# Harvard Round 1 Wiki

## 1NC

### T Per Se

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought

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

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

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

#### Violation—the plan clarifies the comity test for whether the Sherman act applies abroad—it does NOT *necessarily* result in the Sherman Act applying to MORE cases and may result in it applying to FEWER.

#### Prefer that

#### Neg ground—the minimum condition for negative debating is that the aff results in topical action.

#### Limits – allows an explosion of affs that shift and add new legal tests which skew out of core DAs

### K Anti-domination

#### Antitrust intervention adopts neoliberal assumptions of politics and economics where the role of the government is to get out of the markets way

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

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

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

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

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

A. Markets Cannot Be Divorced from Politics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Five Horsemen of the Modern Day Apocalypse

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

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

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

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

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

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

Societies as Decision-Making Systems

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

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

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

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

Oligarchic Control in “Democratic” States

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

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

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

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

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

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

What is To Be Done?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

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

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

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

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

A. The Mind and Body of the Democratic Sovereign

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

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

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

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

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

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

### CP States

#### The 50 states and all relevant subnational entities should establish a balancing test that expands the extraterritorial scope of its antitrust laws.

#### State courts enforce comity principals—precedent for uniformity in this instance

Dodge, Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law, ‘15

(William S., “INTERNATIONAL COMITY IN AMERICAN LAW,” Columbia Law Review, Vol. 115, No. 8, <https://columbialawreview.org/wp-content/uploads/2016/03/Dodge-William-S..pdf>)

Comity served not just as the basis for enforcing foreign laws in American courts, but also as the basis for recognizing foreign judgments,99 most famously in Hilton v. Guyot. 100 Justice Gray began by restating the traditional rule of strictly territorial sovereignty: “No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” 101 Thus, the effect not just of an executive order or legislative act but also of a judicial decree “depends upon what our greatest jurists have been content to call ‘the comity of nations.’” 102 Like Huber and Story, Gray noted the territorial sovereign’s discretion not to enforce foreign law against its own interests. Comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” 103 Despite its slippery definition of comity,104 Hilton articulated clear rules for the enforcement of foreign judgments in the United States:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . . 105

These rules were generally followed by state courts, and have been codified in two uniform state acts that govern the enforcement of most foreign judgments in the United States today.106

### CP Comity Rule

**The United States federal government should increase prohibitions on anticompetitive business practices by establishing a prescriptive comity rule that expands the extraterritorial scope of its antitrust laws.**

#### The CP creates an international comity RULE instead of an balancing TEST – prescriptive rules are based on objective factors that do not invite judicial discretion

Stephen D. Piraino, Hofstra Law, A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act, 2012, Hofstra Law Review, Vol. 40, Iss. 4

In order to solve the problem created by Hartford Fire's majority, courts must first recognize the importance of prescriptive comity in deciding whether the Sherman Act reaches foreign conduct. When foreign conduct causes effects in the United States, the court must then perform an analysis based on prescriptive comity. 330 As seen in Empagran, foreign conduct with foreign effects will not allow for an extraterritorial application of the Sherman Act. 331 Therefore, the Supreme Court has used prescriptive comity in the past when it declined to allow U.S. law to intrude on the sovereignty of another nation.332 There is no need for any type of analysis in these situations because case law firmly establishes that these types of cases involve no justiciable claim.333 There are two situations where courts would have to perform a comity analysis. The first situation is when conduct is legal-but not required-in the country where it occurred, but proscribed under the Sherman Act.334 The second situation is when conduct is illegal under both the Sherman Act and the laws of the country where it occurred.335

1. The Hartford Fire-Type Situation

To properly use prescriptive comity, courts must look beyond whether conduct is simply legal in another country. They must look to how the industry in which the alleged anticompetitive conduct is regulated by the foreign country where it occurred. If the conduct is regulated under a comprehensive regulatory scheme, such as the reinsurance industry in Hartford Fire, a court should decline to exercise the Sherman Act extraterritorially in order to respect that nation's right 336 to regulate its own industries.

In Hartford Fire, the foreign defendants who challenged jurisdiction based on principles of comity were reinsurers based in London.337 The London reinsurance market alone has a thirty percent market share.338As a result, the United Kingdom has developed a comprehensive regulatory structure for the reinsurance market.339 Therefore, the United Kingdom wanted the United States to respect its own ability to regulate an industry of national importance.34 ° It did not want U.S. antitrust laws to dictate changes to its historic policy, especially when the extraterritorial application of the Sherman Act in Hartford Fire would have done so without any input from the United Kingdom.341

Using prescriptive comity to decline jurisdiction over foreign conduct in this way is consistent with the principles of the Member States of the Organization of Economic Cooperation and Development ("OECD") in that member states "respect[] ... the interests of other Member Countries. 342 If a court finds that a country has a comprehensive regulatory scheme in place for a certain industry, the court must decline to apply the Sherman Act extraterritorially to that conduct. This approach is grounded in prescriptive comity because the United States would be limiting the reach of its laws so as to respect the sovereignty of another nation.343 That respect comes from acknowledging that the United States cannot regulate the economic activity in every country solely based on effects felt within the United States. 3"

The analysis into a country's regulation of an industry would be objective because it would be "based on externally verifiable phenomena, as opposed to individual's perceptions., 345 History of regulation and a country's market share in an industry are objective factors.346 Market share is data-based, which is clearly an objective factor.347 A history of regulation is also an objective factor because it is based on fact, instead of a judge's opinion about national interests.348 U.S. courts can make active inquiries into foreign law.349 Federal Rule of Civil Procedure 44.1 grants courts broad authority to decide issues of foreign law.35° Once a party has raised an issue about foreign law, "the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. '351 The court's decision on foreign law is treated as a matter of law, instead of as a matter of fact.352 The Federal Rules of Criminal Procedure provides a nearly identical rule for using foreign law in criminal proceedings. 353

#### Balancing tests are bad—they leave critical sovereignty issues to judicial discretion—CP solves

--assumes aff updated comity analysis

Stephen D. Piraino, Hofstra Law, A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act, 2012, Hofstra Law Review, Vol. 40, Iss. 4

An objective analysis avoids the problems inherent in balancing tests. 354 Balancing tests are ill-suited to determine the extraterritorial application of the Sherman Act.355 These types of tests do not operate well in practice and become problematic for judges.356 Courts cannot properly judge and balance the political factors inherent in balancing tests. 357 Further, these balancing tests-which do not represent rules of international law-have not adequately addressed the comity concerns raised by foreign nations. 358 Given the open-ended nature of balancing tests, there can either be multiple answers or no answer.3 59 Judges who cannot properly balance national interests will inevitably assert jurisdiction, which does nothing to further international relations. 360 However, an objective analysis grounded in prescriptive comity would solve many of the international relations issues because a nation's sovereignty is adequately protected.

One proposed solution to the extraterritorial application of the Sherman Act is modifying the Restatement (Third) of Foreign Relations Law.36 1 In its current form, the Restatement provides a list of factors for courts to balance when deciding if they ought to apply laws extraterritorially. 362 This new Restatement would use the locus of principle effects and principle contacts as an important factor.363 Courts would also look at the "combined overall welfare of the communities affected. 364 Instead of including the list of factors to be weighed from the current form in the new Restatement, the revised Restatement would include factors in a comment that could possibly be used when deciding whether to apply a law extraterritorially. 365 This approach recognizes that the current Restatement factors are not applicable in all circumstances and are outdated.3 66 Even though this new approach would include a comity-type analysis by acknowledging the effects of enforcement in a foreign country, it still leads to a balancing test of interests.367 Further, this new approach continues to reinforce the effects as the most important factor for application of a law extraterritorially and not the place of the conduct.368 This would not be consistent with prescriptive comity because it ignores the sovereignty of the nation where the conduct occurred.

#### Invading the sovereignty of foreign countries spurs efforts to destabilize the international application of U.S. antitrust law – that turns case.

