# Northwestern Doubles Wiki

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#### “Prohibit” means to forbid a given practice---that’s distinct from restriction.

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### Exemptions based on the rule of reason means practices are not prohibited.

Skoczny 01 – Professor of law, Holder of the Jean Monnet Chair on European Economic Law at the Warsaw University Faculty of Management

Tadeusz Skoczny, “Polish Competition Law in the 1990s - on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules,” European Business Organization Law Review, Vol. 2, Issue 3-4, September 2001, LexisNexis

Most importantly, the new Act departed from the relativity of the prohibition of dominant position abuses; as in Article 82 EC Treaty, it is now a general prohibition which does not allow for exemptions on the basis of a rule of reason. Also new is the prohibition of the abuse of dominant position by groups of undertakings, which will allow to effectively control the state and the development of competition on oligopolistic markets. The Act also eliminated the distinction between monopolistic and dominant position; in theory and in practice, it was difficult to justify the maintenance of this distinction. Therefore, the Act relates only to a dominant position, the definition of which however has been changed. According to the new Article 4 point 9, dominant position means a position "which allows [the undertaking] to prevent effective competition on the relevant market thus enabling [the undertaking] to act to a significant degree independently from its competitors, contracting parties and consumers". It is easy to notice that this definition is based on the United Brands and Hoffmann La-Roche standards. It must nevertheless be emphasised that such understanding of dominance was introduced by the AMC already in 1993; it considered dominance as the capacity to act "to a large extent independently of the competitors and clients, thus also the consumers". Thanks to the AMC's judgements also the relevant product and geographical markets are defined on the basis of the criteria of "close commodity substitutability" and "homogenous competition conditions".

#### It requires ending something fully---anything short of that is a regulation, which allows activities to continue within the bounds of certain prescribed rules---the aff is the latter, because all it does is change the standard applied---that does not mandate prohibition.

Hadley 1909 – Judge

Hiram E. Hadley, McPherson v. State, 174 Ind. 60, Supreme Court of Indiana, December 1909, LexisNexis

In the majority opinion it is conceded "that there is a marked difference" between unqualified prohibition of the sale of intoxicating liquors and the regulation of such sale. It is said in the opinion that "to regulate, restrict and control the sale implies that the sale shall go on within the bounds of certain prescribed rules, restrictions or limitations." Citing Sweet v. City of Wabash (1872), 41 Ind. 7; Duckwall v. City of New Albany (1865), 25 Ind. 283; Loeb v. City of Attica (1882), 82 Ind. 175, 42 Am. Rep. 494.

"Prohibition," states the majority opinion, "as applied to the liquor traffic, implies putting a stop to its sale as a beverage; to end it fully, completely and indefinitely. So, if the purpose of the act in question is to authorize the exercise of unqualified prohibitory power, as usually understood by the term, the act is void because its subject is not expressed in the title." The court might properly have further said [\*\*\*45] that if the act under its provisions is not one to regulate the sale of intoxicating liquors it is void, for the reason that it does not meet or respond to the subject as expressed in its title.

#### “Increase” means to make greater---that’s not the aff, because they replace one standard with another, that’s not a net increase---means they’re extra-topical at best because they decrease standards before increasing.

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

#### “Expand the scope” means broadening the range of claims that can be brought---that explicitly excludes altering the standard that determines whether a plaintiff should be granted relief.

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### That’s a voter for limits and ground---

#### a---Limits---allowing affs that don’t increase prohibitions on conduct that isn’t currently prohibited creates an untenable prep burden for the negative by exploding the amount of topical affs.

#### b---Ground---those affs avoid core generics by not increasing antitrust’s applicability, which makes negating impossible and means the aff always wins.

### K

Third off is the K

#### The affirmatives approach to antitrust 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.

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

MacKay 18 – Professor of Sociology, Mohawk College

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

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

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

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

The Five Horsemen of the Modern Day Apocalypse

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

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

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

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

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

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

Societies as Decision-Making Systems

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

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

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

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

Oligarchic Control in “Democratic” States

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

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

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

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

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

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

What is To Be Done?

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

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

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

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

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

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

#### 2In response to the crisis we face, a new form of governance and markets is needed – focusing on anti-domination in antitrust and politics rejects systems of power that are not accountable to the public

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

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

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

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

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

### CP States

Fourth is the states cp

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

#### 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.

### CP Courts

Next is courts CP

#### Text: The United States Courts should issue a ruling regulating private sector business practices that violate an antitrust worker welfare standard.

#### The 1AC has forwarded offensive reasons for Congressional action being good---reciprocity means we get to test it.

### CP Enforcement

Next is enforcement

#### Text: The Federal Trade Commission and the Department of Justice should issue a joint guidance document regulating actions inconsistent with the concern for worker welfare.

#### Agency guidance CP solves---gets agencies to stop prosecuting unions EXCEPT when those unions are harming the welfare of employees.

**Kim 20** – Law Clerk at U.S. Court of Appeals for the D.C. Circuit

Eugene Kim, “Labor’s Antitrust Problem: A Case for Worker Welfare,” The Yale Law Journal, 2020, https://www.yalelawjournal.org/pdf/130.2Kim\_xd4nbvvm.pdf

B. Federal Agency Guidance

1. The Proposal

The federal antitrust agencies—namely, the Bureau of Competition at the FTC and the Antitrust Division of the DOJ—should issue a joint guidance document (in similar fashion to the jointly issued Horizontal Merger Guidelines), stating that prosecution of employee organizations is not a priority for the agencies. To accommodate evolving notions of labor within the gig economy and elsewhere, both agencies should use a definition of employee based on the ABC test to clarify that workers who are nominally independent but resemble employees in several key ways are unlikely to be subjected to antitrust scrutiny. One sample guidance document is provided in the Appendix, which outlines the ABC test and contextualizes it in statutory text, legislative history, and modern developments in the labor market.

Under the current state of the law, the federal government has investigated and litigated against numerous workers’ associations, claiming that these associations are engaged in collusive or otherwise anticompetitive activity.138 These groups range from associations of public defenders seeking higher compensation,139 to physicians jointly dealing with insurers,140 to truck drivers seeking better pay and work conditions.141 In many of these cases, organizing activities have been enjoined and participants subjected to agency supervision.142 An agency policy based on the ABC test would not foreclose all of the actions agencies have historically brought against workers’ organizations, but it should foreclose most actions that are inconsistent with the concern for worker welfare underlying the antitrust laws. Consider, for example, North Texas Specialty Physicians, which addressed an agreement by independent physicians regarding how they would negotiate payments with payors (like insurance companies, health maintenance organizations, and preferred provider organizations).143 Agencies would still have leeway to prosecute these sorts of actions because independent doctors are probably not considered employees under the ABC test: they control their own work; to the extent they are hired by patients, they do a different type of work than the patient; and they are engaged in an independently established trade. On the other hand, consider the recent FTC action against a group of port truck drivers who had organized and initiated work stoppages to contest sub-minimum-wage pay and long hours.144 These actions are more questionable under the proposed guidance, given that the drivers lack control over crucial aspects of their job, such as pay and conditions of work.145 Distinguishing workers’ organizations based on these factors—in particular, the extent of hirer control—serves the normative goals of the framework introduced in Part I. From an economic perspective, efforts by physicians to organize should be subject to greater scrutiny because they tend to be more regressive than efforts by truck drivers to do the same. From a legislative-history perspective, if the purpose of the union exemption is to allow workers to balance disparities in bargaining power, the extent of control that workers have over their work should be a decisive factor in determining whether to extend the antitrust exemption.

### PIC Healthcare

Next is the pic

#### Text: The United States federal government should regulate private sector business practices that violate an antitrust worker welfare standard except for hospital mergers.

**Hospital mergers violate the worker welfare standard---their author**

Suresh **Naidu 18**. \*Associate Professor of International and Public Affairs and Economics, Columbia University. \*Eric Posner is a Kirkland & Ellis Distinguished Service Professor of Law, University of Chicago Law School. \*E. Glen Weyl is a Principal Researcher, Microsoft Research New England and Visiting Senior Research Scholar, Yale University Department of Economics and Law School. “Antitrust Remedies for Labor Market Power”. University of Chicago Law School. 2018. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13776&context=journal\_articles

Defenses. Because we have never seen an attempt to justify anticompetitive labor market effects of mergers, it is hard to know what efficiencies merging partners would attempt to bring to bear. One possibility, noted above, is that a merger could reduce redundancy. Another possibility would be increased productivity because of greater ease of medical record sharing or cross-hospital referrals. The merging parties would have to show that these efficiencies would be likely to increase wages and could not be achieved without a merger. Other informal factors seem important here, especially changes to hours, benefits, and job descriptions, as these can be highly specific to a particular hospital, and nurses can be asked to work odd hours. Given large economies of scale in hospitals and often the necessity of affiliating with a major university, we doubt that entry analysis would play a large role in this case, nor would potential competition. However, the prospect of coordinated effects might be important given the close geographic proximity of hospitals and their frequent communication about community health, which may serve as a ruse for collusion on wages.

In short, the tools already used by antitrust regulators to predict the product market price effects of mergers can be readily applied to predicting their labor market wage effects. Using available estimates of hospital market power in the nursing market and existing antitrust heuristics, we guess that the wage effects of hospital mergers are substantial, suggesting that antitrust regulators should subject them to an additional level of scrutiny.

**Consolidation is necessary to preserve rural hospitals, but antitrust expansion deters and prevents necessary mergers**

**Kaufman 20** – chair of Kaufman, Hall & Associates LLC

Ken Kaufman, "Removing Antitrust Barriers to Solve the Rural Health Care Crisis," Morning Consult, 1-2-2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated **21 percent** of rural hospitals are at **high risk of closure**.

The high number of financially stressed hospitals is creating a **crisis of access** for rural communities and a potential **crisis of quality** and patient safety, as these hospitals **struggle to secure** **sufficient** clinical and technological **resources**. These struggles can be even more difficult in towns that could once support two hospitals but can **no longer do so**.

A **solution** to the rural health crisis that promotes **partnerships** with larger health systems addresses two critical needs. First, it enables a **rational, equitable approach** to a fundamental restructuring of rural health care resources. Second, it provides **access to sufficient financial resources** to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current **antitrust law makes it difficult** for individual hospitals or health systems to **collaborate on efforts** to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a **single health system**, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the **value** of a **system-based approach** to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a **safe zone** for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are **unlikely** to **reduce competition substantially**.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving **efficiencies** may be **realized** … **through a merger**.”

The situation becomes **more difficult** when a community has two hospitals that do not fall within the safe zone and it can **no longer support both**. Such markets will be considered highly concentrated, and an attempt to merge the hospitals **likely will be challenged** by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The **threat** of **antitrust enforcement** actions **throws a chill** over health system-led efforts to make the **rural health care** delivery system **more rational**, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and **ongoing scrutiny** these systems take on certainly might **dissuade other health systems** from pursuing a **similar route**.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a **practical reality** in rural communities.

The rural health care crisis is **happening now**; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that **understand** and **are willing** to take on the challenges of rural health care markets should be **given the opportunity** to do so.

**Rural hospital closures cause massive food spikes**

**Alemian 16** – President & CEO of Alemian & Associates

David Alemian, "Rural Healthcare Is a Matter of National Security," HCPLive, 11-8-2016, https://www.hcplive.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If **too many** rural health organizations go **out of business**, it then becomes a matter of **national security** and here’s why:

In most rural communities, the healthcare organization is the **largest employer**. When the largest employer goes out of business, the **community collapses** and **people move away**. What was once a thriving community then **becomes a ghost town**. Rural America **produces the food** that feeds the rest of the country.

What will happen when our **amber waves of grain turn to desert wastelands** because there is **no one to work our great farmlands**? As the source of food dries up, and store shelves empty, the price of food will go **through the roof**. As food prices go up, hyperinflation will become a reality, and our printed money will **become worthless**. Almost **overnight**, Americans will **begin to go hungry** because they won’t be able to afford to put food on the table.

**Food insecurity causes conflict and war---continued US leadership is key and no one fills the vacuum**

**Flowers**, director of the Global Food Security Project and the Humanitarian Agenda at the Center for Strategic and International Studies (CSIS), **‘18**

(Kimberly, “Keeping it Stable: The Connection Between Hunger and Conflict,” January 31, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/31/keeping-it-stable-the-connection-between-hunger-and-conflict)>

Although achieving this SDG’s targets in totality is unlikely, a global focus on reducing poverty, malnutrition, and hunger around the world **remains essential** both as a universal moral value in a world of inequalities, and as an important contributor to economic growth and **national security**. The United States has been a **global leader** in **addressing the root causes** of hunger and poverty through **agricultural development**, including President Obama’s leadership role in creating the L’Aquila Initiative at the 2009 G8 summit in Italy. The initiative emerged in **response to a food price crisis** and resulted in a promise by donors to provide $22 billion in agricultural development assistance over three years.

It is **more critical now than ever** for leaders within the Trump administration to continue to leverage that progress, starting with gaining a better understanding of the complexity of global food insecurity and its inherent connection with conflict. As food insecurity is both a cause and a consequence of conflict, addressing food insecurity goes well beyond a moral obligation; **it is a national security imperative.**

A lack of access to food can **spark unrest** among civilian populations, particularly when triggered by food **price spikes**. Hungry populations are more likely to express their discontent with unresponsive or corrupt leadership, perpetuating a **cycle of political instability** and further undermining long-term economic development. In addition, governments and non-state actors alike can **use food as a strategic instrument of war**, as witnessed in instances spanning from Sudan’s civil conflict in the 1990s to President Bashar al-Assad’s war-torn Syria today. In Syria, all sides have used food as a tool to **control** and **expel** populations. ISIS has used food resources as both a source of **funding** and a lure for **recruitment**. Food **weaponization** further **underscores the importance of United States** action to protect food security abroad and recognize strategies employed to transform a basic necessity into a military tool.

Today, between 1.2 and 1.5 billion people live in fragile, conflict-ridden states. These conflicts have pushed over 56 million people into crisis and emergency levels of food insecurity. The U.N. estimates that 65 million people are internally displaced within their own countries or are refugees in other countries. These numbers continue to rise as conflicts and violence **escalate across the world,** in countries like **Yemen**, South **Sudan**, and **Syria**, causing social and economic devastation. Meanwhile, the number of people dependent on humanitarian assistance has mushroomed. Projections indicate that by 2030, more than two-thirds of the world’s poor could be living in fragile countries.

The international community is increasingly recognizing the **linkages** between **food insecurity** and **political instability.** Sharp rises in global food prices in 2007 and 2008 sparked riots and street demonstrations in more than 40 countries across the world. Since political leaders started paying attention to this connection, there has been notable progress in increasing international attention and funding to address the root causes of hunger and poverty. The United States has dedicated roughly $1 billion to agricultural development since 2010 through its global food security programs. Thanks to the bipartisan Global Food Security Act that passed in July 2016, multiple U.S. agencies are implementing a global food security strategy that reduces poverty, bolsters resilience, and improves nutrition.

