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

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

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

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

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

A. Markets Cannot Be Divorced from Politics

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

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

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different 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.

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try-or-die for putting power in the hands of the citizenry and reorienting government decision-making toward the public good.

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

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

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

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

The Five Horsemen of the Modern Day Apocalypse

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

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

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

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

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

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

Societies as Decision-Making Systems

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

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

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

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

Oligarchic Control in “Democratic” States

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

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

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

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

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

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

What is To Be Done?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

## Court Legitimacy DA

#### Plan increases court legitimacy – current jurisprudence wholly lacks legitimacy because judges restrain antitrust statutes without any justification – expanding antitrust reverses Congressional acquiescence by returning to doctrines of Congressional intent instead of judicially-created law

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Daniel A. Crane, “Antitrust Antitextualism,” *Notre Dame Law Review*, vol. 96, no. 3, 28 January 2021, pp. 1253-1255, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr.

The phenomenon of antitrust antitextualism is important for understanding the U.S. antitrust system, its history, and the possibilities for its reform, but it also has significance for more general understandings of how statutes are written and how their interpretation functions or should function. Scholars have argued that Congress sometimes means statutory language to be purely expressive, indeed that it means for the courts not to give that language legal effect.262 But the story of antitrust antitextualism goes far beyond judicial excision of stray words or phrases from the antitrust statutes. In important instances, particularly with respect to the FTC and Robinson-Patman Acts, the courts have entirely rewritten the textual meaning and legislative purpose of the statute.263 Through a chronic cycle of legislative enactment, judicial disregard, and implicit legislative acquiescence, Congress and the courts have constituted the common-law system that judges and scholars across the political spectrum now consider normalized and perhaps even inevitable.

This pattern of judicial/legislative engagement (with the executive playing an enabling role) raises both analytical and normative questions for the jurisprudence of statutory interpretation. Analytically and descriptively, is antitrust law sui generis, or do other statutory domains exhibit a similar, but perhaps unrecognized, dynamic? Do the antitrust laws idiosyncratically operate in a space of equipoise between Jeffersonian idealism and Hamiltonian pragmatism, with Congress implicitly assigning itself the role of idealist orator while acquiescing as the courts provide pragmatic counterbalance? Or is this yin and yang phenomenon, disguised in the interpretive rhetoric of broad delegations and common-law method, a more general one, in maybe unappreciated ways? Once a pattern is observed in one legal domain, it tends to be observed soon in others as well. Finding a recurrence of the antitrust pattern elsewhere could provide new insights on statutory interpretation, separation of powers, and the de facto institutional roles of the legislative and judicial branches.

Normatively, there is much to question about the democratic legitimacy of the implicit system of legislative declaration and judicial reformation described in this Article. There seems little in it that either a committed textualist or a committed purposivist could defend, since the system entails the courts honoring neither what Congress wrote nor what it meant. To rehabilitate the system’s democratic legitimacy, a subtle purposivist might say that what Congress actually meant—in a deep sense—must be gathered from the norms of the system itself rather than from conventional evidence such as floor statements by members of Congress, committee reports, or other contemporaneous sources of public meaning. Perhaps members of Congress legislate against a backdrop of expectation that the courts will continue to read down new statutes to accommodate pragmatic efficiency interests, and consenting to this implicit system, the members feel liberated to express more in the statute than they actually mean as prescriptive. But if that is wholesome democratic practice, that case is yet to be made.

Finally, if the system lacks democratic legitimacy, there is the question of how to begin unwinding it—and whether anyone has the incentive to try. Most committed textualists are also committed economic conservatives;264 it would take abundant motivation from pure principle for the average Federalist Society judge to restore the original meaning of the Robinson-Patman Act or the Clayton Act’s incipiency presumption, much less mount a cataclysmic return to section 1’s absolutist prohibition on agreements restraining trade. Progressive judges, perhaps looking for leverage to unwind the perceived laxity of Chicago School antitrust, might invoke statutory text or original meaning as a foil, but they too face Pandora’s Box. To insist on taking at face value Congress’s words and ostensible purposes—words and purposes to which Congress itself might not have been fully committed—would risk considerable backlash after the long reign of moderating common law and the system’s reliance on the courts to correct Congress’s textual overstatements. So maybe it should count in favor of the system’s normative legitimacy that it has worked for 130 years without anyone complaining too much.

#### Low court legitimacy prevents the Court from overturning Roe v. Wade now – it’ll only overturn major precedents if it gets a greenlight to move the court in a controversial direction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Reproductive rights key to solve overpopulation and systemic death – solves climate change and food shortages

Schlanger 14

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

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

No Food, No Water

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

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

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

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

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

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

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

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

The Big Taboo

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

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

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

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

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

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

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

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

Leaving Half the Population Behind

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

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

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

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

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

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

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

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

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

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

‘God Will Provide’

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

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

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

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

The Great Girl Bounce

What would happen if contraception suddenly became a universal right?