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James S. McNeill, “Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction,” California Western International Law Journal, Vol. 28, No. 2, 1998, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1316&context=cwilj

The history of court opinions, enforcement policies, and antitrust statutes clarifies the reason behind international mistrust of United States antitrust enforcement: inconsistency.237 One significant result of this confusion is the suspicion of United States antitrust actions by the international community.238 Foreign states take various measures specifically to defeat the effect of United States enforcement, allowing those foreign governments to give their resident trading entities predictability in their United States commercial interactions.239 Allowing avoidance of treble damage awards240 via "claw-back" provisions241 and discovery or judgment blocking242 are just a few examples of how governments have hindered United States antitrust enforcement. At the root of these efforts is resentment of what is perceived as an invasion of sovereignty, namely the United States extending its law to adjudicate foreign commerce disputes affecting foreign interests.243

#### Flexible extraterritorial regulation solves existential risks.

**Kent 16**

Dr. Randolph Kent, Director of the Humanitarian Futures programme at King’s College London, Senior Research Associate of the International Policy Institute, Fellow at The Policy Lab, long-time senior UN official, Joanne Burke, and Amanda Taylor, King’s College London, EXPLORING ALTERNATIVE WAYS OF UNDERSTANDING HUMANITARIAN CRISES AND SOLUTIONS, http://www.humanitarianfutures.org/wp-content/uploads/2017/10/Alternative-Humanitarian-Paradigm-Final-4-July-2016s.pdf

Never before have we been able to **disrupt the fundamental processes of Earth’s ecology**, and never before have we created **social, economic and technological systems** – from **continent-wide industrial agriculture** to the **international financial system** – with today’s **enormous** complexity, **connectedness** and **speed of operation**. Whether the issue is **drug resistant diseases** or **shiploads of migrants** dumped on our shores, our problems **spill across geographical** and intellectual **boundaries**, their complexity often exceeds our wildest imaginations, and they **converge and intertwine** in totally unexpected ways. The **real danger of the 21st century** is ‘**synchronous failure**.’1