Even the U.S. intelligence community has noticed food security challenges. In November 2015, the National Intelligence Council released an assessment that linked food insecurity to political instability and conflict. The report states that the overall risk of food insecurity in many countries, **compounded** by demographic shifts and constraints on key resources such as land and water, **will increase** during the next decade. The assessment concludes that in some countries, declining food security will contribute to social disruptions and **large-scale political instability** or conflict. The intelligence community’s highlighting of the importance of food security as a diplomacy tool and security strategy broadens the number of stakeholders who are tracking, responding to, and mitigating food insecurity. It is no longer solely a focus for policymakers in the development space.

After nearly a decade of progress, global hunger is again on the rise. A U.N. report on food security and nutrition released last year estimates that 815 million people, or 11 percent of the global population, are chronically malnourished, an increase of nearly 40 million people over the previous year. Conflict and climate change are the two primary causes of this reversed trend. More than half of those experiencing extreme hunger live in countries affected by protracted conflict. Droughts and natural disasters also pose a serious threat to food security, particularly to smallholder farmers vulnerable to a volatile climate.

The 2017 State of Food and Agriculture report explains that conflict and climate change are responsible for rising global hunger levels. Smallholder farmers around the world will be forced to adjust to changing rainfall patterns and severe droughts and floods, which will directly impact their crops and incomes. Many weeds, pests, and pathogens are influenced by climate and thrive in warm conditions. Severe floods can wipe out fields and block market transportation routes, reducing smallholders’ abilities to maintain a sustainable income. Researchers, including those at the National Academies of Science, conclude that human-induced climate change and drought is one of the root causes of Syria’s conflict. Climate change thus places an added burden on countries with limited resources already struggling to feed their populations, as declining agricultural growth and incomes can create displacement and heighten hunger.

Food insecurity and climate change are not the sole cause of the conflict in Syria, but their contribution to the country’s instability cannot be ignored. Investing in international development programs and humanitarian **assistance** that fosters agricultural-led growth and **strengthens the resilience** of vulnerable people can **create peace**, improve lives, and **reduce conflict.** U.S. foreign policy priorities should include strengthening the health and prosperity of those less fortunate before a crisis occurs because our investments can help prevent a crisis in the first place. As Former Secretary of Defense Robert M. Gates said, “Development is a lot cheaper than sending soldiers.”

### DA Innovation

Sixth is the innovation da—

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

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

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

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

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

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

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

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

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

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

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Inequality

#### Oligarchic capture makes populism inevitable – it makes people feel powerless in the world which incentivizes them to lean towards populist leaders

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David Cayla, “Neoliberalism and Populism,” Routledge, 2021, https://www.routledge.com/Populism-and-Neoliberalism/Cayla/p/book/9780367427702

In addition to the lack of new ideas, what exactly to change and how to do it, the political situations in many countries do not favour a radical overhaul of public policies. The management of the 2007–2008 crisis, as well as the sharp rise in inequality that most countries experienced since the 1980s, has led to a deep distrust among a section of the population that has resulted in the emergence of populist forces and broad social protest movements. The turn that the political debate has taken since then is not conducive to a thorough rethinking and rebuilding of societies. Instead, populism generates sterile opposition against elites accused of betraying the people and against minorities or foreign populations. Populism is also an “identitarianism”. It seeks to rehabilitate popular cultures and identities in response to representations and social hierarchies that fail to give them the consideration they expect.

But populism cannot be reduced to its political dimension. It is, more fundamentally, the expression of a social disorder. The vote for the Brexit and the election of Donald Trump are sometimes considered the most striking populist events of recent years. That is forgetting that populist movements took root in many countries long before they reached the Anglo-Saxon world. Central Europe was, in the early 2010s, the laboratory of a form of populism that man- aged to gain and maintain power. In Southern Europe, a specific form of populism emerged, shaped by social issues and the Eurozone crisis. In Turkey, Russia and the Philippines, populism has taken an authoritarian dimension that challenges civil rights and democracy itself. The list is long: the key point is that populism, although fairly easy to identify, is embodied politically and socially in very diverse ways. Moreover, its causes are not always clear, and no consensus can be found among those who study it.

For instance, while social and economic inequalities appear to be a decisive factor in the emergence of populism, it is not clear that fiscal redistribution alone would be sufficient to weaken it. Indeed, once populist leaders come to power, they rarely implement equalitarian measures. Behind the nationalist rhetoric many employ, there are frequent injunctions to work and effort instead of waiting for governmental subsidies. Similarly, populist leaders are often businessmen, and some of them are billionaires.

In this book, I wish to explore the link between populism and neoliberalism. Why? Perhaps because the former may be a consequence of the latter, and to understand them, it may be necessary to deal with them together. The idea to study populism and neoliberalism in conjunction is not new. Most authors who have studied populism connect it to the economic disarray that the working classes have fallen into. And those scholars have no difficulty in linking this disarray to economic policies and neoliberalism.

What is more debatable, however, is the nature of the relationship between these two phenomena. In order to characterize it, it is primarily necessary to delve deeper into the origin of the different forms of populism and to understand what it is that unites them despite the apparent heterogeneity of their agendas. Secondly, it is essential to clearly define what neoliberalism stands for. What a curious doctrine whose name is itself a matter of debate! Is it a simple “market fundamentalism” as the Nobel Prize winner in economics, Joseph Stiglitz claims? If that is all there is, then one would conclude that the global economy has already emerged from neoliberalism since states have intervened widely and massively to rescue markets in recent years.

First, let us honestly admit that no one seriously believes in the perfection of markets any more. Everyone now accepts that markets need public institutions to function and, on occasion, strong support from public authorities to rescue them from chaos. But if neoliberalism is not simply market fundamentalism, how shall it be defned and characterised precisely?

This book seeks to answer all these questions. More specifcally, I defend two main arguments. The frst one is that the roots of populism lie frst and foremost in the feeling of distrust that people feel towards a powerless political structure. It is argued that if politics have become impotent, it is mainly because its ability to act in the economic sphere has been taken away. In the name of free competition and free trade, many levers of action have been deactivated by competitive markets in favour of regulation. The state has thus gradually resigned from its role as a producer and economic regulator in favour of merely preserving and repairing the market order. Neoliberalism is therefore not market fundamentalism because it does not rest on the perfection and autonomy of markets. That is why it puts the state at its service. There are, of course, as we shall see, several forms of neoliberalism and different conceptions about the nature of the order that is supposed to ensure the proper functioning of markets. But all neoliberals, including Hayek and Friedman, believe that some form of public intervention is necessary to make markets work in the best possible way.

#### Basic economics shows oligarchic increases inequality via gutting aggregate demand – it concentrates wealth into the hands of elites crushing the worth of the dollar and diminishing demand

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Josh Bivens, “Inequality is slowing US economic growth,” *Economic Policy Institute*, 12 December 2017, pp. 3-9, https://files.epi.org/pdf/136654.pdf.

This new attention to the crisis of American pay is totally proper. The failure of wages of the vast majority of Americans to benefit from economy-wide growth in productivity (or income generated in an average hour of work) has been the root cause of the stratospheric rise in inequality and the concentration of economic growth at the very top of the income distribution. Had this upward redistribution not happened, incomes for the bottom 90 percent of Americans would be roughly 20 percent higher today. 3 In short, the rise in inequality driven by anemic wage growth has imposed an “inequality tax” on American households that has robbed them of a fifth of their potential income.

There would be huge benefits to American well-being from blocking or reversing this upward redistribution. This welfare gain stemming from blocking upward redistribution is the primary reason to champion policy measures to boost wage growth and lead to a more equal distribution of income gains. Put simply, a dollar is worth more to a family living paycheck to paycheck than it is to families comfortably in the top 1 percent of the income distribution.

Proponents of increases in the minimum wage and other measures to boost American wages have often argued that there are benefits to these policies besides the welfare gains stemming from pure redistribution. These proponents have often argued that boosting wages would even benefit aggregate economic outcomes, like growth in gross domestic product (GDP) or employment.

Recent evidence about developments in the American and global economies strongly indicate that these arguments are correct: boosting wages of the bottom 90 percent would not just raise these households’ incomes and welfare (a more-than-sufficient reason to do so), it would also boost overall growth. For the past decade (and maybe even longer), the primary constraint on American economic growth has been too-slow spending by households, businesses, and governments. In economists’ jargon, the constraint has been growth in aggregate demand lagging behind growth in the economy’s productive capacity (including growth of the labor force and the stock of productive capital, such as plants and equipment). Much research indicates that this shortfall of demand could become a chronic problem in the future, constantly pulling down growth unless macroeconomic policy changes dramatically.

Our rising inequality is being driven by the slowdown in wage growth for the bottom 90 percent

It is now well-known that incomes in America grew much less equally after 1979. Probably the most important fact about this growing inequality is that it has overwhelmingly been driven by trends in market-based income rather than in the taxes and transfers component of income. Table 1 shows the sources of income growth for the top 1 percent of households in the three decades before the Great Recession. It uses Congressional Budget Office (CBO 2016) data on comprehensive household income, which includes noncash market-based income such as employer contributions to health insurance premiums as well as non–market-based income such as government transfers. The CBO data show that inequality is increasing (the share of all income that is going to the top is rising) because the top 1 percent are getting a greater share of each type of market income and because the types of market income that are most concentrated at the top (particularly capital gains and business income) constitute a growing share of all income, whereas income from less-concentrated sources (particularly labor compensation) is falling as a share of overall income. The data in the table also indicate that the direct, arithmetic influence of taxes and transfers has been minimal, with rising inequality of market incomes explaining more than 100 percent of the rise in the after-tax income share of the top 1 percent.4

The first block of columns simply shows the top 1 percent share of overall household income and of various income types as identified in CBO (2016). A clear finding is that the top 1 percent share of every source of income except government transfers rose significantly between 1979 and 2007. The share of overall income held by the top 1 percent more than doubles (rising from 8.9 to 18.7 percent of total income) between 1979 and 2007. And even with the enormous blow to top 1 percent incomes dealt by the 40 percent loss in the stock market from 2007 to 2010, the top 1 percent share in 2012 of 17.3 percent was almost double its 1979 level. Particularly salient to this analysis is the rough doubling of both labor and total capital shares claimed by the top 1 percent from 1979 to 2007 and 2012.

The next block of columns shows each income category’s share of overall household income. The most striking finding here is the large decline in the labor compensation share of total income, falling from 70.6 percent in 1979 to 61.0 percent in 2007 and 2012. Correspondingly, the share of total capital and business income (driven by capital gains and business income) rose substantially, from 17.5 percent in 1979 to 22.1 percent in 2007. 5 Due to the stock market crash in 2007 and the hangover from that crash through 2010, capital income shares (and thus total capital and business income) remained lower in 2012 than in 2007, but still above the 1979 levels. Finally, pension payments and transfer incomes have risen steadily over time as shares of total income.

The third block of columns calculates how much growing concentration within each income category contributed to the increasing top 1 percent share of income from 1979 to 2007 and from 1979 to 2012. The growing concentration of particular income types in the top 1 percent of households contributed 7.2 percentage points to the 9.8 percentage-point increase in the top 1 percent’s income share from 1979 to 2007, accounting for essentially three quarters of the rise. The vast majority of this concentration within income sources is accounted for by labor and capital incomes. The last block of columns summarizes how much the shift from less-concentrated (labor) income to more-concentrated (capital) incomes boosted the top 1 percent share of overall household income. The sum of these shifts contributed 2.6 percentage points to the growth of the top 1 percent share from 1979 to 2007, and 0.4 percentage points from 2007 to 2012.

One way to summarize what these data tell us is that the vast majority of households (those outside the top 1 percent) are losing out in claiming their proportionate share of total income growth in two significant ways. First, workers as a group are losing out to capital owners, with the shift from labor to capital income explaining a significant portion of the rise of the top 1 percent. Second, the bottom 99 percent of income earners in America are able to claim only an ever-shrinking portion of the overall wage bill, with the highest-paid workers in the top 1 percent more than doubling their share of labor income over the last three and a half decades.

In our view, these are simply two sides of the same coin: a pronounced reduction in the collective and individual bargaining power of ordinary American workers that led to pay growth lagging productivity so badly in recent decades. If wages of the bottom 99 percent had kept pace with productivity growth for most of the past generation (the way that typical workers’ wages did in the post-WWII generation), then most of the increase in income inequality we have seen simply would not have had space to develop, as concentration within labor incomes would not have grown and the share of total output available to be claimed by capital owners would have been significantly smaller. 6

But wages for the vast majority of workers stopped keeping pace with economy-wide productivity growth in the late 1970s, and the cumulative wedge between productivity and typical workers’ pay has risen ever since, as shown below in Figure A. This figure shows growth in economy-wide productivity, defined as the amount of income and output generated in an average hour of work in the economy. While the pace of productivity growth slowed down in the late 1970s, productivity still grew steadily in the following decades. The figure also shows a measure of hourly pay (including both wages and benefits) for production and nonsupervisory workers in the U.S. economy. This nonmanagerial group includes roughly 80 percent of the private-sector workforce. After growing right in line with productivity for decades following World War II, hourly pay for these workers all but stagnated after 1979. Because productivity kept growing but pay for 80 percent of the private-sector workforce stagnated, this means that the economy continued to generate growing incomes on average each year, but pay for typical workers slowed radically. In short, the growing wedge between these lines represents the disproportionate share of economic growth claimed by those at the top after 1979.

Table 1 and Figure A together tell a clear story about the rise in American inequality: it has been made possible by the suppression of wage growth for the vast majority of American workers. Until this wage suppression ends and hourly pay for the vast majority of workers begins rising in lockstep with economy-wide productivity, there is very little reason to hope that rising inequality can be arrested. This makes focusing policy attention on boosting wage growth absolutely crucial.

“Secular stagnation,” or, the chronic shortage of aggregate demand constraining economic growth

A useful (if admittedly too-simple) way to think about an economy’s growth is as an interplay between the economy’s productive capacity and the level of aggregate demand. The economy’s productive capacity is a measure of potential that includes three major “inputs” of production: the labor force, the capital stock, and the state of technology. However, for these potential inputs to be fully utilized, aggregate demand—or spending by households, businesses, and governments—must be strong enough to mobilize them. Take the example of a hotel’s economic fortunes from 2007 to 2010. In 2007, the building and physical plant existed, the systems for taking reservations existed, and there were plenty of workers, both actual employees and potential workers willing to take jobs at the right wages. Also in that year, there were customers; rooms were likely booked to capacity and the owners may have even considered adding rooms. In 2010, this hotel still had a physical plant and reservation systems, and while their own staff was likely much smaller because of layoffs in the wake of the Great Recession, there was a huge increase in potential workers looking for jobs that could have been hired. But what kept the hotel’s hiring constrained and profits low in 2010 was lack of customers, not slow growth in the economy’s potential (or productive capacity).

Recently, a number of economists have noted that evidence over recent decades indicates that growth has been constrained more by slow growth in aggregate demand than by slow growth in the economy’s productive capacity. For example, the full business cycle between the peaks of 2001 and 2007 saw the slowest economic growth then on record. The result of this slow growth was that the unemployment rate never returned to prerecession levels, and the prime-age employment-to-population (EPOP) ratio never approached prerecession levels. (See Bivens and Irons 2008 for a full accounting of this business cycle’s place in historical comparisons.) All of this indicates that the slow growth that took hold even before the Great Recession hit was likely a function of too-slow growth in aggregate demand—or spending by households, businesses, and governments.

