story/2019-10-08/china-hong-kong-tweet-houston-rockets-nba-adam-silver) the NBA because of a tweet from an employee of the Houston Rockets basketball team. In this world, any new offshore market for yuan is unlikely to be perceived as much safer from Beijing’s political cudgel than onshore Chinese markets—and thus not that safe.

To be fair, officials in China never had much of a shot at displacing the dollar’s reserve status. Nor do governments anywhere. The reason: Market incentives and economic self-interest are what keep the dollar’s status as a reserve currency steady. And these market forces are largely impervious to the wishes of today’s governments, even if they do operate within structures created by past regimes.

To illustrate, imagine the world waking up with amnesia about the whole chain of events that culminated in the original arrival of the U.S. dollar as a global reserve currency after World War II. What would happen to the dollar as the world readjusted?

Virtually nothing. The post-amnesia equilibrium would be today’s equilibrium.

Managers of businesses with operations abroad would find that about 50 percent of existing international trade invoices, cross-border loans, and international bonds [are](https://www.bis.org/publ/cgfs65.pdf) in U.S. dollars. No other foreign currency would offer access to commercial and financial networks of this size; for as many businesses as before, the U.S. dollar would still be better than the alternatives. Foreign governments and central banks would see businesses within their jurisdictions accumulate this dollar exposure. In light of this exposure, to fulfill their domestic policy objectives, foreign officials would then stockpile U.S. dollars. The dollar’s share of official foreign exchange reserves would have no reason to deviate from the roughly [60 percent](https://www.bis.org/publ/cgfs65.pdf) level it is at now.

This thought experiment captures the basic dynamic of the dollar’s genesis as the reserve currency. As the Bretton Woods conference in July 1944 unfolded, World War II was effectively purging the prewar monetary system from the rest of the world’s memory. There, allied governments [decided](https://www.investopedia.com/terms/b/brettonwoodsagreement.asp) that everyone would wake up to find themselves rebuilding a world in which the U.S. dollar had become the reserve currency. Whether everyone knew or cared about how or why this happened didn’t matter. Due to the strong [network effects](https://ideas.repec.org/p/hkm/wpaper/242014.html) that operate in currency markets, dollars then begot more dollars. Even the [suspension](https://en.wikipedia.org/wiki/Nixon_shock) of the convertibility of U.S. dollars to gold in the 1970s failed to disrupt the self-perpetuating logic of the dollar’s reserve role.

Nonetheless, when it comes to the dollar’s reserve status, many observers seem to assume that its longevity remains a function of the factors relevant to the circumstances of birth, like geopolitical clout and agreements with allies. But this assumption has implications that are odds with observable features of reality.

For instance, by most accounts, the peak of U.S. geopolitical clout on the world stage came around 1990. The Iron Curtain fell. Even history itself [felt](https://en.wikipedia.org/wiki/The_End_of_History_and_the_Last_Man) like it ended. Yet the U.S. dollar’s role in international trade has [increased](https://www.imf.org/~/media/Files/Publications/WP/2020/English/wpiea2020126-print-pdf.ashx) since, even as its share of world trade and GDP have [fallen](https://www.imf.org/~/media/Files/Publications/WP/2020/English/wpiea2020126-print-pdf.ashx). The dollar’s share of official [foreign exchange reserves](https://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/Appendix%201%20Final%20October%2015%202009.pdf) has also since gone up, undermining the common [analogy](https://www.nytimes.com/2005/03/13/magazine/our-currency-your-problem.html) between mid-20th-century Britain and 21st-century America.

Meanwhile, some of the allied nations present at Bretton Woods have themselves explicitly tried to loosen the dollar hegemony their own predecessor governments helped to design. But not even they can succeed. In 2019, a coalition of European governments unveiled an alternative currency payment mechanism intended to circumvent U.S. sanctions on Iran. In over a year, the European payment mechanism has now managed to facilitate all of a single [transaction](https://www.tehrantimes.com/news/450640/INSTEX-Europe-s-fragile-muscle-flexing) of 500,000 euros. The U.S. sanctions had induced European firms to cancel [billions](https://www.dw.com/en/french-energy-giant-total-officially-pulls-out-of-iran/a-45150849) of dollars of planned investments in Iran.

Even China can’t quit the dollar when it tries to.

Allies aside, currency markets have been an afterthought of Beijing’s policy in Hong Kong, but even China can’t quit the dollar when it tries to. Its steady [trillions](https://twitter.com/Brad_Setser/status/1296468849370583040) of dollars in official reserves reflect its decision to deal with the global economy as it exists, rather than any goodwill or foreign-policy intentions.

But unfettered envy for the United States would be premature.

If the U.S. dollar’s reserve status stays steady as the U.S. share of world GDP falls, the United States may find “[exorbitant privilege](https://www.brookings.edu/blog/ben-bernanke/2016/01/07/the-dollars-international-role-an-exorbitant-privilege-2/)” turning into exorbitant handcuffs. The resulting balance of payments trend would [likely](https://www.foreignaffairs.com/articles/americas/2020-07-28/it-time-abandon-dollar-hegemony?utm_campaign=tw_daily_soc&utm_medium=social&utm_source=twitter_posts) favor financiers on Wall Street at the expense of exporters on Main Street, widening the regional and income inequalities already dividing the United States. Americans could tolerate this as a price of privilege. Or they could look for escapes from it. One route could entail balancing the federal budget or regulating U.S. dollar debt. Another would entail restricting inflows of capital into the United States, much as mainland China does now. Only time, and perhaps the American voter, will tell.

Tales of the dethroning the dollar may be fun to talk about. And Chinese policymakers may have, alas, just removed the biggest risk to its health. But that doesn’t mean the next phase of its life won’t be just as interesting.

### Credit Suisse

#### Pounder – competition *regulation* is *increasing* now too so plan is at best neutral

Lawrence J. Spiwak, President, Phoenix Center for Advanced Legal and Economic Public Policy Studies, November 29, 2021, A Change in Direction for the Federal Trade Commission? https://fedsoc.org/contributors/lawrence-spiwak

While the “antitrust versus regulation” debate has raged for some time, the election of President Joe Biden has brought a new wrinkle: Lina Khan, the newly-appointed Chair of the Federal Trade Commission (FTC), has made it very clear that she would like to expand the Commission’s role from that of a mere enforcer of the nation’s antitrust laws to that of an agency that also promulgates ex ante “bright line” rules to regulate firms’ conduct. Thus, the “antitrust versus regulation” debate is no longer academic.

Khan, even before she was nominated, has been quite open about her policy vision for the FTC. For example, last year, Khan coauthored an essay with her former boss (and later briefly her FTC colleague) Rohit Chopra in the University of Chicago Law Review entitled “The Case for ’Unfair Methods of Competition’ Rulemaking.”[4] Given the tremendous power Khan now wields and the aggressive agenda she has laid out for the agency,[5] perhaps it makes sense to summarize and scrutinize her arguments.

#### Circumvention – can’t solve small firms impact bc antitrust courts always favor large incumbents

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

#### Innovation turn—reversing Credit Suisse makes banks de facto market insurers—undermines econ and innovation

Englert J.R., JD, Partner @ Robbins Russel, ‘07

(Roy T., Motion for Leave to File Brief as Amici Curiaea and Brief of the Securities Industry and Financial Markets Association, The Chamber of Commerce of The United States Of America, And The Business Roundtable as Amici Curiae in Support of Petitioners, <https://www.chamberlitigation.com/sites/default/files/scotus/files/2007/Credit%20Suisse%20Securities%20%28USA%29%20LLC%2C%20et%20al.%20v.%20Billing%2C%20et%20al.%20%28NCLC%20Brief%20on%20Merits%29.pdf>)

The IPO process is one of the linchpins of the private economy. It is by “going public” that American enterprises secure financing for major expansion, position themselves to obtain more capital and at lower cost in the future, create liquidity and therefore heightened value for their equity, attract and provide incentives to qualified employees, and enhance their visibility and prestige. An affirmance would interfere with these objectives and thus with the SEC’s mandate to promote the formation of capital. Relatedly, an affirmance would disadvantage U.S. capital markets in relation to their international competitors.

The decision below subjects amici’s members to the potential for enormous exposure. The plaintiffs in this case are seeking damages for drops in market value associated with at least 850 initial public offerings from 1997 to 2001. See Consol. Compl. Ex. A; Pfeiffer Compl. ¶ 4. The plaintiffs may claim that their damages run into the hundreds of billions of dollars—and that is before trebling. See SECURITIES INDUSTRY FACT BOOK 2002, at 10 (2002), available at http://www.sia. com/research/pdf/2002Fact\_Book.pdf (IPOs raised $76.1 billion in 2000 alone). Moreover, as with securities class actions, there will be nothing to prevent any class actions against underwriters following future market declines for alleged antitrust violations in connection with syndicate activities before the decline. If these complaints are sustained, then, the banks could become de facto insurers against market drops.

That would be a problem for the whole economy, not just the Wall Street firms. The possibility that conduct and communicationsin connection with IPOs could give rise to antitrust liability would make participation in a syndicate less attractive for potential underwriters. Syndicates would thus become rarer or smaller and in any event more costly—both because of the increased risk of liability and because each member of a smaller syndicate would be risking a greater share of capital in connection with the offering—with the ultimate result that underwriters would charge the issuer a higher risk premium. In other words, the cost of capital to businesses seeking financing would increase, which means, among other things, that some IPOs that otherwise would have occurred will not take place at all, because they will be too expensive for the issuer.

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#### Our interpretation enhances the understanding of antitrust – Antitrust reform requires a philosophy of how to guide it which means debating about that philosophy is a core part of this topic

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

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

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

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

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

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

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

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

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

#### Capture DA – proceduralism allows outside groups to capture regulatory agencies and courts. This causes them to ignore the affirmatives worker welfare standard and reimpose harmful impacts

Bagley 19 – Professor of Law, UMich

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

Finally, and perhaps of greatest moment, administrative law is fond of imposing judicially enforceable procedural rules on agencies to facilitate the ability of **outside groups to influence agency decisionmaking**, to monitor agency activities, and to check agency overreach. Some examples include notice-and-comment rulemaking, FOIA requests, and hard-look review, though there are many others. But taking advantage of these participatory opportunities is costly: it demands time, resources, and expertise. The implication is that facially neutral procedural rules can give well-organized, wellfinanced groups—in particular, those that **represent business interests—a distinct participatory advantage**. 147 Under some conditions, that participatory advantage can magnify industry’s ability to **influence outcomes on** the **administrative state**. And, as a general matter, industry’s goal when it comes to administrative action is not subtle—**it wants less of it.** 148 I’ll return to the point later in arguing that procedures that are sold as defenses to agency capture often end up making it worse. For now, the crucial point is that administrative law’s formal neutrality may afford groups with an **antiregulatory agenda** disproportionate influence **over** **agency decisionmaking.** In short, proceduralism does not just favor the status quo, though it does that. It also systematically favors inaction over action, deregulation over regulation, and nonenforcement over enforcement. The end result is a distinctively libertarian slant to administrative law.

#### Neutrality DA – the perm would cede control of markets and politics to courts which makes it impossible to effectively contest elite capture

Bagley 19 – Professor of Law, UMich

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

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

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

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

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

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

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

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

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

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

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

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

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

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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. 1353-1359, https://texaslawreview.org/wp-content/uploads/2016/09/Rahman.pdf.

