# 1NC

### K

#### The 1AC’s application of antitrust is underpinned by a host of assumptions imported from neoclassical economics---its facially neutral technocratic doctrine in practice naturalizes corporate domination and the idea that the government should stay out of the market. Recognizing the inherently political nature of antitrust and struggling to define its content is key to counter corporate power.

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

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

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

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

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

A. Markets Cannot Be Divorced from Politics

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

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

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different configurations 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 monopolisstic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Neoliberal antirust approaches are part of a broader legal proceduralism that puts power in the hands of conservative courts instead of democratic/progressive agencies – that guts effective governance thru a strong administrative state and prevents tackling existential threats like climate change, pandemics, and inequality

Bagley 19 – Professor of Law, UMich

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### An anti-domination approach to the political economy counters the neoclassical assumptions preventing regulations and locking in judicial supremacy---restoring popular sovereignty grants agencies the flexibility to check existential threats and carry out democratic lawmaking.

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

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

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

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

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

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

#### Neoliberal antitrust is comparatively worse than the alternative---only an anti-domination frame in antitrust can spur economic growth and counter monopoly power.

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

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

HOW REMAKING ANTITRUST LAW COULD HELP END THE NEW GILDED AGE

Congress, the antitrust agencies, and federal courts should restore the original anti-monopoly, pro-worker vision for the antitrust laws. For much of their history, these laws had a pro-capital, anti-worker orientation. Not- withstanding this record, these laws can be reoriented to police capital and accommodate labor in accord with the intent of Congress. In passing these laws, Congress aimed to curtail the power of capital and also preserve space for workers to organize.392 The antitrust agencies and federal courts should reject the ahistorical and deficient efficiency paradigm and embrace the political economy framework of the sponsors of the antitrust laws. Specifically, they need to reinterpret antitrust to restore competitive market structures and limit the power of large businesses over consumers, producers, rivals, and citizens. Along with imposing checks on the power of large businesses, Congress, the agencies, and the courts must preserve freedom of action for workers acting in concert.

New statutes and executive and judicial reinterpretation of antitrust law, in accord with congressional intent, would help remedy many economic and political injustices in the United States today. Monopoly and oligopoly appear to contribute to a host of societal ills. These include increased inequal- ity,393 diminished income for workers394 and other producers,395 and declining business formation.396 At the same time, protecting workers’ collective action against antitrust challenges would create more space for workers to organize and claim a fairer share of income and wealth.397 Restoring antitrust law to its original goals would likely produce a more just and equitable society. Although no means a panacea for what ails the United States, antitrust law should be part of a broader social democratic agenda that reduces the yawning inequalities in wealth and power today.398 Reinterpreting and reviving antitrust law will require new legislation from Congress,399 a radical remaking of the federal antitrust agencies and the courts, or some combination of both. Congress, the DOJ, the FTC, and the courts would have to undo a thick accretion of pro-business, anti-worker case law and guidelines.400 The current Supreme Court and the Trump administration are, if anything, likely to entrench the consumer welfare antitrust that failed consumers and workers, to continue to tolerate the abuses of monopolies and monopsonies, and to deploy antitrust against the powerless.401 Yet, administrations and the composition of the Supreme Court are not destined to remain the same.

Already signs of progress are clear. Along with bills on strengthening antitrust in Congress, a number of members of Congress and candidates for Congress are making antitrust a centerpiece of their agenda.402 At least on the Democratic side, antitrust and anti-monopoly appear likely to be important themes in the contest to be the party’s presidential nominee in 2020. And if and when an administration committed to the revival of antitrust and control of corporate power is elected, it would have an opportunity to pursue a different course on antitrust through both appointments to the federal anti- trust agencies and to the judiciary. In relying on the executive branch and the courts, the conservative reinterpretation—and retrenchment—of antitrust offers one model for reviving the field.403 And even in the near term, litigation can yield important advances. Some lower courts appear receptive to reinvigorating or at least honoring mid-century precedents the Supreme Court has not overruled.404

A. Confronting the Power of Capital

A reinterpretation of the antitrust laws needs to be founded on the political economy embodied in the legislative histories of the principal antitrust laws. The Congresses that enacted these statutes were not concerned with narrow economics or some abstract notion of competition. Instead, they sought to control the power of the new monopolies and trusts that dominated the American political economy. They had a broad conception of the power of large-scale enterprise and considered—and condemned—the trusts’ power over consumers, producers, competitors, and citizens.405 A review of the legislative histories reveals economic and political ideas that are consonant with popular concerns about corporate power today.406

Permissive merger and monopoly policy resulted in a highly concentrated industrial structure.407 Numerous sectors across the economy became more concentrated over the past two decades.408 A few examples are illustrative. In the airline industry, the number of major carriers declined from nine to four since 2005.409 Two duopolies dominate railroads—one east of the Mississippi and one west of it.410 The wireless industry has four major players,411 with AT&T and Verizon accounting for approximately seventy percent of market share by revenue.412 In agriculture, concentration in- creased dramatically in markets throughout the supply chain, starting with inputs such as fertilizer and seeds through processing of farmers’ crops, live- stock, and poultry and food retailing.413 Most local labor markets in the United States, and in rural areas in particular, are highly concentrated (as de- fined by the Horizontal Merger Guidelines)414 and have become more concentrated since the 1970s.415

Consumer welfare antitrust failed even on consumer welfare grounds. In metropolitan areas across the country, hospital mergers created highly concentrated markets for hospital services and contributed to higher costs in health care.416 John Kwoka has shown that the antitrust agencies often failed to challenge mergers that had subsequent anticompetitive effects (higher short-term consumer prices).417 Furthermore, Kwoka found that merger remedies, especially behavioral remedies, often failed to preserve competition.418 Other research has also shown that increased market concentration contributes to higher consumer prices.419

The failures of consumer welfare antitrust become even clearer when a broader set of economic and political interests are examined. Higher consumer prices are one manifestation of business power but only one and arguably not the most important one. Concentration in labor and product markets contributes to lower wages.420 Just from a consumer angle, dominant online platforms, with their huge troves of user data and lack of effective competition, pose serious threats to personal privacy.421 Companies that control infrastructure that support a range of activity, whether they are the electric grid or a search engine monopoly, have the power to shape large swaths of the economy over time.422

The economic power of large business can also translate into great political power.423 Empirical research found that big business exercises disproportionate influence over the political system.424 John Browne, the former CEO of oil and gas giant BP, explained the nexus between economic power and political power. In an interview with The Wall Street Journal in 2003, he described how BP’s size gives it political power:

We do get the seat at the table because of our scope and scale. Whether we are the second or the third largest (oil) company is of very little import, but we’re certainly up there and we operate in places which are important to the United States government, and the United States government is important to us. . . . We have large numbers of employees in the United States. That’s very important in a political system. And they are highly concentrated. So we have a very significant presence in Texas, Illinois, Alaska, California. These are important because our employees are voters.425

Economic power extends beyond influence over politicians, regulators, and other public officials. Comcast and Google illustrate this hegemonic power. These giants use their power and wealth to shape the terms of debate through financial support for academics and non-profit organizations, including organizations with otherwise progressive reputations.426 In their funding of academics and think tanks, these companies are representative of large- scale capital, rather than outliers. Large businesses outside telecommunications and technology also use their wealth and power to manipulate the parameters of public discussion,427 including by attempting to discipline critical voices.428

Current legal standards fail to provide a check on the prerogatives of large businesses and do not even protect consumers from the burden of monopoly and oligopoly. Antitrust legal standards, such as the rule of reason and the analytically comparable Horizontal Merger Guidelines, impose onerous burdens on plaintiffs challenging anticompetitive conduct and call for complicated, speculative inquiries into whether a business practice or merger led to or will likely lead to consumer harm in the near term.429 These standards ensure plaintiffs rarely win and help protect monopolistic and oligopolistic domination of markets.430 Largely quantitative analysis, likely defective even for the consumer welfare standard,431 cannot do justice to the qualitative manifestations of business power identified in the legislative histories of the Sherman, Clayton, and FTC Acts.432 These standards cannot protect the open markets or the American political system from private business power. And these standards, by elevating complexity over simplicity, favor well-heeled interests who can afford to retain the most expensive lawyers and consultants—the monopolies and oligopolies themselves.433

To limit the power of large corporations, Congress, the antitrust agencies, and the courts must embrace clear rules and presumptions and reject the prevailing rule of reason approach. The Supreme Court once recognized the importance of rules in antitrust law and the unworkability of complicated standards.434 For antitrust enforcement to be effective and efficient, per se rules and presumptions of illegality must become the default in antitrust law.435 At present, rules are the norm only for price fixing and similar forms of horizontal collusion.436 Per se rules or presumptions of illegality should govern a range of conduct that threatens structurally competitive markets. Conduct that carries this competitive threat includes horizontal and vertical mergers in concentrated markets and predatory pricing, exclusive dealing, and tying by monopolists and near-monopolists. Under these presumptions, certain firm conduct would be illegal unless the business could present credible business justifications.

