# Northwestern Round 3 Compiled Docs

## 1NC

### T USfg

#### Our interpretation is that the affirmative must demonstrate the desirability of the resolution either in totality or in a particular instance to meet the necessary win condition of being topical.

#### United States federal government means the three branches of government

USA.gov 13 "USA.gov is the U.S. government's official web portal" http://www.usa.gov/Agencies/federal.shtml

U.S. Federal Government - The three branches of U.S. government—legislative, judicial, and executive—carry out governmental power and functions.

#### Should means desirable

Atlas Collaboration, 1999, “Use of shall, should, may can,” <http://rd13doc.cern.ch/Atlas/DaqSoft/sde/inspect/shall.html>

'shall' describes something that is mandatory. If a requirement uses 'shall', then that requirement \_will\_ be satisfied without fail. Noncompliance is not allowed. Failure to comply with one single 'shall' is sufficient reason to reject the entire product. Indeed, it must be rejected under these circumstances.   Examples:  "Requirements shall make use of the word 'shall' only where compliance is mandatory."  This is a  good example.    "C++ code shall have comments every 5th line."  This is a bad example. Using 'shall' here is too strong. should 'should' is weaker. It describes something that might not be satisfied in the final product, but that is desirable enough that any noncompliance shall be explicitly justified. Any use of 'should' should be examined carefully, as it probably means that something is not being stated clearly. If a 'should' can be replaced by a 'shall', or can be discarded entirely, so much the better.  Examples:  "C++ code should be ANSI compliant."  A good example. It may not be possible to be ANSI compliant on all  platforms, but we should try.    "Code should be tested thoroughly."  Bad example. This 'should' shall be replaced with 'shall' if this requirement is to be stated anywhere (to say nothing of defining what  'thoroughly' means).

#### Resolved is certain

Random House Unabridged 6 (http://dictionary.reference.com/search?q=resolved&r=66)

re·solved Audio Help /rɪˈzɒlvd/ Pronunciation Key - Show Spelled Pronunciation[ri-zolvd] –adjective firm in purpose or intent; determined.

#### Interpretation: The core antitrust laws are only sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### “business practices” are a repeated pattern of conduct

Lucas 88 – Judge, California Supreme Court

Malcolm Millar Lucas, Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147, Supreme Court of California, October 1988, LexisNexis

\*\* Italics in original.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent *business practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

#### Prohibit means Affirmative teams must completely ban a type of anticompetitive business practices – they don’t

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### We have two impacts

#### Fairness – claiming to win the debate for reasons in addition to the desirability of the plan is bad—it justifies an infinite number of alternative frameworks and isn’t predictable by spiking out of all our offense – it’s functionally extra T. That makes the scope of negative research too broad and makes it too easy to be aff. Fairness outweighs any other impact because debate is a competitive activity, and a skewed debate undermines the value of the energy and research that teams put into winning the competition. It makes the debates determined by a coinflip not research.

#### Clash: it’s the only educational benefit intrinsic to debate and link turns all of their offense. Everyone comes to debate for different reasons and leaves with different skills, but the process of defending against third and fourth level responses is the only way to instantiate any of the benefits of debate and develop a deeper understanding of the content.

#### No risk of aff offense – you’re allowed to include your justifications as a reason for why the plan would be desirable, but the end determinant of who wins is whether or not the affirmative proved the desirability of topical action

### K Legalism

#### 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.

#### The affirmatives imposition of a worker welfare standard reinvests faith into courts – that allows courts to reintroduce economic analysis into their decision to turn worker welfare into consumer welfare v2

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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

#### Administrative state is key to every progressive goal – it counters political hierarchies and forces institutions to operate in the public interest

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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.

#### In 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.

### Case

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

#### 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.

#### 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.

#### Consequentialism – justifications are ultimately useless because we all have the same justification to try and reduce harm. The only way to actually determine what to do is via weighing the consequences of our assumptions

Joseph Schwartz, Associate Professor of Political Science at Temple University, *The Future of Democratic Equality*, ‘8

Yet as Wendy Brown admits at the opening of States of Injury, radical democrats must offer a vision of a political order that enhances the ability of individuals to deliberate equally and collectively about their common destiny.79 The social theorist must justify those political and socio-economic arrangements that would best institutionalize democratic principles. But **such arguments will be** **political** and not metaphysical. **The retreat of** much of contemporary political **theory into epistemological concerns serves as a** haven in a heartless conservative political world, where democratic agency seems next-to-impossible. **But so long as self-described emancipatory political theory avoids** **arguing on the** policy and political terrain of hegemonic conservative ideology—**and remains obsessed with the metaphysical** rather than the political—**it will likely make little contribution to public political discourse.** Post-structuralism has **never offered**—**nor can it** promise—a coherent social theory of how society develops and how it can be transformed by human action, as it only deals with the psychological and linguistic norming of (“incoherent”) individuals. In a manner strikingly akin to Rawlsian “foundational” liberal theory’s taking as “representative” of humanity one “rational chooser,” allegedly anti-representational post-structuralism takes as paradigmatic of the human condition one “fragmented, incoherent self.” Yet, **in the real world**, individuals and groups that resist dominant norms draw their alternative “practices” from the **shared norms** and **understandings of their** “counter-hegemonic” **communities**. Whether it be the “performative” resistance of dressing in “drag” or “slacking off” at work or rendering “Black as beautiful” as an alternative aesthetic of beauty, individuals construct practices of “resistance” in collaboration with others (who view themselves as having a self that can choose). Social movements develop strategies of resistance and try to discern **how institutions** (and persons) of authority **will react to their resistance**. As Susan Bickford notes, much of poststructuralist theory fails to comprehend the collective, inter-subjective nature of political contestation and communicative performance.80 “Performance” not only necessitates a social audience, it also necessitates the sociability of learning how to “resist.” We don’t “deploy” such strategies solely through our (incoherent) inner sanctum of discursive practices. The weakness of a hard poststructuralist epistemological and political perspective is not only its failure to speak to ordinary people’s conception of themselves as having (constrained) choice. It also fails to offer a theory of inter-subjectivity that provides insight into how human beings work to transform the institutions that constrain them. **If discourse is everything,** then we need to ask: **where are the people struggling to be free?**

#### Extinction is a categorically distinct phenomenon that outweighs other considerations

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8. Global ethics must respond to mass extinction. In late 2014, the Worldwide Fund for Nature reported a startling statistic: according to their global study, 52% of species had gone extinct between 1970 and 2010.60 This is not news: for three decades, conservation biologists have been warning of a ‘sixth mass extinction’, which, by definition, could eliminate more than three quarters of currently existing life forms in just a few centuries.61 In other words, it could threaten the practical possibility of the survival of earthly life. Mass extinction is not simply extinction (or death) writ large: it is a qualitatively different phenomena that demands its own ethical categories. It cannot be grasped by aggregating species extinctions, let alone the deaths of individual organisms. Not only does it erase diverse, irreplaceable life forms, their unique histories and open-ended possibilities, but it threatens the ontological conditions of Earthly life.

IR is one of few disciplines that is explicitly devoted to the pursuit of survival, yet it has almost nothing to say in the face of a possible mass extinction event.62 It utterly lacks the conceptual and ethical frameworks necessary to foster diverse, meaningful responses to this phenomenon. As mentioned above, Cold-War era concepts such as ‘nuclear winter’ and ‘omnicide’ gesture towards harms massive in their scale and moral horror. However, they are asymptotic: they imagine nightmares of a severely denuded planet, yet they do not contemplate the comprehensive negation that a mass extinction event entails. In contemporary IR discourses, where it appears at all, extinction is treated as a problem of scientific management and biopolitical control aimed at securing existing human lifestyles.63 Once again, this approach fails to recognise the reality of extinction, which is a matter of being and nonbeing, not one of life and death processes.

Confronting the enormity of a possible mass extinction event requires a total overhaul of human perceptions of what is at stake in the disruption of the conditions of Earthly life. The question of what is ‘lost’ in extinction has, since the inception of the concept of ‘conservation’, been addressed in terms of financial cost and economic liabilities.64 Beyond reducing life to forms to capital, currencies and financial instruments, the dominant neoliberal political economy of conservation imposes a homogenising, Western secular worldview on a planetary phenomenon. Yet the enormity, complexity, and scale of mass extinction is so huge that humans need to draw on every possible resource in order to find ways of responding. This means that they need to mobilise multiple worldviews and lifeways – including those emerging from indigenous and marginalised cosmologies. Above all, it is crucial and urgent to realise that extinction is a matter of global ethics. It is not simply an issue of management or security, or even of particular visions of the good life. Instead, it is about staking a claim as to the goodness of life itself. If it does not fit within the existing parameters of global ethics, then it is these boundaries that need to change.