Introduction: The Copernican challenge Nicholas Copernicus at the beginning of the 16th Century announced his theory that the earth was not at the centre of the universe, but actually rotated around the sun. This proposition, though resisted initially by the establishment, ultimately formed an alternative basis of knowledge and understanding about our universe that continues today. 1 Presentation by Dr. Thomas Homer-Dixon, of the University of Toronto’s Center for the Study of Peace and Conflict, ‘Synchronous Failure: the Real Danger of the 21st Century’, for the US Congressional bi-partisan study group on ‘Security for a New Generation’, 5 December 2002, US Capital, Washington, DC. The underlying assumptions upon which knowledge and the search for knowledge are based are generally referred to as paradigms. The search for alternative paradigms is intended to improve both understanding and explanations by challenging the assumptions that underpin present conceptual constructs. It is not about improving understanding and explanation by building upon existing assumptions, but rather by proposing alternative assumptions that might provide different frameworks for ordering evidence that leads to knowledge.2 This note comes at a time when there is growing concern that the present humanitarian sector may not be adequate to meet the crises – the disasters and emergencies -- of the present, let alone the future. Directly and indirectly a series of global consultations and meetings, including the World Humanitarian Summit, have been seeking ways to make humanitarian action more relevant to ever growing types, dimensions and dynamics of humanitarian threats. And, while there has been a wide spectrum of suggestions aimed at improving the sector, this spectrum is nevertheless sustained by a traditional set of assumptions that might be described 2 Two key figures in the understanding of paradigms and the assumptions that sustain or challenge them are Thomas Kuhn, The Structure of Scientific Revolutions, University of Chicago Press, 1962 and Imre Lakatos, Proofs and Refutations: The Logic of Mathematical Discovery, Cambridge University Press, 1976. 2 as ‘the Western hegemonic’ paradigm.3 Is there an emerging alternative? This exploration of alternative ways of understanding the contexts and factors which underpin crisis threats and their solutions is closely tied to the Planning from the Future [PFF] project. The PFF is primarily concerned with the loosely defined ‘humanitarian sector’s capacities to deal with ever more complex and uncertain humanitarian crises, or, disasters and emergencies. Towards that end, the PFF partnership, consisting of King’s College London, the Overseas Development Institute and Tufts University, will in the first instance explore the present landscape of the humanitarian sector, how that sector responds to ‘game changers’ that confront it with unanticipated challenges and the extent to which that sector is fit for the future. 4 In that context, if the sector is not fit for the future, plausible solutions may emerge for improving it through institutional change and methodologies that reflect our present understanding of the nature of crisis threats and mitigation. Or, alternatively, the assumptions that are made about crisis threats and appropriate action may stem from a paradigm which by analogue might be Copernican in consequence, and may well lead not only to different understandings about the nature of crises, but also to different approach to solutions. This exploration began with extensive research about the nature of paradigms and the assumptions that underpin humanitarian action. The concepts incorporated in the paper were frequently the result of seven meetings with humanitarian experts, and at the end with a major consultation that brought together all of those who had helped in the past. 3 See, for example, the forthcoming Planning from the Future report (Chapter 1). www.planningfromthefuture.org The result is Exploring alternative ways of understanding humanitarian crises and solutions. The paper is divided into three man sections: Section 1 suggests five assumptions that might serve as guideposts on the journey for alternative perspectives. In Section 2, the three key elements of the emerging paradigm are considered, each with a set of reflections about what will be described as their ‘normal life’ implications. Finally, Section 3 draws specific conclusions about what might be considered as the humanitarian implications that can be drawn from this emerging paradigm. In its totality, the paper links directly into what is called the Synthesis Report, or, Planning from the Future: Humanitarian spectres, a PFF product intended to make futures real for humanitarian practitioners. Exploring alternative ways has been designed to suggest different approaches for understanding the nature and drivers of risk as well as new ways to understand alternative solutions. The Synthesis Report is intended to incorporate these new perspectives into broad but practical approaches to planning and decisionmaking. I Hypotheses guiding the paradigmatic exploration There are five hypotheses that guide this effort to identify the possibility of an emerging alternative humanitarian paradigm: [1] Humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. They are not aberrant phenomena, divorced from ‘normal life,’ but rather a reflection of it,5 everything 4 See the forthcoming Planning from the Future report (Chapter 2). www.planningfromthefuture.org 5 ‘Normal life’ in this context refers to the fact that disasters and emergencies are an integral 3 from governance and leadership to human security and socio-economic opportunities; 6 [2] Humanitarian crisis drivers, their dimensions and dynamics are directly linked to human progress and related change, including technological advance;7 [3] Except for existential crises, e.g., asteroid impact8 , the types of humanitarian crisis drivers, their dimensions and dynamics, have increased exponentially over the past 200 years, and continue to do so even more intensely. This latest phase of exponential increase is due to a rapidly changing, interconnected and globalised world, one in which technology will continue to act as a major driver of change and determinant of human progress; [4] Increasing extra-terrestrial, or, outer space involvement by humankind is but one dramatic example of highly plausible change in the nature of vulnerability and the perception of what and who is vulnerable. The prospect of existential risk that have potential global impacts are increasing, all in one way or another underscoring the part of environmental abuse and economic and social exploitation. Rather than the assumption that disasters and emergencies foster vulnerability, the ways in which human beings organise their social and economic lives do. Randolph C. Kent, Anatomy of Disaster Relief: The International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 6 See the forthcoming Planning from the Future: Humanitarian spectres for specific discussions on governance and human security and human agency. 7 Linked to societal structure and resource allocation is the impact of technological advance, which over the past 200 years has bent the curve of human history – of populations and social development – by almost 90 degrees. See Eric Brynjolfsson and Andrew McAfee, The Second Machine Age: Work, Progress and Prosperity in a Time of Brilliant Technologies, W.W. Norton & Co., New York. 2014, p.6 8 The Cretaceous–Paleogene (K–Pg) extinction event was a mass extinction of some threequarters of plant and animal species on earth increasing speed of global vulnerability9 ; [5] As suggested in #1, above, humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. This is what was referred to above as the ‘normal life proposition’, and is based upon the dynamics of complex systems. Such systems are open, dynamic, non-linear and in a state of perpetual disequilibrium. This, therefore, suggests that ‘…in many of the pressing issues for our future welfare as well as for the management of our everyday life, [we] will need such a systemic complex system and multidisciplinary approach’10 to be adequately prepared to deal with ever more complex and uncertain threats. II An exploration of paradigmatic assumptions The search for the possibility of an emerging alternative paradigm might begin with the ‘normal life’ proposition that suggests that all societal phenomena, including disasters and emergencies, reflect highly complex that occurred over a geologically short period of time, 66 million years ago 9 The University of Cambridge’s Centre for Study of Existential Risk is but one of a growing number of interdisciplinary research centres focused on the study of human extinction-level risks that may emerge from amongst other things technological advances. Examples include M. Rees, Our Final Century: Will the human race survive the 21st century?; J.F.Richard, High Noon: 20 global problems, 20 years to solve them, New York – Basic Books, 2002, Nick Bostrom, “Existential Risks: Analysing human extinction scenarios and related hazards,” Journal of Evolution and Technology, Vol.9, No.1, 2002 10 D. Sornette, “Dragon-Kings, Black Swans and the Prediction of Crises,’ International Journal of Terraspace Science and Engineering, 2(1): 1-18, p.1, 2009 as quoted in Ben Ramalingam, Aid on the Edge of Chaos: Rethinking International Cooperation in a Complex World, Oxford University Press, 2013, p.138 4 messes, 11 and that such ‘messes’ are not restricted in either space or time. They perpetually evolve. This runs contrary to standard assumptions underlying the term, ‘humanitarian’. That term is principally concerned with systems failures, and reflects a belief that such failures have finite beginnings and ends. An emerging paradigm might be based upon the assumption that humanitarian crises from a whole of society perspective are not bound by clearly defined space and time dimensions. And, emerging from this perspective are three interconnected sets of propositions that form the basis of the proposed alternative humanitarian paradigm: [1] Reflections of normal life – The proposition that humanitarian crises are reflections of normal life is on the one hand generally accepted.12 Yet, on the other, ‘disasters are still predominantly seen as exogenous and unforeseen shocks that affect supposedly normally functioning economic systems and societies.’13 However, what all too often have not been appreciated are the full implications of ‘the normal life’ proposition. In this regard, a more comprehensive societal focus changes 11 In defining the use of the term, ‘messes’, Alpaslan and Mitroff state that problems ‘resist our attempt to confine them and rein them in by reducing them to a single discipline or point of view. For example, different stakeholders rarely have the same definition of the individual problems that constitute a mess and of the entire mess itself. Indeed the fact that different stakeholders have different perceptions of a mess is itself one of the keys defining attributes of messes! As a result “problem negotiation” is one of the most important aspects of managing messes. Before one can “solve” a problem one first has to agree on the nature of the problem. And if agreement is arrived at all, it should be reached only at the end of an intense debate about the “nature” of the problem instead of the all–too-common pressure to get a quick consensus.’ Can M. Alpaslan and Ian I. Mitroff, Swans, Swine and Swindlers: Coping with the growing threat of mega-crises and megamesses, Stanford University Press, Stanford, 2011, pp xx ff. 12 Op cit. #5 See, for example, Randolph C. Kent, Anatomy of Disaster Relief: The the ways that crisis threats are defined and solutions posited. This focus in turn suggests the following: n humanitarian crises consist of complex systems of changing problems that interact with each other. No crisis driver is in itself the sole explanatory factor for a crisis event or its consequences. People ‘are not confronted with problems that are independent of each other, but with dynamic situations that consist of complex systems of changing problems that interact with each other’.14 These are defined as ‘messes’, and this concept is an important starting point for understanding and explaining humanitarian crises. The need to understand and prepare for humanitarian threats and actions in terms of complex systems and interacting problems will become increasingly evident as such ‘messes’ reflect ever more fluid manifestations of vulnerability. Accepting the concept of ‘messes’ should narrow the perceived bifurcation between so-called natural disasters and man-made emergencies.15 And, International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 13 Allan Lavell and Andrew Maskrey, The Future of Disaster Risk Management: An Ongoing Discussion 14 Russell L. Ackoff, Re-creating the Corporation, Oxford University Press, New York, 1999, p.324 15 The definition of ‘emergency’ within a humanitarian context has various interpretations. Quarantelli sees ‘emergency’ as one of a threshold of events, each depending upon resource requirements, from accidents to emergencies to disasters and finally to catastrophes. The OCHA orientation handbook sees emergencies as ‘a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency.’ The IFRC views a complex emergency ‘as a reflection of disasters [which] can result from several different hazards or, 5 yet, while there are perceptible moves towards recognising the interconnectedness between certain types of humanitarian crises (e.g., natural hazards and technological failures), there continues to be resistance in the humanitarian world to accepting the interdependent nature of most if not all crisis events, including natural events and conflict. In that sense, ‘some of the greatest mistakes are made when dealing with a complex mess, by not seeing its dimensions in their entirety, carving off a part, and dealing with this part as if it were a complicated problem, and then solving it as if it were a simple puzzle, all the while ignoring the linkages and other connections to other dimensions of the mess.’16 This tendency to accept if not reinforce the dichotomy and to ignore basic causation and solutions can also be perceived as a convenience. Not unlike the reactions of the establishment in the time of Copernicus, politicians, policymakers and planners resist alternative perspectives because it goes against the inherent ‘short-termism’ of most institutions and their incremental approach to problem solving.17 n humanitarian response is underpinned by contending and not universal principles, the former reflecting cultural, local more often, to a complex combination of both natural and man-made causes and different causes of vulnerability. Food insecurity, epidemics, conflicts and displaced populations are examples.’ 16 Ben Ramalingam and H. Jones with T. Reba and J. Young, ‘Exploring the Science of Complexity: Ideas and Implications for Development and Humanitarian Efforts’, Working Paper 285, ODI, London, 2008, p.11 17 As described by one analyst, in crises, ‘political stakes logically increase….Disasters overload political systems, catastrophes can bring down regimes.’ Richard Stuart Olson, ‘Towards a Politics of Disaster: Losses, Values, Agendas and Blame, International Journal of Mass Emergencies, August 2000, Volume 18 #2. and regional perspectives and values. One prevailing assumption underpinning the predominant humanitarian paradigm is that there is an inherent human motivation that explains why human beings respond to the plight of other human beings, namely, an overarching moral sense of responsibility, benevolence and empathy that is universal. This abiding motivation in turn justifies what are regarded as universal humanitarian principles. Morality as motivation and universal principles, however, ignore the relationship between crises and the ways that they test and reinforce basic values – religious, spiritual, philosophical. There are profound differences in the ways that societies explain and interpret their respective worlds.18 Increasingly, ‘we will have to deal with “contending” and not “universal principles,” suggests the renowned anthropologist, Arjun Appadurai. In a world in which different power structures will emerge, with their concomitant local and regional perspectives and values, the presumption of common principles will be less and less relevant. More and more, perceptions of self-interest and possible mutual self-interest will be at the heart of humanitarian action.19 18 ‘Thank you for explaining your principles,’ said a member of a Middle Eastern group that had come to hear an ICRC delegate’s explanation of the organisation’s humanitarian role. ‘However, we, too, have our own principles,’ he continued, ‘Ours begins with justice. To what extent do your principles incorporate the concept of justice?’ In so many ways, the avowedly universal principles presented by humanitarians reflect a Western hegemony that can be traced to the age of discovery in the 15th and 16th centuries, to the age of industrialisation, colonialism and economic dominance of the 18th and 19th centuries – past Solferino – and clearly into the 20th century in the post 1945 world. 19 Students of humanitarian affairs will have ‘to deal with “tactical humanism” – a humanism that is prepared to see universals as 6 n humanitarian crises always have transformative consequences that go well beyond the geopolitical and socio-economic boundaries of the event, itself. As in physics, so, too, in the nature of ‘normal life’, dynamics are not constrained by fixed time and space. Their effects continue in various forms over time and across spatial boundaries. While these dynamics are inherent in all matter, they are becoming increasingly evident in a world that is overtly more interconnected, through trade and through movements of capital, people and information. ‘What we call “flows”’.20

The ‘normal life’ dimension of humanitarian crises means that the drivers of such crises are part of systems that are in constant flux, driven by a ‘persistent need for energy’.21 They are in a state of ‘non-equilibrium’. In that sense, as suggested below in the technological paradox, humanitarian crises also reflect the ever-fluctuating boundaries of ‘normal life’, and those boundaries are moving in myriad directions, including beyond the earth’s atmosphere. Hence, another assumption underpinning the alternative paradigm is that a growing number of crisis drivers and ways to mitigate them will become extraterrestrial. **Extraterritoriality** will emerge as a **major factor** in what we continue to call ‘humanitarian response’, and will fundamentally change many aspects of what is a crisis driver and who and what is a ‘humanitarian actor’.22