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

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

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

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

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

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

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

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

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

#### Extinction – increasing reproductive rights is key

Ehrlich 13

Paul R. Ehrlich is the Bing Professor of Population Studies, and President, Center for Conservation Biology at Stanford University, Millennium Alliance for Humanity and Biosphere, November 5, 2013, “Overpopulation and the Collapse of Civilization”, http://mahb.stanford.edu/blog/overpopulation-and-the-collapse-of-civilization/

A major shared goal of the Millennium Alliance for Humanity and the Biosphere (MAHB) and Sustainability Central is reducing the odds that the “perfect storm” of environmental problems that threaten humanity will lead to a collapse of civilization. Those threats include climate disruption, loss of biodiversity (and thus ecosystem services), land-use change and resulting degradation, global toxification, ocean acidification, decay of the epidemiological environment, increasing depletion of important resources, and resource wars (which could go nuclear). This is not just a list of problems, it is an interconnected complex resulting from interactions within and between what can be thought of as two gigantic complex adaptive systems: the biosphere system and the human socio-economic system. The manifestations of this interaction are often referred to as “the human predicament.” That predicament is getting continually and rapidly worse, driven by overpopulation, overconsumption among the rich, and the use of environmentally malign technologies and socio-economic-political arrangements to service the consumption.

All of the interconnected problems are caused in part by overpopulation, in part by overconsumption by the already rich. One would think that most educated people now understand that the larger the size of a human population, ceteris paribus, the more destructive its impact on the environment. The degree of overpopulation is best indicated (conservatively) by ecological footprint analysis, which shows that to support today’s population sustainably at current patterns of consumption would require roughly another half a planet, and to do so at the U.S. level would take four to five more Earths.

The seriousness of the situation can be seen in the prospects of Homo sapiens’ most important activity: producing and procuring food. Today, at least two billion people are hungry or badly in need of better diets, and most analysts think doubling food production would be required to feed a 35% bigger and still growing human population adequately by 2050. For any chance of success, humanity will need to stop expanding land area for agriculture (to preserve ecosystem services); raise yields where possible; increase efficiency in use of fertilizers, water, and energy; become more vegetarian; reduce food wastage; stop wrecking the oceans; significantly increase investment in sustainable agricultural research; and move feeding everyone to the very top of the policy agenda. All of these tasks will require changes in human behavior long recommended but thus far elusive. Perhaps more critical, there may be insurmountable biophysical barriers to increasing yields – indeed, to avoiding reductions in yields – in the face of climate disruption.

Most people fail to realize the urgency of the food situation because they don’t understand the agricultural system and its complex, non-linear connections to the drivers of environmental deterioration. The system itself, for example, is a major emitter of greenhouse gases and thus is an important driver of the climate disruption that seriously threatens food production. More than a millennium of change in temperature and precipitation patterns is now entrained, with the prospect of more crop-threatening severe storms, droughts, heat waves, and floods— all of which are already evident. Thus maintaining – let alone expanding – food production will be ever more difficult in decades ahead.

Furthermore, agriculture is a leading cause of losses of biodiversity and the critical ecosystem services supplied to agriculture itself and other human enterprises, as well as a major source of global toxification, both of which pose additional risks to food production. The threat to food production of climate disruption alone means that humanity’s entire system for mobilizing energy needs to be rapidly transformed in an effort to hold atmospheric warming well below a lethal 5o C rise in global average temperature. It also means we must alter much of our water-handling infrastructure to provide the necessary flexibility to bring water to crops in an environment of constantly changing precipitation patterns.

Food is just the most obvious area where overpopulation tends to darken the human future – virtually every other human problem from air pollution and brute overcrowding to resource shortages and declining democracy is exacerbated by further population growth. And, of course, one of our most serious problems is the failure of leadership on the population issue, in both the United States and Australia. The situation is worst in the U.S. where the government never mentions population because of fear of the Catholic hierarchy specifically and the religious right in general, and the media keep publishing ignorant pro-natalist articles, and in Australia even advertise on prime-time TV to have more kids.

A prime example was a ludicrous 2010 New York Times screed by David Brooks, calling on Americans to cheer up because “Over the next 40 years, the U.S. population will surge by an additional 100 million people, to 400 million.” Equal total ignorance of the population-resource-environment situation was shown in 2012 by an article also in the New York Times by one Ross Douthat “More Babies, Please” and one by a Rick Newman in the USNews “Why a falling birth rate is a big problem,” both additional signs of the utter failure of the US educational system.

A popular movement is needed to correct that failure and direct cultural evolution toward providing the “foresight intelligence” and the agricultural, environmental, and demographic planning that markets cannot supply. Then analysts (and society) might stop treating population growth as a “given” and consider the nutritional and health benefits of humanely ending growth well below 9 billion and starting a slow decline. In my view, the best way to accelerate the move toward such population shrinkage is to give full rights, education, and job opportunities to women everywhere, and provide all sexually active human beings with modern contraception and backup abortion. The degree to which that would reduce fertility rates is controversial, but it would be a win-win for society. Yet the critical importance of increasing the inadequate current action on the demographic driver can be seen in the decades required to change the size of the population humanely and sensibly. In contrast we know from such things as the World War II mobilizations that consumption patterns can be altered dramatically in less than a year, given appropriate incentives.

## 1nc—States CP

#### Text: The fifty states and all relevant United States territories should should enter into a compact overruling the precedent in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, Toolson v. New York Yankees, and Flood v. Kuhn by expanding the scope of the Sherman Act to apply to Major League Baseball.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

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

I. THE ANTITRUST FEDERALISM LANDSCAPE

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

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

## 1NC—Mortality Rates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Restoring competition key to develop a more well-functioning health care system---that substantially reduces the risk of all death across the country.

Gaynor ’21 - E.J. Barone University Professor of Economics and Public Policy at Carnegie Mellon University and former Director of the Bureau of Economics at the U.S. Federal Trade Commission. Professor Gaynor's research focuses on competition and incentives in health care, and on antitrust policy.

