# 1AC D7

**1AC---Platforms**

Advantage 1 is Platforms---

**Platform companies facilitate transactions between two sets of users—think Amazon—the *Amex* decision made it extremely difficult to challenge anticompetitive conduct in platform markets**

**Hovenkamp**, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, **‘21**

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

A. Against Platform Exceptionalism

**In *Amex***, the Supreme Court **disregarded a basic principle about markets**, which is that they consist of **close substitutes**.212 Instead, it lumped production complements into the same market, and in the process, it **stymied coherent economic analysis** of the problem. To be sure, power in one side of a two-sided market cannot be assessed without determining what is occurring on the other side. But one does not need to group the two sides into the same “market.” Rather, a relevant market should be determined by reference to the side where anticompetitive effects are feared. Then, assessing power requires the fact finder to consider offsetting effects, some of which may occur on the other side.213

Second, the Court ignored an important distinction between fact and law. Disputes about market boundaries involve questions of fact. Nevertheless, the majority wrote—**as a matter of law**—that two-sided platforms compete **exclusively with other two-sided platforms**. These dicta have already produced **mischief in lower-court decisions**. For example, it led one court to conclude that a merger between a two-sided online flight-reservation system and a more traditional system **could not be a merger of competitors**.214

Third, without argument or evidence, the Court required litigants to show market power indirectly in vertical restraints cases by reference to a relevant market, even though superior techniques are available. Direct measures are particularly useful in digital markets, where the necessary data are easy to obtain and product differentiation makes traditional market definition unreliable.215 This was another breach of the boundary between fact and law.

Fourth, the Court misunderstood the economics of free riding, ignoring the fact that when a firm is able to recover the value of its investments through its own transactions, free riding is not a problem.

Fifth, the Court **failed** to perform the kind of **transaction-specific factual analysis** that has become **critical to economically responsible antitrust law**. Rather, it simply assumed, **without examining the actual transactions** before it, that losses on one side of a two-sided market are **inherently offset by gains on the other side**.216 Amex’s antisteering rule produced immediate losses for both the affected cardholder and the affected merchant. The only beneficiary was Amex, the operator of a platform able to shelter itself from competition. That competition, in turn, would have benefitted both cardholders and merchants.

Markets differ from one another.217 This is why we apply mainly antitrust law to **some markets**, regulation to others, and some mixture of the two to yet others. It is also why antitrust is **so fact intensive**, particularly on issues pertaining to market power or competitive effects. Indeed, the **biggest advantage that antitrust has** over legislative regulation is its **fact-driven methodology**. Antitrust courts do and should **avoid speaking categorically** about market situations that are not immediately before them and avoid making cursory conclusions based on inadequate facts. Within the antitrust framework, **there is no reason to think that digital platforms are unicorns** whose rules as a class differ from those governing other firms. Every market has its distinct features, but the ordinary rules of antitrust analysis are **adequate to consider them**. The ***Amex*** decision is a **cautionary tale** about what can happen when a court is so overwhelmed by a market’s idiosyncrasies that it makes **grand pronouncements**, abandoning well-established rules for analyzing markets in the process.

**Fintech’s disruptive startups have been squashed by large financial institutions**

**Loo ’18** – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

Fintechs can be of any size. Four of the ten largest U.S. companies, **Google, Apple, Amazon, and Facebook**, **all have built payment systems** and made other **inroads into finance**.36 Despite the participation of large technology companies, **the main drivers of fintech innovation** have been the **thousands of startups** attracting billions of dollars in investment each year. Startup business models are novel, diverse, and shifting. One of the earliest fintech areas was peer-topeer lending, in which companies link individuals who have money to those who want it.37 Most of the original peer-to-peer companies have already grown beyond their origins and now engage in more familiar "marketplace lending."38 They receive money from banks to lend to individuals, and their innovations have spread to other areas, such as sophisticated analytic tools for estimating borrowers' creditworthiness.39

Unlike the other categories of consumer fintechs, advisory fintechs do not need to directly receive any money from consumers to offer their basic product. The goal of Credit Karma, NerdWallet, Mint, and other advisory fintechs is to help people make all of their financial decisions through a single app.4" These companies learn about users-with permission-by accessing personal bank accounts, credit scores, credit card records, tax returns, and other similar sources of financial information. Users then receive recommendations about credit cards or mortgages with lower fees, savings accounts that pay higher rates, and other products that better meet their needs.41

While the term "fintech" is used here to exclude traditional banks, all major financial institutions have become highly technological. The leading banks are each purchasing fintech startups, forming strategic partnerships, or internally building whiz teams to design new products.42 JP Morgan Chase's Intelligent Solutions Group has over 200 analysts and data scientists and produced about fifty technologies in 2015 alone.43 Goldman Sachs, which has more engineers than Facebook or Twitter, is launching an online lender.44 In light of Wall Street's increasing launch of digital products and adoption of artificial intelligence,45 regulating fintech amounts to regulating the future of finance.

B. Private Sector Institutional Dynamics

Fintechs could in theory pose a threat to traditional banks. Almost threequarters of millennials say they would prefer to receive their financial services from technology companies such as Google and Amazon, rather than big banks.46 Convenience, trust, and price all could play important roles in driving customer switching. Individual users, including small businesses, increasingly find dealing with big banks to be time-consuming and frustrating compared to the ease of tailored startup apps.47 In recent years, consumers have grown distrustful of large financial institutions, whose reputations have been battered by subprime mortgage lending, the financial crisis, the LIBOR scandal, and Wells Fargo opening millions of fake accounts in customers' names. 48

Innovation helps explain why publicly traded companies are disappearing at a **faster rate** today than ever before-**six times as fast** as forty years ago.49 Online startups have even thrived in other **heavily regulated** industries, such as transportation and gambling." Convenience and lower costs have driven some of this success, and many fintechs offer **similar advantages**.51 Furthermore, unlike some industries that **Silicon Valley has invaded**, finance lacks a **meaningful physical component**. This makes the base products **inherently vulnerable** to digital competition. Traditional banks' infrastructures-including their **legacy information systems** and physical branches-**inhibit their ability** to rapidly respond to disruption.

Since Dimon's 2015 warning, however, the **dynamics** between fintech and traditional firms appear to have **shifted**. Entrepreneurs who started out wanting to do to banks what Amazon did to retail have wound up **licensing their technology** to banks.52 As one industry observer puts it: "What was once perhaps an **adversarial** relationship has warmed .... Many no longer see an **existential threat** in fintech. Instead, they believe that "[i]t is most likely that the small fintech companies will be **subsumed**" by large financial institutions. 4

Ii. The Competition Shortcomings

A given fintech's decision of whether to **challenge or join** banks will depend in part on whether regulations and market dynamics give it a **real chance** to compete. Competition is **extremely difficult** to measure, and economic models **inadequately** consider important factors, such as innovation.5 To assess the hypothesis that a lack of competition inhibits fintech, this Part surveys the evidence related to entry barriers, customer switching, anticompetitive prices, and the relative pace of U.S. innovation.

A. Entry Barriers

When firms face excessive barriers to entering a market, competition can **stagnate**, raising prices and **lowering innovation**. 6 Although part of the problem is simply the large amount of regulation, 7 fintech has faced two further entry barriers: traditional firms' ability to block market access and the difficulty in obtaining a federal bank license.

Legacy financial institutions can limit some fintechs' operations through control of data. Most notably, advisory fintechs rely on access to both personal and general product data. 8 Some banks' response has been to block or limit fintechs' access to customer accounts, thereby making it harder for fintechs to provide tailored advice. 9 Legacy institutions can also block fintechs from collecting online product information by using laws never intended for such a purpose, including trespass to chattel, the Digital Millennium Copyright Act,6 " and the Computer Fraud and Abuse Act.61 As a result, advisory fintechs cannot on their own provide comprehensive financial advice to their users. In order to access crucial data, fintechs may need to prioritize big banks' interests over helping consumers switch.

Some legacy firms can also **limit market access** through their dominant market positions. Over **99 percent** of all credit card transactions run through the Visa, American Express, Mastercard, and Discover networks.62 Many commentators have documented credit card companies' ability to engage in **exclusionary conduct**, such as vertical restraint clauses that prevent merchants from using other payment methods.63 Although credit card companies may not be able to use those **same tactics** against payment fintechs, their strong market positions could enable them to **deploy other tactics**. They have, for instance, instituted "Honor All Cards" rules requiring merchants to accept their **contactless payments** as a condition of accepting plastic cards. These rules arguably "**foreclose entry to** those digital wallets that.., do not use the credit **card networks** for payments. 64

**That means US fintech will lose to international competitors.**

**Loo ’18** – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

C. International Competitiveness

Less **efficient** and **innovative** U.S. financial services are problematic not only in **isolation**, but also from an **international perspective**. Scholars and regulators have inconclusively debated whether banks need to be big to maintain their international competitiveness. 12' Less well-recognized is how a lack of **domestic competition** may undermine U.S. financial firms' global competitiveness. Foreign financial firms may gain an **edge** by being subject to greater competition in their home markets, thereby being **forced to innovate** more and operate leanly. This creates two potential problems. First, reduced domestic competitiveness may make the United States **less able** to enter foreign markets. The U.S. economy has **benefited** in recent years from billions of dollars in revenues **earned abroad** by Google and other leading digital companies. 126 Given the growing portion of the global economy taken up by finance, the fintech lag could constitute a **large-scale missed opportunity** for U.S. firms to strengthen the economy by **bringing in revenues** earned abroad.

Second, in the long term, American financial firms may become **more vulnerable** to international competition even in **domestic markets**. Although U.S. licenses can shield banks from foreign fintech challengers today, distributed **ledger** technologies may change this. Americans are already **increasingly using** Bitcoin, Ethereum, and other unregulated virtual currencies based on blockchain technology.127 Much is unknown about how such technologies will develop, and the trust offered by a governmentally overseen financial system may prove difficult to replicate. 128 If, however, an era of **wide-open** global finance arrives, U.S. financial institutions could find themselves **suddenly exposed** to international competition as never before. Without U.S. regulators to **insulate** them, U.S. financial institutions made soft by lesser competition would be more prone to lose **significant market share** to foreign financial institutions than they would be if domestic markets were more **competitive**.

**Fintech innovation is key to the effectiveness of U.S. economic sanctions**

**Harrell and Rosenberg 19** – Peter E. Harrell is an adjunct senior fellow at the Center for a New American Security; former Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department. Elizabeth Rosenberg is a senior fellow and director and director of the Energy, Economics, and Security Program at the Center for a New American Security.

Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 25-26, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

**Developments in fin**ancial **tech**nology also **have the potential to affect the availability and strength of coercive economic measures** over the longer term. The movement to develop **blockchain-based, decentralized payments platforms and** new digital **currencies** or tokenized assets that feature anonymity **can undermine** the strength of **coercive economic measures**. However, **fin**ancial **tech**nology **developments**, such as the development of artificial intelligence/machine learning (AI/ML) compliance technologies, also **present potential means to better detect and stop evaders and avoiders of U.S. economic coercion** throughout global chains of financial interconnectivity.

**Fin**ancial **tech**nologies are not themselves the drivers of potential future changes to the sources of coercive economic leverage. However, they may **enable foreign governments to** develop better tools to **insulate transactions from U.S. jurisdiction**. And, regardless of the actions of foreign governments as they spread commercially, they may help evaders duck U.S. coercive economic power in limited but meaningful ways. **Conversely, new AI/ML or other technologies may help U.S. policymakers implementing economic coercion** to better do their job.

Financial technology can be a facilitator of rapid transformation in the financial services sector. Importantly, financial technology developments will not happen just in the United States; a number of other countries, from China to Singapore to Switzerland, are promoting themselves as financial technology leaders. There is no guarantee that financial technology innovators and investors will be centered in the United States in the future—which represents a vulnerability to U.S. economic prominence.

Maintaining U.S. Leverage

**The extent to which the U**nited **S**tates **will maintain coercive economic leverage** in a world where financial technology disrupts aspects of the traditional financial architecture **will depend** to a significant degree **on the extent to which U.S. firms**, and large global firms, continue to **play a dominant role in the development of the technology**. To put it bluntly, a blockchain-based clearing mechanism that enables trade between foreign countries without financial transactions touching the dollar would likely undermine U.S. leverage if the technology were developed and operated by a foreign company that had no need to adhere to U.S. law. **The U**nited **S**tates **would maintain** at least some **leverage if the technology were developed** or operated **by a U.S. company** obliged to adhere to U.S. sanctions, technology-export restrictions, and other relevant laws, or a foreign company with significant U.S. exposure.

**Iran’s an emerging global hub for Bitcoin mining---that obviates the effectiveness of sanctions.**

**Erdbrink 19** --- Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

**Iran’s economy** has been **hobbled by banking sanctions** that effectively stop foreign companies from doing business in the country. But transactions in **Bitcoin**, difficult to trace, could allow Iranians to make international payments while **bypassing** the **American restrictions on banks**.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the **anonymous payments** made in Bitcoin **could change that**. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to **conduct business under American radar**.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the **blockchain**, maintained communally by many **independent computers**. The system is designed explicitly to avoid central banks and **large financial institutions**. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without **going through any central authority.**

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of **exchanges to facilitate trading**, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a **global center for mining Bitcoins**. Because of generous **government subsidies**, electricity — the **energy for the computers needed to process cryptocurrency** transactions — **costs little in Iran**. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, **dozens of foreign investors** from **Europe**, **Russia** and **Asia** have considered moving their mining **operations to Iran** and other low-cost countries like Georgia. “We have to be flexible in this industry and go where **prices are the lowest** in order to survive,” said the European investor.

**Tracking solves Iranian evasion---US lead key**

**Robinson 21** --- Ph.D., Co-founder and Chief Scientist discusses cryptocurrency forensics, investigations, compliance, and sanctions.

Tom, "How Iran Uses Bitcoin Mining to Evade Sanctions and “Export” Millions of Barrels of Oil," Elliptic, <https://www.elliptic.co/blog/how-iran-uses-bitcoin-mining-to-evade-sanctions>

The **Iranian state** is therefore **effectively selling its energy reserves** on the global markets, using the **Bitcoin** mining process to **bypass trade embargoes**. Iran-based miners are paid directly in Bitcoin, which can then be used to pay for imports - allowing sanctions on payments through Iranian financial institutions to be **circumvented**.

This has become **all but an official policy**, with a think tank attached to the Iranian president’s office recently publishing a report highlighting the use of cryptoassets to avoid sanctions.

Many of those making the Bitcoin transactions and paying the fees to Iran-based miners will be **located in the** **U**nited **S**tates - the very country spearheading the sanctions. As the US government considers whether to lift some sanctions on Iran in exchange for a return to a nuclear deal, it will need to consider the role that Bitcoin mining plays in enabling Iran to monetise its natural resources and **access financial services** such as payments.

In the meantime, financial institutions should consider the sanctions risk they are exposed to due to Iranian Bitcoin mining - particularly those that are beginning to offer cryptoasset services. If 4.5% of Bitcoin mining is based in Iran, then there is a 4.5% chance that any Bitcoin transaction will involve the sender paying a transaction fee to a Bitcoin miner in Iran. Financial institutions should also be on the lookout for crypto deposits originating from Iranian miners that are seeking to cash-out their earnings.

Solutions for Sanctions Risks

However as we discuss in more detail our new sanctions guide, solutions to these challenges exist and are already used by financial institutions engaging in cryptoasset activity.

For example, **blockchain analytics solutions** such as those provided by Elliptic can be used by regulated **financial institutions** to **detect and block cryptoasset deposits** from Iran-based entities **including miners**. Techniques can also be employed to ensure that **transaction fees are not paid** to miners in high risk jurisdictions.

**Strong sanctions prevent Iranian nuclear acquisition**

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Kallen, 2021, “Economic Sanctions and Nuclear Non-proliferation: A Comparative Study of North Korea and Iran, “University of Waterloo, Fulfilment of the thesis requirement for the degree of Master of Arts, https://uwspace.uwaterloo.ca/bitstream/handle/10012/16666/Morrison\_Kallen%20.pdf?sequence=3

Economic sanctions have been successful in stopping Iran from **pursuing their nuclear program thus far**. Iran has conceded multiple times to the United States and the international community to halt the **enrichment of uranium** and the advancement of their nuclear program. The most notable example of Iran’s concessions has been the signing of the Joint Comprehensive Plan of Action in which Iran agreed to halt and greatly reduce their nuclear program in return for substantial easing of economic sanctions. The second criteria has been met as Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Iran’s economy has **significantly worsened** due to **continued economic pressure** from the United States and the international community. Continued economic pressure has been **paramount** to bringing Iran to the negotiating table. While the United States and its regional allies do pose a military threat to Iran, that is **unlikely a sufficient factor** in dissuading Iran.

We have established that the level of political contestation in the targeted countries, their economic and security vulnerabilities, and the degree of international cooperation are important factors in determining if economic sanctions are effective at limiting nuclear proliferation. In Iran’s case the regime, while authoritarian, allows for limited **political contestation**. The general public gets to elect the president (even if candidates are handpicked by the supreme leader). Iranians have been able to protest against the government. One goal of economic sanctions is to **galvanize the general public** against the government and their policy decisions. Iranians have indeed been frustrated by the sanctions and **voiced their discontent** with the government policies targeted by the sanctions.

Iran’s international environment is also conductive for economic sanctions to be effective. Iran is a regional power with an impressive arsenal of missiles and extensive network of proxy forces. Therefore, nuclear weapons are not imperative for Iran’s defence. On the other end, Iran’s economy is largely based on oil and gas exports. **Integration** into the global market is very important for Iranians and a **vital source of revenue for the government**. Economic sanctions have hurt the Iranian economy and therefore have **hurt Iranians**. The **economic squeeze** has brought **Iran to the negotiating table** in the past and **will likely do so in the future**. The international approach to Iran has been encompassing with the European Union and the United Kingdom taking a common stand with the United States in preventing Iran from acquiring nuclear weapons. Even after the United States left the JCPOA the EU and UK have attempted to develop mechanisms to provide Iran with economic incentives to keep Iran abiding to the JCPOA. Even though China has given Iran an economic lifeline there is tension within Iran over concerns of becoming too economically dependent on China.

**Israel preempts Iran prolif---draws in all major powers**

**Scheinman 18** – Security Studies Chair, Nat’l War College; Nuclear Nonprolif Rep. for Obama

Adam M. Scheinman, What if Iran leaves the NPT?, 8 June 2018, <https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>

Not to diminish the immensity of North Korea’s nuclear challenge, but Iran’s withdrawal from the NPT carries weightier risks. It would likely mean that Iran’s Supreme Leader had given the green light to an Iranian nuclear weapon, opening the floodgates to NPT withdrawals by other Arab states—Saudi Arabia, the UAE, and Egypt head that list. These and possibly other Sunni governments, none of whom can rely on a major power for defense, may conclude that they require their own nuclear weapon to check Iran’s rise. The Saudis are very clear and public on this point.

More immediately, Israel may feel compelled to **strike** Iranian nuclear facilities **before** they become fully **operational**. This raises the specter of a **regional war** that may **draw in** **several** of the **nuclear weapon states**—the **United States, the UK, France, and Russia**—and reshape the Middle East in ways we cannot predict. Whether the NPT could survive such a shock is another unknown.

**Loss of economic leverage alone is sufficient to trigger the impact.**

**Zilber 21** --- Journalist covering Middle East politics and an adjunct fellow at the Washington Institute for Near East Policy.

Neri, 9-14-2021, "Israel Can Live With a New Iran Nuclear Deal, Defense Minister Says," Foreign Policy, https://foreignpolicy.com/2021/09/14/israel-iran-nuclear-deal-defense-minister-gantz/

TEL AVIV, Israel—Israel would be willing to **accept a return** to a **U.S.-negotiated nuclear deal** with Iran, Defense Minister Benny Gantz told Foreign Policy—but Israeli officials are also pressing Washington to prepare a serious “demonstration of power” in case negotiations with Tehran fail.

The remarks, made during an exclusive interview last week, appear to reflect a shift in policy for Israel, which under the leadership of former Prime Minister Benjamin Netanyahu loudly opposed the 2015 nuclear agreement and worked to undermine it.

Former U.S. President Donald Trump pulled the United States out of the agreement in 2018, but the Biden administration has **renewed the diplomacy**—even as Iran moves closer to enriching enough uranium to make a nuclear weapon.

Gantz, asked about efforts by the Biden administration to get back to an agreement with Iran, said: “The **current U.S. approach** of putting the Iran nuclear program back in a box, **I’d accept that**.”

He added that **Israel would want to see** a “viable **U.S.-led plan B**” that **includes broad economic pressure on Iran in case the talks fail**. And he gestured at **Israel’s own “plan C**,” which would **involve military action**.

Gantz estimated that Iran was two to three months away from having the materials and capabilities to produce one nuclear bomb. Iran has steadily ramped up its nuclear work since the United States withdrew from the deal, despite a so-called maximum pressure campaign advanced by Trump and Netanyahu that included sanctions and sabotage efforts.