[Footnote 22] An example is ‘asteroid impact avoidance’ where technology enables human intervention to divert asteroids. Hence, the ‘humanitarian actor’ might well be someone who has the capacity to **prepare for** and **prevent** potentially **existential threats**. This could well be the humanitarian actor of the future. [End Footnote 22]

### DA Innovation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### DA FTC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch – no alt causes – restoring competition in hospital markets is key to reduce costs

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Healthcare driven budgetary overstretch causes global instability

Brown, PhD, Professor of Practice and Vice Chair, Public Administration and International Affairs at Syracuse, worked as an economist at the International Monetary Fund and as Chief Economist for Eastern Europe, Africa, and the Middle East at BNP Paribas, ‘13

(Stuart S., “Global Power: Key Issues,” in *The Future of US Global Power: Delusions of Decline*, Palgrave, p. 57-58)

In the first instance, structural26 budget deficits are more likely to be symptoms of incipient overstretch then prima facie evidence of national decline. Overstretch suggests a need to realign commitments and resources, hence spending and revenues. In principle, persistently large deficits demand adjustments that need not materially impact the underlying drivers of longer-term prosperity. In contrast, if fiscal imbalances prove sufficiently chronic, they can eventually trigger growth-inhibiting alterations in microeconomic incentives. In such cases, incipient overstretch can mutate into a more primary threat to the system's underlying dynamism.

In its classical formulation, “imperial overstretch” refers to unrestrained and exorbitant foreign military campaigns. The latter can be said to redound to the detriment of great powers by crowding out more productive capital investments. Yet in contrast to widespread impression, the US fiscal challenge does not primarily reflect out-of-control defense spending and the burden of foreign entanglements. If this were the case, then the feasibility of financing an ever-expanding global power projection would be brought into question. This neither minimizes the sizable resources the US commits to military-related spending nor denies that cutbacks in such spending can help facilitate overall fiscal adjustment. Rather, the point is that an endemic failure to rein in explosive economy-wide health care costs with the latter's implications for public sector health insurance programs – the real fiscal challenge – will do more to endanger macroeconomic stability and eventually erode the material foundation of US power (see chapter 8).

By viewing (health-care driven) fiscal deficits as a necessary manifestation of overstretch is misguided for a more basic reason. The root of the US fiscal problem involves unsustainable commitments – particularly in the area of health expenditure – made by government to its citizens. It is decidedly not a question of any dearth of national resources to adequately meet the health needs of the population at large. As the richest country in the world, the US possesses more than enough resources to achieve this goal. The relevant political and social question is whether the population’s basic health requirements are best met via ever-expanding entitlements requiring increasingly higher levels of taxation.

### Cartels Adv

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

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

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

A NOT SO BRILLIANT FUTURE OF INTERNATIONAL CARTELS?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Supply chain relocation is inevitable – COVID and U.S.-China strategic rivalry ensure it.

**Suzuki 21** – Visiting fellow with the Japan Chair at the Center for Strategic and International Studies

Hiroyuki Suzuki, “Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region,” CSIS, February 2021, https://www.csis.org/analysis/building-resilient-global-supply-chains-geopolitics-indo-pacific-region

Covid-19 Has Accelerated Supply Chain Restructuring

During the era of globalization over the last two decades, companies of all sizes have been building domestic and international supply chains that prioritize efficiency. However, rising labor costs in emerging economies, including China, and growing geopolitical uncertainty due to U.S.-China strategic rivalry, including the strengthening of protectionist policies in the United States, forced a reassessment of global business models—such as multinational corporations announcing plans to relocate their manufacturing operations to Vietnam and Mexico in 2018–19. The Covid-19 pandemic has greatly accelerated this trend and reaffirmed the importance of protecting citizens’ livelihoods by strengthening supply chains. In particular, the impact on essential commodities such as food and medicines and on social infrastructure, coupled with political tensions, provided an opportunity to promote policies of homeland security in many countries.

In response to an increasingly complex global economic environment, global corporations are taking the following measures to reduce supply chain risk:

▪ Reshoring

In short, this is a strategy to redirect manufacturing operations back to the home market. This trend has been evident since 2019, particularly in the United States due to tariff increases in the wake of the U.S.-China trade conflict that have caused the U.S. manufacturing import ratio (imports as a percentage of total domestic manufacturing output) to fall for the first time in almost a decade. In addition, the Covid-19 pandemic has increased awareness in the United States of the vulnerability of supply chains for critical items such as health care products and food, further encouraging policies that allow companies to repatriate their supply chains back to their home countries. However, in the case of developed countries, reshoring entire supply chains is not practical due to additional labor and overhead costs, so it is important to focus on strategic sectors for reshoring from a national security and industrial policy viewpoint.

## Indigenous Development Adv

#### Thesis of adv is wrong—US antitrust is isolated

Waller, John Paul Stevens Chair in Competition Law, Loyola University School of Law, ‘18

(Spencer W., “The Omega Man or The Isolation of U.S. Antitrust Law,” December 4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988>)

Some of the enduring and increasing isolation of United States antitrust in the world community also is a function of ideology. As Professor Eleanor Fox has noted:

In the matter of single-firm conduct, the U.S., especially as recited in the Trinko case, is laissez faire; it makes assumptions that the EU does not make. The default presumptions are very powerful. For example: if you are acting as a single firm (not in conspiracy with competitors), you’re probably going to do what’s best for the market if government leaves you alone. That is because (the assumptions go) markets work well and will punish you if you try to harm competition.415

Taking the U.S. agencies and courts at their word, the sole or principal objective of U.S. antitrust is the promotion of consumer welfare defined in a narrow price theory fashion.416 While many commentators dispute whether this is true historically or desirable normatively, this is the gospel that the U.S. agencies preach in their dealings with other jurisdictions.

The United States has pursued a policy of promoting its view of best practices to other jurisdictions in a variety of fora. First, the United States worked to oppose the inclusion of competition rules in the WTO negotiations because of concern that binding rules would be adopted that differed from U.S. practice and interests.417 Instead, the United States promoted the creation of the International Competition Network (ICN), a virtual organization that would be voluntary, consensus driven and focused on development of best practices.418 The United States has worked through both government agency personnel and non-governmental advisers to promote its view of best practices to varying degrees of success since the creation of the ICN over both Republican and Democratic administrations.

From this perspective, the ICN report card is mixed. As noted throughout this paper, the ICN often has documented the diversity of competition law practice rather than promote the substantive convergence of competition hoped for by U.S. interests. The ICN has been very valuable as a teaching tool and as a forum for the sharing of information and practice among diverse jurisdictions but it has not resulted in most jurisdictions becoming a mirror for the United States. More often than not, other jurisdictions enforce their own competition laws knowledgeably and effectively, but do not do so by adopting the existing U.S. approach.

A similar pattern existing in the other U.S. interactions in international organizations, regional trade arrangements, and bilateral relationships in the competition sphere. This is the case at the OECD where most of the members follow the EU, rather than the US, model for competition matters. 419 It is true at UNCTAD which is dedicated to the interests of smaller and developing jurisdictions.420 It is similarly the case at The World Bank which views competition law as part of a developmental agenda.421

A cursory review of the work product of important organizations such as the ICN and the OECD show the diversity of opinion on a plethora of key competition issues. Two surveys help illustrate the extent of the divergence. The first survey relates to the goals of competition law itself. That survey notes that a majority of the respondents identified the promotion of consumer welfare as only one of several goals for competition law. 422

A second ICN survey on unilateral conduct provisions similarly shows the wide gulf between U.S. practice and the rest of the world. The survey begins with a list of ten different goals for single firm conduct provisions which include:

1) Ensuring an effective competitive process;

2) Promoting consumer welfare;

3) Maximizing efficiency;

4) Ensuring economic freedom;

5) Ensuring a level playing field for small and medium size enterprises;

6) Promoting fairness and equality;

7) Promoting consumer choice;

8) Achieving market integration;

9) Facilitating privatization and market liberalization; and

10) Promoting competetiveness in international markets.423

#### No impact to prolif

Akisato Suzuki ’15, Researcher, Institute for International Conflict Resolution and Reconstruction, Dublin City University “Is more better or worse? New empirics on nuclear proliferation and interstate conflict by Random Forests,” *Research and Politics*, pgs. 3-4, <http://rap.sagepub.com/content/2/2/2053168015589625>

Discussion and concluding remarks

The main findings reveal that the optimist expectation of the relationship between nuclear proliferation and interstate conflict is empirically supported:9 first, a larger number of nuclear states on average decreases the systemic propensity for interstate conflict;

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and second, there is no clear evidence that the emergence of new nuclear states increases the systemic propensity for interstate conflict. Gartzke and Jo (2009) argue that nuclear weapons themselves have no exogenous effect on the probability of conflict, because when a state is engaged in or expects to engage in conflict, it may develop nuclear weapons to keep fighting, or to prepare for, that conflict. If this selection effect existed, the analysis should overestimate the conflict-provoking effect of nuclear proliferation in the above model. Still, the results indicate that a larger number of nuclear states are associated with fewer disputes in the system.