B. Recognizing Labor Is Not Just Another Commodity

The antitrust laws also need to be reinterpreted to preserve the rights of workers to engage in collective action. The present interpretation of the statutory exemption is far too narrow and only protects workers with employee status under federal law.437 Workers of all types face serious obstacles when they seek to establish a collective voice by forming a union. For workers without employee status under federal law, they face the additional threat of antitrust liability. Even as antitrust law permits monopolies and oligopolies to dominate the economy, it is used to thwart the efforts of many American workers to build countervailing power. In contrast to present administration and interpretation of the antitrust laws, the Congresses that passed both the Sherman and Clayton Acts sought to protect workers from antitrust attacks. The sponsors of these statutes viewed the new laws and labor organizing as complements in challenging and controlling the power of large-scale businesses. They made clear distinctions between capital and labor and did not conceive of the antitrust laws as prescriptions for maximizing competition categorically across American society. In their approach toward labor, the framers of the antitrust statutes wanted workers to have the freedom to act in a collective capacity.438

The present, restrictive interpretation of the statutory antitrust exemption creates a significant legal threat to the organizing efforts of a large fraction of workers. While the exemption protects workers who are employees under federal labor law, it does not protect workers without employee status under federal labor law—workers classified as independent contractors may face antitrust liability for engaging in collective action.439 Given that nearly nine percent of workers are now classified or misclassified as independent contractors,440 this threat is not merely an academic one. Antitrust law may help deter millions of workers from organizing for higher wages and better working conditions. The rise of precarious employment arrangements could arguably make these “alt-labor” organizing activities as important as traditional labor organizing in the coming years.441 A critical segment of labor organizing is now focused on workers outside of conventional employee-employer relationships.442

Congress or the Supreme Court should revisit the statutory exemption and extend it to cover not just workers in traditional employee-employer arrangements but workers of all types.443 Workers, regardless of formal legal label and unlike capitalists, face “[p]ressures of economic necessity to work in order to provide for one’s family and to accommodate the needs of the person who is paying for the services are applicable to every person engaged in a trade, calling or profession.”444 They “must work to support themselves and their families and must make themselves available to render services at such times as they are needed.”445 It is long past due for the federal antitrust agencies and the courts to recognize the qualitative difference between home health care workers banding together to demand a living wage and corporate mergers that seek to enhance market control and bolster profits. All those who labor for a living should be entitled to the antitrust exemption, not only those workers who are “employees” under federal law.446

While congressional or judicial expansion of the labor exemption may not happen in the near term, the federal antitrust agencies, in the meantime, should reconsider their current enforcement priorities. They should stop investigating the concerted activity of workers, professionals, and other small players and bringing enforcement actions against them. This proposition should not be controversial. At a time of agency budget cuts447 and monopolies and oligopolies in a number of sectors,448 the antitrust agencies cannot justify using public money to bring enforcement actions against music teachers and organists. Even under the existing antitrust paradigm centered on consumer welfare, the music teachers’ restrictive code of ethics does not seem like a major threat to consumer interests.449 Assuming that preserving low consumer prices in the short run is the exclusive or primary goal of anti- trust law, limits on price competition between music teachers appears inconsequential in the larger universe of anticompetitive conduct.

# Case

## Advantage 1

#### Unilateral imposition of extraterritorial antitrust liability escalates to war! — And collapses cooperation on other issues, and trade flows

Salbu 99 – Professor of law and ethics, Georgia Tech

Steven R. Salbu, The Foreign Corrupt Practices Act as a Threat to Global Harmony, 20 MICH. J. INT'L L. 419 (1999), Available at: <https://repository.law.umich.edu/mjil/vol20/iss3/1>

The world is too culturally diverse to accept the external imposition of laws without resentment. 154 [ FN 154] 154. For comparison, consider treaties through which signatories all agree to mutually accepted conditions and terms that apply only to the signatories themselves. Within these bounds, no laws are being applied extraterritorially without the consent of the local sovereignty. In contrast, FCPA-style legislation, now to be adopted in dozens of countries, restricts behavior even in non-signatory nations that have not consented to the intrusion. [End FN] Under these conditions, extraterritorial legal fiat is at the very least insulting and distasteful.'55 Transnational relations likely will be strained by the overreaching of any one nation into the affairs conducted within the borders of another.'56 As one commentator suggests, other nations "may perceive the FCPA as a culturally arrogant encroachment on their ability to govern activities exclusively within their own borders, in accordance with international law principles on territorial sovereignty."''57

While the risk of being perceived as obnoxious and intrusive is hardly insignificant, it pales when compared with a more serious risk--the increased likelihood that transnational relations will become strained,'58 and that nationalistic sentiments will flourish in response to the perceived invasiveness of the extraterritorially applied laws. 5 9 The results of this scenario can range from mounting hostilities over other issues to the severance of trade,' 6 0 and potentially even to military confrontation.161 [Footnote 161] 161. The potential for hostilities over extraterritorial legislation to escalate to the point of military confrontation is a logical possibility, rather than a trend in recent history. Indeed, even U.S. antitrust law, the extraterritorial application of which has evoked substantial retaliatory reaction, has not led to this extreme. See William S. Dodge, Extraterritoriality and Conflict-ofLaws Theory: An Argument For Judicial Unilateralism, 39 HARV. INT'L L.J. 101, 165 (1998) (noting that while extraterritoriality of U.S. antitrust law has evoked blocking statutes and claw-back statutes, it has not caused the cessation of international cooperation). While we have yet to see hostilities over U.S. extraterritorial legislation escalate to the point of war, the potential for such a scenario can never be ruled out. [End FN] Thus, van den Berg observes that extraterritorial application of the Helms-Burton Act in Canada has fueled an "international perception of the United States not only as a cultural imperialist but as a growing legal imperialist."' 62 Perhaps more threatening to the delicate global diplomatic balance, the reach of the Helms-Burton Act has sparked an unforeseen and undesirable alliance between Canada and Cuba, 163 in effect undermining U.S. efforts to apply economic sanction pressures in the latter. Simply stated, laws resented for their overreaching nature can be counterproductive.

Van Wezel Stone identifies similar risks in another area where extraterritorial law has been posited as a possible global solutioninternational labor regulation.'" She notes that because extraterritorial jurisdiction does not aspire to be integrative, it fails to contribute to a common international system of norms and standards.' 65 Instead, extra-territorial jurisdiction tends to undermine international peace and cooperation by creating tension and destabilizing international relations.'" Sovereign nations "react with intense hostility when... activities within their own borders are made the subject of investigation by a foreign nation applying foreign rules and procedures.' 6

The world is not sufficiently homogenized to embrace one conceptualization of morality in gray areas, '6 8 and attempts to force a unified fit via extraterritorial legislation are likely to spark ill will and retaliation.'69 Such hostilities can result, of course, whenever one country imposes its rule upon transactions that occur in another country. The potential is increased when vague laws are applied to the ambiguous conditions of markets in transition, such as communist economies that are in the process of converting to capitalist ones. 70 This suggests a danger in externally-based efforts to unify legal structures addressing such moral issues. Must we therefore throw up our hands in despair, and abandon all exertions to extirpate bribery and corruption? The answer is decidedly no. Abdication of responsibility to improve global markets would be as irresponsible as overweening intrusion into the affairs of other nations. The appropriate middle ground between complacency and invasiveness is persuasion.

**Protectionism causes global wars**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Advantage 2

#### Expansive application of U.S. antitrust laws wrecks a number of foreign leniency programs.

Tone 14 – Partner, Katten & Temple LLP

Jeffrey R. Tone, Brief of the Korea Free Trade Commission as Amicus Curiae in Support of Appellees’ Opposition to Rehearing En Banc, Motorola Mobility LLC v. AU Optronics Corporation, et al., US Court of Appeals for the Seventh Circuit, October 2014, LexisNexis

II. Application of U.S. Antitrust Laws in the Context Proposed by Plaintiff Will Interfere With Other Countries’ Antitrust Enforcement.

The expansive application of the U.S. antitrust laws urged by Plaintiff will also undermine one of the most fundamental features of other countries’ public antitrust enforcement regimes: leniency programs. Like the U.S. Department of Justice and the European Commission, the KFTC has adopted a delicately balanced leniency program that effectively detects and deters cartel activities, which by nature are often undertaken in secret. To the KFTC’s knowledge, numerous other countries have also adopted similar leniency programs. If the U.S. antitrust laws are applied to claims arising out of transactions that take place outside the United States without any direct effect on the U.S. markets, companies will be discouraged from seeking leniency from non-U.S. antitrust authorities, including the KFTC. Under those circumstances, filing for leniency with non-U.S. antitrust authorities might actually result in a greater likelihood of facing private antitrust damages actions in the United States. Such disincentive is likely to undermine substantially the effectiveness of other countries’ leniency programs and will interfere with those countries’ overall antitrust enforcement.

It is the KFTC’s understanding that the U.S. government itself recognized the foregoing issue when it enacted the Foreign Trade Antitrust Improvement Act of 1982 (“FTAIA”), 15 U.S.C. § 6a, to clarify the scope of extraterritorial application of the U.S. antitrust laws. The FTAIA excludes from the scope of the Sherman Act non-import activities involving foreign commerce unless (i) such activities have a direct, substantial, and reasonably foreseeable effect on domestic trade, import, or (certain) export commerce, and (ii) such effect gives rise to a Sherman Act claim. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161-62 (2004); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853-54 (7th Cir. 2012) (en banc). A panel of this Court held that Category II Transactions had only an indirect effect on the domestic commerce in the United States. That panel also concluded that Category II and Category III Transactions did not give rise to any antitrust claim because Plaintiff at its discretion set prices of the mobile phones that it sold in the U.S. Hence, the FTAIA bars Plaintiff’s Category II and III claims. A contrary ruling will undermine the delicate balance that the FTAIA sought to achieve and preserve.