IV. Constitutional Political Economy and Fourth-Wave Legal Realism

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

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

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

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

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

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

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

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

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

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

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

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

#### Courts are an awful actor to try and regulate AI and will guarantee either over or under enforcement – a strong agency and administrative state is core to ensure a balanced development of this new technology

Mannix 18

Brian Mannix, Research Professor on energy and environmental regulation-GW Regulatory Studies Center, former EPA Associate Administrator for Policy, Economics, and Innovation (2005-2009), Benefit‐Cost Analysis and Emerging Technologies, Hastings Center Report, Jan/Feb 2018 Supplement S1, Vol. 48, pS12-S20, doi: 10.1002/hast.817

At their onset, and sometimes well beyond that, radical technological breakthroughs can present difficult public policy dilemmas. Splitting the atom was, and is, one example. Artificial intelligence, now trading in our financial markets and beginning to show up in our automobiles, may turn out to be another. Recombinant DNA provoked consternation in the 1970s, and twenty‐first‐century developments in synthetic biology are raising new questions about how we should govern what we do not yet understand.

Emerging technologies are, by definition, full of surprises: developments that we cannot fully anticipate and that might have some bad outcomes as well as good ones. This presents a challenge for anyone trying to make forward‐looking policy decisions, including those who apply benefit‐cost analysis (also known as “cost‐benefit analysis,” but I'll stick with the usage preferred by the Society for Benefit‐Cost Analysis). In a sense, though, emerging technologies are nothing new. Since the industrial—and political and economic and legal—revolutions of around 1800, the pace of innovation has been unrelenting. This has sometimes been disruptive, and it has generated some backlash, like the nineteenth‐century Luddite movement in Great Britain. In France, Frederic Bastiat rebutted the Luddites’ attack on machinery by using a version of benefit‐cost analysis, some sixty years before the technique was even invented, in his famous essay, “What Is Seen and What Is Not Seen.”[ 1]

Overall, technological advances in the past few centuries have been so beneficial to human health and welfare that economists have dubbed the growth the Great Enrichment,[ 2] and they have struggled to explain its astonishing magnitude. The economist Robert Gordon has argued that it cannot continue—that we have reached the point of diminishing returns to innovation itself, as “all the good stuff” (like indoor plumbing) surely has already been invented.[ 3] Alternatively, Gordon, like most of us, may simply lack the imagination to foresee what wonders might be accomplished by future advances in artificial intelligence, or synthetic biology, or space travel.

Like evolution, technological innovation frequently makes mistakes, which are then subjected to a sorting process that discards the unworkable novelties and retains the most successful. Indeed, unlike evolution, technology is a human endeavor, guided by human judgment. Therefore, we should be more comfortable with the idea that, over time, it goes in a particular direction that we can confidently label as progress. It seems reasonable to assume that, on average, the benefits of innovation will exceed the costs. Yet innovation has occasionally raised some alarming possibilities. The development of artificial intelligence has inspired some great fiction and entertainment—the indie film Ex Machina and HBO's WestWorld come to mind—but also has raised serious questions about the “technological singularity,” when humanity might find itself subordinate to more intelligent machines.

The development of recombinant DNA caused scientists themselves to call, in 1974, for a moratorium on experimentation until the implications of this new technology could be understood. A conference at Asilomar in 1975 developed the first set of principles for containing the products of recombinant DNA; research resumed soon thereafter. In the 1980s, the first commercial applications of recombinant‐DNA technology began to emerge from the laboratory. Accordingly, a number of federal agencies in the United States began to examine their legal authority to regulate it, and at the request of the Office and Management and Budget, the White House Office of Science and Technology Policy convened both the funding agencies and the regulatory agencies to sort out their respective roles. The result, known as the “coordinated framework for the regulation of biotechnology,” was based, in part, on the expectation that the nature of the risks from biotechnology and therefore the appropriate regulatory approach to take were more closely associated with the application (food, drug, or pesticide, for example) than it was with the underlying technology. That meant that existing agencies, using existing statutes, could reasonably undertake the task of regulating this new technology.

With the further development of synthetic biology, has anything changed? Arguably, it has. New tools are emerging that facilitate inexpensive and very rapid innovations. Not only has this expanded the set of possible commercial applications, but it has also raised the possibility of noncommercial “bio‐hackers” who neither depend on government funding nor fall under the jurisdiction of any existing regulatory agency. In addition, there are more countries today where cutting‐edge synthetic biology might be pursued. And there is a greater possibility of malicious applications. Even the beneficial scenarios, like the extinction of malaria‐carrying mosquitos,[ 4] raise difficult policy questions. All this may be good reason to rethink the legal framework that governs biotechnology—always keeping in mind that, notwithstanding the scary scenarios, innovation is generally a good thing and should not be impeded without compelling reasons.

Benefit‐cost analysis is a well‐established technique for making regulatory decisions, including those involving risks to human health and the environment. BCA is now widely known and used, but it is also widely misunderstood—by many of its advocates as well as its detractors. In this essay, I will begin by examining some of the strengths and weaknesses of BCA as a normative science. Yes, that phrase is an oxymoron, and the incongruity it speaks to is a source of much of the controversy; BCA is an imperfect answer, but often the best available answer, to the question of how a society should go about making collective but not unanimous choices.

I also want to take a hard look at the question of what we are evaluating. BCA is designed to weigh government actions, to see whether they are in the public interest; it is not designed to evaluate private actions. But if the government action is to approve a private action that otherwise would be prohibited, then the BCA inevitably must evaluate the latter. From the perspective of a government regulator, it is very tempting to shift the burden of proof onto private innovators—to obligate them to seek permission to proceed, and to demonstrate that their proposed actions have acceptable risks and will produce a net social benefit. But such burden‐shifting is not merely an administrative convenience; it has serious economic consequences that need to be examined.

The Ethical Function of Benefit‐Cost Analysis

You must be the best judge of your own happiness.” So said Jane Austen, in Emma. The statement also effectively captures a keystone principle of modern microeconomic theory and provides the epistemic foundation that makes benefit‐cost analysis possible. The only way for us to know people's preferences is to observe the choices that they themselves freely make; all inferences about the public interest must begin there.

Congress typically does not specify BCA as an explicit requirement in statutes that delegate regulatory authority to the executive branch. Nonetheless, it has become the standard tool by which presidents seek to guide the agencies under their supervision. Building on narrower precedents by Presidents Nixon, Ford, and Carter, Ronald Reagan issued the first of a series of executive orders that requires executive branch regulators to conduct BCA;[ 5] the most recent was signed by Bill Clinton and remains in effect today.[ 6] Courts too, when reviewing administrative decisions, often look for some form of balancing of benefits and costs. Recent rulings have found that the failure to consider costs as well as benefits might render a decision arbitrary and capricious under the Administrative Procedure Act.[ 7]

Proposals abound for tweaking BCA to correct for various perceived weaknesses: giving extra weight to the old, or to the young, or to cancer victims, or to “jobs.” But before amending it, or replacing it altogether, we should take the trouble to understand how it works, why it makes the assumptions that it does, and what ethical considerations have shaped its design.

In explaining BCA, many observers will cite Ben Franklin's Prudential Algebra,[ 8] which involves making a list of pros and cons and weighing them against each other, before making a consequential decision. But that analogy is misleading because it suggests a single autonomous decision‐maker. When applied to government regulation, BCA is intended not simply to inform a solitary decision‐maker but specifically to make a collective decision. We can think of it as helping to solve a serious principal‐agent problem, when it is difficult for the principals to know whether an agent is being faithful to their interests. The 2016 Nobel Memorial Prize in Economics was awarded to two economists for their contributions to solve a similar problem in contract theory. How, for example, might a board of directors compensate a corporate chief executive officer to align her incentives with the interests of the shareholders? Who should bear which risks and to what degree? Compensation schemes that resolve these problems are of little use, however, when we think about the incentives faced by government regulators. How can we ensure that public servants use their considerable powers in the service of the public interest? What exactly do we mean by the public interest, anyway?

The fact that BCA is used to make collective decisions, on behalf of more than one principal, is what distinguishes it from many similar methodologies (such as discounted cash‐flow analysis) that are used by private individuals or businesses. BCA purports to evaluate a decision from the perspective of multiple affected parties whose views and interests are not completely aligned. Sometimes, BCA is described as consisting of two simple steps: assume that individuals are utility maximizers when they make their own decisions, and then choose government policies that maximize the sum of the affected individuals’ utility. Up until about seventy‐five years ago, this was a pretty accurate description of how it worked. But during the twentieth century, BCA (along with most of the rest of microeconomics) made the transition from neoclassical welfare economics, in which individuals were presumed to have quantitative utility functions, to modern welfare theory, in which individuals are presumed to have only ordered preferences. This is not the place to try to explain that transition; suffice it to say that, if cardinal utility functions exist, they don't matter because we cannot observe them. All we can observe are the choices people make in the marketplace, and from those we can infer an ordinal set of preferences.