This conclusion, however, raises questions about how to reconcile this study’s findings with those of a recent quantitative dyadic-level study (Bell and Miller, 2015). The current paper finds that nuclear proliferation decreases the systemic propensity for interstate conflict, while Bell and Miller (2015) find that nuclear symmetry has no significant effect on dyadic conflict, but that nuclear asymmetry is associated with a higher probability of dyadic conflict. It is possible that nuclear proliferation decreases conflict through the conflict-mitigating effects of extended nuclear deterrence and/or fear of nuclear states’ intervention, to the extent that these effects overwhelm the conflict-provoking effect of nuclear–asymmetrical dyads. Thus, dyadic-level empirics cannot solely be relied on to infer causal links between nuclear proliferation and a systemic propensity for conflict. The systemic-level empirics deserve attention.

## 2NC

### T Expand

#### Interpretation – prohibit means to forbid a given practice – that’s distinct from restrictions

Kennard 93 – Judge, California Supreme Court

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

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

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### They are at best not topical. The aff only POSES the question of WHETHER the Sherman Act applies, it does not ANSWER the question with “IN MORE PLACES”

Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

That leaves the question of what type of effect “gives rise to a claim” that the Ninth and Seventh Circuits have attempted to address: a US plaintiff bringing a claim against a non-US defendant encompassing wholly foreign conduct and an effect felt in the United States, such as if the US clothier from the opening hypothetical decided to sue the Pakistani textile manufacturers in the United States.195 It is this type of narrow case, where prescriptive jurisdiction hangs on the “directness” of the effect, that a balancing test would prove beneficial in the absence of a circuit split resolution.196 So, while the Supreme Court has cautioned against case-by-case comity inquiries, this balancing test is only employable in a small universe of cases.197 Consequently, the balancing test would not be “too complex to prove workable,” as imagined by the Court in Empagran, particularly taking into account the stylized factors to be discussed.198 But even if the case technically meets the standards for FTAIA’s exemption, the balancing test may still be used to evaluate whether extraterritorial application of US antitrust laws is apt.199

#### At worst, it is antitopical. Murray indicates the “modus operendi” of the aff’s balancing test is responding to criticism that the Sherman act applies TOO WIDLY

Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

Chiefly, this balancing test would supplement the FTAIA. The underlying impetus for the FTAIA’s enactment – responding to international criticism of expansive US extraterritorial jurisdiction and to calls for recognizing foreign sovereignty where the basis for US prescriptive jurisdiction is weak – functions as this balancing test’s modus operandi. While the difficulty in interpreting “direct” has instigated its introduction, the balancing test does not attempt to shed any more light on the FTAIA’s contemplation of “direct.” Instead, it provides an alternative framework to properly apply the FTAIA where the statute’s language makes it impossible to do so.

#### their ev is explicit that the comity test would attempt to stop over-enforcement of antitrust – that’s the opposite of what the aff has to do!

Murray ‘17 [Sean; 2017; J.D. Candidate and Stein Scholar, Fordham University School of Law; Fordham International Law Journal; “With A Little Help From My Friends: How A Us Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress.” vol 41, iss. 1 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj]

In response to international criticism of the statute’s unbridled transnational application, the United States has curtailed the Sherman Act’s reach both judicially and legislatively.20 Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.21 The Ninth Circuit was the first court to invoke international comity in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., which used an interest-balancing test to determine whether exercising jurisdiction was proper.22 Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.23 Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.24 However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators’ amnesty programs.25

The aforementioned responses to these competing concerns have been ambiguous, inconsistent, and over-inclusive or under-inclusive.26 In particular, the poorly worded FTAIA has created more problems than it has solved, including inconsistent holdings, wrongly decided cases, and disagreements among the circuit courts over interpreting the statute’s language.27 The most recent interpretational difficulty involves determining what constitutes a “direct” domestic effect under the FTAIA. Some courts have held that “direct” takes on a broader meaning, where conduct causing domestic effect need only be an “immediate consequence.”28 In comparison, other courts have narrowly interpreted the statute’s “direct” domestic effect requirement as calling for “a reasonably proximate causal nexus,” drawing from tort law to exclude an injury that is too remote from the injury’s cause.29 The most recent appellate decision involving the FTAIA, Motorola Mobility LLC v. AU Optronics Corp., has contributed to the statute’s confusion.30 There, the Seventh Circuit held that a US parent company failed to show that it suffered direct injury as a result of foreign anticompetitive conduct, despite the fact that price-fixed component products were purchased by its majority-owned foreign subsidiaries to be incorporated into final products purchased by the US parent and sold to US customers.31

Nevertheless, various delineations already exist that suggest a solution to the inconsistency is attainable and may be designed to enhance global antitrust enforcement through greater availability of worldwide private redress. What is apparent from the succession of decisions from Hartford Fire Insurance Co. v. California32 to F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)33 is that the FTAIA grey area has been sufficiently tapered to allow for the return of a comity balancing test to appropriately reconcile the conflicting interests at hand in the residual universe of cases.34 This Note argues that Hartford Fire, its progeny, and Empagran form confining parameters on the applicability of the FTAIA, namely that cases that do not involve a US party, domestic effect, and domestic injury arising from that effect will fail the FTAIA’s exemption test. Moreover, because the FTAIA’s “direct, substantial, and reasonably foreseeable” effect test can be construed as a proxy for the United States’ prescriptive jurisdiction interest, comity analysis is helpful in its interpretation.35 Thus, claims which are based on exclusively non-US conduct that questionably has a “direct effect” on US commerce resulting in the plaintiff’s injury are more properly decided not by the courts’ current focus on statutory interpretation, but rather by a Timberlane-style ad hoc fact-intensive balancing test that contemplates factors more suitable to the modern global economy and promoting international dialogue.36

In sum, this Note proposes the introduction of a new international comity balancing test into US antitrust jurisprudence with the aim of fostering and strengthening global antitrust enforcement and private redress. It does so in four parts. Following this introduction, Part II briefly summarizes the expansion of US antitrust extraterritorial application. Next, Part III discusses various developments undertaken to limit and demarcate the reach of US antitrust law. Part IV raises issues arising from those efforts that have resulted in inconsistent and questionable holdings. Finally in Part V, by analyzing and synthesizing the existing precedent, this Note contends that a judicial international comity balancing test would most appropriately determine the propriety of US antitrust extraterritoriality for particular types of private recompense cases that are problematic under the current framework.

### CP Comity

#### That’s specifically true if judges use the balancing tests to apply Sherman act to states with established antitrust regime—Japan proves

Negishi 14 – Law professor at Konan Law School and Emeritus Professor at Kobe University

Akira Negishi, Amicus Curiae Brief of Professor Akira Negishi in Support of Appellees, Motorola Mobility LLC v. AU Optronics Corporation, et al., US Court of Appeals for the Seventh Circuit, October 2014, LexisNexis

III. International Comity

Applying U.S. antitrust law and approving the treble damages claim based on the sales arising from trades outside the United States would have an extremely severe and negative effect on enterprises in Japan and also on the proper enforcement of the Antimonopoly Act. Doing so would also cause serious concerns in terms of international comity.

Assume an enterprise in Japan participated in bid rigging or price cartels, outside the United States, and then self-reported the facts regarding a violation to the JFTC. Pursuant to the leniency program under the Antimonopoly Act, the enterprise is granted reduction or exemption of surcharges because the enterprise self-reported the violation. It is inevitable that the enterprise would be subject to a claim for treble damages pursuant to the U.S. antitrust law, which significantly exceeds the amount of the benefit given under leniency program. Therefore, if the enterprise's conduct is subject to U.S. antitrust law, the enterprise in Japan might refrain from self-reporting the facts regarding any violation to the JFTC. In that case, in light of the situation wherein the proper function of the leniency program is essential for enforcing the Antimonopoly Act as stated above, applying U.S. antitrust law and approving the treble damages claim based on the sales arising from foreign trades would have a severe and negative impact on the proper enforcement of the Antimonopoly Act.