Martin Gaynor, “Antitrust Applied: Hospital Consolidation Concerns and Solutions,” Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights U.S. Senate, May 19, 2021, https://www.judiciary.senate.gov/imo/media/doc/Gaynor\_Senate\_Judiciary\_Hospital\_Consolidation\_May\_19\_2021.pdf

Health care is a very large and important industry. Health care spending is now over $3.8 trillion ($11,582 per person) and accounts for 17.7 percent of national income (measured as gross domestic product; GDP) – nearly one-fifth of the entire U.S. economy and larger than the entire economy of France (Martin et al., 2021). Hospital services are a large part of the U.S. economy. In 2019, hospital care alone accounted for 31.4 percent (almost one-third) of total health spending and 5.6 percent of GDP – approximately the same size as the entire information sector or retail trade sector, and larger than the construction or transportation sectors. By comparison, physician services comprise 20.3 percent of health spending and 3.6 percent of GDP (Martin et al., 2021), pharmaceuticals account for 9.7 percent of health spending and 1.7 percent of GDP, and health insurance is 6.3 percent of health spending and approximately 1 percent of GDP. The share of the economy accounted for by these sectors has risen dramatically over the last 30 years. In 1980, hospitals and physicians accounted for 3.6% and 1.7% of U.S. GDP, respectively, while the net cost of health insurance in 1980 was 0.34% (Martin et al., 2011).

Of course, health care is important not only because of its size. Health care services can save lives or dramatically affect the quality of life, thereby substantially improving well being and productivity.

As a consequence, the functioning of the health care sector is vitally important. A well functioning health care sector is an asset to the economy and improves quality of life for the citizenry. By the same token, problems in the health care sector act as a drag on the economy and impose a burden on individuals.

The U.S. health care system is based on markets. The vast majority of health care is privately provided (with some exceptions, such as public hospitals, the Veterans Administration, and the Indian Health Service) and over half of health care is privately financed (Martin et al., 2021). As a consequence, the health care system will only work as well as the markets that underpin it. If those markets function poorly, then we will get health care that’s not as good as it could be and that costs more than it should. Moreover, attempts at reform, no matter how important or clever, will not prove successful if they are built on top of dysfunctional markets.

There is widespread agreement that these markets do not work as well as they could, or should. Prices are high and rising (Rosenthal, 2017; National Academy of Social Insurance, 2015; New York State Health Foundation, 2016; White, 2017; Kronick and Neyaz, 2019; White and Whaley, 2019), they vary in seemingly incoherent ways, there are egregious pricing practices (Cooper and Scott Morton, 2016; Rosenthal, 2017; Garmon and Chartock, 2017; Kliff, 2019; Cooper et al., 2020), there are serious concerns about the quality of care (Institute of Medicine, 2001; Kohn et al., 1999; Kessler and McClellan, 2000), and the system is sluggish and unresponsive, lacking the innovation and dynamism that characterize much of the rest of our economy (Cutler, 2010; Chin et al., 2015; Herzlinger, 2006).

One of the reasons for this is lack of competition. The research evidence shows that hospitals that face less competition charge higher prices to private payers, without accompanying gains in efficiency or quality. Moreover, the evidence also shows that lack of competition can cause serious harm to the quality of care received by patients, even substantially increasing the risk of death.

It’s important to recognize that the burden of higher provider prices falls on individuals, not insurers or employers. Health care is not like commodity products, such as milk or gasoline. If the price of milk or gasoline goes up, consumers experience directly when they purchase these products. However, even though individuals with private employer provided health insurance pay a small portion of provider fees directly out of their own pockets, they end up paying for increased prices in the end. Insurers facing higher provider prices increase their premiums to employers. Employers then pass those increased premiums on to their workers, either in the form of lower wages (or smaller wage increases) or reduced benefits (greater premium sharing, greater cost sharing, or less extensive coverage) (Gruber, 1994; Bhattacharya and Bundorf, 2005; Baicker and Chandra, 2006; Emanuel and Fuchs, 2008; Baicker and Chandra, 2006; Currie and Madrian, 2000; Anand, 2017). Employers may also respond to these increases in their costs of employing workers by reducing workers’ hours or the number of workers. A recent study (Arnold and Whaley, 2020) finds that “hospital mergers lead to a $521 increase in hospital prices, a $579 increase in hospital spending among the privately insured population and a ... $638 reduction in wages.”

The burden of private health care spending on U.S. households has been growing, so much so that it’s taking up a larger and larger share of household spending and exceeding increases in pay for many workers. Figure 1 illustrates this. Workers’ contributions to health insurance premiums grew 259 percent from 1999 to 2018, while wages grew by only 68 percent (Henry J. Kaiser Family Foundation, 2020). Figure 2 illustrates that middle class families’ spending on health care has increased 25 percent since 2007, crowding out spending on other goods and services, including food, housing, and clothing. Health insurance fringe benefits for workers, chief among which is health care, increased as a share of workers’ total compensation over this same period, growing from 12 to 14.5 percent, while wages stayed flat (see Monaco and Pierce, 2015, Table 1).