But that inference does require a fundamental assumption: that individuals’ preferences are transitive, so they can be put in an unambiguous order. Sometimes this is called internal consistency; more often the transitivity assumption is what economists mean when they say an individual has “rational” preferences. If I prefer A to B, and B to C, you can assume that I prefer A to C. I am certainly free to change my mind, depending on my circumstances and mood. But if I am persistently irrational (intransitive), then my preferences won't fit very well into any economic model. How big a problem is that? Well, irrational behavior is not exactly rare. But that doesn't mean that it is economically important. Anyone with consistently irrational preferences can be turned into a money pump—you could charge me a penny to exchange B for A, another penny to exchange A for C, and a third penny to exchange C for B. We are back where we started, except that you have some of my money; soon, unless I learn to be more rational, I will be penniless. For this reason, economists generally are comfortable assuming that intransitive individual preferences do not play a major role in shaping the economy. Transitivity of preferences can be even more important on a large scale. A nation that displayed intransitive preferences in its trade patterns, for example, would soon find that it had nothing left to trade. But there is a problem: rationality does not automatically scale up. This brings us to the Condorcet paradox, first described by the Marquis de Condorcet in 1785. Suppose we have three options, A, B, and C, and a committee of three to decide. Alice's ranking is A > B > C; Bob's ranking is B > C > A; Chris's ranking is C > A > B. It is plain to see that, for each option, there exists another option that is preferred by most members. And the remarkable thing is that not only do a majority agree that a better option exists, but a majority agree on a specific option that would be preferable to the one chosen. (Alice and Bob agree that B is better than C, for example.) And yet choosing that option does not solve the problem. No matter what option we choose, a majority will agree that it is inferior to a particular alternative. Condorcet published in 1785. Many mathematicians since then have tackled the problem, including Charles Dodgson (better known as Lewis Carroll, the author of Alice's Adventures in Wonderland). But a major advance (or perhaps retreat) was made by Kenneth Arrow, winner of the 1972 Nobel Prize in Economics, while a graduate student at Stanford. He proved what we know as the Arrow impossibility theorem. In mathematical form it can be complex, but here is how the Stanford Encyclopedia of Philosophy describes it: Which procedures are there for deriving, from what is known or can be found out about [people's] preferences, a collective or “social” ordering of the alternatives from better to worse? The answer is startling. Arrow's theorem says there are no such procedures whatsoever.[ 9] Well, that is a rather discouraging result. Is it really impossible for rational individuals to come up with a rational way to decide things as a group? There are some escapes from the theorem's logic. One is the dictatorship option. If Alice is able to impose her own preferences on everyone else in society, then policy choices will be easy; there is nothing to debate. Many households and firms work this way, but it is not attractive on a larger scale. Another exception is the set of easy problems: the Pareto improvements that everyone can simply agree on. This is the domain of voluntary market transactions. Since dictatorship is so unpleasant, we should try to use markets to solve problems as much as possible—establishing property rights in fisheries, for example, so that markets can work their magic, making it unnecessary to come up with some kind of groupthink fishery policy or dictator of fish. That leaves a set of problems for which markets are not working well—the public goods, externalities, and the other familiar market imperfections cataloged in economic textbooks. People will have different opinions about how large or how important this set is and whether imperfect collective decisions will produce better results than imperfect market outcomes. It is indisputable, however, that a very large set of government programs purport to be occupying this space, busily pursuing what they call the public's business. Hundreds of government agencies, wielding delegated regulatory powers, use force against their own citizens—necessarily making at least some of them worse off. How can we ensure that regulatory agencies act in the public interest? How can we know whether their use of force against some is nonetheless justifiable because it promotes the general welfare? To answer that question, BCA uses the Kaldor‐Hicks test, in which those who support a particular policy outcome are imagined to be able to compensate those who oppose it and thereby to change their minds. A decision passes the Kaldor‐Hicks criterion if, when such compensating side payments are made, the decision becomes unanimous. Unanimous sounds good! Such decisions are called “potential Pareto improvements”—they would be Pareto improvements and would be accomplished by the market instead of the government, if the market were better able to find these bargains. (And, thanks to advances in technology, the market is getting better at finding bargains all the time.) But with a few exceptions, like the ingenious Clarke tax,[ 10] the compensating payments are not actually made. Thus, the Kaldor‐Hicks methodology does not actually constitute an exception to Arrow's theorem, because the choices that are evaluated are not identical to the choices that are being made. The Kaldor‐Hicks criterion has another noteworthy strength, and another weakness. The strength is that it generally produces a transitive ranking of options and so appears to be “rational,” in that narrow sense. The weakness is that the rankings depend upon the initial distribution of income or wealth, which is taken as a given. Surely when the framers wrote “to promote the general welfare,” they were not thinking of the ordinal preference functions of modern postneoclassical welfare economics. Nor did they imagine the vast reach of the modern administrative state. Yet the economists’ definition of welfare, however technocratic it sounds, and despite its acknowledged flaws, is actually very well suited for making decisions about how regulation can best promote the public interest.

Advocates of BCA lament that it is too often used simply to defend decisions that an agency has already made rather than to inform decisions as it makes them. This is a fair criticism, but it's also a bit naïve. If an agency did not have to defend its decision on benefit‐cost grounds, why would it bother to use BCA at all? Agency heads and program managers have varied backgrounds, but they typically have lots of the specialized subject‐matter expertise that we hear so much about and will often have strong opinions about what options they would like to pursue. Some of them may be predisposed to use economic analysis, but probably not very many. If they have broad authority to make decisions and if their decisions are not going to be questioned, they may simply default to some version of the “dictator” paradigm: “My own preferences are rational, so we'll just go with those.”

But our government is one of checks and balances rather than independent decision‐makers. Government is force, in the words of George Washington, and the use of force—particularly by a government against its own citizens—must be justified.[ 11] Agency officials are not principals; they wield whatever power they have as agents of the people. They ought to be able to demonstrate that their discretionary official actions serve the public interest, or promote the General Welfare, or otherwise advance the common good.

It is not possible to find a fully satisfactory answer to the question of what constitutes the public interest, the general welfare, or the common good—which is one reason we should limit the use of governmental force in its pursuit. But where the government is applying force, BCA can help us to distinguish those actions that appear to be justified from those that clearly are not.

Who should apply that test? It depends on the context; BCA is used for possibly millions of routine government decisions. Analyses of such routine decisions, done by a competent and unbiased analyst, can usually be relied upon. But when a decision is more consequential for the agency—potentially affecting the size of its budget or the scope of its authority—some external review is necessary. BCA requires judgment calls that are easily tilted to skew the result, and no agency can be relied upon to produce an objective analysis when the result could be contrary to the agency's interest.

It is helpful to make a distinction between the way we analyze spending programs and regulatory programs. In the case of spending, the use of force is generally confined to the collection of revenues that provide the ways and means to support the program. That allows us to engage in specialization. Agencies pursuing all manner of activities—space exploration, education, espionage, wildlife management—will develop unique expertise in the benefits of their programs and are likely to always feel underfunded. The legislature can make funding decisions, aided by a central budget office and the recommendations of the chief executive. Agencies will pursue their varied mission subject to a budget constraint that they feel is too binding. The size of its budget is a good measure of the burden it imposes, and accordingly it gets scrutiny from politically accountable elected officials: the Congress and the president. This is how spending has been organized since 1921, when the Bureau of the Budget (now the Office of Management and Budget) was created. The details of spending decisions are left to the cognizant agency, subject to scrutiny by budget analysts at OMB and the staffs of congressional committees. Congress and the president participate in an annual budget process, setting agency limits, and adjusting them annually. Unable to spend as much as they would like, agencies engage in cost‐effectiveness analysis that enables them to make the most of what they have. Over time and with experience, unsuccessful programs will be scaled back, while successful ones will be permitted to grow. Well, that's the theory, anyway. The budget process in practice is riddled with pathologies. But the notion that Congress and the president set binding limits on agency spending is unassailable. Allowing agencies to decide their own level of spending is as unthinkable as allowing employees to decide their own salaries. The analysis of regulatory programs is entirely different. When Congress delegates to administrative agencies the authority to make binding law, the ability to use force against citizens becomes dispersed among hundreds of officials with the authority to issue legally binding rules, effectively diverting economic resources from the private economy to achieve their ends. Some have made proposals to pull this together into a kind of regulatory budget, and the debate continues on whether that is feasible or desirable,[ 12] but for now, agencies face no budget constraint when they use regulation to divert economic resources toward their own ends. Proposed and final rules do get reviewed at the Office of Information and Regulatory Affairs within OMB, where the agency's BCA (in the form of a regulatory impact analysis) may get a skeptical reading. A series of presidents—now including President Trump—has issued executive orders encouraging agencies to reevaluate old regulations, but that effort remains quite limited and cannot compare to the iterative process that shapes the federal budget. Critics of BCA will characterize it as embracing a narrow set of values, or reducing everything to dollars, or elevating business interests and mere “economic efficiency” above more noble human goals. But this is a misunderstanding of what economists mean by “efficiency” in the BCA context. The analysis is designed to summarize the preferences of everyone who has any preference at all regarding a particular policy outcome. BCA is intended to guide government officials to act in a way that is faithful to public preferences; it does not place any constraints on what the public's preferences might be, nor on the values that individuals might want to consider in arriving at their preferences. It uses dollars only because that is one of the things that people happen to have preferences about, and because this simplifies the accounting (through the Kaldor‐Hicks compensating payments) of their preferences. BCA takes into account only the preferences of real people; businesses are artificial persons and do not have preferences that are given any weight in the analysis, just as businesses do not get to vote in elections. A common misunderstanding is that the “costs” in a BCA are incurred by businesses (and somehow “absorbed”), but that is not the case. If the costs imposed on businesses by regulation are used in a BCA, it is only as a proxy for costs whose final incidence is on real people: consumers, employees, investors, or taxpayers.

BCA strives to avoid the dictator outcome that elevates one individual's preferences above everyone else's, which makes BCA unattractive to those who are certain that their own preferences are right and that others’ are simply wrong. And BCA takes wealth distribution—which can affect the willingness‐to‐pay metric—as a given, making it useless to those whose purpose is to justify spending other people's wealth rather than their own.

Certainly there are alternative methods of arriving at collective decisions, but there are no methods that completely avoid ethical compromises. Such compromises are inevitable when a decision is not unanimous and the dissenters are forced to acquiesce. Formal BCA has the virtue of being explicit about the assumptions that it makes and rigorous in showing the derivation of a preferred policy from a set of the empirical observations of individuals’ preferences. Anyone proposing a different method of deciding social questions should be prepared to be similarly explicit and rigorous. To make a vague call for “social consensus,” for example, is simply to assume away the problem. People frequently disagree, and an honest decision‐making rubric needs to confront that reality.

BCA's reliance on empirical evidence of people's preferences is one of its virtues, but it also helps us recognize an inherent limitation of the method. We use observations of market prices to make inferences about people's preferences. How much do people pay to obtain a good or service or to avoid a known risk? Often the inferences are indirect: how far will people travel to visit a park that has free admission? The travel cost can serve as a proxy for a price. How much more does lakefront property cost than nearby comparables? An amenity value for the lake is capitalized into the prices of homes that border it.

But even the most creative BCA cannot find empirical evidence of preferences regarding things that lie entirely outside of our experience. It is relatively straightforward to weigh the benefits and costs of using genetically modified microorganisms in a contained environment to manufacture a useful product. For example, a rare medicine like artemisinic acid may be manufactured more economically, and in larger quantities, to treat malaria. The potential benefits and costs associated with that process are entirely within the realm of our experience with treating diseases. An advanced genetic procedure may be used to create the yeast that synthesizes the drug, but this does not appear to raise any difficult questions about how to weigh the benefits and costs. Using genetically modified cyanobacteria to produce ethanol raises questions about containment, but these are manageable parts of the risk assessment, which would provide some of the most important information about potential costs. There appears to be no particular difficulty with assembling a BCA that weighs the risks and benefits of such an innovation. The use of a gene drive to modify organisms in the wild raises more intractable questions for BCA. Altering the desert locust so that it no longer swarms could provide benefits, in the form of reduced agricultural damage, that are easy to calculate. Nevertheless, many people will have strong preferences against making a possibly irreversible change to the genetics of a prominent (if infamous) species. This is not simply a risk‐assessment problem; we lack experience with comparable interventions, and there is no obvious way to measure the strength of the public's preferences.

Permitted vs. Permissionless Innovation

Those who innovate present a difficult problem for those who regulate—and vice versa.

Whether using BCA or some other set of criteria for making decisions, a regulatory agency will have difficulty anticipating how things might change in the future. As technology changes, any rigid set of rules will become obsolete and will require constant revision lest the rules become an obstacle to innovation. Indeed, that inability to adapt is sometimes an argument for deregulating altogether. The late Cornell economist Alfred Kahn, when he was chairman of the Civil Aeronautics Board and was removing price controls from the airline industry, was asked how airlines might evolve after deregulation. His answer: “Ma'am, if I knew that I could just order it!” His experience with the pathologies of economic regulation persuaded him that a deregulated airline industry would perform better than a regulated one, even if he did not know exactly how it would do so—indeed, because he did not know exactly how it would do so. Such humility is an important and rare virtue in a regulator.