**Can’t stay contained---multiple pathways to global nuclear war.**

**Avery 13** – Lektor Emeritus & Associate Professor, U of Copenhagen

John Scales Avery, Lektor Emeritus, Associate Professor, at the Department of Chemistry, University of Copenhagen, since 1990 he has been the Contact Person in Denmark for Pugwash Conferences on Science and World Affairs, An Attack On Iran Could Escalate Into Global Nuclear War, 11/6/13, http://www.countercurrents.org/avery061113.htm

Despite the willingness of Iran's new President, Hassan Rouhani to make all reasonable concessions to US demands, Israeli **pressure groups in Washington** continue to demand an attack on Iran. But such an attack might escalate into a **global nuclear war**, with catastrophic consequences. As we approach the 100th anniversary World War I, we should remember that this colossal disaster **escalated uncontrollably** from what was intended to be a **minor conflict**. There is a danger that an attack on Iran would escalate into a large-scale war in the Middle East, entirely destabilizing a region that is already deep in problems. The unstable government of **Pakistan** might be **overthrown**, and the revolutionary Pakistani government might enter the war on the side of Iran, thus **introducing nuclear weapons** into the conflict. **Russia and China**, firm allies of Iran, might also be **drawn into** a **general war in the Middle East**. Since **much of the world's oil** comes from the region, such a war would **certainly** cause the **price of oil to reach unheard-of heights**, with **catastrophic effects on the global economy**. In the dangerous situation that could potentially result from an attack on Iran, there is a risk that nuclear weapons would be used, either intentionally, or by accident or **miscalculation**. **Recent research has shown** that besides **making large areas of the world uninhabitable** through **long-lasting radioactive contamination**, a nuclear war would **damage global agriculture** to such an extent that a **global famine** of previously unknown proportions would result. Thus, nuclear war is the **ultimate ecological catastrophe**. It could **destroy human civilization** and much of **the biosphere**. To risk such a war would be an unforgivable offense against the lives and future of all the peoples of the world, US citizens included.

**The aff solves—it enables tailored remedies that promote competition but maintain efficiency**

**Hovenkamp**, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, **‘21**

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

More Creative Alternatives

Frequently, **neither** simple **injunctions** nor **simple breakups** will be **good solutions for platform monopoly**. Injunctions may be inadequate to restore competition, and breakups may **impair efficient operation** and **harm consumers** in the process.

The case for a breakup is strongest when noncompetitive performance or conduct seems to be inherent in a firm’s current structure. Even then, however, there is no guarantee that the firm, once dismantled, will perform any better than before. For example, how do we break up Facebook without harming the constituencies that it serves?

The approaches discussed briefly in this Section **do not require the breakup of assets** or the **spinoff of divisions** or subsidiaries other than some that have been acquired by merger. Rather, they alter the nature of ownership, managerial **decision making**, **contracts**, intellectual-property **licenses**, or information management. Instead of **attempting to force greater competition** between a dominant platform and its rivals, we might do better to **leave the firm intact** but **encourage more competition within it**. Alternatively, we might increase interoperability by requiring more extensive sharing of information or other inputs. While the current antitrust statutes grant the courts equitable power sufficient to accomplish these remedies,299 the proposals are novel and could provoke resistance.

These remedies can be applied to entities other than structural monopolies, and for offenses under both section 1 and **section 2 of the Sherman Act**. While less intrusive than asset breakups, however, they can be more intrusive than simple conduct injunctions. As a result, they should be limited to situations where **prohibitory injunctions alone are unlikely to be adequate**. **Occasional uses of unlawful** exclusive **dealing**, most-favored-nation agreements,300 or other anticompetitive contract practices **deserve an injunction**, but ordinarily **would not merit a breakup** of the entire firm or fundamental alteration of its management structure.

The traditional way that antitrust law applies structural relief is to break up firms’ various physical assets, through such devices as forcing selloffs (divestiture) of plants, products, or subsidiaries.301 To the extent these breakups interfere with a firm’s production and distribution, **they can produce harmful results** such as increased costs or loss of coordination. This is particularly true of integrated production units, such as single digital platforms. The D.C. Circuit noted this concern in Microsoft when it refused the government’s request for a breakup.302

a. Enabling Competition Within the Platform

One alternative to divestiture is to leave a platform’s physical assets and range of participants intact but change the structure of ownership or management so as to make it more competitive internally. A platform or other organization **can itself be a “market”** within which competition can occur. In that case, antitrust law can be applied to its internal decisions, **improving competition** **without** limiting the **extent of scale economies or beneficial network effects.**

Ordinarily, agreements among subsidiaries or other agents within a firm are counted as unilateral and so are attributed to the firm itself.303 That rule is a direct consequence of the separation of ownership and control. The all-important premise, however, is that the firm’s central management is the only relevant economic decisionmaker. When that is not the case, even agreements among the various constituents within the firm can be treated as cartels.

There is plenty of precedent on this issue. The history of antitrust law is replete with examples of incorporated firms that are owned or managed by distinct and often competing entities. The courts have treated these firms as cartels or joint ventures, even for practices that, from a corporate law perspective, appeared to be those of a single firm. If properly managed, the result can be to force entities within the same incorporated organization to behave competitively vis-à-vis one another.

Firms whose ownership is reorganized in this fashion **can still be very large** and **retain** most of the **attributes of large firms**. On the one hand, this will **satisfy** those concerned that the breakup of large firms can **result in the loss of economies of scale or scope**, or of other synergies that generally lead to high output and lower prices. **On the other hand,** it will not satisfy those who believe that “big is bad” for its own sake.304

Joint management of unified productive assets has a storied history that goes back to the Middle Ages. Farmers, ranchers, and fishermen produced cattle, sheep, and fish on various “commons,” or facilities that were shared among a large number of owners and subjected to management rules.305 Many of these operated on a mixed model that involved individual production for stationary products such as crops, but a commons for grazing cattle or other livestock. For mobile products such as cattle or fish, the costs of shared management were lower than the costs of creating or maintaining boundaries. That was not the case for radishes or wheat. So rather than cutting a large pasture or bay into 100 fenced-off plots, participating property owners operated it as a single economic unit, substituting management costs for fencing costs. Just as for any firm, size and shape are determined by comparing the costs and payoffs of alternative forms of organization.306

So while a commons can be a very large firm, it can be operated by a collaboration of competing entities rather than a single one. Output reductions and price setting by a single firm are almost always out of reach of the federal antitrust laws. On the other hand, if a market is operated by a joint venture of

active business participants, their pricing is subject to the laws against collusion. Their exclusions also operate under the more aggressive standards that antitrust applies to concerted, as opposed to unilateral, refusals to deal.307 The fact that this joint venture is a corporation organized under state law, as many ventures are, does not make any difference. It is still a collaboration as far as antitrust law is concerned.

The theory of the firm precludes claims of an antitrust conspiracy between a corporation and its various subsidiaries, officers, shareholders, or employees. This preclusion is an essential corollary to the proposition that a corporation is a single entity for most legal purposes and not simply a cartel of its shareholders or other constituent parts. This is how corporate law preserves the boundary between firms and markets.308

But important exceptions exist. While a corporation is a single entity for most antitrust purposes, if it is operated by its shareholders for the benefit of their own separate businesses, its conduct is reachable under section 1 of the Sherman Act. A cartel is still a cartel even if it organizes itself into a corporation.

The classic antitrust example of such a collaborative structure is in the 1918 Chicago Board of Trade case, which first articulated the modern rule of reason for antitrust cases.309 As Justice Holmes had described the Board thirteen years previously, 310 it was an Illinois state-chartered corporation whose 1600 members were themselves traders for their own individual accounts, and with individual exclusive rights to do business on the Board’s trading floor.311 The “call rule,” which prevented collaborative price making among the members except during exchange hours, could not have been challenged under the antitrust laws as unilateral conduct. A single firm may set any nonpredatory price it wishes. Further, all of the relevant participants were inside the firm. Nevertheless, they were regarded as independent actors for the purpose of trading among themselves.

Thus the United States challenged the call rule as price fixing among competitors. 312 Not only is the substantive law against such collaborative activity more aggressive than that against unilateral actions, but the remedial problems are less formidable. If a firm acting unilaterally should set an unlawful price, the court must order it to charge a different price, placing it in the awkward position of a utility regulator. By contrast, price fixing by multiple independent actors operating in concert is remedied by a simple order against price fixing, requiring each participant to set its price individually without dictating what the price must be. The Supreme Court ultimately found the Chicago Board’s call rule to be lawful. If it had not, however, the remedy would have been an injunction against enforcement of the rule, leaving the members free to set their own prices. In fact, the United States’ requested relief was precisely that.313

The same thing applies to refusals to deal. If a firm is acting unilaterally, its refusal to deal is governed by a strict standard under which liability is unlikely, particularly if there has not been an established history of dealing.314 Further, in many circumstances a court can enforce a dealing order only by setting the price and other terms. By contrast, if the entity that refuses to deal is operated by a group of active business participants, its collective refusal to deal is governed by section 1 of the Sherman Act. A court usually need do no more than issue an injunction against the agreement not to deal. This is true even if the actors have incorporated themselves into a single business entity, as in the Associated Press case, which involved a New York corporation whose members were 1200 newspapers. 315 The government charged the Association with “combining cooperatively” to prohibit news sales to nonmembers or making it more difficult for a newspaper to enter competition with an existing newspaper.316 The Court upheld an injunction against the restrictive rules under the Sherman Act.317

The modern business world provides many analogies to this structural situation. For example, each of the NCAA’s 1200 member schools operates as a single entity in the management of education, student housing and discipline, and financing of its own operations, including athletic departments. By contrast, the rules for recruiting and maintaining athletic teams, their compensation, as well as the scheduling, operation, and playing rules of games, are controlled through rulemaking by the collective group.318 While the schools compete with one another in recruiting athletes and coaches, in obtaining both live and television audiences, and in the licensing of intellectual property, all of these things fall within NCAA rulemaking and are reachable by antitrust law. Specifically, decisions to restrict the number of televised games;319 to limit the compensation of coaches320 or players;321 or to limit licensing of students’ names, images, and likenesses322 all fall within section 1 of the Sherman Act. When a violation is found, the antitrust remedy is an injunction permitting each team to determine its choices individually.