9. An Earth-worldly politics. Humans are worldly – that is, we are fundamentally worldforming and embedded in multiple worlds that traverse the Earth. However, the Earth is not ‘our’ world, as the grand theories of IR, and some accounts of the Anthropocene have it – an object and possession to be appropriated, circumnavigated, instrumentalised and englobed.65 Rather, it is a complex of worlds that we share, co-constitute, create, destroy and inhabit with countless other life forms and beings.

The formation of the Anthropocene reflects a particular type of worlding, one in which the Earth is treated as raw material for the creation of a world tailored to human needs. Heidegger famously framed ‘earth’ and ‘world’ as two countervailing, conflicting forces that constrain and shape one another. We contend that existing political, economic and social conditions have pushed human worlding so far to one extreme that it has become almost entirely detached from the conditions of the Earth. Planet Politics calls, instead, for a mode of worlding that is responsive to, and grounded in, the Earth. One of these ways of being Earth-worldly is to embrace the condition of being entangled. We can interpret this term in the way that Heidegger66 did, as the condition of being mired in everyday human concerns, worries, and anxiety, to prolong existence. But, in contrast, we can and should reframe it as authors like Karen Barad67 and Donna Haraway68 have done. To them and many others, ‘entanglement’ is a radical, indeed fundamental condition of being-with, or, as Jean-Luc Nancy puts it, ‘being singular plural’.69 This means that no being is truly autonomous or separate, whether at the scale of international politics or of quantum physics. World itself is singular plural: what humans tend to refer to as ‘the’ world is actually a multiplicity of worlds at various scales that intersect, overlap, conflict, emerge as they surge across the Earth. World emerges from the poetics of existence, the collision of energy and matter, the tumult of agencies, the fusion and diffusion of bonds.

Worlds erupt from, and consist in, the intersection of diverse forms of being – material and intangible, organic and inorganic, ‘living’ and ‘nonliving’. Because of the tumultuousness of the Earth with which they are entangled, ‘worlds’ are not static, rigid or permanent. They are permeable and fluid. They can be created, modified – and, of course, destroyed. Concepts of violence, harm and (in)security that focus only on humans ignore at their peril the destruction and severance of worlds,70 which undermines the conditions of plurality that enables life on Earth to thrive.

#### Competition in the private sector is key to drive down costs in space exploration – spurs innovation

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Harvard Business Review, 2-12-2021, "The Commercial Space Age Is Here," <https://hbr.org/2021/02/the-commercial-space-age-is-here>

There’s no shortage of hype surrounding the commercial space industry. But while tech leaders promise us moon bases and settlements on Mars, the space economy has thus far remained distinctly local — at least in a cosmic sense. Last year, however, we crossed an important threshold: For the first time in human history, humans accessed space via a vehicle built and owned not by any government, but by a private corporation with its sights set on affordable space settlement. It was the first significant step towards building an economy both in space and for space. The implications — for business, policy, and society at large — are hard to overstate.

In 2019, [95%](https://brycetech.com/reports) of the estimated $366 billion in revenue earned in the space sector was from the space-for-earth economy: that is, goods or services produced in space for use on earth. The space-for-earth economy includes telecommunications and internet infrastructure, earth observation capabilities, national security satellites, and more. This economy is booming, and though [research shows](https://hbsp.harvard.edu/product/716037-PDF-ENG) that it faces the challenges of overcrowding and monopolization that tend to arise whenever companies compete for a scarce natural resource, [projections for its future](https://hbsp.harvard.edu/product/720027-PDF-ENG) are optimistic. Decreasing costs for launch and space hardware in general have enticed new entrants into this market, and companies in a variety of industries have already begun leveraging satellite technology and access to space to drive innovation and efficiency in their earthbound products and services.

In contrast, the space-for-space economy — that is, goods and services produced in space for use in space, such as mining the Moon or asteroids for material with which to construct in-space habitats or supply refueling depots — has struggled to get off the ground. As far back as the 1970s, [research](https://ntrs.nasa.gov/citations/19780004167) commissioned by NASA predicted the rise of a space-based economy that would supply the demands of hundreds, thousands, even millions of humans living in space, dwarfing the space-for-earth economy (and, eventually, the entire terrestrial economy as well). The realization of such a vision would change how all of us do business, live our lives, and govern our societies — but to date, we’ve never even had more than [13 people](https://www.space.com/6503-population-space-historic-high-13.html) in space at one time, leaving that dream as little more than science fiction.

Today, however, there is reason to think that we may finally be reaching the first stages of a true space-for-space economy. SpaceX’s [recent achievements](https://www.nasa.gov/press-release/nasa-s-spacex-crew-1-astronauts-headed-to-international-space-station/) (in cooperation with NASA), as well as upcoming efforts by [Boeing](https://www.nasa.gov/feature/boeing-s-starliner-makes-progress-ahead-of-flight-test-with-astronauts), [Blue Origin](https://www.blueorigin.com/news/nasa-selects-blue-origin-national-team-to-return-humans-to-the-moon), and [Virgin Galactic](https://spacenews.com/virgin-galactic-prepares-to-transition-to-operations) to put people in space sustainably and at scale, mark the opening of a new chapter of spaceflight led by private firms. These firms have both the intention and capability to bring private citizens to space as passengers, tourists, and — eventually — settlers, opening the door for businesses to start meeting the demand those people create over the next several decades with an array of space-for-space goods and services.

Welcome to the (Commercial) Space Age

In our [recent research](https://www.hbs.edu/faculty/Publication%20Files/jep.32.2.173_Space,%20the%20Final%20Economic%20Frontier_413bf24d-42e6-4cea-8cc5-a0d2f6fc6a70.pdf), we examined how the model of centralized, government-directed human space activity born in the 1960s has, over the last two decades, made way for a new model, in which public initiatives in space increasingly share the stage with private priorities. Centralized, government-led space programs will inevitably focus on space-for-earth activities that are in the public interest, such as national security, basic science, and national pride. This is only natural, as expenditures for these programs must be justified by demonstrating benefits for citizens — and the citizens these governments represent are (nearly) all on earth.

In contrast to governments, the private sector is eager to put people in space to pursue their own personal interests, not the state’s — and then supply the demand they create. This is the vision driving SpaceX, which in its first twenty years has entirely upended the rocket launch industry, securing 60% of the global commercial launch market and building ever-larger spacecraft designed to ferry passengers not just to the International Space Station (ISS), but also to its own promised [settlement on Mars](https://www.spacex.com/media/making_life_multiplanetary_transcript_2017.pdf).

Today, the space-for-space market is limited to supplying the people who are already in space: that is, the handful of astronauts employed by NASA and other government programs. While SpaceX has grand visions of supporting large numbers of private space travelers, their current space-for-space activities have all been in response to demand from government customers (i.e., NASA). But as decreasing launch costs enable companies like SpaceX to leverage economies of scale and put more people into space, growing private sector demand (that is, tourists and settlers, rather than government employees) could turn these proof-of-concept initiatives into a sustainable, large-scale industry.

This model — of selling to NASA with the hopes of eventually creating and expanding into a larger private market — is exemplified by SpaceX, but the company is by no means the only player taking this approach. For instance, while SpaceX is focused on space-for-space transportation, another key component of this burgeoning industry will be manufacturing.

[Made In Space, Inc.](https://madeinspace.us/capabilities-and-technology/archinaut/) has been at the forefront of manufacturing “in space, for space” since 2014, when it 3D-printed a wrench onboard the ISS. Today, the company is exploring other products, such as high-quality fiber-optic cable, that terrestrial customers may be willing to pay to have manufactured in zero-gravity. But the company also recently received a [$74 million contract](https://www.nasa.gov/press-release/nasa-funds-demo-of-3d-printed-spacecraft-parts-made-assembled-in-orbit) to 3D-print large metal beams in space for use on NASA spacecraft, and future private sector spacecraft will certainly have similar manufacturing needs which Made In Space hopes to be well-positioned to fulfill. Just as SpaceX has begun by supplying NASA but hopes to eventually serve a much larger, private-sector market, Made In Space’s current work with NASA could be the first step along a path towards supporting a variety of private-sector manufacturing applications for which the costs of manufacturing on earth and transporting into space would be prohibitive.