#### Global protectionism is on the rise, but will remain largely confined to rhetoric because the international agreements barring trade barriers. Aggressive use of antitrust to achieve political objectives provides a unique means to circumvent that—Would put the nail in the coffin of the international free trade framework for years!

Murray 19 – Chief Growth Officer, CheckAlt; Judicial Law Clerk, US Bankruptcy Courts

Allison Murray, JD, Loyola Law School, Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?, 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019), Available at: <https://digitalcommons.lmu.edu/ilr/vol42/iss1/3>

The WTO’s warning was intended to raise awareness that the creeping protectionism of the 1930s may be rearing its ugly head yet again, with the intention of preparing world leaders to avoid the pitfalls of such an approach.195 With so many agreements in place that are designed to prevent countries from raising tariff levels and engaging in the policies which plagued the world economy during the Great Depression, it makes sense that individual countries may fall back to antitrust law as a lever to promote protectionist policies.

VI. CONCLUSION

There is a clear “conflict between the evolving economic and technical interdependence of the globe and the continuing compartmentalization of the world political system composed of sovereign states . . . .”196 This conflict can breed protectionist political views. Unless and until there is a complete paradigm shift away from protectionism, which is impossible, the global economy will not meet the “rational” assumptions necessary to preserve free market efficiency.

Some amount of protectionism is inevitable. Although “inefficient” in economic and academic circles, protectionism preserves the sovereign powers enjoyed by certain countries. In this way, it is a necessity of free trade. This paper is not intended to be a commentary on whether protectionism is right or wrong, but rather a demonstration and prediction that antitrust law, a tool of political and economic power, can and will be wielded by individual countries to promote protectionist policies that will affect the international trade landscape in the near term.

While attempting to act on this protectionism is difficult because of the web of international trade agreements currently in existence, individual countries may still use domestic antitrust law to meet protectionist aims, especially given that an international authoritative body governing the use of antitrust does not exist. Countries serious about preserving free trade may cooperate with one another to adopt realistic economic policies that serve to dull the blade of antitrust law through regional agreements, but ought not to attempt to eliminate it altogether.

Antitrust law, like medicine, must be used appropriately to be effective. While antitrust laws generally should encourage free trade, as promoting competition is the aim of their enforcement, they are also at risk of being used to thwart free trade. That risk is further exacerbated by perceptions of unfair enforcement and the divisive rhetoric of world leaders. In this way, antitrust law has the potential to weaken the already delicate international cooperative framework that exists to foster free trade. Absent a change in perceptions and the protectionist rhetoric fueling the current political landscape, antitrust law is likely to be manipulated to serve protectionist viewpoints, making it increasingly likely to become a nail in free trade’s coffin, instead of the key to its preservation. It may be a nail that nations are able to ignore for the sake of its benefit, or it may be the one that finally puts an end to the pursuit of truly international free trade. Only time will tell, but one thing is clear: anti-trust law is a field that will impact the international economic community significantly for years to come.

# 2NC

## Case

### A1

#### The application of our antitrust laws extraterritoriality returns the world to the 1914 style of protectionism that causes war that’s Salbu. Declining trade due to blocking statutes removes the strongest disincentives for war which makes it more likely leaders start new disputes and escalate current ones that’s Palen

#### Trade turns and solves the case---foreign competition is better than antitrust

Anu Bradford 19, Henry L. Moses Professor of Law and International Organization at Columbia Law School, LLM from Harvard Law School, Master of Laws from University of Helsinki, JD from Harvard Law School, and Dr. Adam S. Chilton, University of Chicago, Professor of Law and the Walter Mander Research Scholar at the University of Chicago Law School, MA in Political Science from Yale University, JD and PhD in Political Science from Harvard University, “Trade Openness and Antitrust Law”, Journal of Law & Economics, Volume 62, Number 1, 62 J. Law & Econ. 29, February 2019, Lexis

2.1. Trade and Antitrust Law as Substitutes

Many scholars suggest that trade liberalization may make adopting an anti trust regime unnecessary (Bhagwati 1968; Helpman and Krugman 1989; Blackhurst 1991; Neven and Seabright 1997; Melitz and Ottaviano 2008). According to this view, free trade is an effective way to ensure that markets remain competitive because facilitating entry checks market power (Baumol, Panzar, and Willig 1982). For example, when an economy is open to trade, monopolists refrain from abusing their market power because low external barriers ensure that competitors can enter the market and contest any such abusive practices. In this way, trade liberalization renders an anti trust intervention into monopolistic practices superfluous. Exports fueled by trade liberalization should also enhance market competition. New opportunities in export markets ensure that more firms can reach an efficient scale of production, which further spurs competition and reduces the need for an anti trust regime (Bartók and Miroudot 2008).

Relying on trade liberalization to safeguard market competition could have several advantages. First, foreign producers must incur certain fixed costs and variable trade costs to enter a new market that domestic producers do not incur. If foreign firms are able to enter and effectively compete even after incurring those costs, they are presumably more efficient and hence may act as an even more effective discipline on the market than domestic firms (Bartók and Miroudot 2008). Second, choosing free trade over anti trust regulation eliminates the need to rely on government bureaucracies. Many who remain skeptical of governmental intervention favor free trade and thus prefer to have imports discipline [\*33] anticompetitive behavior. This argument may gain all the more force today considering the complexities associated with antitrust regulators from over 130 countries all applying different rules in an effort to regulate the global marketplace. Finally, although trade openness may "act as an effective antitrust policy" (Pomfret 1992, p. 11), an effective antitrust policy does not act as an effective trade policy. For example, if the United States were to impose a 30 percent tariff on foreign producers today, foreign firms would likely not enter no matter how competitive the markets are behind the border. Domestic antitrust laws thus may do little to facilitate market entry in the presence of highly protectionist trade policy.

#### Stepping up extraterritorial jurisdiction causes China to respond in kind – that means the aff increases anticompetitive Chinese activities and makes conflict more likely.

1AC Zhang 21 – Associate professor at the Faculty of Law at the University of Hong Kong

Angela Huyue Zhang, “Chinese Antitrust Exceptionalism: How The Rise of China Challenges Global Regulation,” Oxford University Press, 2021, https://doi.org/10.1093/oso/9780198826569.001.0001

In this chapter, I have explained one last facet of the Chinese antitrust exceptionalism by showing how the Chinese government has employed the AML as part of its tit-for-tat strategy against aggressive US sanctions. By holding up merger approvals of high-profile transactions involving US companies, and by threatening to penalize firms that boycott or refuse to deal with Chinese technology firms, the Chinese government is wielding the AML to administer targeted retaliation against the United States. With the pending revision of the AML, which will significantly increase the punishment power of the Chinese antitrust authority, the AML will likely play a more prominent role in China’s geopolitical contestation with the United States. However, the Chinese government will find it difficult to overcome the economic constraints it faces in using antitrust law as an instrument of trade policy. China continues to be heavily dependent on US investment not only as a form of capital investment but also as a countervailing political force against aggressive US trade policy. I therefore predict that the AML will at best be used to fight a limited war with the United States rather than being turned into a weapon of mass retaliation.

Prominent scholars of Chinese laws have long debated the Chinese government’s attitude towards the law in general. Some argue that China has retreated from legal reform, while others have stated that Chinese politics has in fact become more legally oriented, and then there are those who have witnessed both trends occurring simultaneously, albeit in different areas of governance.116 Thus far, most of these legal arguments are quite inward-looking, focusing on the incentives of domestic constituents. However, with China’s accelerated integration into the global economy, foreign governments have taken on more prominent roles and are actively shaping the developments of Chinese laws. The invigoration of Chinese antitrust law as a tit-for-tat strategy during the Sino-US tech war thus serves as a good illustration of the effects of foreign influence on Chinese law.

At this point, there is a great deal of uncertainty around how China’s legal strategy will evolve. China’s domestic regulatory moves are profoundly dependent on how the United States chooses to proceed, and the latter’s decision in turn is contingent on what it perceives China’s likely response will be. But one thing is clear: as the United States steps up its efforts to claim exterritorial jurisdiction over Chinese technology firms and executives, China will retaliate in kind by boosting its own extraterritorial regulatory capacity. The two sides are now locked in a dangerous battle of regulatory competition, leaving the occurence of a disastrous outcome to chance.

#### The aff takes antitrust enforcement too far – that makes China more aggressive and drowns out progressive reformists.