The same analysis drove the American Needle litigation, a refusal-to-deal case that involved the National Football League (NFL).323 The NFL is an unincorporated association controlled by thirty-two individual football teams, each of which is separately owned. NFL Properties (NFLP) is a separate, incorporated LLC in New York, controlled by the NFL. The individual teams are members, and they also collectively control the licensing of the teams’ substantial and individually owned intellectual-property rights. In this case, the team members voted to authorize NFLP to grant an exclusive license to Reebok to sell NFLlogoed headwear (i.e., helmets and caps) for all thirty-two teams.324 The plaintiff, American Needle, was a competing manufacturer that the agreement excluded.325

The issue for the Supreme Court was whether NFLP’s grant of an exclusive license should be addressed as a “unilateral” act of NFLP or as a concerted act by the thirty-two teams acting together, and the Court unanimously decided the latter.326 As a matter of corporate law, the refusal to deal appeared to be unilateral. NFLP, the licensing party, was an incorporated single entity. The lower court had relied on earlier Seventh Circuit decisions holding that professional sports leagues should be treated as single entities under these circumstances.327

The Supreme Court’s decision to the contrary was consistent with its earlier cases Sealy328 and Topco.329 In both of those cases, the Court held that even if an entity is incorporated, it can be addressed as a collaboration of its competing and actively participating shareholders. In Sealy, each member was a shareholder, and collectively the members owned all of Sealy’s stock.330 In Topco, each of the twenty-five members owned an equal share of the common stock, which had voting rights. They also owned all of the preferred stock, which was nonvoting, in proportion to their sales.331

Agreements among the active memb+ers or shareholders on incorporated real-estate boards are treated in the same way. Acting as a single entity, the board organizes the listing of properties for sale, formulates listing rules, promulgates standardized listing forms and sales agreements, and controls much of the conduct of individual brokers. Acting individually, the shareholder-brokers show properties to clients and obtain commissions from sales. Each real-estate office acts as not only a shareholder or partner in the overall organization, but also a competitor for individual real-estate sales.

Without discussing single-entity status, in 1950 the Supreme Court held that price fixing among real-estate agents who were members of an incorporated board was an unlawful conspiracy.332 A leading subsequent decision involved Realty Multi-List, a Georgia corporation organized and owned by individual real-estate brokers.333 Under the corporation’s arrangement, one shareholder member could show properties listed by a different shareholder member.334 The Fifth Circuit concluded that both the agreements among the members fixing commission rates and setting exclusionary and disciplinary rules for brokers who deviated from these rates were unlawful under section 1 of the Sherman Act.335

In the 2000s, the government and private plaintiffs sued several multiplelisting services, challenging their decisions to exclude real-estate sellers.336 The Fourth Circuit eventually applied American Needle, rejecting the contention that concerted action was lacking because the parties making the decision were acting as “agents of a single corporation.”337 Several other decisions have arrived at similar results reaching both price fixing and concerted exclusion.338

Hospital-staff-privileges boards also provide an analogy. Hospitals regularly use such boards to decide which physicians can be authorized to practice at the hospital. If physician-board members with independent practices deny staff privileges to someone, they may be treated as a conspiracy rather than a single actor.339

Even an incorporated natural monopoly can be subject to section 1 of the Sherman Act if it is controlled by its shareholders for their separate business interests. That issue arose in the 1912 Terminal Railroad decision.340 The railroadbridge infrastructure across the Mississippi was very likely a natural monopoly, given it operated as a bottleneck through which all traffic across the river had to pass.341 However, the facility was incorporated, and its shareholders were a group of thirty-eight firms and natural persons organized by railroad financier Jay Gould.342 The venture constituted a single corporation under Missouri law, but it was actively managed by its shareholder participants, all of whom had separate businesses. They were mainly individual railroads, a ferry company, bridges, a “system of terminals,” and several individuals.343 The venture thus controlled an extensive collection of railroad transportation, transfer, and storage facilities at a point at which all east-west traffic in that part of the country had to cross the Mississippi River.344

The Court’s order is both interesting and pertinent to platforms. It rejected the government’s request for dissolution. It noted that dissolving the corporation would do nothing to eliminate the bottleneck.345 Rather, it ordered the district court to fashion a “plan of reorganization” that permitted all shippers, whether or not they were members of the organization, to have access on fair and reasonable terms, with the goal of “plac[ing] every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.”346 Dissolution would be mandated only if the parties failed to agree on these terms.347

The *Terminal Railroad* decree suggests a way to remedy anticompetitive behavior by large digital platforms representing several sellers **without sacrificing operational efficiencies**. Rather than requiring divestiture of productive assets, which almost always leads to higher prices, we could restructure ownership and management. A large firm such as Amazon can attain economies of scale and scope that rivals cannot match. Further, **Amazon benefits consumers**, most suppliers, and labor, by selling its own house brands and the brands of third-party merchants on the same website. This is how a seller of house brands can break down the power of large name-brand sellers.348

The problem is not that Amazon sells too much, but rather that Amazon’s ownership and management make it **profitable for Amazon to discriminate** in favor of its own products and against those of third-party sellers, or to enter other anticompetitive agreements with independent sellers. Breaking up Amazon or forcing a physical separation of own-product and third-party sales would mean giving up a great deal of brand rivalry that benefits consumers.

Suppose a court required Amazon to turn important commercial decisions over to a board of active Amazon participants who made their own sales on the platform, purchased from Amazon, or dealt with it for ancillary services. Acting collaboratively, they could control product selection, distribution and customer agreements, advertising, internal product development, and pricing of Amazon’s own products. Their decisions would be subject to antitrust scrutiny under section 1 of the Sherman Act.

Such an approach could be particularly useful in situations involving **refusals to deal**. To illustrate, an important focus of the EU’s November 2020 Statement of Objections Against Amazon is on claims that Amazon “artificially favour[s] its own retail offers” in product areas where it sells both its own and third-party merchandise.349 Under current United States antitrust law, a firm acting unilaterally would not be prevented from discriminating between its own and thirdparty sales. That was the very issue in Trinko—namely, that monopolist Verizon discriminated against third-party carriers and favored its own.350

If decision making in this area were entrusted to a board of active sellers, including both Amazon itself and third parties, the section 1 standard would reach the conduct. Justice Scalia’s Trinko opinion, citing Terminal Railroad, observed that the Supreme Court had imposed nondiscrimination obligations under similar circumstances, but only when the government was attacking concerted rather than unilateral conduct.351 Further, when such conduct is concerted, it is “amenable to a remedy that does not require judicial estimation of free-market forces: simply **requiring** that the outsider be **granted nondiscriminatory admission** to the club.”352 The number and diversity of participants could vary, but they should be sufficiently numerous and diverse to make anticompetitive collusion unlikely. That could include individual merchants who sell on Amazon, principal shareholders, and perhaps customers and others. The Board should be subject to rules setting objective standards for product selection.

Numerosity should not interfere with effective operation. The Chicago Board of Trade had 1800 trading members and decisionmakers in 1918, when organizational rules and procedures were still being managed with pencil and paper.353 The NCAA has more than 1200 member schools,354 and the Associated Press had more than 1200 member newspapers in 1945.355 The Terminal Railroad Association had 38 shareholder members, but the decree contemplated nondiscriminatory sharing with any non-shareholder who wished to participate. 356 One large real-estate board, the Chicago Association of Realtors, has

over 15,500 members.357

The designated decisionmakers need not be Amazon shareholders, as long as they have independent business interests and operate on Amazon. In fact, the details of state corporate law or organization would not ordinarily affect the federal antitrust issue. For example, in some of these cases—such as Terminal Railroad, 358 Sealy,359 and Topco360—the relevant decisionmakers owned shares in the corporation. In American Needle, the organization in question was NFL Properties, an LLC,361 which does not have shareholders but rather owner-members similar to a partnership. Similarly, in Associated Press, the Court probed a cooperative association incorporated under the Membership Corporation Laws of New York.362

Whether the court applies the per se rule or the rule of reason in such cases would depend on the offense. In NCAA, the Supreme Court concluded that the rule of reason should apply to all restraints undertaken by the association because cooperation was necessary to the creation of the product: intercollegiate sports.363 That is not the case with product sales on Amazon. Rather, the traditional distinction between naked and ancillary restraints would work well. Price fixing or unjustified limitations on output would be strongly suspect.364 On the other hand, rules establishing uniform practices governing distribution and resolution of customer complaints could certainly be reasonable and thus lawful. Concerted refusals to deal can cover a range of practices from naked boycotts motivated by price (per se unlawful)365 to reasonable standard setting (rule of reason),366 and should be addressed accordingly.

Such an approach **would notably not aim at size *per se*.** An Amazon with competitively restructured management could be **just as large as it is now**. Indeed, **it could be even larger**. Cartels and monopolies function by **restricting output**, and facilitating internal competition could serve to increase it. Amazon would likely **retain the efficiencies that flow from its size and scope**. We would have effectively **turned the internal workings of its platform into a market**. It still might be in a position to undersell other businesses or to exclude products that its members and rules disapprove. **If it did so in an anticompetitive manner,** however, section 1 of **the Sherman Act could be applied**.

**1AC---Plan**

Plan---

**The United States federal government should increase prohibitions on those anticompetitive business practices which cause net-harm on one side of platforms.**

**1AC---Conduct**

Advantage 2 is Conduct---

**The full scope of *Amex* is unclear—companies will exploit it to misuse their platforms—that’s effectively impossible to police**

**Khan**, JD, FTC Chair, former director of legal policy with the Open Markets Institute, former professor at Columbia Law, **‘18**

(Lina, “The Supreme Court just quietly gutted antitrust law,” July 3, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>)

Antitrust laws have never permitted monopolistic firms to wield their market power against one set of customers so long as they benefit another set of players. Yet this kind of “balancing” is exactly what the Second Circuit ratified. Consider: Under the logic the appeals court used, an anticompetitive scheme by Uber to suppress driver income would not be considered illegal unless those bringing the suit showed that riders were also harmed.

What’s more, the court said, plaintiffs have to **meet this new burden** at the **very earliest stage of litigation.**

Last Monday, a 5-4 majority on the Supreme Court upheld that approach. Not only does the decision show stunning disregard for core elements of antitrust law, it carelessly mangles long-accepted legal rules along the way to establishing its position. Perhaps most strikingly, it overrides or ignores facts established by the district court.

For example, the Supreme Court states that AmEx’s increased merchant fees reflect “increases in the value of its services,” even though the lower court expressly found that AmEx’s price hikes exceeded the value of the cardholder rewards.

**In practice**, the Court has **shielded from effective antitrust scrutiny a huge swath of firms** that provide services on more than one side of a transaction — and, in today’s digital economy, **there are many** (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns).

Worse yet, **the Court left unclear what kinds of businesses actually qualify for this new rule**. As the Open Markets Institute, for which I work, explained in an amicus brief, deciding an antitrust case using the amorphous concept of a “two-sided” market **will incentivize all sorts of companies to seek protection under this bad new theory**.