Another major area of space-for-space investment is in building and operating space infrastructure such as habitats, laboratories, and factories. Axiom Space, a current leader in this field, recently [announced](https://www.theverge.com/2021/1/26/22250327/space-tourists-axiom-private-crew-iss-price) that it would be flying the “first fully private commercial mission to space” in 2022 onboard SpaceX’s Crew Dragon Capsule. Axiom was also [awarded](https://spacenews.com/nasa-selects-axiom-space-to-build-commercial-space-station-module/) a contract for exclusive access to a module of the ISS, facilitating its plans to develop modules for commercial activity on the station (and eventually, beyond it).

This infrastructure is likely to spur investment in a wide array of complementary services to supply the demand of the people living and working within it. For example, in February 2020, Maxar Technologies was awarded a [$142 million contract](https://www.builtincolorado.com/2020/02/03/maxar-technologies-142m-nasa-contract) from NASA to develop a robotic construction tool that would be assembled in space for use on low-Earth orbit spacecraft. Private sector spacecraft or settlements will no doubt have need for a variety of similar construction and repair tools.

#### Colonizing space is the ONLY way to solve inevitable extinction – its try or die

Dorrier 10/19/2016, Jason is managing editor of Singularity Hub. He did research and wrote about finance and economics before moving on to science, technology, and the future. He is curious about pretty much everything, and sad he'll only ever know a tiny fraction of it all, “Elon Musk Is Right: We Can Insure Against Extinction by Colonizing Space”, (<https://singularityhub.com/2016/10/19/elon-musk-is-right-well-avoid-extinction-by-colonizing-space/>) KL

What you haven’t heard is anything to inspire a sense of urgency. Indeed, NASA’s struggle to defend its existence and funding shows how weak these justifications sound to a public that cares less about space than seemingly more pressing needs. Presumably, this is why SpaceX founder Elon Musk, in a [fascinating interview](https://aeon.co/magazine/technology/the-elon-musk-interview-on-mars/) with Ross Andersen, skipped all the usual arguments in favor of something else entirely. Space exploration, he says, is as urgent as easing poverty or disease—it’s our insurance policy against extinction. As we extend our gaze back through geologic time and out into the universe, it’s clear we aren’t exempt from nature’s carelessly terrifying violence. We simply haven’t experienced its full wrath yet because we’ve only been awake for the cosmological blink of an eye. Musk says an extinction-level event would, in an existential flash, make our down-to-earth struggles irrelevant. “Good news, the problems of poverty and disease have been solved,” he says, “but the bad news is there aren’t any humans left.’” We’ve got all our eggs in one basket, and that’s a terrible risk-management strategy. We should diversify our planetary portfolio to insure against the worst—and soon. Musk’s line of reasoning isn’t completely novel. It’s what led science fiction writer Larry Niven to say, “The dinosaurs became extinct because they didn’t have a space program.” And it drives Ed Lu’s [quest to save humanity](https://singularityhub.com/2014/07/02/we-dont-have-to-play-cosmic-russian-roulette-with-asteroids-anymore/) from a major asteroid hit. But while we may spot and potentially derail asteroids, not every cosmic threat can be so easily predicted or prevented—a blast from a nearby supernova; a gamma ray burst aimed at Earth; a period of extreme volcanism. Any of these could wipe us out. Musk says he thinks a lot about the silence we’ve been greeted with as our telescopes scan the sky for interstellar broadcasts from other civilizations. Given the sheer number of galaxies, stars, and planets in the universe—it should be teeming with life. If even a tiny percent of the whole is intelligent, there should be thousands of civilizations in our galaxy alone. So where are they? This is known as the [Fermi Paradox](https://singularityhub.com/2016/08/31/are-there-other-intelligent-civilizations-out-there-two-views-on-the-fermi-paradox/), and Musk rattles off a few explanatory theories (there are many). But he settles on this, “If you look at our current technology level, something strange has to happen to civilizations, and I mean strange in a bad way. It could be that there are a whole lot of dead, one-planet civilizations.” That something strange might be an evolutionary self-destruct button, as Carl Sagan theorized. We developed modern rockets at the same time as nuclear weapons. But the Fermi Paradox and its explanations, while philosophically captivating, haven’t settled the question of intelligent life. SETI’s [Seth Shostak cautions](https://theconversation.com/why-i-believe-well-find-aliens-leading-expert-on-search-for-intelligent-extra-terrestrial-life-31066), “The Fermi Paradox is a big extrapolation from a very local observation.” That is, just because we don’t see compelling evidence of galactic colonization around here doesn’t mean there is none. But even without the Fermi Paradox, our planet’s geologic record is enough to show that, as Sagan phrased it, “Extinction is the rule. Survival is the exception.” So, if you buy Musk’s argument—what next? Well, he didn’t start SpaceX to boost telecommunication satellites into orbit or shuttle astronauts to low-Earth orbit. SpaceX is Musk’s vehicle to another planet, and he isn’t shy saying so. Long after SpaceX sends its first human passengers to the space station; after it’s perfected [reusable rockets](https://singularityhub.com/2014/04/30/can-elon-musk-and-spacex-take-space-travel-from-evolutionary-to-revolutionary/); after it fires up the first Falcon Heavy deep space rocket—after all that, perhaps in the mid-2030s, Musk will found a colony on Mars. Some colonists will be able to afford the $500,000 ticket, he says. Others will sell their earthly belongings—like the early American settlers—to book their trip. But it won’t be a pleasure cruise. No, we’re talking an all-in, one-way commitment to a cause. Even so, getting people to go won’t be a problem. Mars One, an organization similarly dedicated to sending the first humans to Mars, had [over 200,000 people apply](https://singularityhub.com/2013/09/15/200000-apply-to-mars-one-to-live-out-their-lives-on-the-red-planet/) for a few one-way tickets. Mars One may or may not make it to the Red Planet—but at the least they proved there are people willing to sacrifice the easy life to get there. In the long run, however, to establish a permanent, sustainable presence on Mars, we’ll need a whole lot more than a scattering of rugged colonists. Musk thinks it’ll take at least a million people to form a genetically diverse population and self-sufficient manufacturing base. All that in a freezing desert wasteland with no oil, oxygen, or trees. Mars has water but it’s not readily available. We’d have to mine the surface and set up heavy industry. It would be a mammoth undertaking. Musk thinks it could happen in the next century. And perhaps he’s right. Perhaps not. As Andersen notes, although he’s on an “epic run…he is always giving you reasons to doubt him.” Monumental goals—with dates attached. A century is a long time. But SpaceX colonizing Mars might be a bridge too far. There are some who doubt our abilities in the near future. Astrophysicist and Astronomer Royal, Martin Rees, [has said](https://kingsreview.co.uk/magazine/blog/2014/05/02/an-interview-with-martin-rees-astronomer-royal-4/), “I think it’s very important not to kid ourselves that we can solve Earth’s problems by mass emigration into space. There’s nowhere in our solar system even as clement as the top of Everest or the South Pole—so it’s only going to be a place for pioneers on cut-price private ventures and accepting higher risks than a western state could impose on civilians.” In other words, maybe some people will venture beyond the Earth and Moon. Even live out subsistence-level lives on other planetary bodies. But a civilization growing out of Musk’s million isn’t likely. At least not until we can [engineer on grander scales](https://en.wikipedia.org/wiki/2312_(novel))—terraform Mars, hollow out asteroids, build rolling bubble cities on Mercury. In either case, Musk is right about one thing. It’s time we pushed the boundaries of space exploration. And whatever your opinion, you have to admire the man’s willingness to go out on a limb when no one else will—and invite the rest of us to join him there.

#### Globalization solves war – expectations of future gains from trade disincentivize conflict escalation, *not* current flows

Fay 17

Matthew Fay, Director of Defense and Foreign Policy Studies—Niskanen Center, Fellow—GMU Center for Security Policy Studies, PhD—GMU Schar School of Policy and Government, bachelor’s degree in political science from Saint Xavier University and has two master’s degrees, one in international relations from American Military University and one in diplomatic history from Temple University, TRUMP, TRADE, AND GREAT POWER WAR, MARCH 20, 2017, <https://niskanencenter.org/blog/trump-trade-great-power-war/>

It is not surprising therefore, that U.S. Treasury Secretary Steve Mnuchin nixed attempts to include language supporting free trade in a statement from a G-20 meeting in Baden-Baden, Germany. As CNN reported, while the statement included some positive words on trade, “conspicuous by its absence was the phrase ‘we will resist all forms of protectionism’ that was contained in the communiqué from the last meeting of the group in China, July 2016.” Mnuchin rejected the idea that the omission was meaningful, but the unwillingness to reaffirm American opposition to protectionism ignores that trade provides benefits beyond the global economy. Specifically, the expectation of future trade affects the likelihood of war and peace.