1AC Zhang 21 – Associate professor at the Faculty of Law at the University of Hong Kong

Angela Huyue Zhang, “Chinese Antitrust Exceptionalism: How The Rise of China Challenges Global Regulation,” Oxford University Press, 2021, https://doi.org/10.1093/oso/9780198826569.001.0001

For sure, some external pressure on China to reduce state interference in the economy is beneficial. However, there is a danger that the current Western trend of politicizing antitrust enforcement, if carried too far, can evolve into a double-standard used against Chinese firms. The appearance of this hypocrisy would then severely undercut the ability of EU and US enforcers to convince their Chinese counterparts that antitrust analysis should be grounded in legal and economic analysis, free of political considerations. The trend may even backfire if China retaliates against foreign firms.

Such an outcome would be quite ironic. With the SAMR assuming a leadership role over the new antitrust bureau, Chinese antitrust enforcement is expected to become more legalized and professional. Yet as China is moving towards the law, the rest of the world seems to be moving away from it. As the Trump Administration continues to launch aggressive legal assaults on Chinese technology companies, China has fallen back on its vast market access by wielding its antitrust law against US technology giants. The emerging transatlantic consensus against China and the ensuing nationalist fury are drowning the voices of progressive Chinese reformists advocating for a freer and more equitable China. In fact, Western efforts to contain China will have the unintended consequences of regressing Chinese legal reforms to the detriment of foreign firms operating in China.

### A2

#### Turns case – the aff kills international cooperation, which is essential to fighting cartels.

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

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

II. INTERNATIONAL COOPERATION HAS LED TO THE EFFECTIVE PREVENTION, DETECTION, AND PROSECUTION OF CARTELS

While there are a few exceptions,3 major private civil damage cases in the international cartel arena have generally been brought only after the Division has obtained guilty pleas or convictions. The Division's ability to obtain guilty pleas has been aided greatly by cooperation from foreign governments in global investigations. Numerous foreign governments filed amicus briefs in Motorola Mobility urging the Court not to reach a decision that would infringe on their sovereignty and undermine their own enforcement of competition laws. For purposes of prosecuting international cartels, as well as for follow-on civil actions, maintaining international cooperation is essential.

Cooperation among antitrust enforcers takes many forms, some public, some not: coordinated dawn raids, assistance in obtaining foreign-located evidence, sharing leads and other non-confidential information, adoption of Mutual Legal Assistance Treaties (“MLATs”), and reducing safe havens from extradition for those who do fix prices.4 “While challenges remain in the area of international cooperation, cooperation among jurisdictions in anti-cartel enforcement continues to become more robust, sophisticated, and effective.”5

The Division has observed that, with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or adopted a new corporate leniency program. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world, leading to more effective investigation and prosecution of international cartels.6

### A3

#### Stepping up extraterritorial jurisdiction causes China to respond in kind – that means the aff increases anticompetitive Chinese activities and makes conflict more likely.

1AC Zhang 21 – Associate professor at the Faculty of Law at the University of Hong Kong

Angela Huyue Zhang, “Chinese Antitrust Exceptionalism: How The Rise of China Challenges Global Regulation,” Oxford University Press, 2021, https://doi.org/10.1093/oso/9780198826569.001.0001

In this chapter, I have explained one last facet of the Chinese antitrust exceptionalism by showing how the Chinese government has employed the AML as part of its tit-for-tat strategy against aggressive US sanctions. By holding up merger approvals of high-profile transactions involving US companies, and by threatening to penalize firms that boycott or refuse to deal with Chinese technology firms, the Chinese government is wielding the AML to administer targeted retaliation against the United States. With the pending revision of the AML, which will significantly increase the punishment power of the Chinese antitrust authority, the AML will likely play a more prominent role in China’s geopolitical contestation with the United States. However, the Chinese government will find it difficult to overcome the economic constraints it faces in using antitrust law as an instrument of trade policy. China continues to be heavily dependent on US investment not only as a form of capital investment but also as a countervailing political force against aggressive US trade policy. I therefore predict that the AML will at best be used to fight a limited war with the United States rather than being turned into a weapon of mass retaliation.

Prominent scholars of Chinese laws have long debated the Chinese government’s attitude towards the law in general. Some argue that China has retreated from legal reform, while others have stated that Chinese politics has in fact become more legally oriented, and then there are those who have witnessed both trends occurring simultaneously, albeit in different areas of governance.116 Thus far, most of these legal arguments are quite inward-looking, focusing on the incentives of domestic constituents. However, with China’s accelerated integration into the global economy, foreign governments have taken on more prominent roles and are actively shaping the developments of Chinese laws. The invigoration of Chinese antitrust law as a tit-for-tat strategy during the Sino-US tech war thus serves as a good illustration of the effects of foreign influence on Chinese law.

At this point, there is a great deal of uncertainty around how China’s legal strategy will evolve. China’s domestic regulatory moves are profoundly dependent on how the United States chooses to proceed, and the latter’s decision in turn is contingent on what it perceives China’s likely response will be. But one thing is clear: as the United States steps up its efforts to claim exterritorial jurisdiction over Chinese technology firms and executives, China will retaliate in kind by boosting its own extraterritorial regulatory capacity. The two sides are now locked in a dangerous battle of regulatory competition, leaving the occurence of a disastrous outcome to chance.

**No U.S. modelling---inaction on Big Tech thumps, and the E.U. is the global leader.**

**Alden 21**, "The new US antitrust administration," Concurrences, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

8. **The United States has been AWOL from the antitrust world**. Once the leader, it has donned a see-no-power mantle. US antitrust has lost resonance in the world. The European Union has taken up the slack. It has asserted leadership, launching, for example, international conversations on how to control the power of Big Tech. The US should come to the table. Competition rules for Big Tech platforms are under the consideration of Europe’s Directorate-General for Competition (and other agencies as well). Europe’s Competition Commissioner Vestager has invited the US to help formulate an “EU-US ‘common vision’ on platform competition policy,” [113] a view subsequently formalized in an announcement that that “the EU will propose a new transatlantic dialogue on the responsibility of online platforms, which would set the blueprint for other democracies facing the same challenges.” [114]

**Meta-studies prove no trade impact**

**Schwartz and Davis 16**

Christopher Schwartz and Nicholas R. Davis. Davis holds a PhD in Political Science and is a visiting instructor at Marquette University. Schwartz is a Scientist at the University of Wisconsin, Madison. “Decisions, Decisions: Re-examining the Trade-Conflict,” Prepared for the Annual Meeting of the International Studies Association in Atlanta, March 16th– 19th 2016. Panel TB20: The Initiation, Dynamics, and Termination of International Conflict. March 17, 2016. http://democracyobserver.org/papers/schwarz\_davis\_ISA2016.pdf

Results

The results of our 48 logistic regression iterations appear in the appendix. Due to space concerns and readability, we have outlined our findings in Table 2 below. We enter the logistic regression model results in the table as their temporal domain restriction and trade measure, located under the column that corresponds to spatial dimension choice and row that corresponds to the outcome of interest. Overall, the posterior distribution of results is rather **shocking** given that our prior expectations almost uniformly supported the OR (liberal) position. In twelve of our fourteen hypotheses we expected a confirmation of the liberal position that trade reduces conflict. All but one (H12) of **our fourteen hypotheses fail to find supporting evidence**. In all models, we resisted the practice in the literature to use robust standard errors, which **should** bias our results towards the liberals,9 **yet still found no support for the pacifying effect of trade on conflict**. We have demarcated the results which had the hypothesized sign but failed to gain statistical significance at p < 0.05.

Our findings can be discussed in terms of our three types of hypotheses. First, the general hypothesis H1 and the the unidimensional design choice hypotheses (H2, H3, and H4) were the a priori most likely to find support. Since **we have no findings that support the liberal position in any results**, H1 is not supported. Neither is H2, which examines the pre-World War II temporal constraint, nor H3 that represents the broad spatial domain. H4 examines the role of the liberal trade measure, dependence, also with a null finding.

The second group of hypotheses involve bi-dimensional choices. These introduce spatial differences while holding temporal domain constant (H5 and H6) and then explore spatial differences and trade measure differences without specifying temporal domain. As stated above, none are supported. Perhaps the most interesting finding here is that for H7 there was a prior expectation of an equal probability of pacifying and null outcomes. While this is not born out by the results (again, no liberal outcomes supported) the posterior probability of the classical realist position is quite a bit higher than the prior. H9 and H10 explore choices in temporal constraint and measure choice while allowing the spatial dimension to vary. The results for the test of H10, located in Table 6 (model 8) come the closest to a finding supporting the liberal position, but at a lower level of statistical significance.

The third and final group of hypotheses explores how tri-dimensional choices affect outcomes. Again, the prior expectation of support for the liberal position is not realized. These hypotheses (H11, H12, H13, and H14) all select on the spatial, temporal, and measurement dimensions. H12 is the only hypothesis that is supported, as our prior expectation of null findings across each of the trade measures in the post-World War II politically relevant dyad sample is born out in the model results, located in Table 6 models 5 through 8. Notably, the replication of the OR design (H14) has no support. Interestingly, the neoMarxist position finds limited support (not hypothesized) in samples without temporal or spatial constraints for two of the non-OR trade measures, share and flow.