#### And impacts enforcement and cooperation

Tone 14 – Partner, Katten & Temple LLP

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

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

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

#### Broad analysis. It provides a standard for evaluating all conduct, which ensures compliance.

Kava 19 – J.D./M.B.A. Candidate, 2020, University of Maryland Francis King Carey School of Law and Johns Hopkins University Carey School of Business

Samuel F. Kava, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity,” Journal of Business & Technology Law, Vol. 15, Issue 1, 2019, HeinOnline

B. International Comity Test

In essence, to ensure the economic prosperity of the global economy, the United States Congress should be proactive in amending the FTAIA. Specifically, Congress should prescribe a broad international comity test for courts to consider when deciding if the Sherman Anti-Trust Act should apply extraterritorially. If international comity is taken seriously, unlike its most recent application by the Supreme Court in Hartford Fire Insurance Co., there will be a greater degree of compliance by the international community and more certainty will be provided to consumers and producers. Moreover, federal courts should not wait until Congress amends the FTAIA. In fact, federal courts should, on its own accord, extensively apply an international comity analysis to every case where a foreign entity is involved. As was previously mentioned, some courts continue to apply a robust international comity analysis. Specifically, the Ninth Circuit Court of Appeals in Mujica v. Airscan Inc. considered:

[T]he location of the conduct in question, the nationality of the parties, the character of the conduct in question, the foreign policy interests of the United States, any public policy interests, the strength of the foreign governments' interests, and the adequacy of the alternative forum. 171

Thus, until the United States Congress takes the necessary step to amend the FTAIA, federal courts should consider applying an international comity analysis to all cases that involve an international entity. By adopting a broad international comity analysis: (1) foreign nations would be less likely to adopt burdensome blocking statutes, (2) consumers and producers would have more certainty through unified laws, (3) the global economy will continue to prosper because of the certainty and predictability of the law, and (4) foreign nations may become more amenable to enter into bi-lateral treaties with the United States.

#### The counterplan strikes a balance between avoiding international tensions and avoiding underenforcement.

Piraino 12 – Law Clerk, Meltzer, Lippe, Goldstein, & Breitstone, LLP

Stephen D. Piraino, “A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act,” Hofstra Law Review, Vol. 40, Issue 4, Article 10, 2012, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2685&context=hlr

It is unimaginable that the American Banana Court could have foreseen the dramatic expansion of the Sherman Act.392 Through the effects test and the majority opinion in Hartford Fire, more and more international conduct comes under the ambit of the Sherman Act.393 While the Supreme Court did recognize the importance of prescriptive comity in Emagran, it failed to extend its usefulness to a common area of antitrust enforcement: foreign conduct causing effects in the United States.394 A once strictly territorial statute has, through the years, led to international tensions, even between the United States and its closest allies and trading partners. 395 The current state of the extraterritorial application of the Sherman Act, if not changed through a new judicial standard, will only cause further international tensions.396 Requiring courts to always recognize prescriptive comity is a practical solution that can help to relieve some international tensions.397 It will not dilute antitrust enforcement, but will instead ensure that it is done in a manner consistent with accepted international principles.398 As seen in Justice Scalia's dissenting opinion in Hartford Fire, a comity-based antirust system is consistent with accepted norms of international law that date back to Justice Story.399 This system would appropriately recognize the limits of U.S. laws.400

#### Judges under a “balancing” approach are ALWAYS biased towards American legal interests and will intervene to apply the Sherman act where they shouldn’t

Dodge, Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law, ‘15

(William S., “INTERNATIONAL COMITY IN AMERICAN LAW,” Columbia Law Review, Vol. 115, No. 8, <https://columbialawreview.org/wp-content/uploads/2016/03/Dodge-William-S..pdf>)

In effectuating the purposes of international comity, rules have some advantages over standards. Many of the comity doctrines are justified on the basis of respecting foreign sovereignty and fostering friendly relations.358 Rules further these interests by binding courts to defer to foreign government actors even when they might prefer not to do so. Discussing prescriptive comity as a principle of restraint in the Laker case, Judge Malcolm Wilkey observed:

If promotion of international comity is measured by the number of times United States jurisdiction has been declined under the “reasonableness” interest balancing approach, then it has been a failure . . . . A pragmatic assessment of those decisions adopting an interest balancing approach indicates none where United States jurisdiction was declined when there was more than a de minimis United States interest . . . . When push comes to shove, the domestic forum is rarely unseated.359

Rules may also have advantages with respect to comity’s other purpose of promoting commercial convenience. As a general matter, predictable rules better enable commercial parties to plan their affairs.

#### b. Legitimacy and foreign affairs

John Byron Sandage, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 1985, Yale Law Journal, Vol. 94

Courts avoid rendering determinations beyond their constitutional competence by using the political question doctrine. Relevant indicia of a nonjusticiable question include the court's inability to secure information necessary for reasoned decision,6 " the implication of the responsibilities of the political departments, 3 the dearth of well-defined criteria for judicial decisionmaking," and the appearance that the courts are no longer able to act as neutral arbiters of law.65 Timberlane's method of decision implicates each of these aspects of nonjusticiability.

First, proper resolution of international antitrust cases requires access to a great deal of reliable information68 on the internal policy determinations of foreign governments.17 Hostility to American law has made procuring such data directly from governments extremely unlikely. 8 Further, the limits that other governments have imposed on discovery inhibit necessary fact-finding.69 Second, the President, with the approval of Congress, has responsibility for the conduct of foreign relations."0 Ultimately, these policies must be "defined, presented and defended by the political departments of the government. ' 71 The courts have only a limited role in unsettled areas of foreign affairs.71

Third, as Chief Justice Hughes recognized more than forty-five years ago, one hallmark of a political question is the need for "appraisal of a great variety of relevant conditions, political, social and economic" where there are simply no useful criteria for judicial determination." Such matters are non-justiciable and belong to the political departments. 74 Cases implicating foreign affairs constitute paradigmatic political questions because resolution of such cases requires policy determinations where there are no well-developed guiding principles."5 The lack of useful principles for interest analysis is exemplified by the failure of courts and commentators to agree even on a definition of an "interest" and its constituent elements. 6

Finally, no matter how carefully done, it is unseemly for courts to enter the political thicket of foreign relations. 7 Unquestioning support for the executive branch calls into question the courts' institutional integrity. If judges act independently, however, they may preempt the formulation of policies by the Executive or the Congress for which the latter two branches are together accountable."9 Conversely, any efforts by the political branches to ignore or defy court decisions will diminish the respect and authority upon which the courts' legitimacy depends."0

#### c. Undermines predictability and doesn’t solve international disputes

John Byron Sandage, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 1985, Yale Law Journal, Vol. 94

Beyond the fact that the court role entailed in interest analysis is prudentially inappropriate, the approach itself is unworkable.81 First, as noted above, procuring the necessary information is difficult given foreign hostility to American law. 2 Second, even if all of this information could be aggregated, a court faces the daunting task of assigning relative weights to standardless factors of unequal importance and arriving at a reasoned judgment as to whether United States jurisdiction should be exercised.8

"The Timberlane factors serve only to identify the existence or absence of a conflict; they do nothing to guide courts in choosing the appropriate disposition of a conflict." The Supreme Court has said that courts must not attempt "complex exercises in comparative law" 85 -and courts cannot do so effectively."

Third, even if courts were able to undertake such a balancing, the overwhelming tendency when presented with a request to balance interests is for courts to resolve the conflict, not by seeking to determine if the foreign forum is actually interested in the case, "but rather by asking whether-in light of forum policy-that declared interest seems reasonable. 18 7 The result, predictably, is the application of the lexfori.88 Of the recent decisions of American courts using the interest analysis suggested by Timberlane, there are "none where United States jurisdiction was declined when there was more than a de minimis United States interest."89

Fourth, were courts able to overcome this lex fori tendency, the fact that there is no way to standardize the relative importance of interest factors would undermine the predictable application of United States law.90 Only if the factors that prompt an American court to decline extraterritorial jurisdiction are relatively unambiguous and easily applied can economic actors predictably structure transactions. The largely standardless balancing required by Timberlane cannot yield such results.91

Finally, Timberlane fails to achieve its underlying objective of alleviating the political tensions surrounding extraterritorial application of the Sherman Act because its proposed solution is merely comity. Comity means only that a balancing of foreign government interests is appropriate; it in no way dictates the proper outcome of that balancing.92 An approach that focuses only on process cannot reduce hostility that ultimately derives from outcome. Only the dismissal of suits to more convenient foreign tribunals can reduce the present political tensions.