The connection between trade and conflict has never been as simple as early liberal theorists suggested. The idea, wrongly attributed to the nineteenth century French economist Frederic Bastiat, that “when goods don’t cross borders, soldiers will” still offers a good summation of the longstanding position that trade has pacifying effects on international politics. The logic behind the argument is compelling: the greater the extent of commercial relations between states, the less likely there will be conflict because the economic cost of war (and the lost benefits of trade) will be too high. However, history has shown that states still sometimes go to war despite high levels of economic interdependence at the time of the conflict.

In his book Economic Interdependence and War, political scientist Dale Copeland explained that it is not the current level of trade that is important to the likelihood of conflict. Rather, Copeland argues, it is the expectation of future trade that determines a state’s willingness to go to war. He writes,

In a very real way, it does not matter in the least whether past and current levels of trade and investment have been low, as long as leaders have strongly positive expectations for the future. It is their future orientation and expectations of a future stream of benefits that will likely make the leaders incline to peace. Likewise, it does not matter whether past and current levels of commerce have been high if leaders believe they are going to be cut off tomorrow or in the near future. It is their pessimism about the future that will probably drive these leaders to consider hard-line measures and even war to safeguard the long-term security of the state.

Multilateral trade has been a feature of the liberal international order developed after World War II for a reason. Postwar policymakers feared a return to the closed economic blocs of the 1930s that helped drive the world to war. It is entirely possible that the norms in favor of free trade are robust enough to withstand the absence of routine language from a statement by a meeting of the world’s finance ministers. But groups like the G-20 help set expectations about the future. Given the connection between those expectations and conflict, failing to reaffirm America’s opposition to protectionism could put the world on a dangerous path.

#### Tech and inevitable adaptation prevent apocalyptic collapse – reject their pessimistic fear mongering

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Ronald. March 12. “Climate Change Problems Will Be Solved Through Economic Growth” <https://reason.com/blog/2018/03/12/climate-change-problems-will-be-solved-t>

"It is, I promise, worse than you think," David Wallace-Wells wrote in an infamously apocalyptic 2017 New York Magazine article. "Indeed, absent a significant adjustment to how billions of humans conduct their lives, parts of the Earth will likely become close to uninhabitable, and other parts horrifically inhospitable, as soon as the end of this century."

The "it" is man-made climate change. Temperatures will become scalding, crops will wither, and rising seas will inundate coastal cities, Wallace-Wells warns. But toward the end of his screed, he somewhat dismissively observes that "by and large, the scientists have an enormous confidence in the ingenuity of humans....Now we've found a way to engineer our own doomsday, and surely we will find a way to engineer our way out of it, one way or another."

Over at Scientific American, John Horgan considers some eco-modernist views on how humanity will indeed go about engineering our way out of the problems that climate change may pose. In an essay called "Should We Chill Out About Global Warming?," Horgan reports the more dynamic and positive analyses of two eco-modernist thinkers, Harvard psychologist Steven Pinker and science journalist Will Boisvert.

In an essay for The Breakthrough Journal, Pinker notes that such optimism "is commonly dismissed as the 'faith that technology will save us.' In fact, it is a skepticism that the status quo will doom us—that knowledge and behavior will remain frozen in their current state for perpetuity. Indeed, a naive faith in stasis has repeatedly led to prophecies of environmental doomsdays that never happened." In his new book, Enlightenment Now, Pinker points out that "as the world gets richer and more tech-savvy, it dematerializes, decarbonizes, and densifies, sparing land and species." Economic growth and technological progress are the solutions not only to climate change but to most of the problems that bedevil humanity.

Boisvert, meanwhile, tackles and rebuts the apocalyptic prophecies made by eco-pessimists like Wallace-Wells, specifically with regard to food production and availabilty, water supplies, heat waves, and rising seas.

"No, this isn't a denialist screed," Boisvert writes. "Human greenhouse emissions will warm the planet, raise the seas and derange the weather, and the resulting heat, flood and drought will be cataclysmic. Cataclysmic—but not apocalyptic. While the climate upheaval will be large, the consequences for human well-being will be small. Looked at in the broader context of economic development, climate change will barely slow our progress in the effort to raise living standards."

Boisvert proceeds to show how a series of technologies—drought-resistant crops, cheap desalination, widespread adoption of air-conditioning, modern construction techniques—will ameliorate and overcome the problems caused by rising temperatures. He is entirely correct when he notes, "The most inexorable feature of climate-change modeling isn't the advance of the sea but the steady economic growth that will make life better despite global warming."

Horgan, Pinker, and Boisvert are all essentially endorsing what I have called "the progress solution" to climate change. As I wrote in 2009, "It is surely not unreasonable to argue that if one wants to help future generations deal with climate change, the best policies would be those that encourage rapid economic growth. This would endow future generations with the wealth and superior technologies that could be used to handle whatever comes at them including climate change." Six years later I added that that "richer is more climate-friendly, especially for developing countries. Why? Because faster growth means higher incomes, which correlate with lower population growth. Greater wealth also means higher agricultural productivity, freeing up land for forests to grow as well as speedier progress toward developing and deploying cheaper non–fossil fuel energy technologies. These trends can act synergistically to ameliorate man-made climate change."

Horgan concludes, "Greens fear that optimism will foster complacency and hence undermine activism. But I find the essays of Pinker and Boisvert inspiring, not enervating....These days, despair is a bigger problem than optimism." Counseling despair has always been wrong when human ingenuity is left free to solve problems, and that will prove to be the case with climate change as well.

#### Markets are a computational necessity – we should make them more democratic instead of rejecting them

Posner and Weyl 18 – Eric A. Posner is Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago. E. Glen Weyl is an economist and researcher at Microsoft Research New England.

Eric A. Posner and E. Glen Weyl, “Epilogue: After Markets?” *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Princeton University Press 2018, Epub (email [arg5180@gmail.com](mailto:arg5180@gmail.com) for relevant text).

Markets as Miracles

As we saw in chapter 1, many economists who were committed to the market economy also considered themselves “socialists.” Yet in the early twentieth century, socialism became identified with central planning, thanks to the role of Marxism and the French Revolution in inspiring and justifying the economic policies of the Soviet Union. Central planning also received a boost from World War I, where national control of the economy for the purpose of war production was more successful than advocates of laissez-faire could ever have imagined. This led to a heated debate about whether central planning should be used in peacetime as well.

In the popular imagination, central planning could not succeed because it provided individuals with no incentives to work. People needed the prospect of riches, or at least wages, to get them out of bed in the morning. Yet incentives were quite strong in the Soviet Union, stronger, in many ways, than they are in capitalist countries. While there was less chance under Communism to grow rich, any prisoner of the Gulag knew the fate of those who “malingered.”

Another popular argument against central planning was advanced by Nobel Laureate Friedrich Hayek in 1945. Hayek argued that no central planner could obtain information about people’s tastes and productivity necessary to allocate resources efficiently.1 The genius of the market was the way that the price system could, in disaggregated fashion, collect this information from everyone and supply it to those who needed to know it, without the involvement of a government planning board.

A related version of this argument, less well-known than Hayek’s but actually more compelling, was made a few decades earlier. The brilliant economist Ludwig von Mises argued that the fundamental problem facing socialism was not incentives or knowledge in the abstract but communication and computation.2 To see what Mises meant, consider an illustrative parable proposed by Leonard Read in his 1958 essay, “I, Pencil.” 3

Read tells the “life story” of a pencil. Such a simple thing, one would at first think. And yet as you begin to reflect, you realize the enormously complex layers of thought and planning it would require to make a pencil from scratch. The wood must be chopped, cut, shaped, polished, and honed. The graphite must be mined, chiseled, and shaped. The ferrule—the collar that connects the wood shaft and the eraser—is an alloy of dozens of metals, each of which must be mined, melted, combined, and reformed. And so forth.

Yet what is most remarkable about the pencil is not its complexity but the complete lack of understanding that anyone involved in the manufacture of the eventual pencil has about any of these steps in the process. The lumberjack knows only that there is a market for his wood and some price that induces her to buy the needed tools, cut down trees, and sell lumber down the line of production. The lumberjack may never even know that the wood is used for a pencil. The pencil factory owner knows only where to purchase the needed intermediate materials and how to run a line assembling them. The knowledge and planning of the pencil’s creation emerge organically from the process of market relations.