As documented below, there has been a tremendous amount of consolidation among hospitals. It’s important to be clear that consolidation can be either beneficial or harmful. Consolidation can bring efficiencies – it can reduce inefficient duplication of services, allow firms to combine to achieve efficient size, or facilitate investment in quality or efficiency improvements. Successful firms may also expand by acquiring others. If firms get larger by being better at giving consumers what they want or driving down costs so their goods are cheaper, that’s a good thing (big does not equal bad), so long as they don’t engage in actions to then attempt to limit competition. On the other hand, consolidation can reduce competition and enhance market power and thereby lead to increased prices or reduced quality. Moreover, firms that have acquired market power have strong incentives to maintain or enhance it. This leads to the potential for anticompetitive conduct by firms that have acquired dominant positions through consolidation.

## Case

### Stadium subsidies

#### Can just build a stadium anyway—they’ll get funding somewhere proven empirically

#### They can’t solve—educational inequality exists for reasons that cross funding lines—things like racial disparities, lack of teacher training etc.

#### Lack of edu funding isn’t unique—DOE strapped for cash proven by budget cuts across the board ASIDE FROM stadiums

#### Antitrust enforcement doesn’t solve wealth inequality – market dynamics are way too complex for this facile argument to be true – CEOs in consolidated markets make less than in competitive ones

Schechter ’16 – writer at ProMarket citing Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim

Asher, “Is More Antitrust the Answer to Rising Wealth Inequality?” ProMarket, <https://promarket.org/2016/07/08/antitrust-answer-rising-wealth-inequality/>

Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim. He also disputes the growing notion that a more rigorous antitrust enforcement can diminish wealth inequality, arguing that “more antitrust is not the answer to wealth inequality.”4

In a recent paper, Crane challenges what he deems as an oversimplification, claiming that that the relationship between antitrust law and wealth inequality is “far more complex” and that the relationship between income distribution and market power is “subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize.” Crane then goes on to argue that more antitrust can in fact lead to greater inequality, and that “when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”5

That the U.S. economy is suffering from increasing concentration levels, and that this rise in concentration has led in some cases to significant price increases, has been established in recent years by a growing number of studies. A recent paper by José Azar, Martin C. Schmalz, and Isabel Tecu6 showed that ticket prices are 3-11 percent higher due to common ownership among airlines. A similar paper by Azar, Schmalz, and Sahil Raina that looked at common ownership in U.S. banking7 found that that the largest U.S. banks share identical top shareholders, and that reduced competition in banking leads to worse service for consumers in the form of higher fees for deposit accounts and lower savings interest rates.

In health care, studies show that consolidations among hospitals led to significant price hikes. A 2015 study by Zack Cooper, Stuart Craig, Martin Gaynor, and John Van Reenen found that in markets where hospitals have a monopoly, prices are 15.3 percent higher than in more competitive markets that have four or more hospitals.8

To be sure, Crane does not completely dispute the idea that antitrust enforcement (or lack thereof) is related in some way to growing wealth inequality. What he does dispute, he says, is the “simplistic” version of the relationship between wealth inequality and antitrust, in which consumer-to-producer wealth transfers, enabled by lax antitrust enforcement and rent extractions, create regressive distributional effects. “In a complex, advanced economy, the lines of exploitation and profiting run in too many complicated and cross-cutting directions to permit broad generalization,” he writes in the paper.

“I am not claiming that there is no relationship between wealth inequality and antitrust or market competitiveness,” Crane tells ProMarket. “I am also not claiming that there couldn’t be certain antitrust interventions that would reduce wealth inequality. I think that there could be. All I am saying is that the overall picture, this facile assumption that more antitrust means greater equality and wealth is just way over-broad. The interactions between the distribution of wealth in society and market competitiveness are very complex and cross-cutting, and there are a number of ways in which more antitrust would actually increase wealth inequality.”

He adds: “I am not going to argue that there could never be case in which it would be appropriate to rationalize antitrust enforcement because of the inequality factor—if inequality is your priority, you could try to make a case—but it’s just that there are countercurrents where the effects are much more complicated than the people understand.”

In his paper, Crane disputes one of the key arguments for more antitrust enforcement–that shareholders and senior corporate managers are the main beneficiaries of monopoly rents. The literature on these issues, he argues, is ambiguous. Shareholding is something tens of millions of Americans do across social classes, as part of their 401(k)s and other retirement plans. It is far from clear that shareholders reap the lion’s share of monopoly profits, he notes, and a number of studies have shown that mergers don’t necessarily produce positive returns to the shareholders of the acquiring firm.

Some empirical studies, he claims, have actually shown that CEO compensation declines as markets become less competitive. Labor unions have also supported anti-competitive mergers in the past, he notes—such as the merger between US Airways and American Airlines—expecting that higher concentration would lead to a monopoly wage premium.

“When it comes to regressivity in monopoly, there are two questions: who bears the brunt—who is the effective payer of monopoly overcharges—and who obtains the gains. If you look at CEOs, for instance, the economic literature on CEOS earning a higher wage or stock option in more concentrated markets is very weak. In fact, there’s some literature that suggests that CEOs actually earn a lower wage in monopoly markets. If it’s a monopoly market, they’re less valuable to the firm, because it’s easier to generate income. There’s some literature suggesting it’s precisely where you see highly paid corporate executives that markets are very competitive, because then special talent is most beneficial to shareholders,” he says.