Before the Great Recession, most macroeconomists would have rejected the idea that economic growth could be constrained for long periods of time by too-slow demand growth relative to the economy’s productive capacity. The typical view was that growth in productive capacity was driven by long-run trends that did not change very fast, such as the aging of the population (which determines the pace of potential labor force growth), the accumulation of plants, equipment, and buildings that is the result of decades of past investment, and accelerations and decelerations of technology that were largely exogenous (unrelated to the state of the business cycle). In this view, ensuring that growth in productive capacity (or growth in potential GDP) is fully realized essentially means ensuring that aggregate demand grows quickly enough to keep resources (labor and capital) fully employed.

In past decades, policymakers considered it relatively easy to keep aggregate demand growing fast enough high enough to fully utilize the economy’s productive capacity. In fact, macroeconomic policymakers thought their most difficult task was restraining, not boosting, growth in aggregate demand. When aggregate demand for economic output outstrips the economy’s productive capacity to meet that demand, the result is inflation. So policymakers focused on controlling inflation—or ensuring that aggregate demand did not run chronically too fast. Of course, the U.S. economy underwent recessions during which demand growth lagged behind potential GDP growth, but it was thought that the demand shortfalls could be easily solved by the Federal Reserve reducing short-term interest rates to spur more spending. Because aggregate demand was thought to need policy restraint, not stimulus, this implies that overall growth was constrained by how fast the economy’s productive capacity could grow. Any worry that persistently slow growth (say lasting more than one year) in aggregate demand could be a primary constraint on economic growth over a meaningfully long time period was largely dismissed. We now know that this dismissal was premature, and that sluggish demand growth can pull down economic growth for long periods of time.

The data show we are in such a period, and likely have been for over a decade. The extraordinarily weak GDP growth between 2001 and 2007 was accompanied by decelerating wage growth, and low inflation and interest rates. These trends are strong indicators that demand was lagging growth in productive capacity. This weakness in demand was especially striking given that aggregate demand (or spending by households, businesses, and governments) was buoyed in those years initially by near-zero interest rates (set by the Federal Reserve in the early 2000s) and then by an enormous asset bubble in residential real estate that increased household wealth in the mid-2000s. The housing bubble burst, ushering in the Great Recession. The recovery from that recession was even slower than the recovery from the 2001 recession, despite extraordinarily expansionary monetary policy in the wake of the Great Recession.

#### Neoliberalism’s focus on short-term profit over long-term breakthroughs prevents the US from competing with China and increases national security threats

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

History is again knocking. The growing competition with China and shifts in the international political and economic order should provoke a similar instinct within the contemporary foreign-policy establishment. Today’s national security experts need to move beyond the prevailing neoliberal economic philosophy of the past 40 years. This philosophy can be summarized as reflexive confidence in competitive markets as the surest route to maximizing both individual liberty and economic growth and a corresponding belief that the role of government is best confined to securing those competitive markets through enforcing property rights, only intervening in the supposedly rare instance of market failure.

The foreign-policy establishment need not come up with the next economic philosophy; the task is more limited—to contribute a geopolitical perspective to the unfolding debate on what should follow neoliberalism and then to make the national security case for a new approach as it emerges.

Toward this end, the foreign-policy community needs to shed a number of old assumptions. Whereas the most damaging elements of the previous approach are being discarded from mainstream economics, certain tropes still linger in the foreign-policy conversation.

First, policymakers should recognize that underinvestment is a bigger threat to national security than the U.S. national debt. At annual gatherings both inside and beyond Washington, senior national security experts still inveigh against the debt as a top national security threat. Generals and admirals testify to this effect before the U.S. Congress on a regular basis. But by now it should be beyond argument that secular stagnation (whereby satisfactory growth can only be achieved through unstable financial conditions), not debt, is far and away the more pressing national security concern. After all, the world has now had a 10-year live experiment showing how austerity and lack of investment in the face of low growth produce destabilizing autocrats in the mold of Hungary’s Viktor Orban and Brazil’s Jair Bolsonaro.

This is not to suggest debts and deficits never matter. Rather, it is to emphasize the distinction between good debt and bad debt—a point now widely embraced in economic circles. The U.S. national security community is rightly beginning to insist on the investments in infrastructure, technology, innovation, and education that will determine the United States’ long-term competitiveness vis-à-vis China. With growth, inflation, and interest rates all lagging, policymakers should not be intimidated by arguments going back to the Simpson-Bowles commission (and likely to return if a Democrat takes office in 2021) that the United States cannot afford these investments.

Bad debt, though, does create risk without enhancing medium- and longer-term growth potential. The Trump administration’s 2018 tax legislation, with a price tag of between $1.5 trillion and $2.3 trillion (two or three times what the 2009 stimulus cost), serves as an expensive lesson. There are now too many nails in the coffin of trickle-down tax cuts for corporations and the wealthiest Americans to view it as anything but a zombie ideology that is redistributing trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should likewise dismiss it.

The idea of trickle-down tax cuts for corporations and the wealthiest Americans is discredited. It simply redistributes trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should dismiss it.

Second, advocating industrial policy (broadly speaking, government actions aimed at reshaping the economy) was once considered embarrassing—now it should be considered something close to obvious. Despite a 40-odd-year hiatus, industrial policy is deeply American. Alexander Hamilton’s vision for U.S. manufacturing was the first American industrial policy, a tradition carried forward throughout U.S. history—from Henry Clay’s American System to Dwight D. Eisenhower’s interstate highway network and Lyndon Johnson’s Great Society—until it lost favor in the 1980s.

A return to industrial policy shouldn’t simply pick up where the country left off a few decades ago. Rather than focusing on picking winners in specific sectors, there is an emerging consensus that suggests governments should focus instead on investing in large-scale missions—like putting a man on the moon or achieving net-zero emissions—that require innovations across many different sectors.

The biggest geopolitical reason to get back to industrial policy is climate change. It cannot be addressed by taxing carbon alone. It will take a surge of deliberate and directed public investment that underwrites a shift to a post-carbon U.S. economy through research and development, deployment of new technologies, and development of climate-friendly infrastructure.

Another good reason is that others are doing it, especially the United States’ competitors. President Xi Jinping’s Made in China 2025 strategy is a 10-year blueprint aimed at catapulting China into a technology and advanced manufacturing leader in both the commercial and military domains. Good estimates are elusive, but China’s subsidies alone reach into the hundreds of billions of dollars. And these investments have already paid off handsomely in several areas, like artificial intelligence, solar energy, and 5G, where many experts believe China is on par with or already outstripping the United States.

U.S. firms will continue to lose ground in the competition with Chinese companies if Washington continues to rely so heavily on private sector research and development, which is directed toward short-term profit-making applications rather than long-term, transformative breakthroughs. And the United States will be more insecure if it lacks the manufacturing base necessary to produce essential goods—from military technologies to vaccines—in a crisis.

#### Antitrust enforcement increases inequality

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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.

### Modeling

#### Structural alt causes outweigh

Zakheim 2/13

Dov S. Zakheim is vice chairman of the Center for the National Interest. He was under secretary of defense (comptroller) from 2001 to 2004 and deputy under secretary of defense, The National Interest, February 13, 2017, “Think Asia Will Dominate the 21st Century? Think Again.”, http://nationalinterest.org/feature/think-asia-will-dominate-the-21st-century-think-again-19429?page=show

Nevertheless, despite its huge and well-educated middle class, India remains ~~hobbled~~ [overwhelmed] by everything from an infuriating bureaucracy, which certainly rivals all others for its ability to strangle anything in red tape, to an infrastructure so poor that it often makes more sense to fly even short distances than risk endless traffic jams resulting from U-turns by camel carts or cows blocking the road. Moreover, a huge, young and undereducated lower class, which often still suffers from caste-based discrimination, has never truly disappeared from the nation’s social structure.

### Democracy

#### 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.

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

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

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

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

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

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

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

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

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

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

#### Our assumptions are fundamentally incompatible – rejecting their vision of the political economy is a pre-req to successful economic reforms

**Sitaraman 21** – professor at Vanderbilt Law School and the author of The Great Democracy: How to Fix Our Politics, Unrig the Economy, and Unite America.

Ganesh Sitaraman, “The Coming Revolution in the American Economy,” New Republic, 4/21/21, https://newrepublic.com/article/162211/revolution-american-economy-end-reagan-magic-market

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

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

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

#### Current conceptions of antitrust must be completely rejected – they rely on years of junk judicial decisions completely divorced from congressional intent

**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.

#### That ruins the entire affirmative because court implementation will turn the aff into consumer welfare v2

**Kim 20** – Law Clerk at U.S. Court of Appeals for the D.C. Circuit

Eugene Kim, “Labor’s Antitrust Problem: A Case for Worker Welfare,” The Yale Law Journal, 2020, https://www.yalelawjournal.org/pdf/130.2Kim\_xd4nbvvm.pdf

Just as consumer welfare can be measured through economic factors like price, output, quality, and innovation, courts and economic experts can assess worker welfare through a set of analogous factors: wages and benefits, hours, working conditions,65 and training. One major tension between these two standards is that workers benefit from higher wages while consumers benefit from lower prices, but these factors capture similar characteristics of equilibria in both markets.66 Wages and hours are the labor-market analogs of price and quantity, and benefits can be considered along with wages as a type of compensation. Working conditions reflect heterogeneity within a single type of employment, just as quality reflects heterogeneity within a single type of product. And training reflects how labor markets can be dynamic, just as innovation reflects how prod- uct markets can be dynamic: that is, labor productivity can improve over time, just as firm productivity can improve over time. As in product-market analysis, courts and economic experts can assess how a contested activity (e.g., a merger) affects these factors and estimate the net effect on worker welfare.

A worker welfare standard would be similar to a consumer welfare standard in that much of its application would fall on economic experts, whose work would be assessed and weighed by courts. Of course, some cases will be clearer and may be amenable to per se analysis, like an agreement between firms to fix wages. But, as in product markets, other cases will be subtle, and economics will have a role to play. Just as economic models are used to forecast the effects of certain market events on price and quantity, and aggregate those effects to estimate net effects on consumer welfare,67 economics will also be instrumental in forecasting the effects of market events on wages and hours, and aggregating those effects to estimate net effects on worker welfare. Antitrust analysis is highly technical in the status quo,68 and a worker welfare standard would not be any different in its reliance on economics. The main difference is that a worker welfare standard focuses attention on the interests of workers, who are often neglected despite their vulnerability to rent-extractive firm behavior, and recognizes that advancing the interests of workers may require more than advancing the interests of consumers.

These proposed factors reflect the central grounds of debate in the rich labor- economics literature concerning the impact of mergers and other economic events on workers, which would provide a foundation for expert testimony on worker welfare issues.69 For example, economists have found conflicting results on the effects of mergers on wages—some have found that mergers can increase wages because they improve firm efficiency, especially when the merger involves two firms in the same industry,70 while others have found that mergers decrease wages because they increase firm bargaining power, especially for workers with narrow skill sets.71 The fact that hours and employment can decrease a�er mer- gers is well documented,72 but some economists have questioned that claim, and others have countered that mergers can lead to improved human-capital devel- opment and the matching of workers to appropriate jobs.73 Similarly, scholars have studied the effect of mergers on quality of work—for instance, on worker stress levels and employee-employer relations.74 These factors—wages and benefits, hours, working conditions, and training—reflect existing grounds of debate in the labor-economics literature on the impact of firm conduct on work- ers. As such, courts and economic experts can build on preexisting frameworks and models when analyzing these factors beyond the merger context. Further, this research demonstrates that a worker welfare standard is not necessarily hos- tile to the aims of firms, as certain transactions can plausibly benefit both labor and capital. The net effect of economic activities on worker welfare will be up for debate, and like other economic questions in antitrust enforcement, ought to be assessed on a case-by-case basis.75

#### There’s no amount of congressional change that can solve – court law is premised on a form of economic libertarianism that is at odds with a truly democratic society

Purdy et al 20 – William S. Beinecke Professor of Law at Columbia. He teaches and writes about environmental, property, and constitutional law as well as legal and political theory.

Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman, “Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis,” *The Yale Law Journal*, vol. 129, 2020, pp. 1806-1812, https://www.yalelawjournal.org/pdf/Britton-Purdyetal.Feature\_oopjctns.pdf.

C. The Twentieth-Century Synthesis Comes to Maturity

What we call the Twentieth-Century Synthesis put this account of economic life at the center of both "economic" and "political" legal scholarship and doctrine. One set of legal subfields came to be treated as "about the economy," where the goal of scholarship and policy was to overcome inefficiencies and press toward wealth-maximizing outcomes. In parallel, in areas regarded as "essentially about" the liberty and equality of citizens, the last half-century has seen withdrawal from questions of economic distribution and structural coercion.

In "economic" law, the Synthesis took form through a series of legal-theoretic moves that aimed at the fragmentary implementation of aspects of general equilibrium theory. As we will describe below, these were successful only because they both tracked the institutional developments of the American economy during the neoliberal transformation and had essential affinities with the liberal values of personal freedom and state neutrality. Nonetheless, their genealogy is essentially one of economics-informed legal theory, and their power is rooted in the status of microeconomic rationality and general equilibrium theory as the master platform of "hard" social science.

In the public-law half of the Synthesis, the situation is very different. Here, as the postwar decades gave way to the neoliberal era, law and economics did little formal work. Instead, public law took a new shape around a particularly thin version of key liberal values: freedom, equality, and state neutrality. Constitutional law is emblematic of this development, and we focus much of our attention there. 80Whereas in economic law the Synthesis was driven by scholars working in an influential and often well-funded network, here the decisions of increasingly conservative judges drove the change, and scholarship was often reactive or critical, trying to eke out what little space remained for a robust egalitarianism, even as that space narrowed.

These developments produced a consistent pattern: encasing economic and other structural forms of inequality from answerability to the principle of equality; identifying liberty with certain forms of market participation; and assimilating the political activity of democracy to market paradigms, by turn celebrating a commercialized public sphere as a paragon of self-rule and denigrating the actions of actual government institutions as interest-group capture and entrenchment. The courts produced, and scholarship adapted to, a denuded and distorted version of liberalism, one unable to demand or defend the institutional arrangements necessary for robust conceptions of liberty or equality.

The encasement of markets and the assimilation of political activity to market activity can be seen in three emblematic moves of modern constitutional law. Each of these moves helped recast issues of justice as something other than political economy questions. First is an account of constitutional equality that exiled matters of class and material, structural inequality from the reach of constitutional law. Second is an expansion of the conception of First Amendment-protected "speech" to encompass certain economic transactions, including protecting advertising, campaign spending, and even the sale of data from regulation. Third is an aggressive application of public-choice theory's market-modeled skepticism of the state to legislation and administrative regulation. These together form an encasement of economic power in the constitutional realm, tending altogether to render democracy subject to the market, rather than subjecting the market to democratic rule.

The first key move on the public-law side of the Synthesis was to render material and structural inequality irrelevant to the Fourteenth Amendment's principles of equal protection and personal liberty. This was not foreordained.

The Court in the 1940s applied elevated equal-protection review to laws falling disproportionately on the poor and described union membership as a "fundamental right" in its ruling upholding the National Labor Relations Act. 81In the 1970s, with the increasingly conservative turn of the Court, those possibilities were cut off in favor of a denial that constitutional liberty and equality had implications for political economy. The result was the constitutional erasure of the structural subordination of the poor, people of color, and women.