In the case of health and safety regulation, we often adopt another means of avoiding rigid rules, by requiring the proponents of new technologies to seek permission from a regulatory agency before coming to market. The law can prohibit the marketing of any new drug, for example, until the manufacturer has demonstrated that it is safe and effective. This avoids the need to write rules in ignorance of future development, but it enables the Food and Drug Administration to evaluate the efficacy (roughly, the benefits) and safety (roughly, the costs) before approving the new drug for sale.

The problem is that this prior‐approval requirement itself creates a barrier to innovation, and one that innovators may not be able to overcome. The problem is made much worse because prior approval also becomes a barrier to competition and thus enhances the market power of incumbent suppliers. The incumbents are likely to be much more organized than the innovators, and they will have an established relationship with the regulators and with their oversight committees in Congress. The result is that a regulatory program that was intended to protect health, safety, or the environment can be captured by special interests and transform into an anticompetitive and anticonsumer weapon. This is at least one part of the explanation for the shockingly high prices for some drugs. The drug approval process, intended to be beneficial for consumers, has prevented or delayed some new products and has thereby subjected consumers to monopoly pricing for the limited number of drugs that have been approved for certain uses.

In a recent book, The Permission Society,[ 13] Timothy Sandefur argues that this tendency to require prior governmental permission is antithetical to the fundamental tenets of a competitive marketplace and of a free society. He points to the challenges faced by innovative companies like Uber and Lyft or AirBnB that draw the wrath of incumbents (traditional taxis and hotels) and of the regulators who serve those incumbents. It may well be the case that having to ask permission to innovate is worse than having to live with an obsolete set of rules. Rules at least provide certainty and perhaps can be adapted or worked around. The requirement to secure permission can present a politically insurmountable obstacle.

While the debate about the effects of requiring permission to innovate has been much in the news lately, it goes back decades. In 1981, an influential study described how high‐sulfur coal producers were able to shape environmental standards in order to exclude newer sources of cleaner low‐sulfur coal.[ 14] Brookings economist Bob Crandall coined the term “new source bias” to describe the general tendency of environmental regulation to grandfather the incumbent firms in an industry, while new firms are forced to meet strict new pollution standards.[ 15] There is, of course, a sensible explanation for why a regulator might want to draw that distinction: it can be far cheaper to install pollution control technology on a newly built plant than it is to retrofit an older plant. Similarly, when the requirements for approval of new drugs or new pesticides are made stricter, it makes sense to grandfather in the existing products, at least for a while. But once the incumbents become grandfathered in, they enjoy a competitive advantage in the marketplace. Their efforts to influence regulatory policy will thereafter be directed at preserving their advantage and making things difficult for any would‐be new entrants. Drawing on observations about state and local regulation of alcohol, Clemson economist Bruce Yandle pointed out that most regulation is sustained by “bootlegger” and “Baptist” coalitions: Durable social regulation evolves when it is demanded by both of two distinctly different groups. “Baptists” point to the moral high ground and give vital and vocal endorsement of laudable public benefits promised by a desired regulation. Baptists flourish when their moral message forms a visible foundation for political action. “Bootleggers” are much less visible but no less vital. Bootleggers, who expect to profit from the very regulatory restrictions desired by Baptists, grease the political machinery with some of their expected proceeds. They are simply in it for the money.[ 16] The “grandfathering” phenomenon is a special (and very common) case of Yandle's bootlegger and Baptist theory. Once my own drug is approved for marketing, I will encourage the regulatory agency to be very strict about approving any generic versions or close substitutes. The public policy argument will be that this strict scrutiny is necessary to protect consumers; the unspoken motivation, however, is that I can profit by depriving consumers of any choice. Peter Huber, in 1983, introduced the terms “exorcists” and “gatekeepers”[ 17] to describe these two general types of health and safety regulation: the former searches for unacceptable risks and takes action to mitigate or extinguish them; the latter stands guard at the entrance to the commercial marketplace and opens the door only to those new products that appear beneficial from the regulator's perspective. Huber pointed out the different incentives faced by the regulators. Exorcists are constantly trying to do battle with established interests, whereas gatekeepers contend with weaker new entrants and have the support of the established interests. Indeed, a gatekeeping agency might be able to charge a fee for the “service” of reviewing new products (as the FDA does), something the exorcists could never get away with. Moreover, the regulated industry may lobby to cut the budget of an exorcist, whereas the industry is more likely to lobby on behalf of the gatekeeper to ensure that it has adequate funds. The ability to withhold permission is in many respects a far greater power than the power to write rules, and gatekeeper agencies can be far costlier than exorcists—even if the costs tend to be less easily observed opportunity costs.

In a 2014 book, Adam Thierer presented a general argument for favoring “permissionless innovation,”[ 18] which he contrasts with the often‐invoked precautionary principle. “Experimentation with new technologies and business models should generally be permitted by default,” he asserts. “Unless a compelling case can be made that a new invention will bring serious harm to society, innovation should be allowed to continue unabated, and problems, if they develop at all, can be addressed later.”[ 19] In contrast, the precautionary principle “is the belief that innovations should be curtailed or disallowed until their developers can demonstrate that they will not cause any harms to individuals, groups, specific entities, cultural norms, or various existing laws, norms, or traditions.”[ 20]

With Michael Wilt, Thierer has published a 10‐point checklist for pursuing a permissionless innovation policy.[ 21] The overall thrust of the list is captured by the first item on it, which is that policy‐makers should “[a]rticulate and defend permissionless innovation as the general policy default.” Items 2 through 4 advocate steps for promoting permissionless innovation, such as protecting freedom of speech and expression. Five to 7 set out the sort of response that Thierer and Wilt prefer for innovations that raise concerns, particularly about risks and possible accidents. Policy‐makers should do the following:

5. Rely on existing legal solutions and the common law to solve problems…. 6. Wait for insurance markets and competitive responses to develop…. 7. Push for industry self‐regulation and best practices…. 8. Promote education and empowerment solutions, and be patient as social norms evolve to solve challenges…. 9. Adopt targeted, limited legal measures for truly hard problems.

The full checklist is annotated, and the authors’ comments about item 9 are worth quoting at length:

Policymakers can adopt targeted legislation or regulation as needed to address the most challenging concerns where the potential for clear, catastrophic, immediate, and irreversible harm exists. Specifically, some morally significant issues may exist that demand a more exhaustive exploration of the impact of technological change on humanity. Perhaps the most notable examples arise in the field of advanced medical treatments and biotechnology. Genetic experimentation and human cloning, for example, raise profound questions about altering human nature or abilities as well as the relationship between generations.

The case for policy prudence in these matters is easier to make because the discussion is literally about the future of what it means to be human. Most technology policy issues do not raise such profound, morally weighty issues. Instead, we generally allow innovators and consumers to experiment freely with new technologies, and even engage in risky behaviors, unless a compelling case can be made that precautionary regulation is absolutely necessary.

Thierer and Wilt appear to be thinking here primarily about modification of human genetics, but their point can apply to synthetic biology, too. In both cases, we are grappling with the possibility of irreversible errors

and the potential for morally unacceptable consequences, so that a “let's see what happens” approach is inappropriate. It may be that better information will dispel those concerns (as was true of recombinant DNA, after Asilomar), but a precautionary pause is sometimes the best option.

With item 10, the authors return to the theme of regulatory restraint. Whenever policy‐makers pass regulatory measures, they should “[e]valuate and reevaluate policy decisions to ensure they pass a strict benefit‐cost analysis.”

Thierer and Wilt recognize that the case for precaution is strongest when “the potential for clear, catastrophic, immediate, and irreversible harm exists” or where innovation raises “profound, morally weighty issues.” Of the synthetic biology cases that are on the horizon, which of them might meet Thierer and Wilt's criteria for being exceptional? The deliberate extinction of species certainly can be irreversible, although it is not clear whether it is always harmful. The extinction of smallpox was easy to accept, but the extinction of disease‐carrying mosquitos is more debatable. Perhaps those mosquitos play an important but unknown role in the ecosystem, although that argument carries less weight if we are talking about extinguishing them only outside of their historic range.

In 2016, an essay in The Guardian addressed the extraordinary potential prospects of synthetic biology by asking, “Should We Wipe Mosquitos Off the Face of the Earth?”[ 22] The author noted, “Even the great and generous E. O. Wilson, author of the touchstone argument for preserving biodiversity, The Creation: An Appeal to Save Life on Earth, makes an exception for Anopheles gambiae, which spreads malaria in Africa. ‘Keep their DNA for future research,’ he writes, ‘and let them go.’ When Wilson thus hardens his heart, he speaks for us all.” Except that he doesn't. Wilson has an unusually well‐informed scientific opinion, as well as a moral sensibility, about life on earth and about the role of insects in particular. The vast majority of us, however, though not indifferent to the fate of mosquitos, remain relatively ignorant of all the considerations that one would reasonably want to work through before deciding to do something so drastic as to effect extinction of a species. And that presents a problem, not only for BCA, but for any methodology that might be used to make consequential decisions on behalf of us all. Benefit‐cost analysis provides a rigorous framework for exploring such major public decisions, but we also need to remember to approach them with a healthy dose of humility, even while being careful not to overdose on precaution.

#### Empirics – market manipulation and regulations have failed to make any progress for decades

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

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

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

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

#### The faith in future tech is a neoliberal method to extract the last bits of profit from the world before we all die – this focus trades off with emissions reductions and is a net negative for the climate

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Phillip Mirowski, “Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown,” Verso, 2014, https://www.versobooks.com/books/1613-never-let-a-serious-crisis-go-to-waste

I think most people on the left don’t fully realize that the phenomena of “science denialism,” “carbon permit trading,” and the nascent science of “geoengineering” are not three unrelated or rival panaceas, but together constitute the full- spectrum neoliberal response to the challenge of global warming. The reason this array qualifies as neoliberal is twofold: initially, they were all proposals originating from within the array of think tanks and academic units affiliated with the Neoliberal Thought Collective; and then, if and when they come to be deployed in tandem, the net consequence is to leave the entire problem to be solved, ultimately not by the state, but rather by the market. The promotion of denialism buys time for the other two options; the financialization of carbon credits gets all the attention in the medium term, while appeals to geoengineering incubate in the wings as a techno-utopian deus ex machina to swoop down when the other options fail. At each step along the way, the neoliberals guarantee their core tenet remains in force: the market will arbitrate any and all responses to biosphere degradation, because it knows more than any of us about nature and society. As a bonus from the neoliberal vantage point, perhaps some segments of the left, operating under the quaint impression they can effectively oppose one or more of these options they find anathema by advocating another—say, aiming to defeat science denialism or geoengineering by taking up advocacy of carbon trading— end up being recruited as unwitting foot soldiers for the neoliberal long march.