Moreover, Crane argues, antitrust cases have been brought not only against abusive corporations, but against middle-class professionals, such as music teachers, dentists, and lawyers. As an example, he points to a case brought by the Department of Justice against the National Association of Realtors in 2005, a case that concerned restrictions on home buyers to search for listings online.“If you look at statistics on the income of relators and the income of people selling homes, the income profile of a home-selling family is roughly twice the income profile of a realtor, on average,” he says. “Which means that if these allegations were correct, this is a huge wealth transfer from much-richer home sellers to much poorer realtors, and the enforcement action would have actually been regressive.” His point, he stresses, is not to dispute the case, but the notion that antitrust enforcement necessarily leads to progressive wealth redistribution.

Another factor that is often not taken into account, he argues, is government purchasing. Monopolists, he notes, often sell to “large intermediary organizations, which may distribute the incidence of monopoly charges progressively.” In the US, federal procurement accounts for roughly one-seventh of the GDP, not including state and local governments. Government, he argues, pays these monopoly overcharges and ultimately transmits them to taxpayers. Since the U.S. tax code is generally progressive, he argues, those overcharges are being borne progressively. Meaning: wealthy people should, in theory at least, pay a greater share, “which actually means that an antitrust intervention that diminishes anticompetitive conduct in government procurement actually has the effect of increasing wealth inequality.”

When it comes to the issue of price discrimination, says Crane, the relatively wealthy tend to be exploited proportionally more than the relatively poor. “According to most economic accounts, price discrimination has progressive distribution effects, meaning that a greater share of the higher prices charged by price discrimination comes from wealthier individuals than from poorer ones. That’s not uniformly true, but as a generality, in a market characterized by less competition, as monopolists are increasing their prices they are going to be charging proportionally higher prices on higher-income people, on average.”

The proponents of government antitrust action, argues Crane, ignore private efforts to curtail monopoly power. Government, he argues, should “get out of the way” of these private efforts. In the paper, he writes: “When it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”

“I think it’s just a mistake, as a general matter, to include reducing wealth inequality as one of the goals of antitrust law,” says Crane. “I’m resisting the idea that somehow talking about wealth inequality will improve antitrust enforcement. If anything, it will just distract, making it a political hot potato, but I don’t think it will have any appreciable effect on wealth inequality. Antitrust law works best when it’s concerned with economic efficiency and the protection of consumer welfare. That has been the consensus by economists, people in the field, and antitrust agencies for several decades now. My concern [is] that at a political level, people are looking for new scapegoats for wealth inequality, and particularly in recent times people have been looking at weak antitrust enforcement.”

### The minor leagues

#### No solvo – economy’s too complex

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1184-1186, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

C. Why the Monopoly Regressivity Claim Is Misguided

The argument that antitrust violations are regressive and hence that antitrust enforcement is progressive is founded on two, sometimes unstated, axiomatic assumptions: (1) relatively rich classes of producers, in particular shareholders and senior corporate managers, capture the majority of the monopoly rents generated by anticompetitive behavior and (2) relatively poorer consumers bear the brunt of monopoly overcharges.56 These assumptions may be generalizable in some circumstances—particularly in the developing world—where the means of production are concentrated in a very small number of private hands and the vast bulk of society interacts with capital only as an employee and a consumer.57 But they are far more difficult to generalize in more economically developed societies where ownership of the means of production is widely distributed, both in terms of active management and passive investment, and there exists a broad middle class capable of appropriating monopoly rents as entrepreneurs, managers, investors, employees, and sellers of assets. As the case for each of the axioms weakens, the case for the progressivity of antitrust enforcement correspondingly diminishes.58

It is doubtful that antitrust violations involve systematic transfers from comparatively poor consumers to comparatively wealthy producers. Almost everyone, both rich and poor, who participates in markets does so both as a consumer and as a producer. People participate as producers in their capacities as employees, sole proprietors, and shareholders. They participate as buyers in their capacities as end consumers, business purchasers, and taxpayers. Thus, any assertion about the regressivity of antitrust violations cannot rest on the bare claim that such violations involve wealth transfers from consumers to producers.

In order to sustain the claim, there would need to be a further specification of the ways in which identified classes of producers skim money from identified classes of consumers. When the actual operation of market power exercises in developed economies and antitrust enforcement seeking to curtail them is explored, it becomes apparent that general claims about the wealth redistribution effects of antitrust violations and enforcement are extraordinarily difficult to sustain. Monopoly rents are not systematically borne by the poor or collected by the wealthy. Rather, in a complex, advanced economy, the lines of exploitation and profit run in too many complicated and crosscutting directions to permit broad generalizations.

#### Antitrust enforcement increases inequality

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1209-1210, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

A. The Arc of Competition Does Not Bend Toward Equality

There is something odd in the monopoly regressivity claim that lax antitrust enforcement contributes to wealth inequality. The critique implicitly assumes that more market competition—the virtue that antitrust law is supposed to produce— means more equality.157 But that assumption cannot be squared with a plethora of redistributive social welfare programs, which are predicated on the assumption that when income is based solely on the value of the participants’ marginal contributions to impersonal markets, gross income inequality results. For example, if competition achieved a desirable income distribution, then minimum wage laws would be unnecessary. Those laws are necessary because the interaction between downstream product market competition and upstream competition for labor inputs results in wages that are deemed socially unacceptable.158 Organizing unions had to be exempted from the antitrust laws because requiring competition for employment among the laboring classes would result in lower income and poorer working conditions.159 The entire social welfare state is predicated on redirecting the paths of markets from the outcomes otherwise determined by competitive exchange.