Now suppose that we were to try to replicate the market relationships with a central planning board. The board would determine how much wood to chop and when, the number of workers to employ at each stage of production, the correct places and times to produce, ship, and build. Yet, to do this effectively the board would have to understand a great many things. It would have to learn from each of these specialized producers the unique knowledge of her domain of expertise that allows her to earn a living—for example, whether the lumber would have a more valuable use elsewhere in the economy (to build houses or ships or children’s toys) than as an input for pencils. Absorbing all this information and constantly receiving and processing the necessary updates to keep abreast of evolving conditions in each of these steps of the process, would overwhelm the capacity of even the most skilled managers.

And even if the board somehow had an unlimited capacity to absorb this information, it would still have the unmanageable problem of trying to act on this sea of data. Prices, supply and demand, and production relations in markets arise through a complex interplay of individuals each helping to optimize a tiny part of a broad social process. If, instead, a single board had to plan this entire dance, it would force a small number of individuals to contemplate an endless sequence of choices and plans. Such elaborate calculations are beyond the capacity of even the most brilliant group of engineers.

Mises wrote decades before the rise of the fields of computer science and information theory and lacked any way to formalize these intuitive ideas. Many of Mises’s arguments were dismissed by mainstream economists, whose increasingly narrow mathematical approach to the field Mises disdained. Mises’s critics, including Oskar Lange, Fred Taylor, and Abba Lerner, argued that the market mechanism was but one of many ways (and far from the most efficient way) to organize an economy. They viewed the economy purely mathematically, rather than computationally, and saw no difficulty in principle with solving a (very large) system of equations relating the supply and demand of various goods, resources, and services.

In a simplified picture of the economy, ordinary people perform dual functions as producers (workers, suppliers of capital, etc.) and consumers. As consumers, people have preferences regarding different goods and services. Some people like chocolate, others like vanilla. As producers, they have different talents and capacities. Some people are good at doing math, others at mollifying angry customers. In principle, all we need to do is figure out people’s preferences and their talents, and assign jobs to people who do them best, while distributing the value created by production in the form of goods and services that people really want. Rewards and penalties need to be determined to give people incentives to reveal their preferences and talents, and to ensure that they actually do what they are supposed to do. All of this can be represented mathematically and solved. That’s why socialist economists viewed the economy as a math problem the solution of which only required a computer.

Yet the later development of the theory of computational and communication complexity vindicated Mises’s insights. What computational scientists later realized is that even if managing the economy were “merely” a problem of solving a large system of equations, finding such solutions is far from the easy task that socialist economists believed. In an incisive computational analysis of central planning, statistician and computer scientist Cosma Shalizi illustrates how utterly impossible “solving” a modern economy would be for a central planning board. As Shalizi notes in his essay, “In the Soviet Union, Optimization Problem Solves You,” the computer power it takes to solve an economic allocation problem increases more than proportionately in the number of commodities in the economy.4 In practical terms, this means that in any large economy, central planning by a single computer is impossible.

To make these abstract mathematical relationships concrete, Shalizi considers an estimate by Soviet planners that, at the height of Soviet economic power in the 1950s, there were about 12 million commodities tracked in Soviet economic plans. To make matters worse, this figure does not even account for the fact that a ripe banana in Moscow is not the same as a ripe banana in Leningrad, and moving it from one place to the other must also be part of the plan. But even were there “merely” 12 million commodities, the most efficient known algorithms for optimization, running on the most efficient computers available today, would take roughly a thousand years to solve such a problem exactly once. It can even be proven that a modern computer could not achieve even a reasonably “approximate” solution—and, of course, today there are far more goods, services, transport choices, and other factors that would go into the problem than there were in the Soviet Union in the 1950s. Yet somehow the market miraculously cuts through this computational nightmare.

Markets as Parallel Processors

But all of this raises a question. If the problem is so hard to solve, how is it possible for the market to solve it? Consider Lange’s quote from our epigraph.5 The market is just a set of rules enforced by the government—not much different from a computer algorithm, although a very complex one. It’s true that no single person invented the market. Yet the rules of the market are well understood, and economists are constantly telling people to implement them. Imagine that a new country is created, and its leaders ask a western economist how best to create an economy. The economist will tell them how to set up a market—the rules of contract and property law, for example. (Indeed, economists have been running around the halls of government of developing countries and the floors of start-ups for decades doing just this.) Aren’t the economists just supplying a kind of computer program to the leaders, who by implementing it are engaging in a style of centralized planning?

To understand how the market solves the “very large system of equations,” you need to know the key ideas of distributed computing and parallel processing. In these systems, complicated calculations that no one computer could perform are divided into small parts that can be performed in parallel by a large number of computers distributed across different geographic locations. Distributed computing and parallel processing are best known for their role in the development of “cloud computing,” but their greatest application has gone unnoticed: the market economy itself.

While the human brain is wired differently from a computer, computational scientists estimate that a single human mind has a computational capacity roughly ten times greater than the most powerful single supercomputer at the time of this writing.6 The combined capacity of all human minds is therefore tens of billions of times greater than this most powerful present-day computer. The “market” is then in some sense a giant computer composed of these smaller but still very powerful computers. If it allocates resources efficiently, it does so by harnessing and combining their separate capacities.

Adopting this perspective, we must ask how the market is “programmed” to achieve this outcome. The economy consists of a variety of resources and human capacities at a range of locations, along with a system for transmitting data about these resources among individual human beings. A standard approach in parallel processing is to take information local to one location in, say, a picture or puzzle and assign this to one processor, integrating these inputs on still other processors in a hierarchical fashion. Now apply this image to the economy. In every place, we take one of the computers (humans) available to us and assign it to collect information about that location’s needs and resources and report some parsimonious “compressed” summary of all that data to other computers. For example, there might be a hierarchical arrangement of computers, with those responsible for particular locations on the ground reporting to a higher “layer” that integrates local areas and then upward from there.

Consider the following example. A person works on a farm and is in charge of ensuring that the farm is productive and that her family is happy. This person sends information about the farm and her family, not in its full richness and complexity, but in broad strokes, to district managers. One manager specializes in understanding the resources that farms need to operate—seeds, fertilizer— while another understands the resources that people living on farms need in order to be happy, including food and clothing. These managers would then aggregate these data and convey them to the next layer, perhaps a national wheat distributor or a regional supplier of products for use on farms. At every level of this chain, some information would need to be lost for the parallel processing to remain parallel and tractable: the farm manager could not detail every way in which a slightly better paved road would help in conveying goods to market or how slightly cleaner water would protect her crops. But at least she could report the largest and most important needs and hope that the loss of information only slightly reduces the efficiency of the resulting solution.

This arrangement has a flavor of central planning but also resembles a market economy. People specialize in different parts of the production chain and operate under limited information, yet are able to coordinate their behavior because the information takes a certain form. While people are experts on local conditions, they know little about economic conditions elsewhere. They know that grain prices are high and tractor prices are low, but not why this is the case. When they buy a tractor or sell grain, they don’t tell the vendor or purchaser their life story, all the conditions on their farm, and so forth. They just place an order or offer so much grain at the going price.

This “price system” thus greatly simplifies communication between different parts of the economy. In fact, economists have shown that prices are the minimum information that a farmer needs to plan her operations effectively. So long as every important way that the farm could benefit or draw down resources from the outside world has a price attached to it, this is all the information the farmer needs to make economic decisions. Any greater information would be a waste, from a purely economic efficiency perspective, though it might be interesting from time to time to develop personal relationships. Conversely, if these prices were not available, there would be no way for a farmer to know whether it pays to use new tractors or rely instead on more labor, nor would she know how many seeds to plant for next season. The farmer without such prices could easily produce too little or waste resources on a tractor that could be better used for more labor, seed, or even consumption.

In this sense, prices are the “minimum” information necessary for rational economic decision-making.7 No other system of distributed computing can be equally productive and yet require less communication.

Markets elegantly exploit distributed human computational capacity. In doing so they allocate resources in ways that no present computer could match. Von Mises was right that central planning by a group of experts cannot replace the market system. But his argument was mistakenly taken as implying that the market is “natural” rather than a human-created program for managing economic resources. In fact, there is nothing natural about market institutions. Human beings create markets—in their capacity as judges, legislators, administrators, and even private business people who frequently set up organizations that create and manage markets.

Markets are powerful computers, but whether they produce the greatest good or not depends on how they are programmed. We advocate “Radical Markets” because we believe that in the present stage of technological and economic development, when cooperation has grown too large to be managed by moral economies, the market is the appropriate computer to achieve the greatest good for the greatest number. If we see it as such, we can fix the bugs in the market’s code and enable it to generate more wealth that is distributed more fairly.