What kinds of companies **might have more freedom** to exert pressure on customers, as a result of this decision? Not newspapers, the Court said: Readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. So someone suing a newspaper on antitrust grounds (say, for prohibiting advertisers from doing business with other newspapers) would not have to prove that a newspaper’s conduct harmed both readers and advertisers.

On the surface, the Court’s language suggests that the special rule **would apply to Amazon’s marketplace** for third-party merchants, to eBay, and to Uber — but not to Google search or Facebook. Indeed, the Justice Department’s antitrust division chief, Makan Delrahim, has also come to this conclusion about the scope of the decision. But the Court’s opinion **hardly delivers a clear and workable standard for judges to go by**.

One can imagine the **reams of studies Google would commission** to show that targeting users with advertising **did indeed amount to a “transaction**” with users that users highly valued — a showing that, if successful, **would likely qualify it for the shield of the special rule**. If so, Google might be able to **impose exclusionary contracts** on advertisers and **significantly boost the prices it charges** them. Amazon, meanwhile, can continue to **squeeze the suppliers** and retailers reliant on its platform with **little worry** about being charged with the abuse of monopsony power.

Federal judges generally lack the expertise needed to **independently assess the hyper-complex economic studies that this new rule will spur**. Rather than focusing on the conduct between a company and one set of its customers, **the new rule requires a much more involved showing.**

***Amex* undermines enforcement against nascent acquisitions**

**Salop**, Professor of Economics & Law, Georgetown University Law Center and Senior Consultant, Charles River Associates, **‘21**

(Steven, “Dominant Digital Platforms: Is Antitrust Up to the Task?” yalelawjournal.org/pdf/SalopEssay\_rnon2ejq.pdf)

This most recent agency loss involved an **acquisition by a dominant digital platform.** Sabre is a **digital platform** that permits airlines to post schedules, fares and seat availability and allows travel agents to access this information, make travel bookings and pay for them. Sabre proposed to acquire Farelogix, which provides technology to airlines. This technology allows an airline to disintermediate Sabre by allowing the airline to **connect directly to travel agencies** and provide travel agencies with information and ticket-booking services itself. Thus, this acquisition **was analytically like a vertical merger**, where Farelogix **sells a critical input** (i.e., its technology) to airlines, which they use to compete with Sabre for the business of travel agents. The competitive concern is that Sabre would **foreclose airlines’ ability to acquire the Farelogix technology input.**

Perhaps attempting to exploit the horizontal-merger structural presumption and avoid the difficulties they faced in AT&T/Time Warner, the DOJ did not litigate the case as a vertical merger. Instead, the complaint alleged that Sabre and Farelogix competed in the provision of booking services for airline tickets sold through travel agencies. This competition is indirect, resulting from Farelogix working with the individual airlines to disintermediate Sabre. However, the trial court did not miss the point. It observed that “Sabre and Farelogix view each other as competitors” and found that “the record reflects competition between Sabre’s and Farelogix’s direct connection solutions for airlines.”94

Having concluded that competition was reduced by the merger, the trial court **nonetheless rejected the DOJ’s complaint** on the grounds that Farelogix and Sabre **do not compete in the two-sided platform market**.95 While Sabre provides services to customers on both sides (i.e., to both airlines and travel agencies), Farelogix provides services to **only one side** (i.e., to airlines, but not to travel agencies). The travel agency services are provided by the airlines themselves, using the Farelogix technology.

This approach was both defective and unnecessary because Sabre competed with the combination of Farelogix and the airlines.96 Yet the court thought that **American Express compelled the opposite result**, despite its own fact-finding and the vertical nature of the transaction. If other U.S. courts similarly follow this same defective approach, the result will be **underdeterrence of anticompetitive acquisitions by digital platforms**.97 Indeed, this approach would lead to **ludicrous results**. Under this reasoning, Microsoft could have **legally ended the competitive threat from Netscape** and Java simply **by acquiring them instead of trying to destroy them.**

**Exclusionary practices suppress innovation---sole big tech innovation has reached its ceiling**

**Allensworth**, Professor of Law at Vanderbilt Law School, **‘21**

(Rebecca, “Antitrust’s High-Tech Exceptionalism,” 130 Yale L.J. 588)

E. Whither Innovation?

As a theoretical matter, big tech’s refusals to deal and predatory copying **suppress innovation**. A retailer with a new idea for a household product will be **less inclined to invest** in producing it if he knows Amazon can **appropriate the returns**. A developer with a better “app for that” will be less likely to bring it to market if she believes Apple or Facebook might someday **remove it from their platforms.** And if a rival search company cannot hope to keep its data private from Google, it will not invest in building a better search engine to try to take on the giant.

Whether big tech stifles innovation as an empirical matter is less clear, but there is anecdotal evidence that it does. During a recent hearing following the House Judiciary Committee’s investigation into competition abuses among high-tech firms, Representative Cicilline read a quote that he said was typical of the entrepreneurs he interviewed: “If someone came to me with an idea for a website or a web service today, I’d tell them to run. Run as far away from the web as possible.”111 **Venture capital,** while booming overall,112 **is shy about funding projects that might compete with Big Tech**. The best-case scenario for a start-up is acquisition by one of the big four—a lucrative payday, for sure, but nothing compared to what could come from **actually toppling a dominant firm**. This puts a **ceiling on the upside**, and with the **ever-present risk of failure**, **it likely leads to under-investment in new ideas**. As one funder put it, **“[w]e don’t touch anything that comes too close to Facebook, Google or Amazon**.”113

CONCLUSION: “ANTITRUST IS GREEDY”

The promise that we saw in high tech during its first boom—that it would change the way we work, communicate, shop, and play—**has largely been realized**. Few can argue with the efficiencies that digital communication and commerce have brought to our lives and markets. But, as Professor Herbert Hovenkamp has said, **“antitrust is greedy.”**114 It wants not only efficiency in end products, but efficiency in the competitive process that brings them about. During the dot-com era, American antitrust institutions became enthralled with the idea that encouraging the development of dynamic, innovative products required **compromising our commitment to dynamic**, innovative markets. That compromise contributed—in a way that is often overlooked—to the current competition crisis in big tech.

**Platform misuse enables a host of bad practices—undermines cyber security**

**Stucke** is a co-founder of The Konkurrenz Group and a law professor at the University of Tennessee, **‘18**

(Maurice, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>)

So, the divergence in antitrust enforcement may reflect differences over these data-opolies’ **perceived harms.** Ordinarily the harm from monopolies are higher prices, less output, or reduced quality. It superficially appears that data-opolies pose little, if any risk, of these harms. Unlike some pharmaceuticals, data-opolies do not charge consumers exorbitant prices. Most of Google’s and Facebook’s consumer products are ostensibly “free.” The data-opolies’ scale can also mean higher quality products. The more people use a particular search engine, the more the search engine’s algorithm can learn users’ preferences, the more relevant the search results will likely be, which in turn will likely attract others to the search engine, and the **positive feedback continues**.

As Robert Bork argued, there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.”

How Data-opolies Harm

But higher prices are not the only way for powerful companies to **harm their consumers** or the rest of society. Upon closer examination, data-opolies can **pose at least eight potential harms.**

**Lower-quality products** with **less privacy**. Companies, antitrust authorities increasingly recognize, can **compete on privacy and protecting data**. But **without competition**, data-opolies **face less pressure**. They can depress privacy protection below competitive levels and **collect** personal data **above competitive levels**. The collection of too much personal data can be the equivalent of charging an excessive price.

Data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are **no viable competitive alternatives** and the **bargaining power is so unequal.**

Surveillance and security risks. In a monopolized market, personal data is concentrated in a few firms. Consumers have limited outside options that offer better privacy protection. This raises additional risks, including:

Government capture. The fewer the number of firms controlling the personal data, the greater the potential risk that a government will “capture” the firm. Companies need things from government; governments often want access to data. When there are only a few firms, this can increase the likelihood of companies secretly cooperating with the government to provide access to data. China, for example, relies on its data-opolies to better monitor its population.

Covert surveillance. Even if the government cannot capture a data-opoly, its rich data-trove increases a government’s incentive to circumvent the data-opoly’s privacy protections to tap into the personal data. Even if the government can’t strike a deal to access the data directly, it may be able to do so covertly.

Implications of a data policy violation/**security breach**. Data-opolies have greater incentives to prevent a breach than do typical firms. But with more personal data concentrated in fewer companies, **hackers**, **marketers**, political **consultants**, among others, have even greater incentives to find ways to **circumvent or breach the dominant firm’s security measures**. The concentration of data means that if one of them is breached, the harm done could be **orders of magnitude greater** than with a normal company. While consumers may be outraged, a dominant firm has less reason to **worry of consumers’ switching to rivals.**

**Platform monopoly ensures any breach cascades, collapses society**

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1. Risk of data breaches. A security breach of any of the digital monopolies could result in **Exabytes of users’ most vulnerable information** being publicly exposed (7). Besides the risk of irreparable damage to people’s reputation, private lives, and identity (as in, e.g., the “Ashley Madison” case (8)), such a breach could result in **unprecedented damage to our econom**y (as in, e.g., the “Sony Pictures” case (9)) and our **political standing** (as in, e.g., “Wikileaks Cablegate” (10)). Importantly, a security **collapse of that nature** might only be the start of a **series of follow-up breaches**. A hack of Google’s Gmail, for example, could allow the perpetrators to obtain a **user’s bank account password** through the “forgot password” functionality, and **ultimately lead to a collapse of businesses and industries (e.g. banking, taxation, weapon silos, etc.**). Compared to what was deemed a “too big to fail” state when a handful of banks collapsed in 2008, such a crisis could be **unparalleled**. Although the digital monopolies employ talented security teams to prevent such hacks, the public has no guarantee that a **skillfully deployed attack** (e.g., by another nation-state, powerful underground organization, or simply a disgruntled employee) **would not be successful**. **Even with the best efforts of the digital monopolies**—which often heavily depend on the priorities of high-ranking leaders in the organization—societies should hence operate under the assumption that the data held by the digital monopolies could be **leaked at any point in time.**

**Regulatory approaches are systemically compromised—capture and comfort means anticompetitive conduct becomes the norm**

**Lambert**, Wall Family Chair in Corporate Law and Governance Professor of Law, University of Missouri Law School, November, **‘11/1/21**

(Thomas, “Tech Platforms and Market Power: What’s the Optimal Policy Response?” Mercatus Working Paper)

The agency oversight approach, however, **is not simply “faster antitrust** with expert adjudicators.” While standards-based and flexible, the approach differs from antitrust along three significant dimensions: **focus**, political **susceptibility**, and duration of **control**. Taken together, antitrust **courts’** more **narrowly focused objectives**, **greater insulation** from **political influences**, and **limited jurisdiction** over their subjects render them far less susceptible to **adverse public choice concerns** than agencies like the UK’s DMU.