Each component of the neoliberal response is firmly grounded in neoliberal economic doctrine, and as such, has its own special function to perform. As we have already learned from historians of the tobacco strategy such as Richard Proctor and historians of climate denialism such as Naomi Oreskes, the purpose of science denialism has been to quash all immediate impulses to respond to the perceived biosphere crisis, and to buy time for commercial interests to construct some other eventual market solutions to global warming. Denying the very existence of global warming is cheap and easy to propagate, can be fostered quickly, and tends to draw attention away from issues of appropriate responses to crisis. The neoliberal think tanks behind the denial of climate change don’t seriously believe they are going to win the war of ideas within academic science in the long run, just as the tobacco strategy never envisioned disproving the smoking-cancer link. Yet, nevertheless, even the existing denial of the science displays its neoliberal bona fides. The first response to a political challenge should always be epistemological, in the sense that the marketplace of ideas has to be seeded with doubt and confusion. This is the core of the agnotological project. Furthermore, human science will never fully comprehend nature in real time. Neoliberals have assumed the equivalent stance hostile to intellectuals dating back to Hayek’s attack in 1949, and no one gets more aggrieved about the lack of deference shown by the intelligentsia than your median neoliberal.21 Bashing pointy-headed elites lends them a certain populist caché; and it plays to an incipient fondness among the uneducated for the fuzzy conviction that wishing can make anything so. This is short-term politics in pursuit of short-term aims. Neoliberal doctrine maintains that anyone should be free to propound any wonky falsehood they may wish, because the final arbiter of truth is the market, and not some clutch of experts who represent sanctioned science. If it just so happens to resonate with the commercial propaganda interests of the oil companies, well, so much the better.

The project to institute markets in pollution permits is a neoliberal mid-range strategy, better attuned to appeal to neoliberal governments, NGOs, and the more educated segments of the populace, not to mention the all-important FIRE sector of the economy. In effect, this strategy is an elaborate bait-and-switch, where political actors originally bent upon using state power to curb emissions are instead diverted into the endless technicalities of the institution and maintenance of novel markets for carbon permits, with the not unintended consequence that the level of emissions continues to grow apace in the interim. Furthermore, professional economists are brought in to shill for this strategy, largely because they enjoy conflicts of interest in this area of a magnitude commensurate with those they have nurtured with the financial sector in general. The neoliberal genealogy of this approach is conventionally traced back to the MPS member Ronald Coase, who first proposed that pollution could be optimized by submitting it to a market calculus.22

The chequered history of traded carbon permits and their mind-numbing technicalities of the ways in which these markets were foisted upon well-meaning reformers has been explained in a number of excellent papers by Larry Lohmann, which deserve to be much better known among environmentalists and the left in general. For purposes of brevity, I will just summarize the case that trading carbon permits doesn’t work, and was never intended to do so.23 The major intentional stratagem is that, once the framework of permit trading is put into place, the full force of lobbying and financial innovation comes into play to flood the fledgling market with excess permits, offsets, and other instruments, so that the nominal cap on carbon emissions never actually stunts the growth of actual CO2 emissions.24 This, in turn, leads to persistent falls in prices of the permits, which continually trend toward utter collapse. This has happened a number of times in the European Emissions Trading System since its inception in 2005.25 Indeed, prices of the ETS dropped to zero in the first phase in 2007, and have been falling again, as demonstrated in Figure 6.1, even though concurrently emissions have risen more or less continuously, with a hiccup during the early phases of the financial crisis. But wild swings in the markets do not perturb neoliberals, since they take the longer view.

The engineered glut of permits is not temporary, since in this system, unused permits can be “banked” for use in future years, although it might not be the most prudent course to hoard an asset of falling value. Indeed, trading systems tend to reinforce oligopoly power, since they always grandfather in the largest emitters, and tend to penalize new entrants. And it is well understood that trading systems tend to stifle further technological measures to curb emissions.

Money that might have been used productively to alter the energy infrastructure instead gets pumped into yet another set of speculative financial instruments, leading to bubbles, distortions of capital flows, and all the usual symptoms of financialization.26

So “cap-and-trade” does not work at ameliorating global warming, primarily because it was never really intended to do so. But as that intentional consequence becomes clear, it gets displaced by the long-game neoliberal solution. The final neoliberal fallback is geoengineering, which derives from the core neoliberal doctrine that entrepreneurs, unleashed to exploit acts of creative destruction, will eventually innovate market solutions to address dire economic problems. This is the whiz-bang futuristic science fiction side of neoliberalism, which appeals to male adolescents and Silicon Valley entrepreneurs almost as much as do the novels of Ayn Rand. Geoengineering is a portmanteau term covering a range of intentional large-scale manipulations of the earth’s climate, often proposed to counteract existing man-made climate change, such as global warming. It proudly flaunts the neoliberal precept that if the economy screws up, just double down on the same sorts of things you have been doing already. It encompasses such phenomena as Earth albedo enhancement through “solar radiation management” (injecting reflective particles into the stratosphere, space mirrors, desert covering); CO2 sequestration (through ocean seeding or churning, burying biochar, introduction of special genetically modified organisms, or CO2 extraction at point of emission); and direct weather modification (hygroscopic cloud seeding, storm modification).

Geoengineering has close ties to the Neoliberal Thought Collective. The American Enterprise Institute has a full-time geoengineering project, and a number of other neoliberal think tanks, such as Cato, the Hoover Institution, and the Competitive Enterprise Institute, have produced studies. Chicago School SuperFreakonomics has come out in hearty open endorsement. Of course, it might seem a bit tactless for units that have prior histories of support for climate denial now getting behind geoengineering; but that simply demonstrates that this is another component of a full- spectrum neoliberal project. The real objective is to get the idea injected into general political discourse; and one indication that they are succeeding is an article that appeared in The New Yorker in 2012, which actually treats the idea as a serious prospect.27 Unfortunately, this article somehow managed to skip over all the daunting reasons why the entire program is sheer lunacy: that there is no way it could be tested ahead of time; that it involves unilateral actions that violate many international treaties; that it imagines a few corporations might hold the entire globe hostage for the sake of some short-term profit; and last but not least, all of the variants of interventions could at best be short-term expedients, since none actually could rectify the true underlying problem, which is the careening acceleration of CO2 emissions worldwide. It gleefully diverts attention to Band-Aids while the patient is dying of heat exhaustion. But maybe that is the point of the exercise.

#### This means solvency of the affirmative is impossible – the court will use their authority to set bad investors free and create a thicket of procedures so dense victory against banks is impossible

Bagley 19 – Professor of Law, UMich

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

Equally crucially, nothing in my argument implies that legally mandated procedures do not yield benefits. They do. But they can also seriously impair the vigor with which an agency pursues its assigned mission. Selecting the type and quantity of procedures to impose on agencies is an optimization problem: Which set of procedures will best balance the competing goals of efficiency, the protection of legal rights, and public accountability? It's easier to state that problem than to solve it. For one thing, we don't all agree on what the right balance should be. For another, we lack good evidence about how most administrative procedures affect that balance. Without either agreement or evidence, administrative law has been shaped by a crude and contested assessment of the costs and benefits of vigorous governmental action.

What informs that assessment? The stories we tell ourselves about the state. That's why it matters so much that administrative law has been built on a bedrock of distrust. When it was adopted in 1946, the APA aimed to soothe the jangled nerves of legal and business communities alarmed by the New Deal and the muscular wartime exercise of state power. 29 Discipline would come through the imposition of procedures to channel, improve, and restrain agency action. Agencies that engaged in formal adjudication would have to adhere to trial-type procedures. 30 Agencies that adopted rules would have to offer notice and an opportunity to comment. 31 Congress also left undisturbed the Supreme Court's decision in SEC v Chenery, which required agencies to offer reasons for acting from the time of decision, not those devised at some later date. 32 To assure fidelity to these procedural rules and [\*353] protect against irrational action, all final agency action was, by default, subjected to judicial review. 33

On the page, the APA's procedural strictures were spare. They were not to remain so. Liberal lawyers in the 1960s and 1970s, many of them products of the Vietnam era, grew increasingly disenchanted with the idea that agencies could act as disinterested experts. 34 They likewise grew attuned to the risk of agency capture, 35 and came to believe that judicial participation in the agency process was necessary both to further congressional intent 36 and to protect individual rights. 37 At the vanguard were newly formed public interest groups staffed by idealistic young lawyers who had been inspired by the courtroom successes of the civil rights movement. 38 Their heroes were not the New Dealers who labored in agency trenches, but crusaders like Ralph Nader and Rachel Carson who held the government to account. 39

By the 1970s, Congress had adopted a rash of new laws to regulate automobiles, air and water quality, workplace safety, and more. 40 Naturally, "political conservatives feared that the bureaucrats might be too zealous, hostile to business and economic growth," so they made common cause with political liberals, fighting with them "for legislative provisions that restricted administrative discretion and subjected it to legal challenge." 41 As the courts began to read novel obligations into the spare language of the APA, the procedural net was drawn tighter still. No longer could agencies offer bare notice of the "subjects and issues" involved in a rulemaking. 42 They were expected to be granular about what they meant to do and to disclose all the evidence that they meant to draw on. 43 No longer could agencies privately mull the comments they received or finalize a rule with a "concise general statement of [its] basis and purpose." 44 They were instead to respond publicly to all vital comments--or, rather, to all comments that a reviewing court [\*354] might later deem vital. 45 And if an agency's final rule departed too far from the proposal, it would have to start all over again to avoid the rule's invalidation on "logical outgrowth" grounds. 46

By 1971, Judge Bazelon could herald "a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts," one in which courts would "insist on strict judicial scrutiny of administrative action." 47 (The equation of "strict judicial scrutiny" with "fruitful collaboration" was emblematic of the times.) Rules about standing were relaxed. 48 Statutes precluding judicial review were read into oblivion. 49 Guidance documents were scrutinized to see if they had binding effect and, if so, were invalidated for failing to pass through notice and comment. 50 In Abbott Laboratories v Gardner, the Supreme Court brushed aside finality and ripeness concerns to endorse preenforcement review of agency rules. 51 The courts subjected compliance with the National Environmental Protection Act (NEPA) to judicial review, "ma[king] adversarial legalism a recurrent feature of governmental efforts to build highways and license power plants, implement forestry plans, dredge harbors, construct waste disposal facilities, and issue offshore oil exploration leases." 52 By the time the Supreme Court recognized in Vermont Yankee that proceduralism had run amok in the lower courts, 53 all of these changes and more were firmly embedded in administrative law.

[\*355] Strict judicial oversight of agencies was accompanied by a surge of congressional interest in transparency tools. First adopted in 1966 54 and substantially amended in 1974, 55 the Freedom of Information Act (FOIA) requires agencies to disclose their records upon request and subjects any refusal to do so to judicial review. The Federal Advisory Committee Act (FACA), adopted in 1972, imposes strict transparency rules on advisory committees, 56 and the Government in the Sunshine Act (GITSA), adopted in 1974, opens every meeting of more than two members of regulatory commissions to public observation. 57

With support from Congress, the executive branch then stepped into the game. In 1980, the Paperwork Reduction Act required agencies to justify any effort to collect information from the public and established the Office of Information and Regulatory Affairs (OIRA) to assure compliance. 58 Shortly after taking office, President Reagan tapped OIRA with responsibility for restraining agencies that were heedless of the costs they were imposing on American industry. By executive order, no major agency rule could take effect without OIRA's sign-off, which would be forthcoming only after a thorough-going review of costs and benefits. 59 (Independent agencies were exempted. 60 ) Because OIRA's gatekeeping role stymied agency decisionmaking--indeed, that was the point--many observers expected President Clinton to rescind the order upon taking office. 61 But an institutional device to promote consistency with White House priorities was too tempting to abandon. President Clinton made OIRA review his own, and OIRA review--gatekeeper function and all--has become an entrenched feature of the regulatory state. 62

When Republicans swept Congress in 1994, they quickly adopted, with President Clinton's support, a number of new procedural rules to constrain agencies. The Congressional Review Act imposes a sixty-day waiting period on the effective date of any major rule, requires agencies to submit a raft of information to Congress about new rules, and adopts fast-track procedures [\*356] to afford Congress a chance to halt new rules. 63 The Unfunded Mandates Reform Act requires agencies to engage in intergovernmental consultation before adopting any rule that might impose financial burdens on state, local, and tribal governments, and to publish the results of that consultation. 64 The Regulatory Flexibility Act compels agencies to specifically account for the burdens that their rules may place on small businesses, exposing that analysis to judicial review. 65 And the Information Quality Act, designed to address the ostensible scourge of "bad science," requires agencies to create a formal mechanism for responding to petitions (usually from industry) asking for the correction of information that doesn't adhere to OIRA guidelines on data quality. 66

The consistent pattern is that procedure after procedure is adopted to soothe an ever-present (indeed, ever-increasing) anxiety about the state. The sediment deposited by this accretion of procedures can channel agency action into unproductive courses or even dam it altogether. 67 There's an analogy here to complaints about how government rules stifle industry. No regulation, taken alone, is especially objectionable, but the sum total frustrates action.