By sharpening our understanding of the role and value of markets, the computational analogy clarifies our claim that the solutions we propose are based on extending the reach of markets. The COST on wealth radicalizes markets as it puts greater responsibility on individuals to articulate their values and gives them greater ability to claim things they value highly. QV does the same in the political sphere. Our ideas on migration give individuals more scope for determining the best path for where they live and work. Our proposals on antitrust and data valuation break up centralized power and place greater responsibility on individuals and small firms to compete, innovate, and make rational economic choices to allow for the distributed computation of optimal economic allocations. But all these proposals raise the question: if the market is just a computer program that harnesses the power of individual human intellects, will it still be necessary as computer power increases?

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#### And that faith in rules makes their impacts inevitable because state planning is bogged down by courts

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III. STOP FETISHIZING PROCEDURE

It has become the **central dogma** of administrative law: **strict procedural rules are** both **essential** to **agency legitimacy** and necessary to **guarantee public accountability.** **That dogma is false**. Proceduralism has a complex, contingent, and often ambiguous connection to legitimacy and capture. Many well-intentioned efforts to promote good governance can—and do—**drain agencies of** their **legitimacy, impair** their **responsiveness** to the public, and **expose them to capture**. Instead of defending proceduralism at a high level of abstraction, lawyers should develop a more granular perspective on the effects that particular procedures have on the task of governance. The reality is usually messier than the rhetoric suggests.

In the meantime, the endless hand-wringing over agency legitimacy and accountability breeds contempt for governance. Instead of the instruments of public aspirations, agencies become the bastard stepchildren of a **damaged constitutional system, rife with corruption** and inside dealing. That dyspeptic vision aligns neatly with suspicion of the state; it is, however, difficult to harmonize with a progressive belief in the promise of government to achieve collective goals. We should—indeed, we must—revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political power; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods.

In the meantime, minimalism should be the watchword. New procedures should be greeted with suspicion; **old procedures should be revisited**, with an eye to cutting them back or **eliminating them altogether.** Administrative law could achieve more by doing less.

#### 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.

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

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

#### Courts have been deeply embedded in the market ideology via conventional notions of freedom – only divesting away from those institutions is key

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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

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.

#### Fractures the party – causes mistrust in instittuions and allows oligarchic capture

Bagley 19 – Professor of Law, UMich

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

Administrative lawyers also tend to overlook the ways that proceduralism can erode legitimacy. One example: In a perceptive report on agency guidance, Nicholas Parrillo has documented the wide range of different approaches—ranging from formal notice and comment to off-the-record phone calls—that agencies use to solicit feedback on guidance documents. He concludes that more procedural formality may sometimes yield greater legitimacy, but not always. At times, the costs of notice and comment can be so acute that various stakeholders **lose faith in** the **agency’s ability to address** their **concerns. Notice and comment** thus becomes **“a factor that kills legitimacy**, at least for part of the community.” 259

By the same token, judicial review is supposed to enhance sociological legitimacy because it encourages agencies to mind their p’s and q’s. Yet it also advertises to the world, sometimes in mocking tones, the deficiencies of agency action.260 Indeed, agencies don’t relish **losing in court** precisely because it damages their reputations, which can have a **direct, negative effect on** their **legitimacy**.261 The effect is also asymmetric: it’s news when an agency loses in court, but rarely when it wins. Even more insidiously, highhanded judicial review can suggest that judges are committed to political neutrality and reasoned decisionmaking, while agencies are reckless, sloppy, and partisan.262 That attitude breeds **suspicion** not only of agencies but also of the entire project of democratic governance. And while the risk of bad publicity may sometimes spur an agency to improve its performance, it may also lead to fatalism within the agency’s ranks.

To cope with the encrustation of procedural constraints, resource strapped agencies may sometimes take to **ignoring or sidestepping** them.263 In so doing, they display a disregard for law that can itself undermine their legitimacy. FOIA, for example, imposes obligations on agencies that they cannot possibly meet, leading to widespread disenchantment with those very agencies. The result, as David Pozen argues, is that “[t]he FOIA process performs the very sort of government dysfunction that the Act is then enlisted to expose.”264 The point generalizes. The claim that an agency has avoided procedural rules becomes a focal point for attack, whether or not the rules do more harm than good. Agencies are then bashed in court and in the press for their purported negligence or carelessness. Sometimes the bashing is warranted; often it is not. Either way, it’s hard to see how publicly shaming federal agencies for failing to do what they were never equipped to do conduces to their legitimacy. It instead reinforces the perception that government is incompetent.

In any event—and this is the really crucial point—we’ve now run a half-century experiment into **whether stringent procedural rules will yield** an administrative state that its opponents **view** **as** fundamentally **legitimate. That experiment has failed**. The root of antipathy to federal agencies is not that they act without procedural safeguards. It is distrust of state power, full stop. Liberals were wrong to ever think that embracing legally mandated procedures would yield some kind of bipartisan détente that empowered agencies to get on with their work. They are wrong today to indulge the same tired belief.

#### The alt solves workers rights – less state power destroys worker rights

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

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

#### The alt solves and the aff is worse for workers– judicial discretion empowers elites to deck the rights to workers while remaining completely unnacountable – only the admin state can be opened up and made democratic

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Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 3-15, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

Pushing an anti-administravist10 agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

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

Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

#### Which is sufficient to solve

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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

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

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

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

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

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

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

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

#### We boost innovation broadly

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

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

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

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

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

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

But there is a catch.

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

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

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

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

## 1NR

### Case

#### Tech scrutiny decks private sector innovation

**Foster 20** – Dakota Foster is a graduate student at Oxford University and a former visiting researcher at the Center for Security and Emerging Technology.

Dakota Foster, 6-2-2020, "Antitrust investigations have deep implications for AI and national security," Brookings, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/

In late March, Attorney General William Barr announced that “decision time” was looming for America’s leading tech firms. By early summer, Barr expects the Department of Justice to reach preliminary conclusions about possible antitrust violations by Silicon Valley’s largest companies. The DOJ’s investigation is just one of several probes scrutinizing potential abuses by Facebook, Google, Amazon, Apple, and Microsoft. While concerns over consumer protections, anti-competitive practices, and industry concentration have fueled these antitrust investigations, their results will almost certainly have national-security ramifications.

Secretary of Defense Mark Esper has argued that artificial intelligence is likely to shape the future of warfare, and the national-security community has largely backed that conclusion. The most recent National Defense Strategy, released in 2018, highlights AI’s importance, noting that the Pentagon will seek to harness “rapid application[s] of commercial breakthroughs…to gain competitive military advantages.” With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies—and leading AI innovators—could affect the United States’ technological edge.

But the effects of such action are highly uncertain. Will a less concentrated tech sector comprised of slightly smaller firms fuel innovation and create openings for a new generation of tech companies? Or will reductions to scale significantly hurt leading tech firms’ ability to leverage the traditional building blocks of AI innovation—like computing power and data—into breakthroughs? The answers to these questions aren’t clear cut but offer a way to begin thinking about how antitrust enforcement could impact artificial intelligence innovation and national security more broadly.

Unlike some earlier national-security technologies, the commercial sector plays an outsize role in AI development. As a result, government access to both AI products and innovation hinges, in large part, on industry. While academia, private research labs, and AI start-ups offer important contributions to AI development, major American technology companies have traditionally led the field. Last year, Microsoft, Facebook, Amazon, Google, and Apple ranked among the ten largest recipients of U.S. artificial intelligence and machine learning (ML) patents.

Changes to the composition of America’s tech sector might boost net AI innovation. From 2013-2018, 90 percent of successful Silicon Valley AI start-ups were purchased by leading tech companies. This is a potentially worrisome trend for AI innovation. After all, incumbent firms and emerging companies can have very different incentives. Entrenched tech giants may be more focused on maintaining market share than disrupting markets altogether.

As Big Tech increasingly moves to acquire AI start-ups, individual firm dynamics also shift. Instead of “building for scale,” start-ups begin to “build for sale,” adopting a mentality that may be ill-suited for moonshot innovations. Would a company like DeepMind (now owned by Google parent-company Alphabet), for example, have developed AlphaGo—the ground-breaking computer program that became the first to beat a human player in Go—if the firm’s primary goal was to be acquired by a bigger player?