In crafting remedies for anticompetitive harm, antitrust courts have a tremendous reservoir of authority.174 But antitrust’s focus—and the objective of any court-ordered remedy—**is narrow:** the restoration of market output **to competitive levels** for the benefit of consumers.175 This **precludes** successful claims by, and remedies in favor of, parties **seeking some private benefit** apart from the enhancement of market output. A digital markets **regulator** is unlikely to be as laser-**focused** on output effects as an antitrust court and will therefore be a more attractive target to rentseeking firms. The DMU’s “open choices” objective, for example, **invites a laggard competitor** that might otherwise be driven out of business to seek some rule **hindering its more efficient rivals**, on the ground that preserving its own offering will create a broader range of options for consumers.

A second important difference between antitrust courts and agencies relates to the decision makers’ incentives. The **federal judges** determining liability and imposing remedies in antitrust cases have **little reason to please** the parties before them. Possessing life tenure and fearing no retribution save possible reversal, they are **insulated from outside pressure** and motivated to make decisions calculated to enhance market output and thereby benefit consumers. The bureaucrats staffing agencies, by contrast, **do not enjoy this level of political insulation**. Many will have been appointed by or **have ties to a political leader**, whom they will wish to please. They may also contemplate **future employment** at one of their regulatees or at a regulatee’s rival. **Even absent** contemplation of a job change, they may have a **stake** in one regulatory outcome over another, as the budget or prestige of their agency **may be affected** by the regulatory choices they make. **Their personal interests** are therefore less aligned with the public’s interest **in maximizing overall market output.**

A third difference between antitrust and agency oversight is that antitrust courts’ involvement with parties is **limited in duration**, while overseeing agencies **remain perpetually involved** with the firms they regulate. Ongoing oversight requires **continuous contact** with the regulatee, whose perspective the regulator needs in order to make sound decisions. Eventually, however, the regulator may begin seeing things from the perspective of the regulatee.176 This is **especially likely** if the individuals with interests adverse to the regulatee’s position are widely dispersed and difficult to organize.177 The benefits to a regulatee from a decision may be outweighed by the **aggregate costs it would impose**, but if the costs are so widely spread that no individual or group has an incentive to incur the cost of arguing against the decision, the only argument the regulator will hear is that of the **regulatee-beneficiary**.178 In light of the relationships that develop from perpetual supervision and the common “concentrated benefits-diffused costs” dynamic, agencies possessing continuing oversight over their regulatees are **frequently captured by those firms,** **to the detriment of the public at large**.179

It seems, then, that the ongoing agency oversight model for addressing market power from digital platforms **may not be the panacea** its proponents have suggested. Combining broad discretion that invites interest group **manipulation**, **exposure to political pressures** that may sway regulators from pursuing the public interest, and the sort of continuous regulatee contact **that often leads to capture**, the approach raises **serious public choice concerns**. The UK’s experience with its new DMU will be informative. But US policymakers would do well to wait on the results of the UK’s experiment, and the resolution of the numerous pending antitrust actions, before abandoning antitrust in favor of a digital platforms regulator.

**1AC---Access**

Advantage 3 is Access---

**Innovation not all created equal – Only nascent firms foster transformative tech innovation across sectors, AND it can’t be predicted or directed**

**Hemphill and Wu 20**, Moses H. Grossman Professor of Law, New York University School of Law, , Julius Silver Professor of Law, Science and Technology, Columbia Law School.

(C. Scott, and Tim, “Nascent Competitors,” 168 U. Penn. L. Rev. 1879)

Over the last century and a half, small, innovative firms have played a **particularly important role** in the process of **innovation** and competition. This is not to discount the important history of innovation at big firms with large research laboratories, such as Bell Labs, Xerox PARC, and research labs at General Electric and Merck.30 However, over the same period, a significant number of disruptive innovations—**those that transform industry**—have come out of **very small firms** with new technologies **unproven at the time**: examples include the **Bell** Telephone Company, RCA, **MCI**, Genentech, **Apple**, **Netscape**, and dozens of others.31

There is a **particular competitive significance** of the **big innovations** at the **smaller firms,** for they also represent competitive entry, and sometimes **completely transform** the industry.32 New, unproven innovators are a key source of disruptive innovation.33 Consider that Bell’s telephone did not improve the telegraph, **but replaced it**, or the impact of Apple’s personal computer on the computing industry. As this suggests, **nascent competitors** can hold the promise of offering **fresh competition for the market**, not just **in** the market. They have the capacity to displace an incumbent through a **paradigm shift**—for example, a new platform for developing software or decoding a genome. **Nascent competition** tends to be **important** in industries marked by **rapid innovation** and **technological change**. **Software**, **pharmaceuticals**, mobile telephony, **e-commerce**, **search**, and social network services **are leading examples**.

Future potency. Second, a nascent competitor is relevant due to its **promise of future innovation**. Its potency is not yet fully developed and hence unproven. Whether that innovation will make a difference in the marketplace is subject to significant uncertainty. That is due to the unpredictable rate and direction of technological change. This uncertainty stems from the same forces of technological progress that make innovation so valuable. The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a quantifiable risk, like the odds in a casino, but closer to Knightian true uncertainty—in other words, not readily susceptible to measurement.34 The unpredictable path of innovation **often results in product plasticity**, in which products evolve and are used for purposes **different than the original**. For example, in the 1990s, mobile telephones gained popularity as a complement to a wired telephone, as a means for making calls on the go.35 Today, they compete with land lines, cameras, computers, televisions, and credit cards. General purpose technologies such as computing and Internet connectivity act as powerful fuel for unpredictable change.36 Uncertainty about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence—uncertainty about the degree to which those products will actually compete.

**Maintaining our innovative lead solves nuclear war**

**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 display** in 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 **a**rtificial **i**ntelligence (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**.

**Continued software breakthroughs vital to solution-development for every existential risk**

**Hayes 14** – Correspondent-Democrat & Chronicle

Matthew Hayes, Bill Gates sees innovation solving world problems, 2014, <http://www.democratandchronicle.com/story/money/business/2014/10/05/bill-gates-sees-innovation-solving-world-problems/16760969/>

ITHACA – Bill Gates delivered an optimistic message about the future to Cornell University students during a back-and-forth Wednesday evening with President David Skorton. Gates, who fielded questions from the audience, spoke to the packed auditorium at Bailey Hall with the message that innovations in science, medicine and computer technologies will continue to shape the world for the better. Progress in reducing health and income inequalities in developing countries gave him particular pride, he said. The Bill & Melinda Gates Foundation, which he co-chairs with his wife, has dispersed more than $30 billion in grants since its inception 14 years ago. The foundation has a mission to improve education in the United States and a global focus on improving people’s health in poor countries. “We saw that health was the greatest injustice,” he told Skorton about his foundation’s mission to improve people’s health. Feeding the poor is only one priority of the Gates Foundation. The philanthropic group has helped lower the number of childhood deaths from 10 million in 2000 to about 6 million today. His goal is to reduce that further to 2 million, he said. He expressed optimism that research into diseases that ravage the poorer parts of the world — malaria, cholera, tuberculosis and others — will continue to be funded. Economic development in poorer countries has helped reduce global inequality, which he said is at a lower level than it has ever been. “The world is A, much richer, and B, much richer in a far more equitable way,” he told the students. That has been the opposite of what has happened in the past three decades or so in the United States, he said. He called for tax policies to help level that inequality, with a progressive consumption tax and a high estate tax that limits the dynastic possession of wealth. While he expressed concern about the current political climate in the country, he felt that science innovations can overcome problems in Washington, D.C. “The things that count in society don’t depend on politicians being geniuses,” he said. At the dedication Gates had a similar optimistic message earlier in the day during the dedication ceremony of Gates Hall. Gates said it’s an exciting time to be involved in the computer sciences, even more than when he got involved 46 years ago. Despite the advances over the past few decades, he said, “the full dream of what is possible with computing has not yet been realized.” Problems like developing vaccines, energy sources without carbon dioxide emissions, and understanding issues as diverse as neurological disease and weather forecasting can all be tackled with emerging technologies. “With every one of these problems, the **digital tools combined with really amazing software are going to be the reason that we can solve these things**,” he said. He said **figuring out solutions depends on software-intensive techniques**, and that Cornell students will be poised to make gains in those fields.

**Synthetic biology advances elsewhere will inevitably result in easy global ability to engineer superbugs. ONLY the U.S. getting out ahead with new breakthroughs can solve**

**Lohr 11/23** – Quoting Endy, Professor of Bioengineering, Stanford University

Steve Lohr, Quoting Drew Endy, professor of bioengineering at Stanford University, 23 November 2021, https://www.nytimes.com/2021/11/23/business/dealbook/synthetic-biology-drew-endy.html

Synthetic biology holds great promise, but there is a dark side as well. Hacking biology and **democratizing the tools** to do so raises the specter of an **angry loner** or **terrorist group** creating a **build-your-own pandemic** **genetically targeted** at their enemies, among other potential horrors.

Mr. Endy, though synthetic biology’s champion, has been **cleareyed about the risks** since the outset. He was the lead author of a report for the Pentagon’s advanced research agency in 2003 that laid out a framework for developing synthetic biology and managing its risks. In the report, he assessed the spectrum of dangers and imagined the bad-actor threat as “Bin Laden Genetics.”

Today, **risk management**, Mr. Endy said, should **start with the assumption** that in the **not too distant future** “**anyone, anywhere can make any virus from scratch.”**

One **line of protection** is **synthetic biology itself**. For example, Mr. Endy points to the possibility of advanced technologies like **engineered chromosomes** that **would give humans a built-in defense system**, say, against the world’s **top 20 pathogens**.

**Only a tech ecosystem that supplements Big Tech with many small disruptive innovators which are independent BUT able to access platforms’ data will allow us to beat China in AI. Centralization guarantees defeat, because China’s better at it and has way more people! Try or die for competitive innovation.**

**Wheeler 20**, visiting fellow in Governance Studies at The Brookings Institution, Chairman of the Federal Communication Commission (FCC) from 2013 to 2017, ‘20

(Tom, “Digital Competition With China Starts With Competition At Home,” <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

The United States and China are engaged in a **technology-based conflict** to **determine** **21st-century** international economic **leadership**. China’s approach is to identify and support the research and development efforts of a handful of “**national champion**” companies. The **dominant tech companies** of the U.S. **are de facto embracing this** Chinese policy in their effort to maintain domestic marketplace control. Rather than embracing a China-like consecration of a select few companies, America’s digital competition with China **should begin with meaningful competition** at home and the allAmerican reality that competition drives innovation.