The difference between agency-enfeebling proceduralism and job-killing regulations, however, is that only the latter is a matter of urgent public and bipartisan concern. When President Trump issued an executive order in the first month of his presidency requiring every agency to withdraw two old rules before adopting any new one, 68 it wasn't surprising to see him employ familiar conservative rhetoric: "This executive order is one of many ways we're going to get real results when it comes to removing job-killing regulations . . . ." 69 But the Obama Administration sang much the same tune: one of its signature regulatory initiatives was a retrospective review to identify rules "that may be outmoded, ineffective, insufficient, or excessively burden-some, [\*357] and to modify, streamline, expand, or repeal them in accordance with what has been learned." 70 Complaints about overzealous regulation are taken seriously in the political culture. Fears that procedural rules may hamper agency action are not. 71

They're not nonexistent, of course. Jerry Mashaw, for example, has written plaintively that the "use of law to defeat law-making may ultimately undermine administrative law itself," and that "legal technicality will eventually come to be seen as the enemy of effective governance." 72 Tom McGarity has been beating the drum for decades about agency ossification. 73 Peter Strauss worries that administrative law has not developed "means of encouraging attention and responsibility without imposing debilitating costs." 74 Shep Melnick has done yeoman's work exploding various platitudes about judicial review. 75 Alan Morrison, Lisa Heinzerling, and Rena Steinzor have all raised alarms about OIRA. 76 And so on.

But voices decrying the costs of administrative law's proceduralism are marginal, absent entirely from the political conversation and relegated to the sidelines of the academic debate. 77 There is zero public pressure to eliminate preenforcement review, to curtail hard-look review, to repeal the regulatory reform bills of the 1990s, to rethink the rigor of notice-and-comment rulemaking, or anything of the sort. The field of modernizing administrative law has been ceded to those--on both the left and the right--who distrust the state. 78

[\*358] B. The Neutrality Myth

Why have progressives abandoned the field? One answer--a deficient one, in my view--is that there is no problem to solve. Administrative law's procedural rules are formally neutral: they constrain, yes, but they constrain alike agencies that wish to do conservative things and those that wish to do liberal things. The key text here is Motor Vehicle Manufacturers Ass'n of the United States, Inc v State Farm Mutual Automobile Insurance Co , where the Supreme Court rejected the argument that the APA exposes deregulatory measures to less scrutiny than agency actions imposing affirmative obligations. 79 State Farm's evenhandedness--its insistence that "the forces of change do not always or necessarily point in the direction of deregulation" 80 --gives the impression that administrative law's procedural burdens may, on net, have no partisan valence at all. The canonical cases taught in every administrative law course reinforce that view. Some cases skew conservative: think of FDA v Brown & Williamson, which rejected FDA's attempt to regulate cigarette marketing, 81 or FCC v Fox Television Stations, which upheld penalties imposed on broadcasters for airing "fleeting expletives." 82 But others skew liberal. The lesson of Overton Park is that administrative law preserves public parks; 83 State Farm, that administrative law improves auto safety; 84 and Massachusetts v EPA, that administrative law protects the environment. 85 Win some, lose some.

Far from accepting agency inaction as some natural baseline, the APA even defines "agency action" to include a "failure to act." 86 And, in Massachusetts v EPA, the Supreme Court held that an agency's refusal to adopt a rule is "susceptible to judicial review" and sternly rebuked EPA for its refusal even to say whether greenhouse gases contributed to climate change. 87 Agencies that decline to act for partisan reasons, or those that are simply sunk in torpor, have as much to fear from the courts as those agencies that regulate with abandon--so the story goes.

The same for OIRA. When originally established under President Reagan, OIRA advanced the deregulatory agenda of its political masters. But President Clinton's embrace of centralized oversight suggested that a de-regulatory [\*359] bent is a contingent feature of the institution, one that waxes and wanes with the sitting administration's political priorities. Where President Reagan wanted to minimize costs, President Clinton wanted to maximize benefits net of costs. 88 His revised executive order also addressed the Reagan-era problem of interminable delay by imposing a ninety-day limit on review. 89 And so OIRA, once an implacable foe of regulation, was domesticated. Still operating a quarter-century later under the Clinton executive order, OIRA has become a seemingly permanent and largely uncontroversial fixture of the administrative state.

Similar stories about administrative law's evenhandedness can be (and have been) told about other aspects of proceduralism. 90 And so the political neutrality of administrative law has hardened into something of an article of faith.

91 Cass Sunstein and Adrian Vermeule, two of the deans of the field, can thus write that "administrative law lacks any kind of ideological valence" and "is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking." 92 They concede that "there is a sense in which administrative law does have libertarian features, certainly insofar as it enables regulated entities to challenge the legality of agency action." 93 But they [\*360] deny that the APA and the doctrinal apparatus that comes along with it can be counted as libertarian "in any general or systematic way," invoking, among other things, the principle from State Farm that deregulatory actions are subject to judicial review. 94 They argue that administrative law instead reflects a compromise:

The political, social, and economic forces that swirl around the administrative state--not only the APA but also the legalism of the organized bar, the technocratic and economic approaches to regulatory policymaking, and the demands for democratic oversight by elected officials and for democratic participation by affected groups and citizens--have produced a set of rules that in effect reconcile and calibrate these crosscutting considerations. It is inconsistent with that basic settlement to select one of the APA's multiple commitments and elevate it as the master principle that should animate administrative law. 95

Sunstein and Vermeule's argument works at the level of justification. Administrative law is indeed defended with reference to broadly shared commitments, not to contested ideological visions. But their argument breaks down at the level of substance. Even compromises justified in neutral terms can have controversial political consequences. Such is the case with administrative law, which has an identifiably libertarian, anti-statist tilt. That shouldn't come as a surprise. A body of law founded on distrust of the state naturally serves to restrain the state--an arrangement that, on net, is more congenial to a libertarian agenda than a progressive one. 96 The surprise, if there is one, is that progressives don't seem to mind that the deck is stacked against them.

C. Administrative Law's Status Quo Bias

As a general matter, any legally mandated procedure raises the costs of agency action. Instead of devoting their limited resources to those tasks that they believe will best advance their legislatively assigned mission, agencies must attend to procedural obligations that they might otherwise have dispensed with. The costs associated with any given procedure may be small, even trivial; the requirement to publish rules in the Federal Register, for example, is not onerous. 97 But most procedural obligations are not so easily satisfied. They require substantial attention from agency staff, which means the diversion of attention from other priorities. And procedures are cumulative. Those that appear reasonable in isolation can, when piled together, take a serious toll on agency efficiency. 98

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

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

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

The uncertainty of judicial review also works against agencies that seek to make the most sensible use of their resources. On the margin, rational agencies will shy away from actions that are likely to provoke litigation 103 (or, alternatively, soften those actions to mitigate litigation risk 104 ), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that's an especially good use of their time. 105 Courts thus distort agency judgment even when they don't review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it. 106 Depending on the year, that means that about four dozen employees 107 working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions. 108 The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that "[m]any, many rules linger at OIRA long past the 90- or 120-day deadline" by which it is supposed to complete its review. 109 "Some rules have been at OIRA for years." 110 Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, "a [\*363] judgment that important aspects require continuing substantive discussion." 111 Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a reactive institution, one with the power to reject agency action but little capacity to spur it. 112 Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism drains agency resources, introduces delay, and thwarts agency action. 113 To that extent, it puts a thumb on the scale in favor of the status quo; 114 by itself, that's enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state? 115 If that were the case, administrative law's apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn't be an asymmetry at all.

Without question, administrative law can entrench Democratic achievements. 116 In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending [\*364] Obama-era rules without observing procedural niceties. 117 For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, proceduralism favors a libertarian agenda over a progressive one.

#### That is built on countless falsehoods as the court consistently MISAPPLIES the standard to overprioritize business interests even when it harms consumers

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

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

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

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

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#### They will never be able to solve issues with finance because they place antitrust in the hands of the Judiciary – only the alt’s democratic movement is sufficient to establish confidence in markets

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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. 3-15, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

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.

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

#### Unchecked market power makes a decline of the dollar inevitable – only democratic accountability can solve

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David Russel, April 15 2015, “Fundamentalist capitalism has led to US decline and loss of influence,” the Hill, https://thehill.com/blogs/pundits-blog/finance/238825-fundamentalist-capitalism-has-led-to-us-decline-and-loss-of

For all of those who revel in blaming big government, too high taxes and too much regulation, there is an unexpected consequence to all their laissez faire, capitalist efforts: Those efforts have resulted in economic volatility that has scared the bejesus out of the rest of the world. They have also accelerated a flight from America's economic model and the country's role as the superpower. Since leadership and power in international relations is based in part on perceptions, all of this "fundamentalist capitalism" has diminished America's influence in the world.

The economic crisis of 2007 to 2008 taught legislators nothing about the consequences of "doing the least." Their naive belief in the fundamental capitalist legacy of the Reagan/Bush/Clinton/Bush era has left us with a system guaranteed to experience violent economic disruptions.

Here is how it works. If you are the world's largest and most stable economy, everyone and every country will accept your currency because its implied backing is the behemoth economic engine. That stature provides the U.S. the status of issuing the "reserve currency," the currency most other countries will accept in return for goods and services. Because the U.S. dollar is the reserve currency, the U.S. can manage its way through lots of economic potholes, as it can issue debt or print money and others will accept it without question.

If the issuing country (in this case, the U.S.) has too much deficit spending, or runs perpetual trade deficits, or has dramatic and violent reversals or downturns, it raises real questions in the minds of other countries as to why that currency should remain dominant. The U.S. evolved as the superpower over a period of decades after World War II because it had a growing economy, strong corporate regulations and a boring but reliably stable banking system. Its economic downturns were moderated by economic stimuli; its budgets were modestly either balanced or had relatively small deficits; and most importantly, it had a growing middle class.