Antitrust action could shift these incentives and spur competition, potentially opening the door for new AI innovations—and for a new wave of AI companies. With their smaller statures, some of these firms might focus on more niche AI applications, including defense-related products, as start-ups like Anduril and ShieldAI have done. Today’s tech giants have every financial incentive to cater to foreign markets and the average consumer, not to the U.S. federal government. Indeed, with its global user-base, it is hard to imagine Google tailoring its AI innovation decisions to U.S. defense needs. The same may not hold within an AI ecosystem where some companies built, for example, in the mold of Palantir (a data-analytics company with clear national-security applications) consider government their primary customer and subsequently concentrate on its demands.

National-security agencies, from the Pentagon to the U.S. intelligence community, could stand to benefit from more targeted innovation—and from an industrial base better attuned to their needs. As Christian Brose points out, only a fraction of the U.S.’s billion-dollar tech “unicorns” have operated in the defense sector, leaving the U.S. military “shockingly behind the commercial world in many critical technologies.”

As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon.

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models to the quantity of data fed into them. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, access to data may diminish, lessening innovation.

#### Communists are less likely to engage in federal procurement –

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

Contracting with the Pentagon is difficult, expensive, and time-consuming. Smaller AI firms may be less able to navigate the federal procurement process, effectively preventing the Pentagon from accessing their technology. The few DOD programs that do partner with smaller firms are under scrutiny for their efficacy.

The high barriers of entry, coupled with an unstable budgetary environment and the high certification costs of federal contracting, favor larger companies.148 Simply put, large firms have more resources and deeper institutional knowledge to bring to the federal contracting process.

#### Break ups disadvantage data collection – that’s key to innovation

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

All else being equal, smaller AI firms have less data. While the relationship between the quantity of data inputs and the quality of algorithmic outcomes is not linear, a correlation is usually evident. For example, recent experiments by researchers at Google found a logarithmic relationship between the amount of data fed into an image recognition model and the model’s performance.42 If more data means more innovation, a post-breakup AI sector could be less innovative overall.

Antitrust action would likely reduce the amount of data held by large companies. This might hurt innovation, especially in application areas requiring exceptionally high amounts of data for acceptable performance.43 In short, the impact of antitrust action on data-driven innovation may hinge on the size of broken-up companies and their data holdings. Google Search or Amazon Web Services, for example, would be large corporations in their own right.44 AWS, one of Amazon’s larger divisions, achieved revenues similar to Raytheon’s company-wide revenues in 2018,45 demonstrating the possible size of spin-offs.46

#### Also decks R&D – funding of new tech is key

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

If R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation. A post-breakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.62

In terms of relative R&D spending—the percentage of total firm expenses spent on R&D—large tech companies remained among the highest spenders, led by Facebook (33 percent) in fifth place globally.63 Alphabet and Microsoft, which each spent 20 percent, and Amazon (13 percent) ranked among the top thirty. The smallest firm (based on total operating expenses) of the top 100 global relative R&D spenders was NXP Semiconductors, a Dutch firm with $6.8 billion in operating expenses.64

Because larger firms tend to spend more on R&D, breaking them up would likely reduce their R&D spending. Increases in spending at smaller firms could counter this decline, but the amount and efficacy of that spending are uncertain—both at the individual firm level and in the aggregate across the post-breakup AI ecosystem.65 That said, broken-up firms would remain very large, with sizable R&D budgets to match. Imagine a break-up of Alphabet, whose operating expenses amounted to $110 billion last year; a spin-off company with one-fourth of Alphabet’s current R&D budget would still be larger than 77 of the 100 leading global relative R&D spenders.

#### Information. Innovations develop over time through experimental searches and unpredictable breakthroughs stemming from market competition. It’s impossible for the state to aggregate enough data to effectively allocate resources – means they can’t solve AI and answers info sharing warrant about Ip

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Nils, Christian Sandström, & Karl Wennberg, 2020, “Bureaucrats or Markets in Innovation Policy? – a critique of the entrepreneurial state,” The Review of Austrian Economics, vol. 34, pg. 81–95.

Information problems concern the difficulty a public actor face in collecting the information and acquiring the knowledge enabling correct decision-making regarding, for example, the allocation of resources. As Hayek (1945) showed, it is practically impossible to aggregate information and knowledge about production conditions, business opportunities, customer preferences, etc. to any central unit in society. Such information is dispersed, local, and time-bound in character, even in today’s modern digital economy. With regard to innovation policy and the results reviewed above, there are numerous implications of Hayek’s argument.

First, the existence of a market failure is empirically difficult to prove, or measure. The original argument by Arrow (1962) was of a theoretical nature and has not been validated. One could expect the potential size of such a market failure to vary greatly depending upon institutional characteristics, industrial context, regional and national setting. Such differences along with the fact that it is a very methodologically challenging task to locate and compute the size of a market failure means that policymakers are put in the awkward position of trying to solve a problem that is unknown both in terms of its existence, size and location. Needless to say, such a situation is almost bound to result in malinvestments.

The second implication concerns that a market economy is more compatible with the notion of dispersed knowledge than a public policy intervention. Industrial development in a market economy characterized by innovations is often described as a complex evolutionary process (Nelson and Winter 1982). Through experimental search characterized by failures and unpredictable breakthroughs, the economy develops over time (Aldrich 1999). Individual market actors make mistakes and invest in the wrong technical solution or the wrong business model for a new technology (Delmar et al. 2011). If the actors themselves who operate in a market are unable to know which technology or business model is optimal, there is reason to question how a public actor in the form of a government agency or a policymaker can perform this task satisfactorily. Government involvement in the form of “picking winners,” that is, attempts to generate growth through government selection of technologies or firms, risks becoming expensive for taxpayers (Lerner 2009). Previous research has shown that venture capital investments tend to be highly spatial and build on social networks (Hochberg et al. 2007). The price mechanism provides aggregate information about customers’ demand, and the firms’ profits and losses. Information and knowledge are thus conveyed and generated among market actors in competitive markets who are nested together through social, economic and technological interdependencies, and this information is hard to extract from its origin and locate in a central policy unit.

#### Incentives. Competition forces private firms to innovate to stay ahead. They translate R&D investments more quickly and effectively.

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John, 11-29-16, “Despite China Favoring State-Owned Enterprises, Its Private Companies are More Innovative and Productive,” ITIF, <https://itif.org/publications/2016/11/29/despite-china-favoring-state-owned-enterprises-its-private-companies-are>

Private firms are not only more R&D intensive than SOEs, they too are better able to translate these R&D investments into productivity growth. Every 1¥ invested in R&D by a private firm returned an additional 0.16¥ in output, while every 1¥ invested in R&D by a SOE returned an additional 0.12¥ in output—[approximately a 30 percent difference](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570736).

China’s own experience with privatizing some SOEs since joining the WTO in 2001 should give them even more reason to fully embrace market-based economic trade policies. A separate [economic analysis](http://socialsciences.cornell.edu/wp-content/uploads/2015/03/Intellectual-Property-Protection.pdf) covering firm data between 1990 and 2013 shows that, on average, when a SOE switched to private ownership, R&D as a share of net assets doubled, or an increase of 0.14 percentage points. This surge in innovative activity also explains why patenting increased by 7.2 percent, which was accompanied by high-quality patents and more collaborative R&D with international companies.

Market dynamics explain most of this sizable difference in productivity and innovation outcomes between firm ownership types. Privately-owned firms tend to operate in more competitive industries, which forces them to make more effective R&D investments to stay ahead of other firms. Conversely, state-owned firms tend to operate in less competitive industries or are insulated from market competition induced through SOE-favoring policies that limit competition in such industries and create an uneven playing field for both domestic and international private companies.

#### State investment creates destructive innovation---crowds out other firms AND suppress long term productivity.

**Karlson et al. 20** --- Ratio Institute, Linköping University, Stockholm, Sweden.

Nils, Christian Sandström, & Karl Wennberg, 2020, “Bureaucrats or Markets in Innovation Policy? – a critique of the entrepreneurial state,” The Review of Austrian Economics, vol. 34, pg. 81–95.