Two steps were key here. First, despite efforts to constitutionalize welfare rights in the late 1960s and early 1970s, the Court held that public-benefits legislation was discretionary and refused scrutiny for poverty as a class, arguing that it was not susceptible to such sharply delineated formal inquiry. 82When individuals argued that their ability to exercise their constitutional rights was pertinent to the constitutional obligations of the state--for example, when women argued that the state could not constitutionally subsidize childbirth without also subsidizing abortion, or plaintiffs asserted that low funding levels for public schools in high-poverty districts denied students the material basis for exercising the rights to speak and vote--the Court demurred. 83Just when the achievement of formal equality meant that the major threats to an egalitarian society lay in structural inequality, the Court approved policies that compounded inherited forms of inequality, permitting education funding to vary in proportion to municipal wealth, and the access-to-abortion right to depend on having the money to exercise it.

Second, the Court encased forms of private, material power by rejecting heightened equal-protection review of policies that predictably and persistently reproduced underlying patterns of economic, racial, and gender inequality. 84In this way, the Court determined that education, public hiring, and criminal-justice policies could reproduce and even amplify social and economic inequality as long as they did not intentionally treat individuals differently on the basis of a forbidden characteristic. Yet it is precisely the defining character of structural inequality that it persists independently of individually disparate treatment. 85A conception of equality that ignored material deprivation and focused on improper intent encased the most pressing sources of inequality from constitutional review, even when they were reproduced and amplified by state action, and went so far as to invalidate policies that sought to mitigate structural inequality by taking explicit account of characteristics such as race. 86In time the Court came to forbid all but the narrowest forms of affirmative--and even remedial--action. 87Congress's own power to remedy discrimination was also curtailed, with the Court insisting that even an amendment that expressly granted Congress power to intervene in private acts of subordination did not authorize a significantly more expansive view of what it means to live in equality than the courts themselves were willing to impose. 88This jurisprudence eclipsed the older view that a conception of citizenship had to be in part a material conception, concerning both distribution and the structure of power within economic relations (such as that enshrined in collective bargaining or antitrust) appropriate to a self-governing community of equals.

A second defining public-law move in the Synthesis was the merging of First Amendment speech with commerce, specifically with certain commercial transactions. This included invalidating laws that limited private spending or donation to electoral campaigns; 89regulations on advertising (for instance, of alcohol or tobacco); 90and expansions in protections for commercial speech (for instance, to encompass the sale of doctors' prescription records). 91Each of these developments was marked by the Court's revision of what democracy required. In the area of commercial speech, for example, the Court shifted over time from a conception that gave no protection at all to commercial speech to one that provided expansive protection--protection the Court considered necessary, citing the importance of information for consumers and efficient markets, and the specter of legislatures harboring animus and bent on discriminating against corporations themselves. 92

At a certain level of abstraction, this development seems in tension with the previous two, as it involves increased constitutional concern with economic ordering, where the first and second developments mainly insist on a sharp distinction between state and economy. As we see it, however, the real importance of these cases is that they fortify the line between the political and the economic by shielding economic power from political disruption, even when the invalidated political action is aimed at achieving a value basic to democracy, such as the equalizing of influence in elections. 93As some of us have argued elsewhere, to understand a pattern of jurisprudence such as the Twentieth-Century Synthesis, one must appreciate that more than one style of reasoning may contribute to the same result. Courts "roll back" review on some fronts and "roll out" review on others, but in both cases they tend to protect private power from state interference, whether that interference takes the form of judicial review or legislative action. 94Moreover, in keeping with the law-and-political-economy premise that state action and economic power are always mutually intertwined, it is key to appreciate that the result of these decisions is not to segregate state power from economic power but to exacerbate an increasingly oligarchic political economy in which private power is readily translated into influence over public decisions. 95

The third defining move was a growing public-law skepticism toward political judgments about distribution and economic ordering, based on the conviction that these judgments are likely to enforce and entrench the kinds of "capture" that James Buchanan's "political economy" emphasized. 96These concerns recur in the Court's First Amendment jurisprudence, in which the Justices suggest that legislatures setting ground rules for campaign finance must be illegitimately seeking to skew future elections 97or when they suggest that legislatures applying specific rules to corporate conduct in markets must be "discriminating" against business. 98It also infuses the Court's recent First Amendment opinions cutting back dues-based funding for public-sector unions, which treat those unions as signal cases of self-entrenching interest groups likely to distort public policy. 99These latter strands of law-and-economic thinking have also had substantial influence on other fields of law. 100The public-choice literature on rent seeking, which models the state as a platform for interest-group competition, deeply reshaped many fields where scholars had previously reasoned about public purposes and participation. 101"Interest-group capture" became an axiomatic problem of the regulatory state, leading influential academics to argue that the only appropriate response was a move to market-mediated technocracy, in the form of cost-benefit analysis. 102The administrative state was remade along the way, with cost-benefit analysis used to block any regulation that did not meet a market-denominated test of value from the Reagan Administration onward. 103A new generation of scholarship seeking to influence the application of cost-benefit analysis followed, creating a new center of gravity in fields from environmental law to workplace regulation. 104More broadly, scholars from across the political spectrum deployed market-making techniques to resolve canonically public-law problems, such as those of environmental protection.

By the 1980s and 1990s, legal scholars were facing courts (and agencies and political parties, though we cannot elaborate the point here) increasingly insensible to dynamics of structural exclusion, and increasingly unwilling to acknowledge the interaction between market relations and citizenship. The legal academy shifted in response, and debates in mainstream legal scholarship migrated to make questions of political economy hard to ask because they were seemingly already settled both theoretically and practically. The end result was a legal-academic discourse that rendered matters of structural subordination increasingly identified as issues of "identity" and institutions that once were robust realms of debate about the institutionalization of democratic voice increasingly subject to expert-denominated claims of efficiency.

#### Proceduralism is deeply ideological, rooted in a misguided libertarian distrust of the state – its facial neutrality is a guise for entrenched status-quo bias

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

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

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

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

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

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

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

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

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

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

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

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

[\*358] B. The Neutrality Myth

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

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

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

Similar stories about administrative law's evenhandedness can be (and have been) told about other aspects of proceduralism. 90 And so the political neutrality of administrative law has hardened into something of an article of faith. 91 Cass Sunstein and Adrian Vermeule, two of the deans of the field, can thus write that "administrative law lacks any kind of ideological valence" and "is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking." 92 They concede that "there is a sense in which administrative law does have libertarian features, certainly insofar as it enables regulated entities to challenge the legality of agency action." 93 But they [\*360] deny that the APA and the doctrinal apparatus that comes along with it can be counted as libertarian "in any general or systematic way," invoking, among other things, the principle from State Farm that deregulatory actions are subject to judicial review. 94 They argue that administrative law instead reflects a compromise:

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

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

C. Administrative Law's Status Quo Bias

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

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

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

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

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

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

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

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

#### Making political decisions based in procedures crushes agency action

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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.

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#### Agency flex is key to every impact – agencies need to be able to respond quickly to emerging risks

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

#### The alt certainly solves any actual impact coming out of this card

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

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

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

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

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

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

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

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

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

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

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

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

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

#### That solves inequality – anti domination allows rapidly effective redistributions of wealth and political power that drastically reduce inequality

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

IV. Constitutional Political Economy and Fourth-Wave Legal Realism

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

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

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

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

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

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

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

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

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

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

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

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

#### Representation is the largest internal link to democracy – via anti-domination the alt leads to millions gaining representation

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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. 38-42, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

Yet if representation is not an inferior re-presentation of the will of an embodied popular sovereign, but instead an institutional tool that helps citizens understand themselves as co-equal participants in lawmaking, then there is little reason to exclude agencies ex ante from the democratic process.279 They, like formal electoral representation, can be a part of a system of democratic autonomy, a political order that promises to provide everyone the greatest say possible that is also compatible with the equal inclusion of others.

This insight is not unprecedented. French philosopher Pierre Rosanvallon argues280 that independent agencies can and do serve as representative agents (of the trusteeship variety281) and provide the neutrality and impersonality that republicans once sought from deliberative legislative bodies. Richard Stewart, in his seminal 1975 essay,282 described in U.S. administrative law a turn towards pluralist interest representation and away rigid applications of the separation of powers doctrine. The interest-group politics of administrative policymaking can, like the interest-group politics of Congressional lawmaking, provide “opportunities for policy proposals to be criticized from a variety of directions, both before and after their implementation.”283 For Stewart, interest group representation might even serve as a new ground for agencies’ political legitimacy.284 Indeed, the legitimacy ascribed through representation seems to be embraced by agencies themselves. In its own educational literature, the “politically independent” U.S. Federal Reserve System (“The Fed”) asserts that “decentralizing the central bank into twelve districts helped to ensure more voices were represented”285 as it went about its business.

Of course, Theodore Lowi, in his famous 1969 study of interest group representation in administration, did not celebrate agencies’ pluralist politics. He lamented its “irrational” incrementalism and the influence it lent to powerful industry actors. 286 In contrast, Noh points out that agencies enjoy a better capacity than Congress to achieve ideal representative deliberation, given their smaller constituencies and limited subject matter.287 With the concurrent rise in public interest advocacy and civil rights legislation, agencies accommodated a growing array of individual rights by incorporating rulemaking procedures that accept input from diverse civil society representatives.288 More recently, Emerson, 289 Rahman & Gilman290 and Mansbridge291 argue that there is an ongoing, constitutive relationship between administrative agencies and citizens as they collaborate to make regulations. Mary E. Guy, past president of the American Society for Public Administration, characterized the people serving public agencies as “facilitators, interpreters, and mediators of public action”292 – a characterization that could just as easily be attributed to elected representatives. Even Locke, despite his commitment to an organ-body conception of popular sovereignty, theorized a connection between the executive and representation. In his theory of government, it is up to the Prince to create new representative offices if time and social change corrupts the representativeness of extant lawmaking institutions.293

There is a stiff backbone of principle behind these authors’ arguments. As mentioned above, representative systems serve democracy by structuring public contestation, stimulating debate and provoking judgment. They thereby permit disaggregated and diverse citizens to participate in the process of forming collective purposes. One can observe this dynamic within agency decision-making, demonstrated by public reactions following recent U.S. Executive Orders regarding immigration, environmental deregulation, etc. They mobilize objections, enabling citizens to make judgments about agency responses. The public criticism to which agencies are routinely subject are sufficient to limit, at least according to Vermeule and Posner, executive agencies far more effectively than do the tenets of statutory delegation and the separation of powers.294

Moreover, agencies serve as fora for the kind of non-electoral political representation that supplements political equality by calling forth previously ignored or silent constituencies.295 In the past, minority communities excluded from electoral politics fruitfully engaged with administrators tasked with implementing social welfare rights.296 Administrative experiments in participatory budgeting and collaborative governance encourage citizens’ engagement in the infrastructure shaping their lives. 297 They can, in Waldron’s terms, “secur[e] multiple points of access for citizen input” and thus add to the “housing” of the kind of public deliberation that promises to secure democratic autonomy.298

Indeed, administration can, perhaps better than Congress, provide a forum where “conflicts and rendered both comprehensible and solvable” and where the values at stake are sufficiently “specific and understandable to generate opinions and dialogue.”299 Because an elected representative will make a variety of unrelated claims regarding lawmaking in a generalized arena (Congress), the potential exercise of political power can become obscure. In contrast, an agency with a particular subject matter jurisdiction can attract representatives and generate claims that target the specific policies that impact citizens’ lives. They give rise to “affected constituencies,” providing “a point of identification around which [citizens] might coalesce as a ‘people’ or demos defined along some dimensions of common interest.”300 Civil society and public interest representatives, for example, have a better opportunity to exercise judgment on and lodge objections to, e.g., how much pollution is permitted in drinking water (EPA); whether discrimination claims are adequately enforced (Department of Justice); and how policing is executed (“citizen audits” of local departments). Indeed, many social movements target their organizing around agency jurisdictions.301 In other words, agencies provide an opportunity for citizens to form the kind of considered political judgments that new theories of representation value. Indeed, it is agencies that can provide that factual information necessary for citizens seeking to exercise judgment on many matters of public concern.302 One need only consider the usefulness of CDC scientists to democratic deliberation during a pandemic. As a result, agencies, like electoral politics, facilitate the “circuation of judgment and opinion that should unite state institutions and the citizens.”303

Furthermore, agencies themselves serve as representatives of underserved consumer and minority interests.304 For example, the Consumer Financial Protection Bureau (“CFPB”), created in response to the capture and fragmentation of financial regulators in the aftermath of the 2008 crisis, was tasked to protect the consumers of financial products. Typically, consumers are poorly situated to influence banking regulation through normal channels. Accordingly, the CFPB serves not as a neutral bureaucracy, but as consumers’ “proxy advocate” (representative!) that solicits the input of veterans, students and pensioners.305 Meanwhile, financial institutions receive (more than) equal representation in other policy-making locations. The CFPB both educates and solicits the opinions and complaints of those who do not normally possess the capacity to make their voices heard when lawmakers turn their attention to high finance. Indeed, the Progressives who supported New Deal agencies created them precisely to balance public might against the already over-represented “aristocracy of wealth.”306 An agency, serving as a counter-power capable of breaking up monopolies or safeguarding labor rights,307 can speak for the consumers and workers neglected by elected politicians.308 President Franklin D. Roosevelt, in a 1932 campaign speech, expressed this idea in colorful language. He dubbed regulators the “Tribune[s] of the people.”309 During Reconstruction, furthermore, federal agencies spoke for those recently freed from slavery when local governments did not.310

#### Opening up regulatory agencies to popular administration is key to ensure they work in the public interest

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K. Sabeel Rahman, “Policymaking as Power-Building,” *Southern California Interdisciplinary Law Journal*, vol. 27, Winter 2018, pp. 333-340, https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1988&context=faculty.

III. THE DEMOCRATIC POTENTIAL OF ADMINISTRATION: A NORMATIVE CASE

From their inception, regulatory agencies have been seen as a remedy for legislative failures. Late nineteenth century reformers developing new regulatory agencies were in part concerned with the dangers of legislative capture, corruption, or ineffectiveness. Furthermore, these early agencies were understood as part of a broader effort to restore popular sovereignty over the more systemic and structural threats to the public good: the upheavals of industrialization, new forms of economic power and inequality, and experiences of economic dislocation that seemed to outstrip the capacities of conventional policy tools and institutions. 64 But what is especially interesting about historical and contemporary accounts of bureaucratic politics and administrative constitutionalism is their democratic valence. Each of these accounts shine light on the efforts by constituencies that are in different ways politically marginalized to enter the regulatory arena and leverage the regulatory process in an attempt to offset this disparity of political power. Regulatory agencies, as policymaking spaces with discretion, become arenas where these constituencies attempt to achieve a more equitable political voice. Indeed, the combination of administrative discretion and the administrative process suggests that in addition to its contributions of expertise and policy innovation, we might think of the regulatory state as mitigating democratic defects as well.