Discussion

Despite trade being recognized as an important factor in the contemporary study of interstate conflict, there is still a debate over whether economic interdependence pacifies, aggravates, or has no effect on interstate relations. Contemporary scholarship has suffered from a **persistent lack of consensus** in the literature, despite the debate evolving to revolve around how the decisions researchers make affect their results. Even as the literature acknowledges that design choices matter, researchers continue to make heterogeneous choices without clearly stated expectations as to how these choices have constrained their findings. We sought to empirically asses the way authors analyze different groups of states, different time periods, and different measures as they seek to contribute to the overall dialogue on trade and conflict. Rather than approach this literature with a normative bias, we reviewed the major contributions to the literature over the past **two decades** and began our analysis with a prior expectation that the liberal position would be the most likely outcome supported despite manipulation of design choices. The results presented above reveal that the posterior distribution of results **almost entirely lies within the classical realist position** (null effect).

As noted by Reuveny, Pollins, and Keshk (2010), the weight of evidence in favor of the liberal commercial peace uses similar statistical models, indicators, and data. As stated above, a number of findings in the literature which are frequently cited as support for the liberal perspective (primarily early OR studies) make research design decisions that that appear **not** to be **advisable**. Our prior beliefs have now been updated regarding the validity of their research designs, and **their findings surrounding the liberal capitalist peace are overstated.** The role of spatial and temporal choices particularly condition results. We hope to eventually identify the temporal or spatial conditions under which the liberal position is supported, but in light of our systematic analysis, including good-faith efforts to replicate typical OR design choices, we can say with a degree of confidence those conditions have not been obtained.

### Solvency

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

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

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

A NOT SO BRILLIANT FUTURE OF INTERNATIONAL CARTELS?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The need for more resources

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

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

#### Alt solves best---it’s key to sustained econ growth and reversal of monopolistic trends.

**Vaheesan 20** – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law,” UC Davis Journal of Law and Political Economy, 2020, https://escholarship.org/content/qt8cj0z1tq/qt8cj0z1tq.pdf

An antitrust policy that seeks to promote a more equitable distribution of power and wealth would have radically different foundations. Replacing the consumer welfare objective with the economic and political objectives that animated the Congresses that enacted the Sherman, Clayton, and Federal Trade Commission Acts is a critical step. Consumer welfare captures a relatively thin slice of corporate power. Equally important is rewriting the rules of antitrust to both curtail the consolidation and monopolization of business property and permit certain forms of coordination between independent actors.

Restrictions on mergers should be a core part of a progressive antitrust. Merger policy should be greatly strengthened for narrow consumer welfare grounds alone. Mergers and acquisitions fail to produce the promised efficiencies and often lead to higher prices and profit margins. But more importantly, mergers combine business assets and centralize power. Larger businesses, whether measured by market share or size, wield greater power over consumers, suppliers, workers, and citizens. A strong anti-consolidation norm should be a mainstay of progressive antitrust, as it was from 1950 through the early 1980s.20

An anti-merger norm would not be a categorical ban on business growth but would instead encourage growth through other means. The Clayton Act’s anti-merger provisions restrict corporate growth through mergers, not corporate growth in general (Peritz 1996). It channels growth strategy away from buying rivals, suppliers, and distributors toward investment in new facilities and technologies. An implicit presumption of an anti-merger statute is that corporations will grow through internal expansion. Philadelphia National Bank, 473 U.S. at 370. Even accepting the unsupported theory that corporate consolidation yields more efficient enterprises, a strong anti-merger rule is not a recipe for stunted firms and a loss of productive efficiencies. Indeed, it could be the basis for a far more productive and technologically dynamic corporate sector.21

Along with hostility toward corporate consolidation, antitrust law and policy should adopt a more nuanced view of collusion among independent actors. As a threshold matter, recognizing that antitrust law permits certain forms of coordinated activity, including mergers and acquisitions, is critical. As Sanjukta Paul has written, antitrust allows business firms to coordinate the activity of their employees, including across separate corporate entities under common ownership (Paul 2020). For instance, if antitrust law categorically promoted competition, it would prohibit two divisions of a single corporation or two members of a joint venture from setting prices—but the Supreme Court has clearly rejected such rules and treated these arrangements as the action of a single entity (Paul 2020). See Copperweld, 467 U.S. at 771; Dagher, 547 U.S. at 6. Instead it singles out price-setting among independent actors. The ban on collusion means small players are robbed of the one mechanism that allows them to govern markets while maintaining their independence (Paul 2020).

The tolerance of certain forms of collusion (or cooperation) is already built into the body of antitrust law. For instance, the courts have interpreted the Clayton Act, Norris-La Guardia Act, and National Labor Relations Act as permitting employees (though not other workers) to engage in some forms of coordinated activity. Apex Hosiery Co. v. Leader, 310 U.S. 469, 512 (1940). In agriculture, the Capper- Volstead Act, 7 U.S.C. § 291, allows “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers” to undertake collective action as sellers without running afoul of antitrust law.

Instead of viewing these legislative exemptions as ad hoc “concessions” to certain groups, progressive antitrust advocates, enforcers, and scholars should treat them as a core part of an anti-monopoly program. Congress enacted the antitrust laws to constrain the power of monopolists and trusts, not to promote “competition”—even a socially destructive competition that further weakens the positions of workers and small firms—indiscriminately across the economy (Vaheesan 2019). Accordingly, a progressive antitrust should be built on constraining the autonomy of powerful corporations and protecting the freedom of workers, professionals, and small firms to join in solidarity. To put it in concrete terms, medium-sized and large corporations would face tight restrictions on acquiring rivals and controlling markets, whereas workers, professionals, and small firms would have the freedom to organize and engage in collective action against more powerful actors (Vaheesan and Schneider 2019).22 (Importantly, small-player coordination should not be carte blanche for all forms of cooperation: for example, small firms should not be permitted to collude against their workers and keep their wages down.)23 Such an antitrust regime would redistribute and democratize power downward (Paul and Vaheesan 2019) and even lay the groundwork for a radical transformation of corporations and the entire American economy (Schneider and Vaheesan 2019).

#### Neolib leads to bad trade policies – state must intervene

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

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

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

Third, policymakers must move beyond the received wisdom that every trade deal is a good trade deal and that more trade is always the answer. The details matter. Whatever one thinks of the TPP, the national security community backed it unquestioningly without probing its actual contents. U.S. trade policy has suffered too many mistakes over the years to accept pro-deal arguments at face value.

The Nobel laureate and economist Paul Krugman has recently issued something of a mea culpa on this issue, noting that he “missed a crucial part of the story” when it came to the impact of China’s entry into the World Trade Organization on communities in the United States. He was partly responding to work by David Autor, David Dorn, and Gordon Hanson, which documented a dramatic loss of U.S. jobs to China—an outcome that had been dismissed by traditional economists during the debates in the late 1990s.

New thinkers are also looking beyond individual agreements to challenge some of the basic premises of trade theory as applied to today’s economy. For example, the idea that trade will necessarily make both parties better off so long as any losers could in principle be compensated is coming under well-deserved pressure within the field of economics. This is especially true given the United States’ terrible track record of harnessing those gains by collecting corporate taxes in the first place, let alone distributing them broadly.

A better approach to trade, then, should involve more aggressively targeting the tax havens and loopholes that undermine many of the theoretical gains from trade. It should also involve a laser focus on what improves wages and creates high-paying jobs in the United States, rather than making the world safe for corporate investment. (Why, for example, should it be a U.S. negotiating priority to open China’s financial system for Goldman Sachs?) And it should connect foreign trade policy to domestic investments in workers and communities so that trade adjustment is not a hollow promise.

Done well, a different course should yield strategic as well as economic dividends. To take just one example, provisions against currency manipulation—absent in TPP—would not only help the American middle class but also the United States’ strategic position by constraining China’s capacity to fund efforts like its Belt and Road Initiative (BRI), a connected set of infrastructure projects designed to enhance Chinese power across multiple continents. (China has funded much of the BRI through its stockpile of foreign exchange reserves—a stockpile it amassed through years of intervening heavily in foreign exchange markets to depress the value of its currency in order to make its exports more competitive.)

#### Neoliberal antitrust is net worse for promoting competition---it discourages horizontal coordination and strengthens big business at the expense of smaller competitors.

**Paul 20** – Assistant Professor of Law, Wayne State University

Sanjukta Paul, “Antitrust as Allocator of Coordination Rights,” UCLA Law Review, 2020, https://www.uclalawreview.org/antitrust-as-allocator-of-coordination-rights-2/

A. Horizontal and Vertical Interfirm Coordination

Horizontal coordination beyond firm boundaries—including between individuals—has become increasingly disfavored in antitrust law over time, while vertical interfirm coordination has come increasingly into favor. Together, these tendencies represent the same preference for control over dispersed coordination that is embodied in the firm exemption itself. Moreover, the disfavor of horizontal interfirm coordination adds to the significance of the firm exemption by allocating certain coordination rights uniquely to firms.

I do not claim that a single school or influence within antitrust law is, by itself, responsible for this overall allocation of coordination rights: the legs of the stool have been built with a variety of materials over an extended time. Yet the Chicago School revolution in antitrust analysis has played an important role in creating or intensifying several aspects of antitrust’s current approach to allocating coordination rights, and some background on its influence is therefore warranted.