Further, it appears that the support schemes can distort firm behavior. Due to the prevalence of public support systems for innovation within countries where different authorities distribute various types of support – often with no or little coordination between the authorities – firms may systematically seek and obtain several grants for related purposes. Not only do this makes evaluations of various policies challenging (Zúñiga-Vicente et al. [2014](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR65)) but it also creates a potential market for rent-seeking activities. Firms that are good at securing public grants may in theory be drawn from any tail in the productivity distribution but in practice authorities seek to foster ‘high-potential firms’ where they seem potential for growth and productivity improvement, meaning that below-average productive firms may easily be lured into a habit of applying for grants and public support rather than seeking to improve their productivity and gain market shares. Such firms in a sense becoming “subsidy entrepreneurs” with lingering low long-term productivity but still being able to hire skilled workers and pay them well, at least for the intermediate time horizon (Gustafsson et al. [2019](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR32)). If grants designed to stimulate innovation instead led to some firms simply specializing in getting grants this may in time create an increasing market for unproductive or even destructive entrepreneurship that compete unfairly with non-subsidies firms (Baumol [1990](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR9)).

#### Profit motive and market competition are key to curbing emissions – any alternative can’t scale up in time or it gets overwhelmed by popular backlash

Turner 19 – Baron Turner of Ecchinswell, Senior Fellow at the Institute for New Economic Thinking, chaired the UK Financial Services Authority

Adair Turner, “Is Capitalism Incompatible with Effective Climate Change Action?,” World Economic Forum, September 3, 2019, <https://www.weforum.org/agenda/2019/09/is-capitalism-incompatible-with-effective-climate-change-action/>.

Believers in a market economy are dismayed by radical voices arguing that capitalism is incompatible with effective climate action. But unless capitalism's defenders start supporting more ambitious targets and policies to achieve net-zero carbon emissions by mid-century, they should not be surprised if an increasing number of people agree.

This year, the evidence that global warming is occurring, and that the consequences for humanity could be severe and potentially catastrophic, has become more compelling than ever. Record global temperatures in June and July. Unprecedented heatwaves in Australia and India, with temperatures above 50°C. Huge forest fires across northern Russia. All of these things tell us that we are running out of time to cut greenhouse-gas emissions and contain global warming to at least manageable levels.

The response has been growing demand for radical action. In the United States, proponents of the Green New Deal argue that America should be a zero-carbon economy by 2030. In the United Kingdom, activists of the “Extinction Rebellion” movement demand the same by 2025, and have severely disrupted London transport through very effective forms of civil disobedience. And the argument that avoiding catastrophic climate change requires rejecting capitalism is gaining ground.

Against this growing tide of radicalism, companies, business groups, and other establishment institutions urge caution and more measured action. Achieving zero emissions as early as 2030, they argue, would be immensely costly and require changes in living standards which most people will not accept. Illegal actions that disrupt others’ lives, it is said, will undermine popular support for necessary measures. A more affordable and gradual path of emissions reduction would be better and still prevent catastrophe, and market instruments operating within the capitalist system could be powerful levers of change.

These counterarguments are robust. The costs of achieving a zero-carbon economy will increase dramatically if we try to get there in ten years, not 30. Most forms of capital equipment naturally need replacement within 30 years, so switching to new technologies over that timeframe would cost relatively little, whereas switching over ten years would require companies to write off large quantities of existing assets.

Technological progress – whether in solar photovoltaic panels, batteries, biofuels, or aircraft design – will make it much cheaper to cut emissions in 15 years than today. And the profit motive is spurring venture capitalists to make huge investments in the new technologies required to deliver a zero-carbon economy.

Meanwhile, decentralized market mechanisms such as carbon pricing are essential to drive change in key industrial sectors, given the multiplicity of possible routes to decarbonization. Socialist planning will not be as effective: Venezuela is an environmental as well as a social disaster. And there is a real danger that excessively rapid action could alienate popular support. After all, the gilets jaunes (yellow vest) movement in France was provoked by tax increases designed to make diesel cars uneconomic, but were imposed at a time when electric vehicles are not yet cheap enough and lack the range to be a viable alternative for less well-off people living outside major cities.

But it is also true that the capitalist system has failed to respond to the challenge of climate change fast enough; and in some ways, capitalism has impeded effective action. Venture capitalists financing brilliant technological breakthroughs have been matched by industry lobby groups successfully arguing against required regulations or carbon taxes. If adequate policies had been adopted 30 years ago, we would be well on the way to achieving a zero-carbon economy at a very low cost. The fact that we did not is, in part, capitalism’s fault.

Massively accelerated action is now required. All developed economies should commit to achieving net-zero carbon emissions by 2050. And zero must mean zero, with no pretense that we can continue burning large quantities of fossil fuels in the late twenty-first century, balanced by equally large quantities of carbon capture and storage.

Developing economies should get there by 2060 at the very latest. That would still leave us vulnerable to significant and unavoidable climate change, but climate science suggests that it would be sufficient to avoid catastrophe. And as the Energy Transitions Commission described in its recent Mission Possible report, it is still possible to achieve that objective at relatively low economic cost, provided we adopt without delay the policies required to drive rapid change.

Carbon taxes should be introduced at a sufficiently high level, and with future increases declared well in advance, to drive the multi-decade investment plans required to decarbonize heavy industry. Carbon tariffs should be used to protect industry from being undercut by imports from countries that fail to apply adequate carbon prices. Airlines should face either steadily rising carbon prices, or regulations requiring them to use a rising proportion of zero-carbon fuels from clearly sustainable sources, with the percentage reaching 100% before 2050.

Blunt but effective instruments – such as banning new sales of internal combustion engine autos from a specific future date, such as 2030, should also be part of the policy armory. And regulations should ban putting plastics in landfills and plastic incineration, forcing the development of a complete plastics recycling system.

None of these policies is anti-capitalist. Instead they are the policies we need to unleash capitalism’s power to solve the problem. Once clear prices and regulations are in place, market competition and the profit motive will drive innovation, and economies of scale and learning-curve effects will force down the costs of zero-carbon technologies. And if we do not unleash that power, we will almost certainly fail to contain climate change.

Believers in a market economy are dismayed by radical voices arguing that capitalism is incompatible with effective climate action. But unless capitalism’s defenders support the immediate establishment of far more ambitious targets and policies to achieve net-zero emissions by mid-century, they should not be surprised if an increasing number of people believe that capitalism is the problem and not part of the solution. They will be right to do so.

#### There has been a massive decline in war since 1945 – disproves their thesis of militarism and proves trade solves war

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**Is war becoming obsolete?** There is wide agreement among scholars that war has been in sharp decline since the defeat of the Axis powers in 1945, even as there is little agreement as to its cause.1 Realists reject the idea that this trend will continue, citing states’ concerns with the “security dilemma”: that is, in anarchy states must assume that any state that can attack will; therefore, power equals threat, and changes in relative power result in conºict and war.2 Discussing the rise of China, Graham Allison calls this condition “Thucydides’s Trap,” a reference to the ancient Greek’s claim that Sparta’s fear of Athens’ growing power led to the Peloponnesian War.3 This article argues that there is no Thucydides Trap in international politics. Rather, **the world is moving rapidly toward permanent peace**, possibly in our lifetime. Drawing on economic norms theory,4 I show that what sometimes appears to be a Thucydides Trap may instead be a function of factors strictly internal to states and that these factors vary among them. In brief, **leaders of states with advanced market-oriented economies have** foremost **interests in the principle of self-determination for all states**, large and small, **as the foundation for a robust global marketplace**. **War among these states**, even making preparations for war, **is not possible,** because they are in a natural alliance to preserve and protect the global order. In contrast, leaders of states with weak internal markets have little interest in the global marketplace; **they pursue wealth not through commerce, but through wars of expansion and demands for tribute**. For these states, power equals threat, and therefore they tend to balance against the power of all states. Fearing stronger states, however, minor powers with weak internal markets tend to constrain their expansionist inclinations and, for security reasons, bandwagon with the relatively benign **market-oriented powers.** I argue that **this liberal global hierarchy is**unwittingly but **systematically buttressing states’ embrace of market norms and values that**, if left uninterrupted, **is likely to culminate in permanent world peace**, perhaps even something close to harmony. My argument challenges the realist assertion that great powers are engaged in a timeless competition over global leadership, because **hegemony cannot exist among great powers with weak markets**; these inherently expansionist states live in constant fear and therefore normally balance against the strongest state and its allies.5 Hegemony can exist only among market-oriented powers, because only they care about global order. Yet, there can be no competition for leadership among market powers, because they always agree with the goal of their strongest member (currently the United States) to preserve and protect the global order based on the principle of selfdetermination. If another commercial power, such as a rising China, were to overtake the United States, the world would take little notice, because the new leading power would largely agree with the global rules promoted and enforced by its predecessor. Vladimir **Putin’s Russia**, on the other hand, **seeks to create chaos around the world.** Most other powers, having market-oriented economies, continue to abide by the hegemony of the United States despite its relative economic decline since the end of World War II.