The arc of competition does not inherently bend toward equality. To the contrary, competition tends to concentrate wealth in the hands of those with the resources valued most by the market. To the extent that resources are unevenly distributed—think of intelligence, skill, family upbringing, and educational opportunity—competition often exacerbates inequality as compared to systems that allocate wealth based on some principle of equal desert. As previously noted, for example, increased product market competition tends to lead to wage increases for skilled workers and wage reductions for unskilled workers.160 Similarly, unregulated markets for executive talent lead to high wages for corporate managers based on competitive benchmarking.161 Further, increases in product market competition might lead to an increase in CEO compensation since managerial talent might be most valuable to corporations when product market competition intensifies.162 In sum, competition tends to distribute wealth unevenly and regulatory intervention is often required to alter these inequality effects.

### Courts

#### Court authority allows them to gut democratic institutions and causes every impact

Bazelon and Posner 17 – Emily Bazelon is a staff writer for *The New York Times Magazine* and the Truman Capote Fellow for Creative Writing and Law at Yale Law School. Eric Posner is a professor at the University of Chicago Law School.

Emily Bazelon and Eric Posner, “The Government Gorsuch Wants to Undo,” *The New York Times*, 1 April 2017, https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html.

At recent Senate hearings to fill the Supreme Court’s open seat, Judge Neil Gorsuch came across as a thoroughly bland and nonthreatening nominee. The idea was to give as little ammunition as possible to opponents when his nomination comes up this week for a vote, one that Senate Democrats may try to upend with a filibuster.

But the reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government — including the rules that keep our water clean, regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the White House adviser Steve Bannon, who has called for its “deconstruction.” The Republican-dominated House, too, has passed a bill designed to severely curtail the power of federal agencies.

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that’s not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state “poses a grave threat to our values of personal liberty.”

The 80 years of law that are at stake began with the New Deal. President Franklin D. Roosevelt believed that the Great Depression was caused in part by ruinous competition among companies. In 1933, Congress passed the National Industrial Recovery Act, which allowed the president to approve “fair competition” standards for different trades and industries. The next year, Roosevelt approved a code for the poultry industry, which, among other things, set a minimum wage and maximum hours for workers, and hygiene requirements for slaughterhouses. Such basic workplace protections and constraints on the free market are now taken for granted.

But in 1935, after a New York City slaughterhouse operator was convicted of violating the poultry code, the Supreme Court called into question the whole approach of the New Deal, by holding that the N.I.R.A. was an “unconstitutional delegation by Congress of a legislative power.” Only Congress can create rules like the poultry code, the justices said. Because Congress did not define “fair competition,” leaving the rule-making to the president, the N.I.R.A. violated the Constitution’s separation of powers.

The court’s ruling in Schechter Poultry Corp. v. the United States, along with another case decided the same year, are the only instances in which the Supreme Court has ever struck down a federal statute based on this rationale, known as the “nondelegation doctrine.” Schechter Poultry’s stand against executive-branch rule-making proved to be a legal dead end, and for good reason. As the court has recognized over and over, before and since 1935, Congress is a cumbersome body that moves slowly in the best of times, while the economy is an incredibly dynamic system. For the sake of business as well as labor, the updating of regulations can’t wait for Congress to give highly specific and detailed directions.

The New Deal filled the gap by giving policy-making authority to agencies, including the Securities and Exchange Commission, which protects investors, and the National Labor Relations Board, which oversees collective bargaining between unions and employers. Later came other agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration (which regulates workplace safety) and the Department of Homeland Security. Still other agencies regulate the broadcast spectrum, keep the national parks open, help farmers and assist Americans who are overseas. Administrative agencies coordinated the response to Sept. 11, kept the Ebola outbreak in check and were instrumental to ending the last financial crisis. They regulate the safety of food, drugs, airplanes and nuclear power plants. The administrative state isn’t optional in our complex society. It’s indispensable.

But if the regulatory power of this arm of government is necessary, it also poses a risk that federal agencies, with their large bureaucracies and potential ties to lobbyists, could abuse their power. Congress sought to address that concern in 1946, by passing the Administrative Procedure Act, which ensured a role for the judiciary in overseeing rule-making by agencies.

The system worked well enough for decades, but questions arose when Ronald Reagan came to power promising to deregulate. His E.P.A. sought to weaken a rule, issued by the Carter administration, which called for regulating “stationary sources” of air pollution — a broad wording that is open to interpretation. When President Reagan’s E.P.A. narrowed the definition of what counted as a “stationary source” to allow plants to emit more pollutants, an environmental group challenged the agency. The Supreme Court held in 1984 in Chevron v. Natural Resources Defense Council that the E.P.A. (and any agency) could determine the meaning of an ambiguous term in the law. The rule came to be known as Chevron deference: When Congress uses ambiguous language in a statute, courts must defer to an agency’s reasonable interpretation of what the words mean.

Chevron was not viewed as a left-leaning decision. The Supreme Court decided in favor of the Reagan administration, after all, voting 6 to 0 (three justices did not take part), and spanning the ideological spectrum. After the conservative icon Justice Antonin Scalia reached the Supreme Court, he declared himself a Chevron fan. “In the long run Chevron will endure,” Justice Scalia wrote in a 1989 article, “because it more accurately reflects the reality of government, and thus more adequately serves its needs.”

That was then. But the Reagan administration’s effort to cut back on regulation ran out of steam. It turned out that the public often likes regulation — because it keeps the air and water clean, the workplace safe and the financial system in working order. Deregulation of the financial system led to the savings-and-loans crisis of the 1980s and the financial crisis a decade ago, costing taxpayers billions.