Starting in the early 1970s, American businessmen and bankers initiated a determined push to have more control over the size of government, the regulation and oversight of America commerce. Over a period of 40 years, business interests managed to persuade legislators and regulators that the private sector and unregulated markets had a special wisdom. As [Alan Greenspan](https://thehill.com/person/alan-greenspan), chairman of the Federal Reserve from 1987 to 2006, was inclined to say, "the rational decision[-]making" of American business would weed out excess and provide "market stabilizing private regulatory forces." This new world of liberated capitalism was dubbed the "American model" and promoted to the rest of the world.

Ironically, the capstone of the process to free entrepreneurs from unwanted regulation — thereby unleashing the American model — were the Clinton administration's Wall Street mavens, [Robert Rubin](https://thehill.com/person/robert-rubin) and [Lawrence Summers](https://thehill.com/person/lawrence-summers), who each served as secretary of the Treasury. They were the architects of the demise of the Glass-Steagall Act, the legislation that required traditional bankers to be separated from investment banks or securities trading. The result was unprecedented leveraging of financial risk (in so many words, using depositors' money from the banks to crap shoot in the stock market and then the housing market.). From this we were treated to the dot-com and housing/derivatives debacles of 1999 to 2001 and 2007 to 2008.

Europeans viewed this with horror, and the Chinese saw it as a threat and an opportunity. In each case, moves were made and continue being made to diversify away from a dollar-dominated international trade system. In so many words, both allies and prospective enemies are vying to find ways to limit and weaken American economic leadership. The effort is not so much to crush the U.S. as it is to protect their own franchises from the consequences of unregulated capitalism.

The very programs and policies of our business community — pushing for deregulation, reductions in taxes and divergence away from the culture that supported a healthy middle class – have led to our decline as a supepower. Rather than unleashing the "genius of American capitalism from the restrictions of unnecessary government regulation," this laissez-faire approach, promoted primarily by Republicans but also the New Democrats (the Clinton era business-oriented "moderates"), has had precisely the opposite effect. It has neither enhanced economic growth nor provided stability. It has not contributed to the country's status in leading the world; rather, it has become the source of its decline.

All of this is detailed in an excellent book, American Power After the Financial Crisis, by Jonathan Kirshner, professor of political economy at Cornell University, in which he assures us that there will be more dramatic and precipitous disruptions as economic bubbles occur, financial concentrations limit liquidity needed in times of disruptions, and concentrations of wealth prevent legislative remedies.

Undergirding these unwanted outcomes is the vexing question as to how long will it take for normal, average, concerned citizens or ideologues to realize that the Horatio Alger myth of equal opportunity for all is little more than an illusion? When will the average American voter "get it"? Those who support a party or candidates that view the financial sector as all-knowing or the myth of capitalism as an exclusive means of advancing societal goals will simply cause themselves harm, as future financial crises take their toll and the country accelerates in its decline.

#### Only the alt solves—aff ensures economic/legal thought reproduces and kleptocracy

Amy Kapczynski David Singh Grewal Jedediah Britton-Purdy, How Law Made Neoliberalism, February 2021, https://bostonreview.net/articles/jedediah-purdy-david-g-victor-amy-kapczynski-lpe/

But this logic was not limited to trade. Government during this period came to be seen not as a vehicle for public will, nor politics a place to debate, form opinions, and seek the public good—rather, both were assimilated to the logic of the marketplace, where the only “rational” choice is maximizing one’s own individual benefits. Here, government—with its monopoly on the use of force and certain public institutions—was a suspect kind of monopolist. Free from the disciplining force of “competition,” it would inevitably become corrupt—a trough where “special interests” go to seek spoils.

On this thinking, it made sense to try to roll back government (read: labor and civil rights protections, environmental regulation, etc.) to enable market competition and have government function like a market. The Supreme Court and public institutions, enabled by both parties, blessed a range of moves to promote this ideal, most beyond the glare of constitutional law. This was the general rule: government would be rolled back at the same time that it was also rolled out. The point—sometimes implicit, sometimes explicit—was to enable market logics to rule over more of public life. All the while, the marketplace increasingly became a locus of concentrated power.

These three presumptions emerged from a combination of intellectual networks and, yes, interest group politics. On the one hand, scholarly debates about concepts such as cost-benefit analysis, economic efficiency, and public choice shaped the terrain of debates about law and public policy. Then, partisan actors and interest groups leveraged these debates to advance specific political agendas. Business lobbies used the rhetoric of efficiency, regulatory capture, and the veneer of academic expertise to lobby for policies that benefited their bottom line. The process was at many moments driven by the right and propelled by the power of well-funded formations—from the Olin Foundation to the Federalist Society. But these ideas could not have become hegemonic without key establishment figures on the left. It was President Bill Clinton, after all, who delivered workfare, “financial reform,” and full-throated neoliberalism in international trade. It is only today that a position on money, budgets, and finance that could truly serve justice and democracy is starting to emerge from the wreckage of years when progressives conceded that there was no alternative to the neoliberal paradigm. The greatest success of neoliberal ideology may have been to make the state appear all the more like its caricature in neoliberal thought: the results provide more proof of the “failure” of the state and of democracy itself.

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There are three principles that might help us move toward a new legal imaginary. Though these do not provide a methodology for scholarship or decision-making, they do represent a principled shift of legal inquiry to counter the precepts of neoliberal thought and the familiar discourses of legal neutrality. They also orient law toward a more democratic future, where the central task is not optimizing wealth and technocratic rule, but creating a more equitable and inclusive democracy and economy.

The process was at many moments driven by the right and propelled by the power of well-funded formations. But these ideas could not have become hegemonic without key establishment figures on the left.

The first step is a reorientation from efficiency to power. Whereas, for decades, we have been asking what legal regimes are “efficient,” we should instead be asking what regimes produce the kind of widely shared political and economic power that is fundamental to a democracy. This is not to insert politics and law where they were absent before, but rather to ask how we can deploy them toward the freedom of all, not just the ruling autonomy of a few. Markets are not “free”; they are riven throughout with power disparities which are, themselves, products of law and policy. We construct the kinds of markets we want—and that means that we should embrace the capacity of law and politics to construct a radically more inclusive politico-economic order.

This shift helps make sense of why, for example, a new approach to labor law and anti-trust law should be central to a just political economy program. The revived attention being given to corporate power and anti-monopoly policy points towards a renewed use of public authority to check concentrations of private power. Similarly, this commitment to rebalancing economic power manifests in the fights over worker rights—from their evisceration by measures such as Prop 22 in California, to the efforts to expand labor’s ability to organize and secure benefits for all. Labor law and the law of finance and money are suddenly among the most dynamic in the legal academy today, as LPE scholars have begun newly mapping the state power at the heart of our systems of market coordination, finance, and banking, and theorizing how they might be designed to distribute, rather than concentrate, power.

Second, we must recognize the ways that formal equality fails and ask how our laws might cultivate a deeper form of equity—the equality of status and dignity that comes from dismantling historical structures of class exploitation and racialized and gendered subordination. There are many challenges here. We must unravel how racism, the marginalization of social reproduction, and the coercion of care are entangled with our political economy. We must work against the grain of liberal thinking about inclusion that has deeply marked law and mainstream legal theory, and simultaneously against an older tradition of political economy that encoded a racialized and gendered conception of the nature of production and the economy. We must theorize the relationships between the carceral state and capitalism and ask how we can constitute democratic publics in a global system that was designed for exploitation and exclusion. We need to bring these insights to bear upon a constitutional tradition that enacts the very “encasement” of the economy to which we are opposed—all in the midst of a legal culture that celebrates tactics like litigation over strategies of movement-building and legislation. But the generativity of this work is also clear, as scholarly debates about reparations, dismantling the carceral state, and intersectional strategies for labor organizing command a new conversation within and beyond the academy.

We construct the kinds of markets we want—and that means that we should embrace the capacity of law and politics to construct a radically more inclusive political economic order.

Third, we must limit the familiar anti-politics of legalism and technocratic decision-making through a commitment to democratic politics. Democracy has to mean more than the manufacture of public opinion alongside elections. At its heart it means that majorities set the country’s direction, not the constitutionally gerrymandered pseudo-majorities of the senate and electoral college or the conclusions of neoliberal trade theory. Democracy also means deeper political empowerment, such as the capacity of communities to mobilize against the hoarding of political decision-making power in wealthier (and often whiter) constituencies.

How can we counter the power of technocratic elites without abandoning the need that any democracy has for expertise? And how can we build more participatory and inclusive political institutions without hampering the exercise of state power, and without simply reproducing class and racialized biases? As we reformulate the central question in fields such as administrative law, new campaigns for community benefits agreements, wage boards, and participatory budgeting are taking root. Emerging work emphasizes the relationship between social movements and law reform. At the same time that participatory politics and movement-building are critical to legal change, we must recognize that—as the recent attack on the Capitol reminds us—we cannot have a democracy without a commitment to constitutional forms. And democracy necessarily always means that our favored cause may lose.

Our three proposals for reorientation are not novel. They owe a great deal to prior generations of critical legal thought, critical race and feminist approaches to law, and prior waves of political economy scholarship dating back to legal realism and the Progressive Era. But in this moment of upheaval and crisis, it is crucial for legal thought and action to reclaim and foreground these orientations. They do not solve these problems; they draw attention to them and suggest terms in which we might engage them with our eyes on the right imperatives and hazards.

Indeed, recognizing the deep structural constraints that led to the present political crisis entails seeing that the four years of Donald Trump’s presidency were less a catastrophic aberration than the culmination of much longer-standing ideologies—including, in law, the Twentieth-Century Synthesis. If they were merely an aberration, we might hope that a good election cycle or two would get things “back on track” without fundamental change. But the current crisis is a symptom of unresolved structural inequities and forms of political disempowerment, stretching back decades and centuries. Trump’s defeat will only set the stage for more conflict.

The last four years have intensified longstanding trends: the collapse of democratic politics into marketing and democratic rule into capitalist power; rampant inequality in a landscape of unmet needs; structural racism and other forms of subordination; the increasing weaponization of racism by political elites to help legitimize the hoarding of wealth; and the resulting failure to create a community of equals capable of collective self-government. With a new administration and Congress in place, there are opportunities to grapple with these deeper structural issues. But if we do not find ways to reckon with them, and with the ideologies that have made them seem tolerable or even inevitable, then the country’s recent bout of nativist kleptocracy portends something far worse.

#### Effective innovation is impossible under their model – concentrations of political power compels firms to avoid info sharing that’s key to innovation

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Susan K. Sell, “What COVID-19 Reveals About Twenty-First Century Capitalism: Adversity and Opportunity,” National Center for Biotechnology Innovation, 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7644989/

Going beyond the broad ‘neoliberalism’ label, John Braithwaite has described capitalism as ‘variegated’; he identified two aspects that are particularly relevant to global health—‘Wall Street’ capitalism and ‘monopoly capitalism’ (Braithwaite 2019). Wall Street capitalism captures the globalization of finance and the increased economic and political power of the financial sector. Financial markets, motives, institutions and elites have come to dominate the global economy affecting everything from production, consumption, regulation and health (Epstein 2005). Monopoly capitalism, or ‘intellectual monopoly capitalism’ (Pagano 2014), captures intellectual property (e.g., patents, copyrights and trademarks) owners’ preference to avoid competition. Ownership of intellectual property (IP) gives owners the right to exclude others from using the IP, reduce competitive supply and increase prices.