The Chicago School influence helped to construct antitrust’s attitude to both horizontal and vertical interfirm coordination in a few ways. First, it intentionally cleared away specific normative benchmarks in older antitrust analysis—notably, conceptions of fair business conduct, the flourishing of small enterprise, and attention to the influence of disparities in economic power upon the polity—that would have provided counterweights to other legal criteria. Second, the Chicago School elevated and intensified the focus upon the ideal competitive order as the unitary normative framework for antitrust analysis; that framework implies that horizontal interfirm coordination has inherently distorting effects. Third, the Chicago School specifically argued for relaxing antitrust scrutiny of vertical interfirm coordination.

1. Clearing Away Older Normative Benchmarks

An original goal of federal antimonopoly legislation was to promote fair competition and business practices, and to furnish a check on emerging consolidations of economic power in both inter-and intra firm arrangements.9 As the pre–New Deal judiciary increasingly used the Sherman Act instead to aid firms in consolidating their power over workers,10 while doing little to check corporate consolidation itself,11 Congress ultimately responded, in part, by again reaffirming its express commitment to fairness as a goal of antitrust policy in passing the Federal Trade Commission Act.12 As modern antitrust enforcement then took off in the latter part of the New Deal era, this antitrust commitment to fairness went hand in hand with the well-documented purpose of dispersing economic power, including the flourishing of small enterprise.13 Antitrust analysis in the New Deal and midcentury period considered ideas of fairness overtly.14

Indeed, in their foundational 1956 article, key Chicago School thinkers Aaron Director and Edward Levi described antitrust, as they found it, as having to do as much with the “laws of fair conduct” as with the narrower economic theory they thought ought to displace them: “[T]here is uncertainty whether the dominant theme of the antitrust laws is to be the evolution of laws of fair conduct, which may have nothing whatever to do with economics, or the evolution of minimal rules protecting competition or prohibiting monopoly or monopolizing inaneconomicsense.”15 The acknowledgment is not able because their goal was to establish precedent for their reform project in existing law, while conceding “the [existing] law’s skepticism for economists and economics.”16

To discredit substantive normative benchmarks such as fairness, dispersal of power, and a commitment to small enterprise, Chicago School antitrust also helped to shift antitrust’s very idea of competition—from a dynamic social and economic process of business rivalry17 to the ideal state contemplated by neoclassical economic theory. The Chicago School Antitrust Project, as it was known, built upon an earlier, conscious decision by its founding members to substitute this idealized competitive order for the classical laissez-faire framework, associated with the Lochner era federal judiciary, in order to advance the same, fundamentally hierarchical political and economic order.18 It then applied that conceptual framework to antitrust law. Thereafter, as one commentator put it, “[l]awyers for corporate interests and industrial organization economists of the Chicago School mounted an organized effort that succeeded in persuading the federal courts to adopt a far narrower view of antitrust that has as its single objective the avoidance of economically inefficient transactions, referred to by economists as ‘allocative efficiency.’”19 Fairness has no role in this conceptual framework.

As a logical matter, these earlier normative benchmarks—fairness, dispersal of power, flourishing of small enterprise—would pose a challenge to the allocation of coordination rights that antitrust later erected. Most obviously, the concern for the existence and flourishing of small enterprise supports the inclusion of many more persons in the privilege and the responsibility of economic coordination. It also itself furnishes an argument in favor of reasonable horizontal coordination beyond firm boundaries, insofar as such coordination contributes to the survival and flourishing of small enterprise.20 The well-established antitrust concern with fairness, also, grounds an argument in favor of a more equitable allocation of coordination rights. Thus, removing these normative benchmarks from antitrust analysis undermined any existing tendencies to allocate coordinate rights in a way that balances power.

2. The Norm Against Horizontal Interfirm Coordination

Both the shift in the concept of competition itself, and the clearing of normative benchmarks other than the ideal competitive order, strengthened the antitrust norm against horizontal coordination beyond firm boundaries. Although the conception of competition as a dynamic, instantiated social process has room for reasonable coordination, the conception of competition as an ideal state—a competitive market—has no space for coordination between separate actors in the same market. Both by entrenching the conception of competition as an ideal state and by working to clear other normative benchmarks for antitrust analysis, Chicago School antitrust thus strengthened the norm against horizontal coordination beyond firm boundaries. Besides the transformation that took place inside the confines of antitrust doctrine itself, many elements of the New Deal order more broadly had an enduringly strong pro-coordination bent, even if overt public price coordination did not survive the first phase of the New Deal as uniform national policy.21 These elements too were similarly attacked and undermined by other arms of Chicago School policy thinking.

# K

### T \*\*read analytics

#### 4---This is the core question of antitrust---means our interpretation is totally predictable and most portable.

**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.

### K Proper

[insert top level explanation]

### 2NC---AT: Perm---T/L

#### a---It severs their justifications which are incompatible with the alt---if we win framework, then they need to defend those---severance is a voting issue because it lets the aff moot negative strategy, making it impossible to negate.

#### b---Doesn’t solve the links, which demonstrate that the aff is actively investing in anti-domination---that’s incompatible with the alt.

#### c---The only net benefit to the perm is their arguments about markets being good, which we’re impact turning---that means they have no offense if we win the impact debate.

#### d---The perm fails---the aff’s understanding of antitrust serves to disseminate myths that reify the hold of corporations, foreclosing effective implementation of the alt.

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

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

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

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

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

### Alt solves

#### Neoliberalism is unsustainable---democratic collapse, mass deregulation, and ineffective climate response make it inevitable.

#### A number of other warrants---the alt’s transition solves.

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

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

Even before the COVID-19 pandemic hit in 2020, capitalism was stuck. It had – and has – no answers to a host of problems, perhaps most crucially the environmental crisis. From global heating to biodiversity loss, human activity is eroding the conditions necessary for social and environmental stability.1 Under current mitigation policy commitments, global surface temperatures are on track to increase by over 3°C relative to pre-industrial times – a magnitude that is widely accepted to have catastrophic outcomes.2 Species extinction has increased 100 to 1,000 times the background extinction rate, leading some scientists to announce that we are witnessing the sixth mass-extinction event.3

Rather than having a sustainable growth path, capitalism has built economies that inflated speculative bubbles, enriched the already immensely wealthy 1 per cent and were destroying the planet. In many Western and Western- style capitalist economies, real earnings for all but a few have barely risen in more than a decade – in some cases, such as the USA, in several decades – exacerbating inequalities between groups and regions despite high levels of employment.4 The dynamics of inequality explain why the profits-to-wages ratio has reached record highs. Between 1995 and 2013, real median wages in Organization for Economic Co-operation and Development (OECD) countries grew at an annual average rate of 0.8 per cent versus 1.5 per cent growth in labour productivity.5 In the period 1979–2018, real wages for the 50th and 10th percentiles of the wage distribution stagnated: there was 6.1 per cent cumulative real wage change over the whole period for the 50th percentile, 1.6 per cent for 10th percentile – versus 37.6 per cent for 90th percentile. In rich countries, private wealth-to-income ratios increased from 200–300 per cent in 1970 to 400–600 per cent in 2010.6

These economies were also, after 2008, hooked on the drug of quantitative easing – central banks injecting massive amounts of liquidity into the system – although economic growth and productivity improvement remained weak.7 Personal debt was back to levels last seen in the early years of this century. By 2018, private debt to GDP reached 150 per cent in the USA, 170 per cent in the UK, 200 per cent in France and 207 per cent in China – all substantially higher than levels at the turn of the century.8

And much of business has been plagued by a dangerous combination of low investment, short-term management and high rewards to shareholders and company bosses.9 In advanced economies, business investment has barely recovered to 2008 levels.10 In the UK in the 1980s, typical CEO pay was twenty times higher than that of the average worker. By 2016, the average FTSE 100 CEO’s pay was 129 times greater than that of the average employee.11 Since 1980, UK dividend pay-out ratios have remained constant, irrespective of profitability. Share buybacks have increased in importance, consistently exceeding UK share issuance over the past decade. In the USA, total pay-outs to shareholders have come to almost $1 trillion, equalling pre- crisis peaks, increasing from around 10 per cent of internal cash flow in the 1970s to 60 per cent by 2015.12

And difficulties are also being experienced in authoritarian, state-capitalist societies. Today, China, the leading authoritarian economy, remains weighed down by inefficient and heavily indebted state industries, a banking system with huge ‘zombie’ loans, an ageing population, and the massive task of shifting the economy away from excessive export dependency and towards greater domestic consumption. To be fair, it is making progress, and has real ambition about greening its economy, with over $1.7 trillion being invested as part of its five-year plan. But a central planning model is not likely to be one that will be able to take on the bold reforms to public and private collaboration that this book envisages.

The COVID-19 crisis also revealed just how fragile capitalism really is. People working in the gig economy have no security. High levels of corporate debt – partly taken on to pay dividends, buy back companies’ own shares and indirectly boost senior executive pay – have left many companies with little to fall back on. Their strategy of relying on attenuated global supply chains to cut costs and reduce the bargaining power of their on-site workers proved to be an Achilles heel when the pandemic disrupted production globally and created fierce competition for even basic items, such as face masks. Some governments, particularly those of the UK and the USA, had outsourced so much of their capacity to the private sector and consultancies that they were not able to manage the crisis properly. This led to deadly blunders, as governments faced shortages in basic PPE and failed to set up enough testing for their populations.13 The ultimate irony was that governments long wedded to austerity abruptly switched their affections to public spending, borrowing and creating deficits on a scale that would earlier have caused ideological apoplexy, as they struggled to do ‘whatever it takes’ to keep their national economies alive. Hammered under the twin blows of a collapse in output and a collapse in demand – largely induced by the government to suppress the virus – the Thatcher–Reagan model of the economy and society has broken down, and the global economy is wrestling with an historically severe depression.