Businesses, however, have continued to complain that the federal government regulates too much. In the past 20 years, conservative legal scholars have bolstered the red-tape critique with a constitutional one. They argued that only Congress — not agencies — can create rules. This is Schechter Poultry all over again.

And Judge Gorsuch has forcefully joined in. Last year, in a concurring opinion in an immigration case called Gutierrez-Brizuela v. Lynch, he attacked Chevron deference, writing that the rule “certainly seems to have added prodigious new powers to an already titanic administrative state.” Remarkably, Judge Gorsuch argued that Chevron — one of the most frequently cited cases in the legal canon — is illegitimate in part because it is out of step with (you guessed it) Schechter Poultry. Never mind that the Supreme Court hasn’t since relied on its 1935 attempt to scuttle the New Deal. Nonetheless, Judge Gorsuch wrote that in light of Schechter Poultry, “you might ask how is it that Chevron — a rule that invests agencies with pretty unfettered power to regulate a lot more than chicken — can evade the chopping block.”

At his confirmation hearings, Judge Gorsuch hinted that he might vote to overturn Chevron without saying so directly, noting that the administrative state existed long before Chevron was decided in 1984. The implication is that little would change if courts stopped deferring to the E.P.A.’s or the Department of Labor’s reading of a statute. Judges would interpret the law. Who could object to that?

But here’s the thing: Judge Gorsuch is skeptical that Congress can use broadly written laws to delegate authority to agencies in the first place. That can mean only that at least portions of such statutes — the source of so many regulations that safeguard Americans’ welfare — must be sent back to Congress, to redo or not.

On the current Supreme Court, only Justice Clarence Thomas seeks to strip power from the administrative state by undercutting Chevron and even reviving the obsolete and discredited nondelegation doctrine, as he explains in opinions approvingly cited by Judge Gorsuch. But President Trump may well appoint additional justices, and the other conservatives on the court have expressed some uneasiness with Chevron, though as yet they are not on board for overturning it. What would happen if agencies could not make rules for the financial industry and for consumer, environmental and workplace protection? Decades of experience in the United States and around the world teach that the administrative state is a necessary part of the modern market economy. With Judge Gorsuch on the Supreme Court, we will be one step closer to testing that premise.

#### Court procedures decks effective democracy promotion

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)

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

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

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

The **uncertainty** of judicial review **also works against agencies** that seek to make the **most sensible use of their resources.** On the margin, rational agencies will shy away from actions that are likely to provoke litigation 103 (or, alternatively, soften those actions to mitigate litigation risk104), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that’s an especially good use of their time.105 **Courts thus distort agency judgment** even when they don’t review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it. 106 Depending on the year, that means that about four dozen employees107 working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions.108 The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that “[m]any, many rules linger at OIRA long past the 90- or 120-day deadline” by which it is supposed to complete its review.109 “Some rules have been at OIRA for years.”110 Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, “a judgment that important aspects require continuing substantive discussion.”111 Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a reactive institution, one with the power to reject agency action but little capacity to spur it. 112 Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism **drains agency resources, introduces delay, and thwarts agency action**. 113 To that extent, it puts a thumb on the scale in favor of the status quo;114 by itself, that’s enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state?115 If that were the case, administrative law’s apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn’t be an asymmetry at all. Without question, administrative law can entrench Democratic achievements.116 In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending Obama-era rules without observing procedural niceties. 117 For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, **proceduralism favors a libertarian agenda over a progressive one.**

# 2NC

### 2NC---F/W---T/L

#### 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.

## Link---Neoliberalism

### \*\* 2NC---Top Level \*\*

[insert explanation from notes] – link level

### Link---Proceduralism

#### 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.

### 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.

#### And no perf-con – key to test the aff from multiple different perspectives, doesn’t matter if we take different positions on it

Key to neg flex + topic education

### AT Paternalism DA

#### 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.

### AT transition wars

No transition wars – it’s a competing political imaginary

Not calling for democratic socialism – don’t let them misconstrue the alt – just saying that market logics shouldn’t take center stage – discusses the means by which we achieve the goal, not saying a world transition to dem socialism

### 2NC---Alt---T/L

#### The alternative is to adopt a political frame of anti-domination---that aligns itself against market logics grounded in maximizing production of goods in favor of a strategy that forefronts equity and democratic political power---that is diametrically opposed to any neoliberal model of governance that forefronts market deregulation, a grounding assumption of which is that the domination of some individuals is an inevitability.

#### The alternative understands that the market isn’t a neutral force to be regulated ex post facto, but rather something to be careful managed to restore popular sovereignty and ensure that the government is accountable to the public interest---that’s 1NC Jackson.

#### That means ONLY the alt solves the aff---reorienting antitrust around anti-domination gives people the democratic agency to directly challenge neoliberal structures and keep big tech in check.

## Case

#### Neoliberalism terminally prevents strong labor markets/power---it inevitably puts downward pressure on wages and protections---only the alt solves.