#### Balancing tests are *subjective* forms of legal reasoning

LII, Legal Information Institute, No Date, https://www.law.cornell.edu/wex/balancing\_test

Balancing test

Primary tabs

Definition

A subjective test with which a court weighs competing interests, e.g. between an inmate's liberty interest and the government's interest in public safety, to decide which interest prevails.

#### The CP is a different type of reasoning – it forces the court to rely on objective determinants

Piraino 12 – Law Clerk, Meltzer, Lippe, Goldstein, & Breitstone, LLP

Stephen D. Piraino, “A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act,” Hofstra Law Review, Vol. 40, Issue 4, Article 10, 2012, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2685&context=hlr

The analysis into a country's regulation of an industry would be objective because it would be "based on externally verifiable phenomena, as opposed to individual's perceptions., 345 History of regulation and a country's market share in an industry are objective factors.346 Market share is data-based, which is clearly an objective factor.347 A history of regulation is also an objective factor because it is based on fact, instead of a judge's opinion about national interests.348

### Cartels

#### Studies prove – even assuming companies are caught, fines are insufficient to deter price-fixing.

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

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

Regardless of the amount of the fine, it seems civil sanctions do not have more than a transitory impact upon the profitability of a business. Another recent study also suggests that civil sanctions have little to no deterrent value. The study identified several companies that average one or more antitrust civil judgements annually between 1990-2015.103

1 The world's leading recidivist for corporations that commit antitrust violations.104

[table omitted]

Evaluating this data, the study concludes:

Monetary sanctions imposed [upon companies who commit antitrust violations] have been the highest in antitrust history. ... extensive recidivism implies that present ... sanctions are inadequate to deter [antitrust violations].105

The study further found that:

Even under the most optimistic assumptions about discovery, leniency and prosecution rates, corporations have found price fixing schemes to be profitable... [T]o ensure optimal deterrence, total financial sanctions should be greater than four times the expected profit one would expect from a price fixing scheme to optimally deter antitrust violations. 106

Put simply, for a civil fine to adequately deter antitrust violations, the fine must certainly take the profit out of committing antitrust violations.

## 1NR

### Indigenous Development

#### There’s 0 way to transition away for developing countries – fossil fuels are so cheap and to get out of poverty developing countries have to emit more

Davey 16 – Tucker graduated from Boston College in 2016 with a major in Political Science and minors in Philosophy and Hispanic Studies

Tucker Davey, August 5 2016, “[Developing Countries Can’t Afford Climate Change](https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/),” Future of Life Institute, https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/

Fossil fuels are still the cheapest, most reliable energy resources available. When a developing country wants to build a functional economic system and end rampant poverty, it turns to fossil fuels.

India, for example, is home to one-third of the world’s 1.2 billion citizens living in poverty. That’s 400 million people in one country without sufficient food or shelter (for comparison, the entire U.S. population is roughly 323 million people). India hopes to transition to renewable energy as its economy grows, but the [investment needed](http://scroll.in/article/774844/indias-2022-renewable-energy-goal-will-require-investment-four-times-the-defence-budget) to meet its renewable energy goals “is equivalent to over four times the country’s annual defense spending, and over ten times the country’s annual spending on health and education.”

Unless something changes, developing countries like India cannot fight climate change and provide for their citizens. In fact, developing countries will only accelerate global warming as their economies grow because they cannot afford alternatives. Wealthy countries cannot afford to ignore the impact of these growing, developing countries.

### FTC

#### Theyre already at their limits – antitrust cases are already intensive enough – cant just add a ton more

Ohlhausen ’20 – former Commissioner of the Federal Trade Commission, JD from George Mason, partner at Baker Botts

Maureen Ohlhausen, “Letter by Maureen K. Ohlhausen to House Subcommittee on Antitrust,” April 17, 2020, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607303&download=yes>

As a former enforcer, I know the agencies work hard to enforce the antitrust laws and police the market for anticompetitive conduct. With much needed additional resources, the enforcement agencies will be able to accomplish even more.

For example, the FTC's recent enforcement efforts have forced the agency to work "at or near the limits of [its] resources ."24 During his congressional testimony last year, former FTC Bureau of Competition Director Bruce Hoffman explained that the FTC, during a two-year time period, conducted nine trials comprising over 132 days of trial time, thereby causing the agency attorneys to spend 1 out of every 5 business days in trial.25 In addition to the taxing demands of litigation and trial, the agency must also devote precious resources to its other enforcement responsibilities. Additional personnel would certainly help ease this burden.

Besides personnel, the agencies are also increasingly in need of additional expert resources. FTC Chairman Joseph Simmons specifically highlighted this request to Congress last year, explaining that economic experts "are a critical resource in every FfC competition case where litigation appears likely" and the cost has tripled in a five-year span causing the agency to come close to the point where it "will be unable" to hire experts "without compromising [its] ability to fulfill other aspects of the mission ."26

DOJ' s Antitrust Division similarly is making the most of its limited resources.27 However, it too needs additional resources to meet its responsibilities. DOJ's proposed budget for the next fiscal year requests $53 million in appropriations for the Antitrust Division, which represents a seventy-one percent increase in appropriations from the prior year.28

Greater funding will not only allow the agencies to continue to meet their current responsibilities but also enable them to expand their capabilities. For instance, because investigations can be quite resource intensive, additional funding provides the agencies with the ability to review a wider scope of transactions and market behavior and to undertake important research on competitive issues.

Therefore, Congress should help ensure the proper functioning of the market by providing the agencies with additional resources.

V. Conclusion

Our antitrust laws are designed to combat anticompetitive mergers and practices in the marketplace, but their application must be tied to the facts and evidence specific to each case. Calls to broaden the scope of antitrust law likewise must be based on reliable evidence that such changes are necessary to promote competition and will make consumers better off. Changing the goal of antitrust from protecting the competitive process to focus instead on company size or other issues, such as consumer privacy, may ultimately result in less competition and fewer benefits for consumers. Enforcing our antitrust laws is a resource-intensive endeavor, however, and our enforcers need more support.

#### It’s zero sum – plan forces focus on frivolous issues

Rosenberg ‘20 – former head of the DEA, Adjunct Professor at Georgetown, served as the U.S. Attorney for the Eastern District of Virginia (EDVA) and for the Southern District of Texas, as a senior FBI official on the staff of two FBI Directors, as Counselor to the Attorney General, as the Chief of Staff to the Deputy Attorney General, as an Assistant U.S. Attorney in EDVA in Norfolk and Alexandria

Chuck Rosenberg, “Why the Attorney General's Meddling on Antitrust Issues Matters,” Lawfare, July 1, 2020, <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted,

[a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices.

There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

### K

#### independently solves democracy

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Which causes global wars

Diamond ’19 [Larry; 2019; Professor of Sociology and Political Science and at Stanford University, Ph.D. in Sociology from Stanford University; Ill Winds, “Conclusion: A New Birth of Freedom,” Ch. 14]

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5

The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of self-doubting democracies.

These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled.

The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

#### Market ideology and conservative jurisprudence are intrinsically linked – both idealize the freedom of the individual to transact within the “marketplace” without government interference

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

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

C. The Twentieth-Century Synthesis Comes to Maturity

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Courts are neoliberal

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I. THE COURT'S POLITICAL ECONOMY OF SPEECH

A. Speech, Democracy, and Entrenchment

The Court's reasoning in the political-spending cases adopts a metaphor of public, political speech as occurring in an efficient market, "the 'open marketplace' of ideas protected by the First Amendment," in which "ideas 'may compete' . . . 'without government interference.'" 10 In this marketplace, electoral "expenditure is political speech presented to the electorate," an offering that "presupposes that the people have the ultimate influence over elected officials." 11 The purpose of the advertising is "advising voters on which persons or entities are hostile to their interests." 12 Within this image, political speech (including spending) is thus "an essential mechanism of democracy, for it is the means to hold officials accountable to the people" by presenting voters with competing accounts of their situation and interests. 13 So understood, speech is the cornerstone of "a republic where the people are sovereign." 14

These passages bolster decisions holding that limits on campaign spending may not be constitutionally justified as measures to reduce "distortion" of political power or "corruption" in the form of undue political influence. 15 The Court's praise of advertising's service to democracy is a buttress for the view that government must not be allowed to make distributional judgments concerning political speech and influence because "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election . . ., and it is a dangerous business for Congress to use the election laws to influence the voters' choices." 16 It is avoiding this summum malum that powers the praise of political advertising and market-style voter choices as a democratic summum bonum. The Court treats elections and political debate as if they were perfect markets because this premise secures them against the vices of political rent seeking.