As more of our day-to-day governance takes place through administrative agencies and processes, the battles over administrative authority have become more fraught. 65 This anxiety is what lies behind calls to reassert classic separation-of-powers restraints on administrative agencies. 66 But these appeals to administrative restraint are themselves problematic; much of the authority and discretion afforded to agencies is ineradicable - and arguably desirable. 67 In contrast to its image as a clinical and mechanistic enterprise, the regulatory process is an essentially political one, an arena in which different constituencies attempt to build and exercise political power, shape public policy, and contest the meaning of moral and policy norms. Adrian Vermeule has argued extensively that we must embrace the reality that regulation is necessarily comprised of "gray zones" of agency discretion beyond direct oversight or accountability. 68 Complete control over agencies is too costly to achieve given the vast expanse of the regulatory state; nor is such tight control desirable.

This reality of administrative power raises two major implications. First, administrative processes are already political domains, affected and influenced by the same kinds of normative judgments and power disparities that characterize ordinary electoral or legislative politics. This reality of power and influence is one of the key lessons of the ongoing concerns over regulatory capture, and the obvious and more subtle ways in which more powerful organized interests, particularly business interests, are able to shape regulations. 69 Second, the plasticity and front-line nature of administrative institutions and processes provide a surprising potential for reshaping these processes in ways that can take better account of such power disparities. Indeed, the persistence of administrative discretion is not a tragic defect of modernity to be minimized or eliminated; rather it is an attractive feature of modern governance to be optimized and embraced. It is this administrative flexibility and discretion that enables agencies to address the complexities of public policy in a rapidly changing society. 70

If this is the case, then it seems that administrative bodies and processes can help address two of the central normative challenges in democratic politics: first, creating spaces in which constituencies can engage in the collective enterprise of making political and policy judgments, and second, in addressing persistent problems of disagreement and power. Indeed, democratic theorists addressing these questions evoke principles and arguments that can be extended to the administrative arena - not just the legislative or electoral arenas that are the more conventional focal points for democratic political theory. 71

A. Democratic Judgment in Administration: Waldron Revisited

The idea that administrative processes may be desirable as a democratic space may seem counter-intuitive at first, but consider the ways in which today's administrative institutions share several features of quintessentially democratic policymaking. To see this democratic potential of regulation, consider a brief comparison to normative defenses of the central institution of democratic popular sovereignty: the legislature. In Jeremy Waldron's classic defense, legislation is fundamentally democratic for three reasons: first, legislation provides an institutional forum in which collective reasoning can occur - and where disagreement can be engaged openly. 72 Second, because legislation arises from elected representatives, the outcomes of legislation are understood to be fundamentally ours - the product of a collective process in which we all have joint authorship - not the result of an alien or arbitrary force. 73 Third, decision-makers are bound by the rules they enact, forcing them to grapple with the costs, burdens, and opportunities arising from policy judgments they might make, while internalizing the tradeoffs and moral risks of their decisions. 74 For Waldron, the messiness and complexity of ordinary legislation is both what seems to drive many theorists to seek more neutral, apolitical forms of judgment - as in the valorization of courts - yet it is that same messiness that makes legislation fundamentally democratic and valuable. 75

Waldron's concern with preserving the space for democratic politics and agency has at times manifested in a critical stance towards the regulatory state. 76 Yet the same defense of legislation, against the idealized image of judicial or apolitical judgment, can also be applied to the administrative state. This intuition may be surprising, because on the surface, regulation seems more analogous to the judicial model than the legislative one, both in its mainstream image and daily operations. The conventional image of regulation draws much of its legitimacy from the idyll of rational technocrats, who like judges, are insulated from the vagaries of conventional politics, making judgments on the basis of their expertise and reason, bound by norms of neutrality and objectivity. 77 But regulatory bodies share many of Waldron's democratic features.

First, regulation can serve as a policymaking forum for collective decision-making. Most statutes and legislative arrangements are broad, leaving weighty moral and political judgment in the hands of agencies. Administrative agencies are one of the primary ways in which our political system addresses some of the most fundamental, yet difficult policy questions. From environmental to workplace safety, to financial regulation, to consumer protection, the modern regulatory state is our primary tool for addressing systemic social and economic concerns. Furthermore, agencies - more so than legislatures - are positioned at the front-line of governance, where these policy problems are ultimately resolved, implemented, and enforced. 78 It is at the regulatory level that policymakers are forced to confront directly the nuts-and-bolts and fundamental societal tradeoffs that policies might trigger. Agencies thus provide a "central linchpin" in linking democratic consent with concrete problem-solving. 79 And in an era of legislative gridlock, we have seen agencies increasingly repurposing old statutory authorities to develop new policies. 80 Agencies thus possess broad authority, and play a central role in policymaking.

Second, agencies and the administrative process offer, perhaps counter-intuitively, some major advantages over the electoral and legislative processes in representation, inclusion, and voice. In particular, agencies have the ability to house a more dynamic forum of representation that is not bounded by the geographic boundaries of legislative districts. 81 Electoral politics remains structured around geographically-bound jurisdictions, yet many of the most important interests and concerns in modern governance cut across these districts, whether in the form of race, ethnicity, class, gender, environmental concern, or other interests. 82 For these groups, nonelectoral forms of representation are crucial to securing an adequate voice in the political arena. The regulatory process offers a more hospitable arena for issue and constituency-based advocacy and voice. 83 The administrative process, then, is more than just a remedial attempt at defusing anxieties about administrative power that exists outside the classic separation-of-powers framework. Rather, it offers the potential of creating genuinely new and more balanced forms of democratic participation and engagement in the day-to-day task of governing.

Third, the good judgment that Waldron celebrates in legislatures is a product of the fact that decision-makers must themselves face the repercussions of their decisions, thus forcing a degree of internalizing costs and tradeoffs, which in turn promotes good judgment. But this is what agencies, more so than legislatures, are particularly adept at doing through their processes of consultation and impact analysis.

Where the analogy holds weakest is in Waldron's normative commitment that decision-making processes be inclusive of affected interests and be understood as expressions of the collective will. The administrative process has developed mechanisms to engage and include diverse stakeholders in the policymaking process. But as we will see, administrative institutions can be reworked to better facilitate such engagement and inclusion, particularly in light of disparities of power, resources, organization, and sophistication among different stakeholders. Nevertheless, agencies are structurally well-positioned as sites of political judgment and day-to-day governance. If we can expand their ability to manage an inclusive political process, the underlying democratic potential of the administrative process can be more fully articulated.

B. Power and Disagreement in Democratic Theory: Madison Revisited

Putting power at the center of our analysis changes significantly how we think about the realities of democratic politics - and what the implications might be for democratic institutional design. In particular, it calls into question one common approach to viewing democratic institutions: what we might call a "good governance" framework. These policies - such as efforts to prevent lobbying, undo the "revolving door," increase the barriers between interest groups and policymakers to make the latter more autonomous and independent, or bind policymakers more directly to rational and apolitical standards of decision-making through data and expertise requirements and transparency measures - ultimately seek to rationalize, sterilize, or insulate the policymaking processes from the undue influence of special interests. 84

But this view of democratic defect and remedy is problematic. Citizens and political associations are not disinterested, rationalistic, deliberative actors; they are, rather, necessarily subjective, partial, political. It is this partiality that motivates political action, and which is irreducibly at the heart of most normative disagreements in politics. 85 Furthermore, attempts at sterilizing the policymaking process, however well-intended, have to be viewed with some degree of skepticism, for it seems unlikely that insulation can redress the fundamental problem of disparate political power. More well-resourced and sophisticated individuals and groups are likely to overcome higher barriers to political entry; the groups most politically disempowered are more likely to be "screened out." 86

The reality is that disagreement and power politics are here to stay, nor are they equally distributed across groups and geographies. That being the case, the challenge for democratic institutional design is not to attempt to sterilize policymaking of these pressures, but rather to engage, manage, and balance them in ultimately productive ways. As James Madison famously observed, a central goal of democratic institutional design was to counteract the dangers of "faction" and of "cabals of the few" by harnessing the countervailing power of rival factions and groups to prevent concentrations of political power. 87 That is, "ambition must be made to counteract ambition." 88 This is the core Madisonian insight: given realities of power and disagreement, institutional design must seek to that channel such disagreement productively, creating institutions that facilitate the mutual checking of power and influence. 89

Whether Madison himself was a true populist, or instead someone bent on preserving aristocratic rule 90 is somewhat tangential for this broader point. The key for our purposes is this shift to a specifically power-balancing view of institutional design and democratic politics. 91 The goal, then, is not necessarily to prioritize institutional designs for their epistemic, deliberative, or technocratic values (though we may of course still hope to promote such values). Rather, this Madisonian view suggests that institutions must also focus on facilitating countervailing power and checks and balances. While we often associate Madisonian institutional design with the constitutional separation of powers, this focus on power-building could take a variety of other forms. 92 Some scholars have highlighted the role of class-based institutions in empowering the powerless public against powerful economic elites as a major tradition in republican thought, from the Roman tribunes of the plebs to more modern consociationalist models. 93 Election law scholars have similarly appealed to Madisonian values of contestation and conflict to call for more competitive electoral systems that undo "lockups" of the electoral process from overbearing parties, political entrenchment, or even campaign finance overreach. 94

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Descriptively, administrative agencies and processes already serve as key forums for democratic politics, advocacy, and social movement engagement with policymakers. Normatively, these institutions and processes could be adapted to more self-consciously promote these democratic features of administration - in particular, facilitating collective democratic judgment and balancing power disparities across different constituencies. But for regulatory agencies to be more effective at this democratic aspiration, we need a somewhat different approach to the design and implementation of regulatory policy. In the next Part, we will see some examples of how local and federal administration can be harnessed to deliberately mitigate power disparities and facilitate the engagement of movements and grassroots constituencies. This in turn will help us develop some more generalizable lessons and tools to be discussed in Part V.

#### Still concludes we hit 3% and that would be CATASTROPHIC and concludes we have to reduce warming more

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In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

#### 3% triggers tipping points that contributes to a spillover effect into further warming

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We are proposing the following extension to the DAI risk categorization: warming greater than 1.5 °C as “dangerous”; warming greater than 3 °C as “catastrophic?”; and warming in excess of 5 °C as “unknown??,” with the understanding that changes of this magnitude, not experienced in the last 20+ million years, pose existential threats to a majority of the population. The question mark denotes the subjective nature of our deduction and the fact that catastrophe can strike at even lower warming levels. The justifications for the proposed extension to risk categorization are given below.

From the IPCC burning embers diagram and from the language of the Paris Agreement, we infer that the DAI begins at warming greater than 1.5 °C. Our criteria for extending the risk category beyond DAI include the potential risks of climate change to the physical climate system, the ecosystem, human health, and species extinction. Let us first consider the category of catastrophic (3 to 5 °C warming). The first major concern is the issue of tipping points. Several studies (48, 49) have concluded that 3 to 5 °C global warming is likely to be the threshold for tipping points such as the collapse of the western Antarctic ice sheet, shutdown of deep water circulation in the North Atlantic, dieback of Amazon rainforests as well as boreal forests, and collapse of the West African monsoon, among others. While natural scientists refer to these as abrupt and irreversible climate changes, economists refer to them as catastrophic events (49).

Warming of such magnitudes also has catastrophic human health effects. Many recent studies (50, 51) have focused on the direct influence of extreme events such as heat waves on public health by evaluating exposure to heat stress and hyperthermia. It has been estimated that the likelihood of extreme events (defined as 3-sigma events), including heat waves, has increased 10-fold in the recent decades (52). Human beings are extremely sensitive to heat stress. For example, the 2013 European heat wave led to about 70,000 premature mortalities (53). The major finding of a recent study (51) is that, currently, about 13.6% of land area with a population of 30.6% is exposed to deadly heat. The authors of that study defined deadly heat as exceeding a threshold of temperature as well as humidity. The thresholds were determined from numerous heat wave events and data for mortalities attributed to heat waves. According to this study, a 2 °C warming would double the land area subject to deadly heat and expose 48% of the population. A 4 °C warming by 2100 would subject 47% of the land area and almost 74% of the world population to deadly heat, which could pose existential risks to humans and mammals alike unless massive adaptation measures are implemented, such as providing air conditioning to the entire population or a massive relocation of most of the population to safer climates.

Climate risks can vary markedly depending on the socioeconomic status and culture of the population, and so we must take up the question of “dangerous to whom?” (54). Our discussion in this study is focused more on people and not on the ecosystem, and even with this limited scope, there are multitudes of categories of people. We will focus on the poorest 3 billion people living mostly in tropical rural areas, who are still relying on 18th-century technologies for meeting basic needs such as cooking and heating. Their contribution to CO2 pollution is roughly 5% compared with the 50% contribution by the wealthiest 1 billion (55). This bottom 3 billion population comprises mostly subsistent farmers, whose livelihood will be severely impacted, if not destroyed, with a one- to five-year megadrought, heat waves, or heavy floods; for those among the bottom 3 billion of the world’s population who are living in coastal areas, a 1- to 2-m rise in sea level (likely with a warming in excess of 3 °C) poses existential threat if they do not relocate or migrate. It has been estimated that several hundred million people would be subject to famine with warming in excess of 4 °C (54). However, there has essentially been no discussion on warming beyond 5 °C.

Climate change-induced species extinction is one major concern with warming of such large magnitudes (>5 °C). The current rate of loss of species is ∼1,000-fold the historical rate, due largely to habitat destruction. At this rate, about 25% of species are in danger of extinction in the coming decades (56). Global warming of 6 °C or more (accompanied by increase in ocean acidity due to increased CO2) can act as a major force multiplier and expose as much as 90% of species to the dangers of extinction (57).

The bodily harms combined with climate change-forced species destruction, biodiversity loss, and threats to water and food security, as summarized recently (58), motivated us to categorize warming beyond 5 °C as unknown??, implying the possibility of existential threats. Fig. 2 displays these three risk categorizations (vertical dashed lines).

#### Warming is existential – further ratcheting is necessary to solve before positive feedback loops make warming irreversible – international action key, Paris alone isn’t enough

\*written by 33 climate scientists and policy experts from 9 countries

Ramanathan et al. 17

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Climate change is becoming an existential threat with warming in excess of 2°C within the next three decades and 4°C to 6°C within the next several decades. Warming of such magnitudes will expose as many as 75% of the world’s population to deadly heat stress in addition to disrupting the climate and weather worldwide. Climate change is an urgent problem requiring urgent solutions. This paper lays out urgent and practical solutions that are ready for implementation now, will deliver benefits in the next few critical decades, and places the world on a path to achieving the longterm targets of the Paris Agreement and near-term sustainable development goals. The approach consists of four building blocks and 3 levers to implement ten scalable solutions described in this report by a team of climate scientists, policy makers, social and behavioral scientists, political scientists, legal experts, diplomats, and military experts from around the world. These solutions will enable society to decarbonize the global energy system by 2050 through efficiency and renewables, drastically reduce short-lived climate pollutants, and stabilize the climate well below 2°C both in the near term (before 2050) and in the long term (post 2050). It will also reduce premature mortalities by tens of millions by 2050. As an insurance against policy lapses, mitigation delays and faster than projected climate changes, the solutions include an Atmospheric Carbon Extraction lever to remove CO2 from the air. The amount of CO2 that must be removed ranges from negligible, if the emissions of CO2 from the energy system and SLCPs start to decrease by 2020 and carbon neutrality is achieved by 2050, to a staggering one trillion tons if the carbon lever is not pulled and emissions of climate pollutants continue to increase until 2030.