**Blanton and Peksen 16** – Professor at the Department of Government, University of Alabama at Birmingham [1]

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Robert Blanton and Dursun Peksen, “The dark side of economic freedom: Neoliberalism has deleterious effects on labor rights,” Phelan Centre, 8/20/16, https://blogs.lse.ac.uk/usappblog/2016/08/20/the-dark-side-of-economic-freedom-neoliberalism-has-deleterious-effects-on-labour-rights/

Neoliberalism – the so-called “Washington Consensus” playbook for economic policies – has generated no shortage of contention over the years. Such controversies have long been a fixture in the global south, as anti-IMF and World Bank protests remain ubiquitous. Over the past decade citizens in the developed world have become “new discontents” against neoliberal policies. Some examples include the recent protracted strikes staged by French workers against labor reforms, a resurgence of anti-globalization populism in the Brexit referendum, and the political ascendance of Donald Trump in the U.S. Indeed, even researchers at the IMF are starting to question whether neoliberalism has been “oversold.”

A common area of concern is the “human cost” of neoliberalism, particularly on lower and working-class citizens. Free-market policies were initially hailed as an important step in ensuring prosperity and broader freedoms throughout the world, and a wide body of research attests to the economic benefits in terms of reduced unemployment and increased economic growth. Yet the common criticism of neoliberalism has been that the distribution of resources in free economies is inequitable, and that market-liberalising policies sacrifice social and political rights in the interests of economic competitiveness.

In a recently published article, we examine a facet of human rights that is one of the most commonly-cited “human costs” of neoliberalism: labor rights. More specifically, we analyse the linkages between core worker rights recognized by the ILO (collective bargaining, freedom of association, acceptable work conditions, and prohibitions of child and forced labor) and five distinct policy areas associated with economic liberalisation, namely freedom to trade, business regulation, sound money, government size, and protection of property rights. While our overall results indicate a consistent, and negative, relationship between neoliberalism and labor rights, our analysis does provide somewhat nuanced and distinct insights into the specific dynamics through which neoliberal policies affect labor rights conditions.

First, a key element of neoliberalism is the openness to global trade and investment, through such policies as the dismantling of tariffs and elimination of capital controls. Unlike commonly-used measures of economic globalisation such as foreign trade and investment flows – which are essentially the intended outcomes of neoliberalism – we focus on the actual policies intended to increase economic openness. We find a negative relationship between such openness and worker rights. Most directly this implies that efforts to increase participation in the global economy are accompanied by reduced protection for workers. These results provide some support for the oft-raised “race to the bottom” dynamic regarding global capital and labor rights.

Along similar lines, we find broader policy reforms to establish a “business friendly” regulatory environment, including increased labor flexibility and lower obstacles to starting businesses, also negatively influence labor rights. Such measures have long been a key part of policies aimed at increasing economic competitiveness with the assumption being that respect for worker rights may be antithetical to economic growth, as business and labor regulations “infringe upon the economic freedom of employees and employers” (Gwartney et al.). Somewhat ironically, while there is mounting empirical evidence that worker rights may actually be conducive to a competitive economy, our findings indicate that states may still view the two as contradictory.

We also find that tighter, so-called “smart money” policies are damaging to labor rights. From a macroeconomic perspective, countries face a trade-off between expansionary and tighter monetary policies. Neoliberal policies emphasize the latter, arguing that the price stability created by such policies provides a more predictable environment for commerce. Despite the other advantages of such policies, particularly the control over inflation, such stability can be damaging to labor rights – it imposes downward pressures on wage levels and potentially undercuts the power of labor organizations to protect the wage levels of their members.

Another key facet of market-friendly institutions is a “small” state that plays a less prominent role in its economy. A minimal state, the argument goes, will be less likely to crowd out private investment and interfere with voluntary market transactions. In terms of societal rights, the primary obligation of a state to its people is in the area of “negative” rights, specifically providing protection to individuals and their property versus aggression or repression. However, we argue – and find – that such a minimal state is less able to protect positive rights such as worker rights. Specifically, the protection of labor rights can be a cost-intensive enterprise, as it connotes the provision of state resources to monitor respect for these rights and to prosecute offenders if necessary. Along those lines, a “small” state is less able to prevent employers from violating the core labor standards of their workers.

In all, excluding the policies associated with the legal environment and security of proper rights, we find a consistently strong, negative relationship between neoliberal policies and respect for core worker rights, as more “market-friendly” policies are damaging to labor rights. In addition to the extent that countries follow neoliberal norms, the shifts towards such policies – free-market reforms – are also of interest. Such reforms swept through the world economy during the 1980s and 1990s, widely seen as the heyday for the “Washington Consensus”, as East and Central-European countries transitioned into free-market structures while many other states drastically reformed their economies in line with IMF and World Bank programs. We find that such transitions, measured by yearly changes in our indices of neoliberalism, are likewise damaging to respect for worker rights. Thus, both the overall levels of neoliberalism in an economic system, as well as moves towards a more free-market system, have deleterious effects on worker rights.

In sum, we offer support for some of the long-held suspicions regarding the impacts of market-friendly policies, and find some empirical basis for both “old” and “new discontents” of neoliberalism. More broadly, our study suggests that it cannot be assumed that the logic of the market will necessarily lead to better worker rights, and that states need to take active steps to ensure that the “embedded liberalism” consensus is not supplanted by neoliberalism. Free-market policies were to a large extent a reaction to the overly controlled labor and business markets, and bloated state sectors, in many countries during the 1970s and 1980s. Along these lines, the intent of neoliberalism was to push the balance of power between capital, the state, and labor to a new equilibrium that was necessary for sustained economic growth. Our findings imply that this new equilibrium is to the detriment of worker rights, and that efforts should be made towards achieving a more equitable balance between the interests of labor rights and economic competitiveness.

#### 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 b