America’s dominant tech companies have seized upon the competition with China as a rationale for why their behavior should not be subject to regulatory oversight that would, among other things, promote competition. “China doesn’t regulate its companies” has become a go-to policy response. When coupled with “of course, we support regulation, but it must be responsible regulation,” it throws up a smokescreen that allows the dominant tech companies to make the rules governing their marketplace behavior.

At the heart of digital competition — both at home and abroad — is the capital asset of the 21st century: **data**. Initiatives such as **machine learning** and **artificial intelligence** are data-dependent, requiring a large data input to enable algorithms to reach a conclusion. China’s immense population of almost 1.5 billion gives it an advantage in this regard. By definition, a population that approaches five times the size of the U.S. population produces more data. The previously “backward” nature of the Chinese economy has resulted in another Chinese data advantage: New smartphone-based apps, created in place of the digital integration that China previously lacked, produce a richer collection of data. This bulk and richness of Chinese data creates **an inherent digital advantage** when compared to the United States.

If the United States **will never out-bulk China** in the quantity and quality of data**, it must out-innovate China**. Here, the United States **has an advantage**, **should it choose to take it**. **The centralized control** of the Chinese digital economy **is an anti-entrepreneurial force**. In contrast, **innovation** is the hallmark of a free and open market. But the domestic market must, indeed, be free, open, and **competitive**.

Currently, the American digital marketplace **is not competitive**. A handful of companies **command** the marketplace by hoarding the data asset others need to compete. As innovative as America’s tech giants may be, they represent a **bottleneck** **that starves independent innovators** **of the mother’s milk of digital competition**. **If America is to out-innovate China**, then American **innovators** **need access** to the **essential data asset** **required for that innovation**.

**The nation’s response to Chinese competition must not be the adoption of China-like national champions**, nor the “China doesn’t regulate its companies that way” smokescreen. American public policy should embrace the all-American concept of **competition-driven innovation**. This begins with **breaking the bottleneck** that withholds data from its **competitive application**. This **does not necessarily mean** **breaking up** the dominant companies, but it does mean breaking open **their mercenary lock** on the **assets essential for competition-driven innovation**.

**China tech lead spreads authoritarianism globally**

**Meserole and Sisson 21** – Chris Meserole is a fellow in foreign policy at the Brookings Institution and director of research for the Brookings Artificial Intelligence and Emerging Technology Initiative. Melanie Sisson is a fellow in the Brookings Institution’s Center for Security, Strategy, and Technology.

Chris Meserole and Melanie W. Sisson, “U.S.-China technology competition,” *Brookings Institution*, 23 December 2021, https://www.brookings.edu/essay/u-s-china-technology-competition/.

Yet **Beijing doesn’t need to bundle Huawei routers with Xi Jinping Thought to undermine liberal values**. The real fear is that **autocrats, as well as** democratically-elected **populist leaders, will increasingly build** out **the next generation of** telecommunications **infrastructure on Chinese hardware**. **The more they do so, the more U.S. and European leaders will lose a point of leverage** — **it’s much easier to insist on governing** telecommunications and **surveillance technology in line with democratic values when you are the supplier of that technology.**

Put differently, the big problem with Chinese technology exports is the downward pressure it places on democratic principles like transparency and accountability, particularly when it comes to the governance of surveillance technologies like facial recognition. If democracies fail to provide compelling alternatives, we’re going to find ourselves in a race to the moral bottom.

SISSON:

Chris is quite right that which governments states buy their technology from matters. **Purchasing technology from countries committed to open societies and human rights is an opportunity to encourage the adoption of liberal principles.** As Chris also notes, **China does not currently seem to use technology exports** and financing explicitly **as a means of** also **exporting** socialism, communism, or **authoritarianism** more generally. **It is possible**, however, that **the effect will be a spread of illiberalism all the same.**

In addition to concerns about how already-illiberal regimes might use Chinese technologies, there is a risk of catastrophic success in all recipient states. It is possible that **near-term material effects** — **felt in economic growth, rising quality of life, and popular satisfaction** — **will make deals with China appealing for** various **governments to get into and very hard for them to get out of. Over time these** political and economic **dynamics might enhance China’s influence** — in bilateral relationships and in overall global market share — **and could habituate societies into technical standards that run counter to liberalism, such as built-in restrictions on** transnational **flows of information and the denial of privacy protections**. The longer these conditions persist, the more entrenched and normalized they become, and the more readily they can be used by regimes interested in exercising social and political control.

**Collapse of democracy guarantees global war**

Larry **Diamond 19**. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

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 selfdoubting 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.

**Innovation key to solve**

**Donahoe 21** – Executive director of Stanford’s Global Digital Policy Incubator. Former U.S. Ambassador to the UNHRC in Geneva.

Eileen Donahoe, “System Rivalry: How Democracies Must Compete with Digital Authoritarians,” *Just Security*, 27 September 2021, https://www.justsecurity.org/78381/system-rivalry-how-democracies-must-compete-with-digital-authoritarians/.

Last, but not least, **democracies need to recognize that normative leadership and technological leadership go together. If our goal is to spread democratic values** rather than authoritarian norms, **we must lead in technological innovation, particularly in AI and quantum computing. Dominance in those realms will translate into leverage and influence in normative realms and tech standard setting bodies**. In addition, we need to become far more proactive in exporting democratic digital infrastructure as part of our trade and economic development aid programs, rather than ceding the opportunity to China to embed values into digital infrastructure in the developing world.

**Empirical evidence shows competition policy DOES solve**

**Maximiano and Volpin 20** – Ruben Maximiano is a Senior Competition Expert at the OECD and a lecturer at Lille Catholic University, where he teaches EU competition law. Cristina is a Competition Law & Policy Expert at the OECD

Ruben Maximiano and Cristina Volpin, December 2 2020, “The Role of Competition Policy in Promoting Economic Recovery,” OECD, https://one.oecd.org/document/DAF/COMP(2020)6/en/pdf

A significant array of empirical evidence shows that competition delivers many benefits at both macro and micro-economic levels. At the macro-economic level **competition promotes the optimal use of scarce economic resources, drives economic growth, boosts firms’ productivity and production levels, multiplies business opportunities and can help reduce inequality and create more and better jobs** (OECD, 2014[34]). At the micro level, **competition leads to better prices, greater choice and higher quality of goods and services**. Competition also accelerates the adoption of new technologies and encourages innovation. This works as a virtuous circle, since a competitive and innovative firms will spur its competitors to compete and innovate. It is this mechanism that then leads to the macro economic benefits boost of growth, benefits that accumulate over time, increasing prosperity in the long run. When the variety of innovation is not protected, consumers are more exposed and more severely affected by demand or supply shocks. This is particularly relevant in a pandemic and post-pandemic world. Using the example of the US market for medical ventilators during the Covid-19 pandemic, Scott Morton (2020[35]) underlines the importance of competition as a key driver of quality, choice and innovation and, in particular, in preserving the variety of innovation. **Competition can help ensure more stable distribution of essential goods**. Even when disruption occurs, in competitive supply chains, these may be corrected by competitors’ entry. Moss and Alexander (2020[36]) have argued that competition can help ensure that food systems (including agricultural inputs, processing, manufacturing, and distribution) are more resilient. The authors state that, while shocks such as extreme weather conditions, diseases and conflict regularly affect food supply chains, those economies where competition is vigorous are less likely to suffer disruptions.

## 2AC

### Adv 1

#### Our representations are accurate. “Regime expediency” structures Iranian nuclear decision-making. Making clear the costs outweigh the benefits is essential to preventing breakout.

**Eisenstadt & Khalaji 21** --- \*Kahn Fellow and director of the Military and Security Studies Program at The Washington Institute. \*\*The Institute’s Libitzky Family Fellow, is a former Iranian journalist and Qom-trained theologian.

Michael & Mehdi, 2-4-2021, "Iran’s Flexible Fatwa: How “Expediency” Shapes Nuclear Decisionmaking," Washington Institute, https://www.washingtoninstitute.org/policy-analysis/irans-flexible-fatwa-how-expediency-shapes-nuclear-decisionmaking

Supreme Leader Ali Khamenei’s years-old fatwa banning nuclear weapons is again making headlines. The regime and its supporters, including former nuclear spokesman Hossein Mousavian, have long claimed that the fatwa is permanent and adduced it as proof that Iran is religiously forbidden from acquiring such weapons. Yet in a January 30 interview with al-Mayadeen television, former Iranian diplomat Amir Mousavi stated, “A fatwa is not permanent, according to Jaafari Shia jurisprudence. A fatwa is issued in accordance with developing circumstances. Therefore, I believe that if the Americans and Zionists act in a dangerous manner, the fatwa might be changed.” His statement confirms that Tehran’s national security decisionmaking is dictated not by religious precepts, but by the principle of “regime expediency” (maslahat-e nezam), whose paramount concern is the survival of the post-revolutionary power structure.

Mousavi is not just any former diplomat; he is also a brigadier-general in the Islamic Revolutionary Guard Corps. As Iran’s cultural attache in the Algerian embassy between 2015 and 2018, he was declared persona non grata for spreading Shia sectarian propaganda. He now directs the Center for Strategic Studies and International Relations, an IRGC think tank based in Tehran.

What Spurred the Fatwa, and Why Is It Mutable?

The Supreme Leader first issued an oral nuclear fatwa in 2003, and he has repeated it in numerous speeches since then. These pronouncements, which use a religious idiom to describe nuclear weapons as “forbidden” (haram), have the same legal standing as written fatwas.

The precise formulations used in these pronouncements have varied. Khamenei has at times categorically forbidden the development, stockpiling, and use of nuclear weapons. On other occasions, he appeared to tacitly permit their development and stockpiling, but not use. When addressing a group of top scientists on October 9, 2019, he stated, “Although we could have taken this path [of producing a nuclear weapon], we decided not to...based on Islam’s verdict; it is wrong to make it and it is wrong to stockpile it because it is forbidden to use it.”

Notably, both the initial fatwa and early Iranian efforts to highlight it followed not long after the discovery and public disclosure of the regime’s clandestine nuclear enrichment program in 2002. These efforts should therefore be seen, at least in part, as damage control. The fatwa has been used for other purposes as well:

To legitimize the nuclear program as a strictly peaceful activity via religious justification

To deflect potential domestic criticism for the program’s slow progress, its numerous setbacks, and the regime’s decision to eschew a rapid breakout

To help the regime promote revolutionary Islam as a coequal system of international legitimacy alongside international law, as expressed through proposals in 2013 to get the fatwa enshrined in a UN resolution.