There are numerous living laboratories including 53 cities, many universities around the world, the state of California, and the nation of Sweden, who have embarked on a carbon neutral pathway. These laboratories have already created 8 million jobs in the clean energy industry; they have also shown that emissions of greenhouse gases and air pollutants can be decoupled from economic growth. Another favorable sign is that growth rates of worldwide carbon emissions have reduced from 2.9% per year during the first decade of this century to 1.3% from 2011 to 2014 and near zero growth rates during the last few years. The carbon emission curve is bending, but we have a long way to go and very little time for achieving carbon neutrality. We need institutions and enterprises that can accelerate this bending by scaling-up the solutions that are being proven in the living laboratories. We have less than a decade to put these solutions in place around the world to preserve nature and our quality of life for generations to come. The time is now.

The Paris Agreement is an historic achievement. For the first time, effectively all nations have committed to limiting their greenhouse gas emissions and taking other actions to limit global temperature change. Specifically, 197 nations agreed to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels,” and achieve carbon neutrality in the second half of this century.

The climate has already warmed by 1°C. The problem is running ahead of us, and under current trends we will likely reach 1.5°C in the next fifteen years and surpass the 2°C guardrail by mid-century with a 50% probability of reaching 4°C by end of century. Warming in excess of 3°C is likely to be a global catastrophe for three major reasons:

• Warming in the range of 3°C to 5°C is suggested as the threshold for several tipping points in the physical and geochemical systems; a warming of about 3°C has a probability of over 40% to cross over multiple tipping points, while a warming close to 5°C increases it to nearly 90%, compared with a baseline warming of less than 1.5°C, which has only just over a 10% probability of exceeding any tipping point.

• Health effects of such warming are emerging as a major if not dominant source of concern. Warming of 4°C or more will expose more than 70% of the population, i.e. about 7 billion by the end of the century, to deadly heat stress and expose about 2.4 billion to vector borne diseases such as Dengue, Chikengunya, and Zika virus among others. Ecologists and paleontologists have proposed that warming in excess of 3°C, accompanied by increased acidity of the oceans by the buildup of CO2 , can become a major causal factor for exposing more than 50% of all species to extinction. 20% of species are in danger of extinction now due to population, habitat destruction, and climate change.

Here we propose a policy roadmap with a realistic and reasonable chance of limiting global temperature to safe levels and preventing unmanageable climate change—an outline of specific science-based policy pathways that serve as the building blocks for a three-lever strategy that could limit warming to well under 2°C. The projections and the emission pathways proposed in this summary are based on a combination of published recommendations and new model simulations conducted by the authors of this study (see Figure 2). We have framed the plan in terms of four building blocks and three levers, which are implemented through 10 solutions. The first building block would be fully implementing the nationally determined mitigation pledges under the Paris Agreement of the UN Framework Convention on Climate Change (UNFCCC). In addition, several sister agreements that provide targeted and efficient mitigation must be strengthened. Sister agreements include the Kigali Amendment to the Montreal Protocol to phase down HFCs, efforts to address aviation emissions through the International Civil Aviation Organization (ICAO), maritime black carbon emissions through the International Maritime Organization (IMO), and the commitment by the eight countries of the Arctic Council to reduce black carbon emissions by up to 33%. There are many other complementary processes that have drawn attention to specific actions on climate change, such as the Group of 20 (G20), which has emphasized reform of fossil fuel subsidies, and the Climate and Clean Air Coalition (CCAC). HFC measures, for example, can avoid as much as 0.5°C of warming by 2100 through the mandatory global phasedown of HFC refrigerants within the next few decades, and substantially more through parallel efforts to improve energy efficiency of air conditioners and other cooling equipment potentially doubling this climate benefit.

For the second building block, numerous subnational and city scale climate action plans have to be scaled up. One prominent example is California’s Under 2 Coalition signed by over 177 jurisdictions from 37 countries in six continents covering a third of world economy. The goal of this Memorandum of Understanding is to catalyze efforts in many jurisdictions that are comparable with California’s target of 40% reductions in CO2 emissions by 2030 and 80% reductions by 2050—emission cuts that, if achieved globally, would be consistent with stopping warming at about 2°C above pre-industrial levels. Another prominent example is the climate action plans by over 52 cities and 65 businesses around the world aiming to cut emissions by 30% by 2030 and 80% to 100% by 2050. There are concerns that the carbon neutral goal will hinder economic progress; however, real world examples from California and Sweden since 2005 offer evidence that economic growth can be decoupled from carbon emissions and the data for CO2 emissions and GDP reveal that growth in fact prospers with a green economy.

The third building block consists of two levers that we need to pull as hard as we can: one for drastically reducing emissions of short-lived climate pollutants (SLCPs) beginning now and completing by 2030, and the other for decarbonizing the global energy system by 2050 through efficiency and renewables. Pulling both levers simultaneously can keep global temperature rise below 2°C through the end of the century. If we bend the CO2 emissions curve through decarbonization of the energy system such that global emissions peak in 2020 and decrease steadily thereafter until reaching zero in 2050, there is less than a 20% probability of exceeding 2°C. This call for bending the CO2 curve by 2020 is one key way in which this report’s proposal differs from the Paris Agreement and it is perhaps the most difficult task of all those envisioned here. Many cities and jurisdictions are already on this pathway, thus demonstrating its scalability. Achieving carbon neutrality and reducing emissions of SLCPs would also drastically reduce air pollution globally, including all major cities, thus saving millions of lives and over 100 million tons of crops lost to air pollution each year. In addition, these steps would provide clean energy access to the world’s poorest three billion who are still forced to resort to 18th century technologies to meet basic needs such as cooking. For the fourth and the final building block, we are adding a third lever, ACE (Atmospheric Carbon Extraction, also known as Carbon Dioxide Removal, or “CDR”). This lever is added as an insurance against surprises (due to policy lapses, mitigation delays, or non-linear climate changes) and would require development of scalable measures for removing the CO2 already in the atmosphere. The amount of CO2 that must be removed will range from negligible, if the emissions of CO2 from the energy system and SLCPs start to decrease by 2020 and carbon neutrality is achieved by 2050, to a staggering one trillion tons, if CO2 emissions continue to increase until 2030, and the carbon lever is not pulled until after 2030. This issue is raised because the NDCs (Nationally Determined Contributions) accompanying the Paris Agreement would allow CO2 emissions to increase until 2030. We call on economists and experts in political and administrative systems to assess the feasibility and cost-effectiveness of reducing carbon and SLCPs emissions beginning in 2020 compared with delaying it by ten years and then being forced to pull the third lever to extract one trillion tons of CO2

The fast mitigation plan of requiring emissions reductions to begin by 2020, which means that many countries need to cut now, is urgently needed to limit the warming to well under 2°C. Climate change is not a linear problem. Instead, we are facing non-linear climate tipping points that can lead to self-reinforcing and cascading climate change impacts. Tipping points and selfreinforcing feedbacks are wild cards that are more likely with increased temperatures, and many of the potential abrupt climate shifts could happen as warming goes from 1.5°C in 15 years to 2°C by 2050, with the potential to push us well beyond the Paris Agreement goals.

Where Do We Go from Here?

A massive effort will be needed to stop warming at 2°C, and time is of the essence. With unchecked business-as-usual emissions, global warming has a 50% likelihood of exceeding 4ºC and a 5% probability of exceeding 6ºC in this century, raising existential questions for most, but especially the poorest three billion people. A 4ºC warming is likely to expose as many as 75% of the global population to deadly heat. Dangerous to catastrophic impacts on the health of people including generations yet to be born, on the health of ecosystems, and on species extinction have emerged as major justifications for mitigating climate change well below 2ºC, although we must recognize that the uncertainties intrinsic in climate and social systems make it hard to pin down exactly the level of warming that will trigger possibly catastrophic impacts. To avoid these consequences, we must act now, and we must act fast and effectively. This report sets out a specific plan for reducing climate change in both the near- and long-term. With aggressive urgent actions, we can protect ourselves. Acting quickly to prevent catastrophic climate change by decarbonization will save millions of lives, trillions of dollars in economic costs, and massive suffering and dislocation to people around the world. This is a global security imperative, as it can avoid the migration and destabilization of entire societies and countries and reduce the likelihood of environmentally driven civil wars and other conflicts.

Staying well under 2°C will require a concerted global effort. We must address everything from our energy systems to our personal choices to reduce emissions to the greatest extent possible. We must redouble our efforts to invent, test, and perfect systems of governance so that the large measure of international cooperation needed to achieve these goals can be realized in practice. The health of people for generations to come and the health of ecosystems crucially depend on an energy revolution beginning now that will take us away from fossil fuels and toward the clean renewable energy sources of the future. It will be nearly impossible to obtain other critical social goals, including for example the UN agenda 2030 with the Sustainable Development Goals, if we do not make immediate and profound progress stabilizing climate, as we are outlining here.

1. The Building Blocks Approach The 2015 Paris Agreement, which went into effect November 2016, is a remarkable, historic achievement. For the frst time, essentially all nations have committed to limit their greenhouse gas emissions and take other actions to limit global temperature and adapt to unavoidable climate change. Nations agreed to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels” and “achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century” (UNFCCC, 2015). Nevertheless, the initial Paris Agreement has to be strengthened substantially within fve years if we are to prevent catastrophic warming; current pledges place the world on track for up to 3.4°C by 2100 (UNEP, 2016b). Until now, no specifc policy roadmap exists that provides a realistic and reasonable chance of limiting global temperatures to safe levels and preventing unmanageable climate change. This report is our attempt to provide such a plan— an outline of specifc solutions that serve as the building blocks for a comprehensive strategy for limiting the warming to well under 2°C and avoiding dangerous climate change (Figure 1). The frst building block is the full implementation of the nationally determined mitigation pledges under the Paris Agreement of the UN Framework Convention on Climate Change (UNFCCC) and strengthening global sister agreements, such as the Kigali Amendment to the Montreal Protocol to phase down HFCs, which can provide additional targeted, fast action mitigation at scale. For the second building block, numerous sub-national and city scale climate action plans have to be scaled up such as California’s Under 2 Coalition signed by 177 jurisdictions from 37 countries on six continents. The third building block is targeted measures to reduce emissions of shortlived climate pollutants (SLCPs), beginning now and fully implemented by 2030, along with major measures to fully decarbonize the global economy, causing the overall emissions growth rate to stop in 2020-2030 and reach carbon neutrality by 2050. Such a deep decarbonization would require an energy revolution similar to the Industrial Revolution that was based on fossil fuels. The fnal building block includes scalable and reversible carbon dioxide (CO2 ) removal measures, which can begin removing CO2 already emitted into the atmosphere. Such a plan is urgently needed. Climate change is not a linear problem. Instead, climate tipping points can lead to self-reinforcing, cascading climate change impacts (Lenton et al., 2008). Tipping points are more likely with increased temperatures, and many of the potential abrupt climate shifts could happen as warming goes from 1.5°C to 2°C, with the potential to push us well beyond the Paris Agreement goals (Drijfhout et al., 2015). In order to avoid dangerous climate change, we must address these concerns. We must act now, and we must act fast. Reduction of SLCPs will result in fast, near-term reductions in warming, while present-day reductions of CO2 will result in long-term climate benefts. This two-lever approach—aggressively cutting both SLCPs and CO2 –-will slow warming in the coming decades when it is most crucial to avoid impacts from climate change as well as maintain a safe climate many decades from now. To achieve the nearterm goals, we have outlined solutions to be implemented immediately. These solutions to bend down the rising emissions curve and thus bend the warming trajectory curve follow a 2015 assessment by the University of California under its Carbon Neutrality Initiative (Ramanathan et al., 2016). The solutions are clustered into categories of social transformation, governance improvement, market- and regulation-based solutions, technological innovation and transformation, and natural and ecosystem management. Additionally, we need to intensely investigate and pursue a third lever—ACE (Atmospheric Carbon Extraction). While many potential technologies exist, we do not know the extent to which they could be scaled up to remove the requisite amount of carbon from the atmosphere in order to achieve the Paris Agreement goals, and any delay in mitigation will demand increasing reliance on these technologies. Yet, there is still hope. Humanity can come together, as we have done in the past, to collaborate towards a common goal. We have no choice but to tackle the challenge of climate change. We only have the choice of when and how: either now, through the ambitious plan outlined here, or later, through radical adaptation and societal transformations in response to an ever-deteriorating climate system that will unleash devastating impacts—some of which may be beyond our capacity to fully adapt to or reverse for thousands of years.

## 1NR

### Inequality

#### Aggregate demand – neoliberalism concentrates wealth into the hands of elites crushing the worth of the dollar and diminishing demand

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Josh Bivens, “Inequality is slowing US economic growth,” *Economic Policy Institute*, 12 December 2017, pp. 3-9, https://files.epi.org/pdf/136654.pdf.

This new attention to the crisis of American pay is totally proper. The failure of wages of the vast majority of Americans to benefit from economy-wide growth in productivity (or income generated in an average hour of work) has been the root cause of the stratospheric rise in inequality and the concentration of economic growth at the very top of the income distribution. Had this upward redistribution not happened, incomes for the bottom 90 percent of Americans would be roughly 20 percent higher today. 3 In short, the rise in inequality driven by anemic wage growth has imposed an “inequality tax” on American households that has robbed them of a fifth of their potential income.

There would be huge benefits to American well-being from blocking or reversing this upward redistribution. This welfare gain stemming from blocking upward redistribution is the primary reason to champion policy measures to boost wage growth and lead to a more equal distribution of income gains. Put simply, a dollar is worth more to a family living paycheck to paycheck than it is to families comfortably in the top 1 percent of the income distribution.

Proponents of increases in the minimum wage and other measures to boost American wages have often argued that there are benefits to these policies besides the welfare gains stemming from pure redistribution. These proponents have often argued that boosting wages would even benefit aggregate economic outcomes, like growth in gross domestic product (GDP) or employment.

Recent evidence about developments in the American and global economies strongly indicate that these arguments are correct: boosting wages of the bottom 90 percent would not just raise these households’ incomes and welfare (a more-than-sufficient reason to do so), it would also boost overall growth. For the past decade (and maybe even longer), the primary constraint on American economic growth has been too-slow spending by households, businesses, and governments. In economists’ jargon, the constraint has been growth in aggregate demand lagging behind growth in the economy’s productive capacity (including growth of the labor force and the stock of productive capital, such as plants and equipment). Much research indicates that this shortfall of demand could become a chronic problem in the future, constantly pulling down growth unless macroeconomic policy changes dramatically.