The quest to be competitive in global markets has led to economic concentration, oligopolies and a reduction in competition (Azmanova 2018). Economic power has shifted from the mainstays of the real economy (commodity producers and traders) to the controllers of global value chains (GVCs) who own intangibles such as intellectual property and financial instruments. According to Medeiros and Trebat,’the “core” business of every TNC (transnational corporation), irrespective of its particular branch, is to control and capitalize on these intangible assets’ in order to maximize shareholder value and generate large rents (Medeiros and Trebat 2017: 407). Firms that are relatively immune to competitive pressure are ‘less compelled to invest’ in the real economy (Durand and Milberg 2018: 34). As Azmanova points out, ‘competition-induced productivity … does not condition growth on employment’ and has resulted in so-called ‘jobless growth’ and ‘jobless recovery’ after economic crises (Azmanova 2012: 453). Economic globalization has reduced the power of labour and has accelerated an increase in ‘labour flexibility’ that translates into precarious employment. Post-the 2007–2008 global financial crisis, austerity programs, cuts in social spending and labour market transformation have had negative effects on health outcomes and health equity (De Vogli 2014).

#### And the alt is sufficient to solve this scenario – we implement key federal programs that boost the ability to use new tech in an equitable way

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

This book encourages us to apply the same level of boldness and experimentation to the biggest problems of our time – from health challenges such as pandemics, to environmental challenges such as global warming, to educational challenges such as the divide in opportunity and achievement between students partly caused by unequal access to digital technology. These ‘wicked’ problems require not just technological, but also social, organizational and political innovations. They are huge, complex and resistant to simple solutions. We must solve them – not merely accommodate them – by focusing policymaking on outcomes. And this means getting the public and private sectors to truly collaborate on investing in solutions, having a long-run view, and governing the process to make sure it is done in the public interest.

The moon landing was a massive exercise in problem- solving, with the public sector in the driving seat and working closely with companies – small, medium and large – on hundreds of individual problems. It required collaboration between government and many different sectors, from computing and electrical equipment to nutrition and materials. Government used its purchasing power to develop procurement contracts that were short, clear and massively ambitious. When the private sector sometimes failed to deliver, NASA threw back the challenge and did not pay until the solution was right. If successful, companies could grow through serving the new markets that government purchases opened up and scale up through a purpose-driven strategy.

What integrated all these efforts and gave them direction was that they were part of a mission – a mission led by government and achieved by many. Today, a ‘mission- oriented’ approach - partnerships between the public and private sectors aimed at solving key societal problems – is desperately needed. Imagine, for example, using public- sector procurement policy to stimulate as much innovation as possible – social, organizational and technological – to solve problems as diverse as knife crime in cities or loneliness of the elderly at home.

Of course, lessons from the moon landing cannot just be cut and pasted onto any challenge. But they do highlight the need to resurrect ambition and vision in our everyday policymaking. This cannot just be about bold statements. We have to believe in the public sector and invest in its core capabilities, including the ability to interact with other value creators in society, and design contracts that work in the public interest. We must create more effective interfaces with innovations across the whole of society; rethink how policies are designed; change how intellectual property regimes are governed; and use R&D to distribute intelligence across academia, government, business and civil society. This means restoring public purpose in policies so that they are aimed at creating tangible benefits for citizens and setting goals that matter to people – driven by public-interest considerations rather than profit.5 It also means placing purpose at the core of corporate governance and considering the needs of all stakeholders, including workers and community institutions, as opposed to just shareholders (owners of stock in a company).

In this context, ‘moonshot’ thinking is about setting targets that are ambitious but also inspirational, able to catalyse innovation across multiple sectors and actors in the economy. It is about imagining a better future and organizing public and private investments to achieve that future. This, in the end, is what got a man on the moon and back.

But there is a catch.

Conventional wisdom continues to portray government as a clunky bureaucratic machine that cannot innovate: at best, its role is to fix, regulate, redistribute; it corrects markets when they go wrong. According to this view, civil servants are not as creative and risk-taking as the entrepreneurs of Silicon Valley, and government should simply level the playing field and then get out of the way – so the risk-takers in private business can play the game.

This book’s thesis is that we cannot move on from the key problems facing our economies until we abandon this narrow view. Mission thinking of the kind I outline here can help us restructure contemporary capitalism. The scale of the reinvention calls for a new narrative and new vocabulary for our political economy, using the idea of public purpose to guide policy and business activity.6 This requires ambition – making sure that the contracts, relationships and messaging result in a more sustainable and just society. And it requires a process that is as inclusive as possible, involving many value creators. Public purpose must lie at the centre of how wealth is created collectively to bring stronger alignment between value creation and value distribution. And the latter should not only be about redistribution (ex post) but also predistribution ex ante: a more symbiotic way for economic actors to relate, collaborate and share.

It is essential to link the micro properties of the system – such as how organizations are governed – to the macro patterns of the type of growth desired. By rethinking how the relationships between the public sector and private sector can be better governed around public purpose, we can create growth that is better balanced and resilient, with new capabilities and opportunities spread across the economy. But this means, at the start, replacing the fashionable, bland terminology of ‘partnership’ with clearer metrics as to what a symbiotic and mutualistic ecosystem looks like; that is, one in which risks and rewards are more equally shared. In our era, unfortunately, the relationship is often parasitic: public-health funding is structured so that publicly financed drugs are too expensive for citizens to buy.

I call this different way of doing things a mission-oriented approach. It means choosing directions for the economy and then putting the problems that need solving to get there at the centre of how we design our economic system. It means designing policies that catalyse investment, innovation and collaboration across a wide variety of actors in the economy, engaging both business and citizens. It means asking what kind of markets we want, rather than what problem in the market needs to be fixed. It means using instruments such as loans, grants and procurement to drive the most innovative solutions to tackle specific problems, whether those be getting plastic out of the ocean or narrowing the digital divide. The wrong question is: how much money is there and what can we do with it? The right question is: what needs doing and how can we structure budgets to meet those goals?

### CP Section 5

#### China’s an alt cause – fragments the internet

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Daniel F. Runde and Sundar R. Ramanujam, “Digital Governance: It Is Time for the United States to Lead Again,” *Center for Strategic and International Studies*, August 2021, pp. 2-3, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210802\_Runde\_U.S.\_Digital\_Governance.pdf?0HOwy9OU\_m5ypT.HwAiNthoEBjXzYVMA.

CHINA’S AUTHORITARIAN VISION

China’s desire to shape the internet’s future is most pronounced with its efforts to “reinvent” the internet in the name of regulating it. Specifically, it has led attempts to capture the institutions governing it and change the norms around the flow of content and data. China relies on an internet model that champions “cyber sovereignty,” where countries exercise their sovereignty over information and data exchanged online—controlling and censoring content, shutting out access in part or in whole, and enforcing data localization requirements. China receives tacit (and sometimes overt) support for this principle from other authoritarian nations, including Iran, Russia, and Saudi Arabia. Institutionally, China succeeded in winning the 2018 leadership elections for the International Telecommunication Union (ITU), a little-known UN agency whose support is needed to alter the existing internet protocol (IP) architecture—a goal that Chinese authorities have pursued for many years. Initially created to regulate the telegram industry, the ITU is now a critical stakeholder in the future regulation of the internet. The ITU operates mainly outside the public spotlight, regulating obscure technical issues like the radio frequency spectrum to more commonly noticed issues like the cost of over-thetop streaming services. If successfully implemented at the ITU, the new IP architecture (and the Chinese vision of the future of the digital sector) could lead to a fragmentation of the internet, allowing state operators to erect their firewalls and hurting the prospects for future technological innovations while undermining the civil rights and liberties of citizens. The Chinese model of digital governance is not just limited to internet standards and regulations. Chinese players in the digital economy have adopted business strategies that heavily rely on a data-extractive operational model. Consequently, as Chinese digital payment systems and other applications grow their user base, it becomes easier for the Chinese state to undermine user privacy and enhance its surveillance system.

Nearly a quarter of all internet users worldwide live in China, giving Chinese technology companies a substantial domestic market advantage. As Congress, CSIS, and other scholars have previously reported, China’s autocratic government uses this advantage to develop, test, and institutionalize digital tools that sustain its oppressive regime. China also exports some of this technology through the Digital Silk Road to undermine freedom and democratic values globally. China has been particularly successful in offering its technological prowess in 5G communications as a low-cost model to several low- and lower-middle-income countries with a growing middle class that is increasingly anxious to modernize its economy for the twenty-first century. For instance, even as Britain, India, and several European countries joined the United States in blocking Chinese 5G network firms from gaining a foothold in their markets, Huawei has been successful in building over 70 percent of Africa’s 4G infrastructure capacity and will create 5G capacity for large countries, such as South Africa. As the number of Digital Silk Road recipients continues to expand—and with the global pandemic accelerating digital transformation in many developing countries—billions of people remain vulnerable to illiberal state actions, such as surveillance, increased state control of online content and censorship, and data localization.

### Suisse

#### AND, even if the plan’s substantive change is fully implemented, Courts change pleading standards to make it impossible to sue

Stone, Research Fellow, International Center for Law and Economics, and Wright, Associate Professor, George Mason University School of Law and Department

of Economics, ‘10

(Judd E., and Joshua, “Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL,” CATO Supreme Court Review)

Without defending Twombly pleading standards in all contexts, and acknowledging the criticism that Twombly and Iqbal have received—that they pose problems for notice pleading generally and require information of plaintiffs that would be most easily obtained during discovery149—in the antitrust context, the plausibility requirement creates value by preventing unwarranted judicial intrusion into business enterprises without at least a cursory presentation of economically coherent harm.150 The economic literature on the theory of the firm teaches us that former Copperweld-availing firms typically structure their business architecture in order to minimize transaction costs.151 By discouraging antitrust suits targeting nominal agreements between such firms that, in reality, represent unilateral action, Twombly allows these firms to pass on welfare gains through lower prices and increased innovation. We suggest that the strengthening of the pleading-stage antitrust filter in Twombly enabled the Court to provide a reasonable answer to Chief Justice Roberts’s inquiry about where the Court should allocate antitrust’s ‘‘inefficiency.’’ In other words, Twombly allowed the Court to expand the scope of the Sherman Act for the first time in nearly two decades without fear of a large increase in the marginal cost of operating the ‘‘antitrust system’’ in the form of the error and administrative costs associated with the Rule of Reason.

But what of Twombly itself? One potential response to Twombly already proposed in multiple circles is simple legislation codifying the previous pleading requirements. This action would presumably lead to a large increase in cases at the margin between, as Twombly put it, merely ‘‘conceivable’’ versus ‘‘plausible.’’152 These cases would be by necessity among the weakest antitrust suits present, requiring the most extensive discovery in order to vindicate the least obvious consumer harms. Antitrust has seen this pattern play out before, however; it was due to the massive proliferation of private actions that inspired much of the error-cost protections not only ensconced in the consumer harm requirements of Section 2 but narrowing Section 2’s scope altogether. To borrow a phrase, the cautionary tale for repealing Twombly is that opening the floodgates to all conceivable antitrust claims is a strategic maneuver that will favor plaintiffs in only the very shortest of temporal horizons—before the antitrust ‘‘system’’ of rules reacts accordingly.

#### Their generic precedent doesn’t send a clear signal

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8