The Court's jurisprudence, accordingly, is not invested in the thorough-going coherence or adequacy of the market metaphor. As Professor David Grewal and I have emphasized elsewhere, modern arguments favoring private economic power over democratic countermeasures tend to have shifting, overlapping aspects: affirmative idealization of the efficiency of market arrangements; moralized identification of the rights and transactions of the marketplace as uniquely compatible with liberty, equality, and dignity; a tragic register insisting that the predictable deficiencies of politics generally, or certain democratic institutions in particular, prevent them from doing better than markets can, even if we might wish otherwise; and a preargumentative "common-sense" dimension that implicitly dismisses certain alternatives as "off the table" before the serious argument has begun. 17 It is typical to move among these different registers almost unselfconsciously because they hang together as an ideological worldview. Indeed, besides their praise of markets and denigration of politics, the political-spending opinions invoke the "worth" and "voice" of speakers, as if corporations were marginalized populations in search of dignity, and liberally invoke the language of nondiscrimination, almost reflexively borrowing the moral language of First Amendment liberties. 18 So the Citizens United Court announced of the corporate-spending ban, "The censorship we now confront is vast in its reach . . . [and] 'muffle[s] the voices that best represent the most significant segments of the economy.'" 19 In these opinions, however, avoiding the pathologies of politics is the keystone.

The implicit standpoint of the campaign-finance cases, then, is the following: The constitutional evil to be avoided is manipulation by the political class of the rules for later elections, which would "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration" and will receive majoritarian endorsement. 20 Seen in this way, limiting campaign spending is a usurping attempt to predetermine the course of democratic self-rule, just like prohibiting antiwar pamphleteering or banning Karl Marx's writings. 21 The Court's way of averting this hazard involves it in a certain view of democratic will formation. In this latter view, voting decisions are fairly characterized on the paradigm of the fully informed economic agent of neoclassical modeling, who gratefully accepts the helpful data that advertising provides. 22 This upbeat idea that the wealthy, whether through the corporate form or otherwise, are simply submitting arguments for assessment by their fellow citizens, is not an empirical claim about political persuasion and judgment. It is a half-theoretical, half-rhetorical premise. Current First Amendment doctrine tends toward this premise in good part to avoid a square confrontation with the problems that arise from its rejection of explicit distributional judgments concerning political influence.

B. A Theoretical and Historical Origin Point for the Court's View

The judicial outlook sketched above emerged before the rise of the "conservative legal movement" that today furnishes many of its spokespersons on the bench. 23 Its early articulation arose from a shared sense of the distinctive problems of capitalist democracy and the role of a constitutional order in mitigating them. The social and intellectual world of its early spokespersons was the end of the post-World War II "great exception," the last years of a period of widely shared growth, the flattest distributions of wealth and income the country has seen, and a strong role for organized labor in the Keynesian management of the national economy. 24

From the point of view of the worried center-right, the postwar era presented a threat: Too much political control of the economy, bolstered by unions and by the left, would stifle personal liberty and initiative, leading to some combination of stagnation and tyranny. 25 The influence of this perspective on elite legal culture was evident in Justice Powell's 1971 memorandum to Eugene Sydnor of the Chamber of Commerce, written shortly before his nomination to the Supreme Court, in which Powell called for a full-court press by business in politics, universities, media, and the courts for "the preservation of the system [of free enterprise] itself." 26 Justice Powell's memo crystallized a development in twentieth-century conservative jurisprudence that has come to full flower in the twenty-first: an across-the-board resistance to the politics of distribution, in which political spending plays a central role.

The fear of state-led distribution has been a frequently renewed resource in U.S. politics since James Madison's warnings against redistributive "factions" in Federalist No. 10. 27 It defined the right wing of the classically liberal Republican Party in the first Gilded Age, and the Liberty League and other opponents of the New Deal recast it for their purposes. 28 When the conservative Reader's Digest published a polemical summary of libertarian economist Friedrich Hayek's already polemical The Road to Serfdom, an antistatist beachhead was announced at the apex of America's (always incomplete and racially stratified) closest approach to social democracy. 29 Hayek and his fellow Chicago economist Milton Friedman (whom Powell admiringly quoted in his 1971 memo 30 ) brought to the defense of markets theoretical sophistication and, especially in Hayek's case, the ambition to synoptic social theory. 31 By the early 1970s, these thinkers, like Powell, were developing the neoliberal response to a cross-national wave of labor militancy, social-movement discontent, and inflationary pressures (the last widely seen as connected with organized labor's expectation of regular wage hikes, even as productivity slowed), 32 which among thinkers of the second Frankfurt School came to be known as the West's "legitimation crisis." 33 Hayek and his allies helped the reflective wing of American business to formulate an imperative to restore competitive pressure throughout the economy and, conversely, to roll back uses of the state that baffled or annulled market competition. 34

Hayek followed political economist Joseph Schumpeter and other skeptics of robust democracy in holding that such ideas as "society" and "the political community" were sentimental mystifications, and distributional politics a semiorganized form of looting. 35 Hayek contended, moreover, that abandoning market coordination implied moving toward the only systemic alternative: outright political command of economic life. 36 He thus worked out in theory the position that Powell adopted in his memo:

The threat to the enterprise system . . . also is a threat to individual freedom.

. . . .

. . . [T]he only alternatives to free enterprise are varying degrees of bureaucratic regulation of individual freedom--ranging from that under moderate socialism to the iron heel of the leftist or rightist dictatorship.

. . . .

. . . [F]reedom as a concept is indivisible. As the experience of the socialist and totalitarian states demonstrates, the contraction and denial of economic freedom is followed inevitably by governmental restrictions on other cherished rights. 37

Hayek argued that, if democracy were to be viable despite these deficiencies, the scope of politically open questions must be closely restricted--specifically to exclude questions of distribution. 38

The Court's worry about political entrenchment thus has a particular historical paradigm: the defense of market ordering, with its accompanying liberties, against the self-perpetuating rule of a bureaucratic state acting on behalf of well-organized or ideologically sympathetic interest groups. Hayek and Friedman joined public-choice theorists such as Gordon Tullock and James Buchanan in warning against this political entrenchment as the distinctive hazard of democratic capitalism. 39 The key to staving off this danger, it was influentially argued on the neoliberal right, was to cordon off questions of distribution from active political contestation.

It was in this setting that the Court announced per curiam that the refusal of distributional judgments was the essential commitment of the Constitution's protection of freedom of speech. 40 When one tries picturing the goal of averting political redistribution as a jurisprudential keystone, other doctrinal developments form an arch around it. The affirmative action cases head off distributional judgments and political entrenchment along racial lines, as in the opinions of Justices O'Connor and Scalia in Croson 41 and Justice Roberts's opinion in Parents Involved. 42 The Court's treatment of public-sector unions in Janus v. AFSCME (discussed in Part III) suggests a pair of touchstone worries: that the support of public-sector unions might provide a means of political entrenchment, and that the political empowerment of such unions might enable them to foist ruinous distributional demands on local and state governments. 43 The Spending Clause opinions in National Federation of Independent Business v. Sebelius, especially the joint dissent of four conservative Justices, aim at heading off Congress's imposing a redistributional form of social provision on the states via the power of general taxation. 44 In short, the anti-distributional nerve of Buckley and the subsequent campaign-finance cases connects that reasoning both to the rising neoliberal political economy of the 1970s and to a substantial body of post-Warren Court jurisprudence, from the Nixon appointees' halt of Warren Court and Great Society egalitarianism to the Rehnquist and Roberts Courts' rollback of the same. Constitutional resistance to redistribution is at the heart of this jurisprudence.