A sluggish global economy, which spells particular disaster for developing countries and the less well-off in developed countries, has exacerbated social and political tensions that have been intensifying for decades. For far too many people, life feels precarious, either because they are in debt or their savings at most cover one month of rent.14 Even in the USA, the world’s biggest economy, whose working class was once a byword for prosperity, a report found that nearly three in ten adults would need to borrow money or sell something to cover a $400 unexpected expense.15

The balance of power has shifted away from workers and towards employers – for example, the relationship between an Uber driver and Uber as a multinational corporation is deliberately designed to shift risk from company to worker – and this, along with other cost-cutting practices that have reduced labour’s negotiating power, is one of the reasons why the ratio of profits to wages has reached a record high in the last decade.16 Others live hand to mouth on zero- hour contracts. Even when they have regular work, many people still depend on welfare to make ends meet.17 Yet it is the low-paid and disregarded workers – garbage collectors, postal staff, hospital cleaners, care workers, bus drivers – upon whom society came to depend most during the COVID-19 crisis, not corporate bosses, financiers and residents of tax havens.

Long-standing political rifts have grown wider: between nationalism and internationalism, democracy and autocracy, efficient and inefficient governments. A deep sense of injustice, powerlessness and distrust of elites – especially business and political elites – has eroded faith in democratic institutions. The global, multilateral system painfully constructed after World War Two and the broadly liberal, open values it embodies are under unprecedented strain. National salvation has trumped international co-operation, much to the delight of ‘strongmen’, demagogues and authoritarian regimes who can ride a tide of populism and exploit a climate of fear. To add to all of this, governments have continued to procrastinate in properly tackling the climate emergency. We can do better. But to do better, we need to fully understand how we got into the mess we are in.

To grasp the true scale of this challenge, it is important to understand that the issues described above are the consequences of deeper forces that together have led to a dysfunctional form of capitalism. There are (at least) four key sources of the problem: (1) the short-termism of the financial sector, (2) the financialization of business, (3) the climate emergency, and (4) slow or absent governments. In each, the way that organizations are structured and how they relate to each other are part of the problem. Their restructuring must, therefore, be part of the solution.

#### It’s collapsing on an international scale---recessions, declining hegemony, and the rise of authoritarianism prove.

**Maskovsky and Bjork-James 20** – Urban Studies and Anthropology, CUNY-Queens College, New York, USA [1]

Assistant professor in the anthropology department at Vanderbilt University in Nashville, Tennessee [2]

Jeff Maskovsky and Sophie Bjork-James, “Beyond Populism: Angry Politics and the Twilight of Neoliberalism,” West Virginia University Press, 2020, https://www.gc.cuny.edu/CUNY\_GC/media/CUNY-Graduate-Center/Images/Programs/Anthropology/Faculty/beyond-populism-intro-by-maskovsky-and-bjork-james.pdf

The Twilight of Neoliberalism

The collapse of the global financial sector in 2007–8 is one of many signs of strain in a global neoliberal order that has sought, since the 1980s, to tie US-led globalism with a revived form of nineteenth-century liberalism. In truth, the form of capitalist political economy since the 1980s that is frequently glossed as neoliberal globalization has never been fully secure, just like the Keynesian order before it (Harvey 2007, 2018). It nonetheless succeeded on many fronts: anointing a new group of transnational elites, restoring profitability and growth in the metropolitan centers of global capitalism after they had declined in the 1960s and 1970s, enabling the rise of China, India, and Brazil as economic powerhouses, and facilitating the emergence and expansion of the entrepreneurial middle classes in parts of Latin America, the Caribbean, Africa, Asia, and in some of the countries in the former Soviet orbit. Yet neo- liberal policies and projects also introduced greater competition, financialized volatility, and economic polarization, poverty, and precarity. For example, the introduction of billions of new workers into the global capitalist system devalued labor on a global scale, producing new patterns of class division, uneven development, and dispossession (Kalb and Halmai 2011). Far from a laissez- faire system, governments—especially central banks—have had to intervene repeatedly to stabilize an increasingly volatile economy. Indeed, long before the 2008 financial meltdown, neoliberal globalization was plagued by recurrent crises, from the US savings and loan disaster of the 1980s and the collapse in the late 1990s of the technology boom, to the 1997 Asian financial crisis. In these moments of crisis, and beyond them, economic policy makers seldom asked for, or were given, popular support or approval for the technocratic re- forms they proposed and implemented. The liberal democratic ideals that are at the ideological core of neoliberalism were thus chronically under strain, and a long-term crisis in political authority and legitimacy was, in fact, endemic to neoliberal globalization from the start.

The twenty-first-century rise of authoritarian regimes is not merely an expression of neoliberalism’s core political contradiction, however. A variety of contingencies have reshaped global, regional, and national politics in the post–Cold War period. The United States attempted to position itself in the aftermath of the Cold War as the unrivaled global hegemon with neoliberalism as the core ideology of its global ambitions. Yet it failed to consolidate global power on precisely these terms in the wake of 9/11. Indeed, the Bush- era war on terror, far from helping to consolidate a new global order, failed at every level, including militarily. What was supposed to mark a new phase of privatist, free market globalism cum US-styled democracy (which is what the neocons envisioned for both Afghanistan and Iraq) marked instead the beginning of the end of global American imperialism (Smith 2005). Russian interventions in the Middle East and elsewhere further offered up an alternative to US geopolitical power and demonstrated the United States’ declining influence. And China’s ascent onto the global stage occurred with- out the democratizing political reforms that pundits in the West predicted for decades as the inevitable consequence of its integration into the global capitalist system (Mann 2008). In parts of the Global South, during the same period, popular mobilizations surfaced against the erosion of the economic and social benefits previously available to the popular classes during the period of state-led development (Almeida 2007; Brenner et al. 2010). Although these mobilizations exposed the limitations of the neoliberal development model and its attendant pattern of inequality, the leaders who rode the wave of these protests into political office had to rely mostly on China and the Global North for investments, rarely broke with global trade accords, and faced considerable obstacles in the crafting of heterodox development mod- els as a result.

With US-led globalism in decline, liberalism itself, and neoliberalism in particular, have weakened in several senses. The neoliberal orthodoxies of unfettered international competition, flexible and deregulated labor markets, and the noninterventionist state, for example, no longer hold sway even if the global economy continues to be organized with a neoliberal architecture. At the level of policy and ideology, neoliberalism has become a form of zombie economics, a set of dead ideas and policies that walk the earth in search of vulnerable people to feed on (Peck 2010; Quiggin 2012). Further, democracy itself is no longer seen as vital to economic growth and prosperity. Indeed, for many, the very idea of a global order organized around human rights and liberal democratic principles is no longer as compelling as it once was, as issues of safety, security, and stability take popular priority over the liberal freedoms that were traditionally valued or aspired to. This is not to say that the ideals and rationalities associated with liberalism, neoliberal or otherwise, were unproblematic. The actually existing liberal order has left a great deal to be desired and was built on systems of colonialism, slavery, exploitation, oppression, war, and violence at a scale that had never been seen in human history. But, as Don Robotham argues in his essay in this volume, the liberal movement also served productively as a counterpoint to more radical experiments in economy, democracy, and inclusion, which now must find different footing in a world where liberalism is no longer taken for granted (cf., Chatterjee 2016). In short, the ideological and political terms of popular struggle and sovereignty have changed dramatically since the Cold War ended, first with the demise of the Soviet model and now apparently with the demise, or at least the dramatic weakening, of the liberal model that was expected to ascend unrivaled after its collapse. Taken together, these developments are suggestive that faith in the idea of representative democracy and cosmopolitan liberalism as the longstanding political and governmental correlates of capitalism itself has been severely undermined.

It is no surprise, in this situation, that the forces of reaction and authoritarianism have grown steadily, frequently in the form of angry politics on the right. The political elite in the United States, for example, lost legitimacy in the aftermath of the 2008 financial collapse, when both neoliberals and neoconservatives alike offered adequate bailouts only to the banks, not to the millions of people who faced home ownership foreclosure, mortgage default, job loss, and social precarity. Donald Trump exploited this legitimacy crisis to make his political ascent. The imposition of austerity worked similarly in Europe, at both its core and edges, where frustration with technomanagerial rule became linked in some political quarters to longstanding skepticism about the European Union and about its stance on open borders and migration. Right-wing populist parties gained electoral ground in Italy, the Netherlands, France, Germany, Hungary, Finland, Bulgaria, and elsewhere. In contrast, Latin America returned to some extent to the neoliberal fold as the antineoliberal “pink tide” receded in the late 2000s. Across the region, the limitations of neoextractivist growth models, or, in Brazil, the “Lula model,” hamstrung le@-leaning governments, which backtracked on their redistributive promises. This created new tensions between leaders and the social movements that brought them to power, and several governments have taken unexpected authoritarian turns, as in Venezuela, as a means to “protect” the Bolivarian revolution against incursions from the right. In Brazil, a coup toppled the le@-leaning president and a far-right populist won the presidency. Meanwhile, in the former Soviet sphere, authoritarian regimes have gained broad popular support as people express their disappointments with the politicians who steered the postsocialist transition and who championed European market integration schemes that weakened worker protections. In Turkey, the Philippines, and India, political entrepreneurs stoke nationalist sentiments to encourage popular outrage at “outsider” privileges, meddling, and control. Meanwhile, since 2017, eleven African countries have experienced coups, popular uprisings, or other forms of nonelectoral political change to oust longstanding dictators, although several have been replaced with equally authoritarian leadership.