Our rising inequality is being driven by the slowdown in wage growth for the bottom 90 percent

It is now well-known that incomes in America grew much less equally after 1979. Probably the most important fact about this growing inequality is that it has overwhelmingly been driven by trends in market-based income rather than in the taxes and transfers component of income. Table 1 shows the sources of income growth for the top 1 percent of households in the three decades before the Great Recession. It uses Congressional Budget Office (CBO 2016) data on comprehensive household income, which includes noncash market-based income such as employer contributions to health insurance premiums as well as non–market-based income such as government transfers. The CBO data show that inequality is increasing (the share of all income that is going to the top is rising) because the top 1 percent are getting a greater share of each type of market income and because the types of market income that are most concentrated at the top (particularly capital gains and business income) constitute a growing share of all income, whereas income from less-concentrated sources (particularly labor compensation) is falling as a share of overall income. The data in the table also indicate that the direct, arithmetic influence of taxes and transfers has been minimal, with rising inequality of market incomes explaining more than 100 percent of the rise in the after-tax income share of the top 1 percent.4

The first block of columns simply shows the top 1 percent share of overall household income and of various income types as identified in CBO (2016). A clear finding is that the top 1 percent share of every source of income except government transfers rose significantly between 1979 and 2007. The share of overall income held by the top 1 percent more than doubles (rising from 8.9 to 18.7 percent of total income) between 1979 and 2007. And even with the enormous blow to top 1 percent incomes dealt by the 40 percent loss in the stock market from 2007 to 2010, the top 1 percent share in 2012 of 17.3 percent was almost double its 1979 level. Particularly salient to this analysis is the rough doubling of both labor and total capital shares claimed by the top 1 percent from 1979 to 2007 and 2012.

The next block of columns shows each income category’s share of overall household income. The most striking finding here is the large decline in the labor compensation share of total income, falling from 70.6 percent in 1979 to 61.0 percent in 2007 and 2012. Correspondingly, the share of total capital and business income (driven by capital gains and business income) rose substantially, from 17.5 percent in 1979 to 22.1 percent in 2007. 5 Due to the stock market crash in 2007 and the hangover from that crash through 2010, capital income shares (and thus total capital and business income) remained lower in 2012 than in 2007, but still above the 1979 levels. Finally, pension payments and transfer incomes have risen steadily over time as shares of total income.

The third block of columns calculates how much growing concentration within each income category contributed to the increasing top 1 percent share of income from 1979 to 2007 and from 1979 to 2012. The growing concentration of particular income types in the top 1 percent of households contributed 7.2 percentage points to the 9.8 percentage-point increase in the top 1 percent’s income share from 1979 to 2007, accounting for essentially three quarters of the rise. The vast majority of this concentration within income sources is accounted for by labor and capital incomes. The last block of columns summarizes how much the shift from less-concentrated (labor) income to more-concentrated (capital) incomes boosted the top 1 percent share of overall household income. The sum of these shifts contributed 2.6 percentage points to the growth of the top 1 percent share from 1979 to 2007, and 0.4 percentage points from 2007 to 2012.

One way to summarize what these data tell us is that the vast majority of households (those outside the top 1 percent) are losing out in claiming their proportionate share of total income growth in two significant ways. First, workers as a group are losing out to capital owners, with the shift from labor to capital income explaining a significant portion of the rise of the top 1 percent. Second, the bottom 99 percent of income earners in America are able to claim only an ever-shrinking portion of the overall wage bill, with the highest-paid workers in the top 1 percent more than doubling their share of labor income over the last three and a half decades.

In our view, these are simply two sides of the same coin: a pronounced reduction in the collective and individual bargaining power of ordinary American workers that led to pay growth lagging productivity so badly in recent decades. If wages of the bottom 99 percent had kept pace with productivity growth for most of the past generation (the way that typical workers’ wages did in the post-WWII generation), then most of the increase in income inequality we have seen simply would not have had space to develop, as concentration within labor incomes would not have grown and the share of total output available to be claimed by capital owners would have been significantly smaller. 6

But wages for the vast majority of workers stopped keeping pace with economy-wide productivity growth in the late 1970s, and the cumulative wedge between productivity and typical workers’ pay has risen ever since, as shown below in Figure A. This figure shows growth in economy-wide productivity, defined as the amount of income and output generated in an average hour of work in the economy. While the pace of productivity growth slowed down in the late 1970s, productivity still grew steadily in the following decades. The figure also shows a measure of hourly pay (including both wages and benefits) for production and nonsupervisory workers in the U.S. economy. This nonmanagerial group includes roughly 80 percent of the private-sector workforce. After growing right in line with productivity for decades following World War II, hourly pay for these workers all but stagnated after 1979. Because productivity kept growing but pay for 80 percent of the private-sector workforce stagnated, this means that the economy continued to generate growing incomes on average each year, but pay for typical workers slowed radically. In short, the growing wedge between these lines represents the disproportionate share of economic growth claimed by those at the top after 1979.

Table 1 and Figure A together tell a clear story about the rise in American inequality: it has been made possible by the suppression of wage growth for the vast majority of American workers. Until this wage suppression ends and hourly pay for the vast majority of workers begins rising in lockstep with economy-wide productivity, there is very little reason to hope that rising inequality can be arrested. This makes focusing policy attention on boosting wage growth absolutely crucial.

“Secular stagnation,” or, the chronic shortage of aggregate demand constraining economic growth

A useful (if admittedly too-simple) way to think about an economy’s growth is as an interplay between the economy’s productive capacity and the level of aggregate demand. The economy’s productive capacity is a measure of potential that includes three major “inputs” of production: the labor force, the capital stock, and the state of technology. However, for these potential inputs to be fully utilized, aggregate demand—or spending by households, businesses, and governments—must be strong enough to mobilize them. Take the example of a hotel’s economic fortunes from 2007 to 2010. In 2007, the building and physical plant existed, the systems for taking reservations existed, and there were plenty of workers, both actual employees and potential workers willing to take jobs at the right wages. Also in that year, there were customers; rooms were likely booked to capacity and the owners may have even considered adding rooms. In 2010, this hotel still had a physical plant and reservation systems, and while their own staff was likely much smaller because of layoffs in the wake of the Great Recession, there was a huge increase in potential workers looking for jobs that could have been hired. But what kept the hotel’s hiring constrained and profits low in 2010 was lack of customers, not slow growth in the economy’s potential (or productive capacity).

Recently, a number of economists have noted that evidence over recent decades indicates that growth has been constrained more by slow growth in aggregate demand than by slow growth in the economy’s productive capacity. For example, the full business cycle between the peaks of 2001 and 2007 saw the slowest economic growth then on record. The result of this slow growth was that the unemployment rate never returned to prerecession levels, and the prime-age employment-to-population (EPOP) ratio never approached prerecession levels. (See Bivens and Irons 2008 for a full accounting of this business cycle’s place in historical comparisons.) All of this indicates that the slow growth that took hold even before the Great Recession hit was likely a function of too-slow growth in aggregate demand—or spending by households, businesses, and governments.

Before the Great Recession, most macroeconomists would have rejected the idea that economic growth could be constrained for long periods of time by too-slow demand growth relative to the economy’s productive capacity. The typical view was that growth in productive capacity was driven by long-run trends that did not change very fast, such as the aging of the population (which determines the pace of potential labor force growth), the accumulation of plants, equipment, and buildings that is the result of decades of past investment, and accelerations and decelerations of technology that were largely exogenous (unrelated to the state of the business cycle). In this view, ensuring that growth in productive capacity (or growth in potential GDP) is fully realized essentially means ensuring that aggregate demand grows quickly enough to keep resources (labor and capital) fully employed.

In past decades, policymakers considered it relatively easy to keep aggregate demand growing fast enough high enough to fully utilize the economy’s productive capacity. In fact, macroeconomic policymakers thought their most difficult task was restraining, not boosting, growth in aggregate demand. When aggregate demand for economic output outstrips the economy’s productive capacity to meet that demand, the result is inflation. So policymakers focused on controlling inflation—or ensuring that aggregate demand did not run chronically too fast. Of course, the U.S. economy underwent recessions during which demand growth lagged behind potential GDP growth, but it was thought that the demand shortfalls could be easily solved by the Federal Reserve reducing short-term interest rates to spur more spending. Because aggregate demand was thought to need policy restraint, not stimulus, this implies that overall growth was constrained by how fast the economy’s productive capacity could grow. Any worry that persistently slow growth (say lasting more than one year) in aggregate demand could be a primary constraint on economic growth over a meaningfully long time period was largely dismissed. We now know that this dismissal was premature, and that sluggish demand growth can pull down economic growth for long periods of time.

The data show we are in such a period, and likely have been for over a decade. The extraordinarily weak GDP growth between 2001 and 2007 was accompanied by decelerating wage growth, and low inflation and interest rates. These trends are strong indicators that demand was lagging growth in productive capacity. This weakness in demand was especially striking given that aggregate demand (or spending by households, businesses, and governments) was buoyed in those years initially by near-zero interest rates (set by the Federal Reserve in the early 2000s) and then by an enormous asset bubble in residential real estate that increased household wealth in the mid-2000s. The housing bubble burst, ushering in the Great Recession. The recovery from that recession was even slower than the recovery from the 2001 recession, despite extraordinarily expansionary monetary policy in the wake of the Great Recession.

#### Financialization – instead of regulating markets, the government bails them out which creates inefficient investment efforts that trigger economic collapse and ruins innovation

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

Finance is financing FIRE

The first problem is that the financial sector has largely been financing itself. Most finance goes back into finance, insurance and real estate rather than into productive uses. The acronym for this is FIRE (finance, insurance, real estate) – appropriate in the sense that it is burning the foundations on which long-term economic growth rests. In the USA and the UK, only about a fifth of finance goes into the productive economy (such as companies that want to innovate, infrastructure that needs building). And in the UK, 10 per cent of all UK bank lending helps non-financial firms; the rest supports real estate and financial assets.18 In 1970 real estate lending constituted about 35 per cent of all bank lending in advanced economies; by 2007 the figure had risen to about 60 per cent.19 The current structure of finance thus fuels a debt-driven system and speculative bubbles which, when they burst, bring banks and others begging for government bailouts. Some of these institutions are deemed ‘too big to fail’, as were banks in the 2008–9 financial crisis: if they failed, the entire system would come crashing down with them. So the banks got the bailouts: FIRE profits are private; FIRE losses are public. Bailing out the banks involved ‘moral hazard’ because, being judged too important to fail, they lived with an implicit government guarantee which tempted them to take excessive risks without having fully to face the consequences if their bets went wrong.

Business is focusing on quarterly returns

The second problem is that business itself has become financialized. In recent decades, finance has generally grown faster than the economy and, within non-financial sectors, financial activities and their accompanying attitudes have come to dominate business. An ever greater share of corporate profits has been used to boost short- term gains in stock prices rather than provide long-term investment in areas like new capital equipment, R&D and worker training: skills are insufficiently developed, too many jobs are ‘McJobs’ and insecure, and wages stay low.20 Indeed, one of the reasons for the high level of private debt in the USA and the UK – driven by a form of capitalism that is aimed at maximizing the returns to shareholders, not all stakeholders – is that many workers need to take on debt to maintain their living standards but cannot earn enough to reduce or pay it off.21 But, unfortunately, the problem goes even further in

Scandinavia, where deregulation of the financial sector has also led to a rise in private debt (also due to home equity withdrawal-based consumption) and overinvestment in FIRE sectors.22

By purchasing its own shares, a corporation can artificially boost its stock price and that of its executives, who are paid in these stocks. In just the ten years to 2019, total buybacks by the Fortune 500 (an annual list of the 500 biggest US companies compiled by Fortune magazine, measured by revenues) exceeded nearly $4 trillion, with many companies spending over 100 per cent of their net income on a combination of buybacks and dividend pay- outs, thus raiding their capital reserves. Over the same period, six of America’s biggest airlines spent an average of 96 per cent of their free cash flow on stock buybacks – the aircraft manufacturer Boeing spent 74 per cent of its free cash flow on stock buybacks – which didn’t deter these companies from asking for federal government help when the COVID-19 crisis struck.23

The excuse often heard from business for doing this is that there are no ‘opportunities for investment’. But, given that the greatest buybackers are in industries where opportunities clearly exist – pharmaceuticals and energy – this is unconvincing. Are there really no opportunities for innovation in antibiotics or treatments for tropical diseases that mostly affect poor people in developing countries, not to mention vaccines? (This question became particularly pertinent with the arrival of COVID-19.) Are there really no opportunities for aircraft manufacturers to invest in renewable energy and other green technologies? The chief culprit is a form of corporate governance obsessed with ‘maximization of shareholder value’ – essentially, maximizing stock prices. Even Jack Welch, the late CEO of General Electric, one of America’s biggest companies, later in life called shareholder value ‘the dumbest idea in the

world’. He explained: ‘Shareholder value is a result, not a strategy ... Your main constituencies are your employees, your customers and your products. Managers and investors should not set share price increases as their overarching goal ... Short-term profits should be allied with an increase in the long-term value of a company.’24

In practice, maximizing shareholder value has often involved loading companies with debt – a supposedly efficient model which leverages a company’s capital base – with the risk that the company is dangerously exposed to unexpected turns of events, such as a pandemic or a market downturn. In 2017, for example, the USA suffered a severe retail slump. The long-established US retailer Toys ‘R’ Us went into liquidation. It had been acquired in 2005 by two private equity firms, Bain Capital and Kohlberg Kravis Roberts, and a real estate firm, Vornado Realty Trust. To buy the company they used the usual private equity formula, saddling it with debt to increase the return later.25 Indeed, company debt rose soon after the takeover from $1.86 billion to nearly $5 billion. By 2007 debt interest payments were 97 per cent of the company’s operating profit. The retail slump of the following years was severe, but the high debt burden imposed on Toys ‘R’ Us impaired its ability to adapt and increased its vulnerability to the downturn.26 The excessive financialization of companies and remorseless pursuit of shareholder value has left many other major companies open to similar charges of moral hazard: ingenious financial structures benefit owners more than other stakeholders such as workers, suppliers and customers – let alone the wider communities in which companies operate.

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

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

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

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

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

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

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

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

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

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

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

The engineered glut of permits is not temporary, since in this system, unused permits can be “banked” for use in future years, although it might not be the most prudent course to hoard an asset of falling value. Indeed, trading systems tend to reinforce oligopoly power, since they always grandfather in the largest emitters, and tend to penalize new entrants. And it is well understood that trading systems tend to stifle further technological measures to curb emissions. Money that might have been used productively to alter the energy infrastructure instead gets pumped into yet another set of speculative financial instruments, leading to bubbles, distortions of capital flows, and all the usual symptoms of financialization.26

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

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

#### Neoliberalism’s focus on short-term profit over long-term breakthroughs prevents the US from competing with China and increases national security threats

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

History is again knocking. The growing competition with China and shifts in the international political and economic order should provoke a similar instinct within the contemporary foreign-policy establishment. Today’s national security experts need to move beyond the prevailing neoliberal economic philosophy of the past 40 years. This philosophy can be summarized as reflexive confidence in competitive markets as the surest route to maximizing both individual liberty and economic growth and a corresponding belief that the role of government is best confined to securing those competitive markets through enforcing property rights, only intervening in the supposedly rare instance of market failure.

The foreign-policy establishment need not come up with the next economic philosophy; the task is more limited—to contribute a geopolitical perspective to the unfolding debate on what should follow neoliberalism and then to make the national security case for a new approach as it emerges.

Toward this end, the foreign-policy community needs to shed a number of old assumptions. Whereas the most damaging elements of the previous approach are being discarded from mainstream economics, certain tropes still linger in the foreign-policy conversation.