### AT Perm

#### Status quo antitrust policy is riddled with a number of paradoxes that make its effective operation impossible.

**Stucke 12** – Associate Professor, University of Tennessee College of Law; Senior Fellow, American Antitrust Institute.

Maurice E. Stucke, “OCCUPY WALL STREET AND ANTITRUST,” Legal Studies Research Paper Series, March 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2002234

IV. CURRENT ANTITRUST PARADOXES

Antitrust policy currently suffers several paradoxes. One paradox is that despite the quest for a single economic goal, U.S. antitrust policy today lacks any clear unifying goal. Competition officials can agree that prohibiting certain egregiously anticompetitive behavior (such as price- fixing) promotes their goal (whether it is consumer welfare, efficiency, or economic freedom). But these restraints were condemned when antitrust recognized multiple social, political, and economic goals.

A second paradox is that the Supreme Court of late has complained about the state of antitrust litigation (for example, the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by lower courts), but the Court itself has created this predicament.108 Over the past thirty years, the Court increasingly relied on its fact-specific weighing standard, the rule of reason, and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation, and often pointed to no particular course of action.

A third paradox is, as Eleanor Fox describes, the efficiency paradox: "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency.',109 While recognizing dynamic competition as more important, antitrust agencies and courts have "tended to avoid dynamic efficiency analysis," focusing instead on a static price competition and productive efficiencies.11° Courts and antitrust agencies applied a light touch to merger review under a fear of false positives and a belief that most mergers promote efficiencies, even though the empirical literature suggests the contrary.' While recognizing an efficiencies defense, antitrust enforcers and courts did not account for postmerger inefficiencies or the competitive distortions in creating TBTF firms.112

A fourth paradox is the economic power paradox. Our constitutional framework seeks to distribute power, rather than promote its concentration. Despite the historical concerns about concentrated economic power, antitrust enforcers and courts over the past thirty years "no longer concern[ed] themselves with preventing bigness, and indeed tend[ed] instead to encourage large-scale enterprise for efficiency's sake."113 While we saw in nature the benefits of diversity,114 we disregarded in one of our more important industries, the financial services markets, the dangers of concentration and systemic risk.115 Despite the public and governmental concern about protecting small businesses from unfair competitive tactics, and the importance of small companies in promoting dynamic efficiencies, the Verizon Communications Inc. v. Law Offices of Cutis V. Trinko, Court praised monopolies. A fifth paradox is that while trust, fairness, and prosocial behavior are vital to the functioning of a market economy,117 antitrust policy ignores these values and views market participants as amoral self-interested profit-maximizers.' 8 A sixth antitrust paradox, observed Jesse Markham, is that the government's "laissez-faire policies" over the past thirty years "led to unprecedented government intervention in the private sector."119

V. CONCLUSION

The concerns in Sandard Oil resonate today. One would expect Occupy Wall Street protesters to question current antitrust policies. But antitrust's relevancy has declined since the 1970s. As one example, antitrust, other than a savings clause,120 is absent in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which ostensibly seeks to promote financial stability by improving accountability and transparency in the financial system, to end "too big to fail," to protect the American taxpayer by ending bailouts, and to protect consumers from abusive financial services practices. The vested interests have little incentive to change the status quo. As Frieden described of the plantation societies in Latin America and the American South, their governments "were rarely willing or able to encourage the socioeconomic development of infrastructure, finance, and education—needed to allow the productive forces of the society as a whole to be brought to bear."121

#### The current neoliberal antitrust paradigm is flawed---it misunderstands how monopolies exert their power and allows them to increase their control.

**Purdy et al. 20** – William S. Beinecke Professor of Law at Columbia Law School [1]

Professor of Law at Berkeley Law School [2], Professor of Law at Yale Law School [3], Associate Professor of Law at Brooklyn Law School [4]

JEDEDIAH BRITTON-PURDY, DAVID SINGH GREWAL, AMY KAPCZYNSKI & K. SABEEL RAHMAN, “Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis,” The Yale Law Journal, 2020, https://mronline.org/wp-content/uploads/2020/06/Britton-Purdyetal.Feature\_iwo42jj4.pdf

Antitrust law, our first example, was remade to address a drastically narrowed conception of the problem of monopoly.60 Market power was to be disciplined only when it interfered with consumer welfare, and sometimes, still more narrowly, only when it increased prices.61 Historically, antitrust law and scholar- ship took a broader view: it emerged from a concern about the power of large corporate entities to influence politics and not just prices, and imposed structural limits and bright-line rules to guard against an array of possible political-eco- nomic implications of firm dominance.62 Replacing this political-economic version of antitrust, the field came to target a much narrower conception of market collusion. The result is a regime that privileges firms as favored instances of (vertical) coordination but repudiates certain forms of (horizontal) coordination among market participants and certain workers (such as independent contractors).63 In the name of supposed efficiency, antitrust now blesses mergers and big firms but restrains cooperation among Uber drivers and church organists.64 This remade antitrust law has in turn helped to remake the corporate world, facilitating the substantial new forms of market concentration and priority for capital over labor that we previewed above.

### AT climate

#### Strong administrative state key to solvf climate change.

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

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

Greening the economy demands and deserves nothing less than a moonshot worthy of the mission. It is not a question of picking a series of outcomes that are only worthwhile for some market participants and disadvantage others. Solving climate change must be transformative across the entire economy. Public, private and civil actors alike will have to shift their mindset from short-term gains to long-run outcomes and profits, particularly against the background of financial stability and transition risks that form the landscape of climate change. Industrial strategies don’t just need different goals: they need missions.

Imagine if we were to bring the courage, spirit of experimentation and willpower of the moonshot to bear on the greatest problem of our time: the climate emergency. Imagine having leaders who proudly declare: ‘We choose to fight climate change in this decade not because it is easy, but because it is hard, because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win.’14

Around the world, there is increasing talk about the need for a Rooseveltian scale of investment to battle climate change. The notion of the Green New Deal consciously evokes the New Deal policies that began to lift the USA out of the Great Depression. A Green New Deal is about transforming production, distribution and consumption across the economy. It must be underpinned by long-term, patient finance which is willing to take risks and able to mobilize and crowd in other investors. This is key, as business investment reacts to the perception of where future opportunities lie: the climate emergency can be both a carrot and a stick to create a new direction of opportunities for the global economy. But where do we begin?

The mission map above on carbon-neutral cities (Figure 7) shows that a green transformation is not just about renewable energy. It’s also about achieving a cross-sectoral approach to innovation whose goal is to build a diverse portfolio of mission projects that engage multiple sectors and spur experimentation by as many different types of organizations. Similarly, the mission map on the future of mobility (Figure 9) spans different sectors that could alter how citizens travel, from innovations in the way that disabled people access ramps to new forms of public transport, public data practices and e-governance.

But, crucially, vision and leadership are needed. In 2019 we saw public figures on two continents take this on in two different ways. In the USA Alexandria Ocasio-Cortez, a Democratic Congresswoman for New York, and Ed Markey, a Democratic Senator from Massachusetts, introduced a Green New Deal to kick-start a new type of US growth based on missions that would eliminate all US carbon emissions. In Europe, Ursula von der Leyen, President of the EU Commission, announced the launch of the European Green Deal, which advocated policy initiatives aimed at making Europe climate-neutral by 2050.15 ‘This is Europe’s man on the moon moment,’ she declared.16

The Green New Deal in the USA set a clear direction for its mission and established targeted, measurable and timebound goals. The resolution Senator Markey and Congresswoman Ocasio-Cortez introduced into Congress called for a ‘ten-year national mobilization’ towards reaching goals such as ‘meeting 100 per cent of the power demand in the United States through clean, renewable, and zero-emission energy sources’. The ultimate goal was to stop using fossil fuels entirely and to move away from nuclear energy.

Within the mission, the targets included ‘upgrading all existing buildings’ in the country for energy efficiency; working with farmers ‘to eliminate pollution and greenhouse gas emissions ... as much as is technologically feasible’ (while supporting family farms and promoting ‘universal access to healthy food’); overhauling transportation systems to reduce emissions – including expanding electric car-manufacturing, building ‘charging stations everywhere’, and expanding high-speed rail to reduce national air travel. On top of that, the mission has social goals, including a guaranteed job with a family- sustaining wage, adequate family and medical leave, paid vacations and retirement security’ and ‘high-quality health care’ for all Americans.17

### AT space

#### Only a strong administrative state spurs space innovation.

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

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

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?