First, policymakers should recognize that underinvestment is a bigger threat to national security than the U.S. national debt. At annual gatherings both inside and beyond Washington, senior national security experts still inveigh against the debt as a top national security threat. Generals and admirals testify to this effect before the U.S. Congress on a regular basis. But by now it should be beyond argument that secular stagnation (whereby satisfactory growth can only be achieved through unstable financial conditions), not debt, is far and away the more pressing national security concern. After all, the world has now had a 10-year live experiment showing how austerity and lack of investment in the face of low growth produce destabilizing autocrats in the mold of Hungary’s Viktor Orban and Brazil’s Jair Bolsonaro.

This is not to suggest debts and deficits never matter. Rather, it is to emphasize the distinction between good debt and bad debt—a point now widely embraced in economic circles. The U.S. national security community is rightly beginning to insist on the investments in infrastructure, technology, innovation, and education that will determine the United States’ long-term competitiveness vis-à-vis China. With growth, inflation, and interest rates all lagging, policymakers should not be intimidated by arguments going back to the Simpson-Bowles commission (and likely to return if a Democrat takes office in 2021) that the United States cannot afford these investments.

Bad debt, though, does create risk without enhancing medium- and longer-term growth potential. The Trump administration’s 2018 tax legislation, with a price tag of between $1.5 trillion and $2.3 trillion (two or three times what the 2009 stimulus cost), serves as an expensive lesson. There are now too many nails in the coffin of trickle-down tax cuts for corporations and the wealthiest Americans to view it as anything but a zombie ideology that is redistributing trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should likewise dismiss it.

The idea of trickle-down tax cuts for corporations and the wealthiest Americans is discredited. It simply redistributes trillions of dollars from lower- and middle-income Americans to the wealthiest—and the foreign-policy community should dismiss it.

Second, advocating industrial policy (broadly speaking, government actions aimed at reshaping the economy) was once considered embarrassing—now it should be considered something close to obvious. Despite a 40-odd-year hiatus, industrial policy is deeply American. Alexander Hamilton’s vision for U.S. manufacturing was the first American industrial policy, a tradition carried forward throughout U.S. history—from Henry Clay’s American System to Dwight D. Eisenhower’s interstate highway network and Lyndon Johnson’s Great Society—until it lost favor in the 1980s.

A return to industrial policy shouldn’t simply pick up where the country left off a few decades ago. Rather than focusing on picking winners in specific sectors, there is an emerging consensus that suggests governments should focus instead on investing in large-scale missions—like putting a man on the moon or achieving net-zero emissions—that require innovations across many different sectors.

The biggest geopolitical reason to get back to industrial policy is climate change. It cannot be addressed by taxing carbon alone. It will take a surge of deliberate and directed public investment that underwrites a shift to a post-carbon U.S. economy through research and development, deployment of new technologies, and development of climate-friendly infrastructure.

Another good reason is that others are doing it, especially the United States’ competitors. President Xi Jinping’s Made in China 2025 strategy is a 10-year blueprint aimed at catapulting China into a technology and advanced manufacturing leader in both the commercial and military domains. Good estimates are elusive, but China’s subsidies alone reach into the hundreds of billions of dollars. And these investments have already paid off handsomely in several areas, like artificial intelligence, solar energy, and 5G, where many experts believe China is on par with or already outstripping the United States.

U.S. firms will continue to lose ground in the competition with Chinese companies if Washington continues to rely so heavily on private sector research and development, which is directed toward short-term profit-making applications rather than long-term, transformative breakthroughs. And the United States will be more insecure if it lacks the manufacturing base necessary to produce essential goods—from military technologies to vaccines—in a crisis.

#### 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.”

#### DOESN’T SOLVE INEQUALITY – 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.

### Democracy

#### finishing 1nc 2

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?

[MARKED]

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.**

#### Courts are structurally biased against worker rights---unaccountable judges will circumvent.

**NELA 12**, National Employment Lawyers Association, “JUDICIAL HOSTILITY TO WORKERS’ RIGHTS: THE CASE FOR PROFESSIONAL DIVERSITY ON   THE FEDERAL BENCH,” https://exchange.nela.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=952ae48d-9dc1-4377-935e-a38ce5241d8e&forceDialog=0

FEDERAL COURTS HAVE GROWN INCREASINGLY HOSTILE TO EMPLOYEES

Significant research confirms that plaintiffs bringing employment discrimination claims are far less likely to prevail than plaintiffs in non‐employment cases.  This double standard is bolstered by recent empirical reports:

• From 1979‐2006, the plaintiff win rate for employment cases (15 percent) was lower than non‐employment cases (51 percent).

• For cases going to trial, employment discrimination plaintiffs (28.47 percent) won less often than other plaintiffs (44.94 percent).

• Employees succeeded on appeal only 9 percent of the time, while employers won 41 percent of appeals.

TOO FEW FEDERAL JUDGES POSSESS PROFESSIONAL DIVERSITY

The reality is that employees rarely stand before a federal judge who possesses any professional experience representing plaintiffs in labor, employment, or civil rights cases.  A study of the federal judiciary prior to the beginning of the Obama Administration confirms this reality:

• Only five out of 162 (3.1 percent) federal appellate judges had substantial legal experience working for non‐profit organizations.3  None of these judges had worked for a non‐profit organization more recently than 1981.

• Only five out of 162 (3.1 percent) active federal appellate judges had worked for organizations or government agencies that enforce civil rights.

• None had substantial experience as in‐house counsel for a labor union.

Only three federal appellate judges had worked for organizations that represent low‐ income Americans, and only one appeared to have had substantial experience advocating for consumer rights

JUDICIALLY CREATED BARRIERS MAKE IT MORE DIFFICULT FOR PLAINTIFF‐ EMPLOYEES TO PREVAIL

Anti‐worker bias in the courts also manifests itself through judicially created procedural and substantive legal barriers applicable only to employment cases.  These judge‐crafted obstacles, such as the ones highlighted below, are applied at the apex of judicial discretion, including on the pleadings, at summary judgment, during post‐trial motions, and on appeal.

• “Stray Remarks” – Allows judges to disregard discriminatory statements made by supervisors or other employees as merely “stray remarks,” and therefore not evidence of discrimination.

• “Business Judgment” – Permits judges to defer to an employer’s “business judgment” instead of carefully examining whether an asserted justification for an adverse employment action was pretext for unlawful discrimination.  Some courts have gone so far as to accept the defendant’s asserted reasons for the adverse employment action being challenged, even when the employer’s explanation is harsh or unreasonable.

• “Self‐Serving Witness” – Enables judges to presume the credibility of testimony from defense witnesses with a vested interest in helping employers avoid liability, while categorizing assertions by or on behalf of plaintiff‐employees as purely “self‐serving.”

### Modeling

#### Populist backlash makes ILaw failure inevitable

Posner 17

Eric Posner, law prof @ Chicago, PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 606, January 2017, “Liberal Internationalism and the Populist Backlash”, https://papers.ssrn.com/sol3/papers2.cfm?abstract\_id=2898357

Abstract. A populist backlash around the world has targeted international law and legal institutions. Populists see international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people. This turn of events exposes the hollowness at the core of mainstream international law scholarship, for which the expansion of international law and the erosion of sovereignty have always been a forgone conclusion. But international law is dependent on public trust in technocratic rule-by-elites, which has been called into question by a series of international crises.

An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War.2 In Russia, Vladimir Putin has drawn on Russian nationalism to consolidate his control, allowing him to engage in violent foreign adventures in Georgia, Ukraine, and Syria. The European Union has been shaken by a debt crisis and a migration crisis, which have accelerated trends toward disintegration. In Hungary and Poland, nationalist governments with authoritarian aspirations have come to power. In the Netherlands, France, Germany, and other European countries, nationalist political parties have achieved high levels of popularity and political influence, while British voters have voted to exit the European Union. In Turkey, the government has launched a ferocious crackdown on the press and the political opposition. In the United States, Donald Trump has criticized numerous international organizations, including NATO, NAFTA, and the United Nations. His election reflects increasing isolationist sentiment among Americans. Trump, like populists in Europe and other countries, has criticized international institutions and norms, and seems likely to repudiate certain international norms and possibly treaties in the areas of trade, security, climate change, and the laws of war. In the Philippines, populist President Rodrigo Duterte has embarked on a scheme of extrajudicial killings in order to combat crime and consolidate his power. In China, President Xi Jinping’s grip on government has strengthened, symbolized by the Central Committee’s recent decision to name him “core leader” of the Party. In India, Prime Minister Narendra Modi preaches Hindu nationalism at the expense of the country’s vast Muslim minority.

Specific causes and circumstances vary across countries but the common theme is a challenge to the “establishment” or “elites” by outsiders on behalf of the common people or, in some cases, by insiders who claim a mandate from the common people.3 The establishment is portrayed as some combination of the following institutions and individuals: the traditional parties and their leadership; the government bureaucracy; business and labor leaders; and international bodies and their memberships. The populist leader argues that the establishment is “corrupt,” meaning that it either enriches itself at the expense of the people, or shows greater concern for foreigners or minorities than for the common citizen. In the most virulent cases, where populism verges on authoritarianism, the populist leader claims the mandate of the nation and denies that a legitimate political opposition exists or can exist.

Not all of the populist leaders have attacked international law. Xi and Modi, for example, have pursued conventional foreign policies—though China’s expansion in the South China Sea, which has involved numerous violations of international law, has sparked tensions with its neighbors and the United States. But this has less to do with populism than with traditional notions of state interest. Populism poses a threat to international law and order because international law is rule by technocracy, and relies on trust and mutual goodwill, while populists see corruption and advantage-taking all around them, and direct their ire at the experts. We see this in the rhetoric of populists, who frequently blame foreign influences and international institutions for the nation’s problems. In recent years, populists have targeted the European institutions, the International Monetary Fund, and the International Criminal Court, and they have mocked and belittled international legal norms, including human rights law and the laws of war, and the quasi-legal principle of humanitarian intervention.

#### BUT the alt solves the internal link because it’s just about PLURALISTIC GOALS ENHANCED BY PUBLIC INTERETESTES

Marianela2AC Lopez-Galdos 17. “Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?” Disruptive Competition Project. 11-17-17. https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

In the rest of the world, including the European Union, most competition systems were put in place in the post-war periods. As such, the pursuit of pluralistic goals guided by public interest concerns through the competition system was a method by which these toddling democracies sought to boost and defend their nascent democratic process. That being said, competition systems have evolved, and mature ones have **narrowed the antitrust analysis to focus on consumer welfare.** In this context, it is noteworthy that the UN and OECD have **separately concluded** that many competition systems **pursue consumer welfare as the primary competition goal.** In 1995, UNCTAD concluded that “There has in fact been an increasing convergence in the provisions or the application of competition laws over the laws two decades. Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as **upon efficiency and competitiveness criteria**, rather than upon other public interest goals”.

#### India’s economy is killing it

Sugaden 16 Joanna Sugden is the Editor of India Real Time, The Wall Street Journal's online journal about India. ("India Leads World Bank Growth Forecast Amid Global Economic Heavy Weather" on January 8, 2016 from blogs.wsj.com/indiarealtime/2016/01/08/india-sheltered-from-global-economic-heavy-weather-world-bank-says/)

New forecasts from the World Bank show **India will be a bright spot amid a gloomy outlook for developing countries in the next two years.** Stretching the weather metaphor further, the bank says **that India is “well positioned to withstand near-term headwinds and volatility in global financial market**s” compared with other major emerging economies and predicts it will grow at 7.9% by 2018. **That would make it the fastest-growing developing-country economy by some margin,** ahead of the next quickest, Bangladesh, at 6.8% and China at 6.5%, according to the World Bank’s “Global Economic Perspectives” report published Wednesday. The prediction comes after Harvard University economists recently projected India would have an annual growth rate of 7% through 2024, the fastest of any major economy. India revised the way it calculates gross domestic product early last year, a recalibration that caused it to shoot past China but which left some economists scratching their heads. The World Bank said **India would benefit because of a reduction in external vulnerabilities, a strengthening domestic business cycle and a supportive policy environment**. “Progress on infrastructure improvements and government exports to boost investment are expected to **offset the impact of any tightening of borrowing conditions** resulting from tighter U.S. monetary policy,” the report said. The tumbling price of oil, lower food-price inflation and a public-sector wage increase could help urban spending, it added, although consumption growth remains below long-term averages. Clouds on the horizon include possible stalling in legislative changes intended to make doing business in India easier, the bank said.

#### The economy is resilient

Accad, 16 - Camille Accad serves as Research Analyst at Asiya Investments, Research Division. ("Indian economy resilient" on February 16, 2016 from www.khaleejtimes.com/international/india/indian-economy-resilient)

**The Indian economy has been resilient** in an environment of slowing global growth and market volatility, with gross domestic product (GDP) growth estimated to accelerate to more than seven per cent year on year (YoY) in the current fiscal year ending in March. The International Monetary Fund (IMF) and the Indian government expect the GDP to keep accelerating next fiscal year. According to the IMF, lower commodity prices and a pick-up in investment as a result of recent policy reforms will benefit growth. In our view, these projections may have to be trimmed down. The GDP for the fourth quarter of 2015 was released last week and registered a growth rate of 7.3 per cent YoY, a deceleration from an upwardly revised 7.7 per cent in the third quarter. Investments grew by the least in over a year, exports witnessed the sharpest decline in more than four years and imports contracted by the most in two years. The main positive takeaway from the latest release was the increase in private consumption growth. Also, imports contracted more than exports which led to an increase in the trade balance, an encouraging development regarding India's plans to reduce its current account deficit. Overall, **the latest release of GDP showed that external factors were benefiting the economy** - the IMF expects them to continue doing so - but the domestic economy was facing hurdles, which in our view will hold back growth next fiscal year. Imports get cheaper On the external front, two key factors will contribute positively to growth next fiscal year. First, as a net oil importer, **the decline in the price of oil is benefiting India**. The government, which has been having to pay less for subsidies, will find it easier to reduce its fiscal deficit. Wholesale energy prices have also been falling sharply in the economy, which has helped boost manufacturing. Second, the Indian rupee depreciated around 10 per cent in the last 12 months. **The improvement in competitiveness should help strengthen India's weak export sector**. Major forecasters do not expect oil prices and the rupee to recover, which should continue to have a positive impact on growth in the fiscal year 2016-17. Domestic economic conditions are a bit more mixed. **Inflation and policy rates are at the lowest levels since the global financial crisis**. The central bank is widely expected to reduce interest rates further in the first half of 2016, with potentially more cuts as the US economic slowdown delays the Federal Reserve's plans to raise interest rates. On the fiscal front, lower subsidy expenses will give room for the government to spend more freely on other matters, which should be confirmed in the budget later this month. Consumption growth Moreover, an expected increase in public worker salaries will support household consumption growth, but the wage raises might take time to be implemented. **Monetary and fiscal policies will help create a business-friendly domestic environment.** However, two key factors need to change in order for growth to pick up next fiscal year. First, the Bharatiya Janata Party (BJP), which leads the government, needs to hold a majority in the Rajya Sabha, India's upper house. The lack of a majority there has hampered the government's ability to implement large-scale reforms. State elections will continue to take place in the next fiscal year, which will determine whether the BJP will get hold of the upper house majority. Second, more rainfalls are needed. Rural areas have suffered from two consecutive years of drought, hurting the agricultural sector. A better harvest would give a much-needed boost to the primary sector. Overall, **both factors are out of the government's hands and will have to improve before the IMF's and the government's projections can materialise**.