Moreover, fatwas are not immutable—they can be altered depending on circumstances. The founder of the Islamic Republic, Ayatollah Ruhollah Khomeini, modified his position and issued contradictory fatwas on a number of issues, including taxes, military conscription, women’s suffrage, and the legitimacy of the shah’s monarchy. Likewise, Supreme Leader Khamenei could reverse his nuclear fatwa should he deem it necessary. Acknowledging this fact, some former Iranian officials have suggested that parliament pass legislation making the nuclear fatwa law in order to preserve its value as a confidence-building measure with the West.

The reason Iranian fatwas can be reversed is because the principle of “regime expediency” guides policy formulation in the Islamic Republic. Before he died, Khomeini ruled that the regime could destroy a mosque or suspend the observance of Islamic tenets if its interests so dictated, and the Islamic Republic’s constitution invests the Supreme Leader with absolute authority to determine those interests. He can therefore cancel laws or override decisions by various deliberative bodies, including parliament, the Guardian Council, and the Expediency Council.

Regime spokesmen also have a habit of proffering convenient interpretations when it comes to fatwas and foreign policy. For example, when Khomeini’s 1989 fatwa calling for the death of author Salman Rushdie sparked a crisis in relations with Europe, Iranian Foreign Ministry officials tried to downplay its importance, claiming that the fatwa reflected the Supreme Leader’s personal opinion and was not officially binding. Regarding Khamenei’s nuclear fatwa, however, Foreign Ministry officials have repeatedly tried to convince the international community that it is a binding religious ruling and would prevent the country from getting the bomb—at least until Mousavi’s statement last month claiming it would not.

The history of Iran’s fatwa on chemical weapons (CW) raises additional questions. During the Iran-Iraq War, Khomeini reportedly issued a fatwa regarding CW, but it is unclear whether he banned their development and production or only their use. It is also unclear whether the edict was eventually altered in the face of escalating Iraqi chemical warfare. Whatever the matter, the fatwa did not stop Iran from producing small numbers of CW-filled mortar and artillery rounds and aerial bombs, transferring some of these munitions to Libya in 1987, and using some of them against Iraqi troops toward the end of the war. And although Iran joined the Chemical Weapons Convention after the war—reportedly destroying its CW capability in the process—the U.S. government continues to believe that the regime is pursuing pharmaceutical-based agents (possibly fentanyl) for offensive purposes. Thus, if Iran’s chemical fatwa did not preclude it from subsequently acquiring and using CW, it is reasonable to doubt that the nuclear fatwa would preclude it from acquiring and using nuclear weapons if doing so were in the regime’s interests.

Implications for Negotiations

Mousavi’s candid admission on al-Mayadeen should come as no surprise given the abundant information available about Iran’s nuclear weapons R&D efforts, as documented in various International Atomic Energy Agency reports and in the secret Iranian nuclear archive that Israeli intelligence covertly removed from the country in 2018. Yet the greatest significance of his remarks—coming just as the potential for negotiations with a new U.S. administration is ripening—may lie in underscoring how interests rather than ideology will drive Iran’s decisionmaking regarding its nuclear program, missiles, and regional activities.

Previously, this principle of regime expediency led Iran to defer its nuclear ambitions and temporarily suspend the program on at least two occasions: 2003 and 2015. The former decision followed the U.S. invasions of Afghanistan and Iraq, while the latter came despite Tehran’s prior claims that it would never negotiate while under sanctions. The challenge, then, is finding the right combination of pressures and incentives to convince Iran that it is in the regime’s interests to lengthen, strengthen, and broaden the Joint Comprehensive Plan of Action (JCPOA) while avoiding a nuclear breakout.

This flexibility means that Tehran’s negotiating positions and redlines are not sacrosanct if violating them would advance the regime’s interests. Indeed, Foreign Minister Mohammad Javad Zarif has already backed off from insisting that the United States take the first step in rejoining the JCPOA, instead talking about ways to “synchronize” or “choreograph” the U.S. reentry.

This also means that the role of trust and confidence in reaching a deal is greatly exaggerated, even though Iranian diplomats incessantly emphasize their importance. Diplomacy can succeed only when Tehran concludes—following an unsentimental, cold-eyed assessment—that a new agreement or series of agreements will advance its interests. At the same time, this likely means that Tehran will adhere to a new agreement only for as long as doing so aligns with its interests. The international community therefore needs to create a framework that can not only facilitate a new deal, but also sustain it for many years to come.

#### Biden’s using sanctions more effectively, which is mitigates the humanitarian impact.

**O’Toole 19** --- Nonresident senior fellow with the Atlantic Council’s Global Business and Economics Program.

Brian, 9-22-2019, "Sanctions are effective—if used correctly," Atlantic Council, https://www.atlanticcouncil.org/blogs/new-atlanticist/sanctions-are-effective-if-used-correctly/

Sanctions are a critical tool of foreign policy available to US policymakers in the administration and in Congress, as they provide more leverage than is available in traditional diplomatic negotiations without the many downsides of military action. Omar cites research showing that sanctions are ineffective, but much of the literature evaluating sanctions success asks too much of the tool before deeming its use successful: sanctions cannot by themselves cause their target to surrender and certainly not overnight.

They can, however, shift the context in which the target makes decisions. Over time, sanctions can work, when combined with broader diplomatic and political efforts (e.g., sanctions brought Iran to the negotiating table and contributed to Soviet leader Mikhail Gorbachev’s determination to ease his country’s isolation). Omar herself lauds the Global Magnitsky sanctions on human rights abuses and corrupt actors, and the boycott campaign against apartheid South Africa as sanctions successes. The former is a good tool and a noble idea that as of yet lacks demonstrated success in changing behavior, while the latter was a UN-led sanctions regime that only succeeded after almost twenty years of multilateral sanctions buoyed by a changing internal political dynamic and intense diplomatic pressure. Her dual condemnation of and praise for sanctions makes it difficult to tease out her exact argument with sanctions.

To work, as I have argued, sanctions must be used judiciously and only as part of a comprehensive and executable strategy to achieve US foreign policy and national security goals. Omar criticizes this administration for failing to articulate and stick to a comprehensive and executable policy outcome when resorting to sanctions. Instead, sanctions under Trump have become the end rather than the means, a tool used in place of a coherent and executable policy and a symbol of resolve rather than an effective means to an identifiable objective. When steely resolve is the primary driver, there is little room for granting any concession to the target, even if those concessions are good policy, like exporting food and medicine. Sloppiness in execution, another consistent policy failing of this administration, exacerbates those problems.

Omar rightly takes issue with the Trump administration’s near-sole focus on maximum pressure, or impact, of Iran, Cuba, and Venezuela sanctions without consideration for the negative impacts broad sanctions can have on a population. The Trump administration has in some cases done more harm to local populations than good in depriving bad regimes of resources, whether by imposing unnecessary, if legally supportable, terrorism sanctions on the Central Bank of Iran or re-imposing strict limits on family remittances to Cuba. Venezuela is a more complicated analysis. The aggressive sanctions deployed against the Nicolas Maduro regime certainly weakened it in the short-term, but the sanctions were so sweeping that they worsened an already critical humanitarian situation—one brought on by the regime’s mismanagement—once the initial push to oust Maduro failed and Trump turned his attention elsewhere.

The Trump administration’s failings on humanitarian aspects of sanctions, however, should not impugn the use of broad-based sanctions, nor are sanctions incompatible with human rights priorities. Congress itself passed the Trade Sanctions Reform and Export Enhancement Act of 2000 in part to require the facilitation of humanitarian trade in jurisdictional sanctions programs, and the George W. Bush and Obama administrations had implemented the law faithfully. The Trump administration’s policies—in this case of discouraging even legitimately authorized humanitarian trade over the mere potential for misappropriation inside Iran—is the problem, not the sanctions themselves.

Rather than throw out the tool, sanctions should be applied with more discipline and only as part of a strong diplomatic effort. In addition, there are important reforms that Congress is considering to the underlying statute for most sanctions programs, the International Emergency Economic Powers Act, in the wake of perceived overuse and misuse of sanctions threats. The Government Accountability Office recently reported on the lack of internal US government assessments on the success of sanctions, a combination of lack of human capital and difficulty in assessing policy outcomes, and Congress has chafed in recent years at not being more involved in the sanctions process. It is clear that the US government should devote more resources to assessing sanctions and wargaming before their future use. Congress also should have a more active oversight role, rather than the rubber stamp process that governs renewing US sanctions programs on a yearly basis. Better understanding of success, planning for future use, and oversight of the sanctions tool will promote more effective policy and more effective sanctions in the future.

Irrespective of their current misuse and flaws in the system, sanctions still have an important role to play. In the hands of an administration that used them more carefully to avoid undue harm to local populations, they still would be a key component of combatting Iranian malign behavior, depriving Maduro of funds he uses as patronage to maintain his base of power, and targeting the human rights abuses and anti-democratic leanings of the Cuban government.

Sanctions today, though, are a tool used too often and in almost near-isolation by an administration that would prefer to govern via fiat rather than do the hard work necessary to make change on the international stage and by a Congress that seemingly can agree on little other than sanctions. Assertions that sanctions are a failure, however, ignore their utility and overstate their downsides. Better implementation and better policy are the answers, not discontinued use.

### Adv 2

#### No reps impact OR self-fulfilling prophecy.

Goddard & Krebs 15 –Jane Bishop ’51 Associate Professor of Political Science at Wellesley College; Beverly and Richard Fink Professor in the Liberal Arts and Associate Professor of Political Science at the University of Minnesota

Stacie E. Goddard, Ronald R. Krebs, Duck of Minerva, September 18, 2015, “Securitization Forum: The Transatlantic Divide: Why Securitization Has Not Secured a Place in American IR, Why It Should, and How It Can”, <http://duckofminerva.com/2015/09/securitization-forum-the-transatlantic-divide-why-securitization-has-not-secured-a-place-in-american-ir-why-it-should-and-how-it-can.html>

\* modified for ableist language

But there are (good) substantive and (not so good) sociological reasons that securitization has failed to gain traction in North America. First, and most important, securitization describes a process but leaves us well short of (a) a fully specified causal theory that (b) takes proper account of the politics of rhetorical contestation. According to the foundational theorists of the Copenhagen School, actors, usually elites, transform the social order from one of normal, everyday politics into a Schmittian world of crisis by identifying a dire threat to the political community. They conceive of this “securitizing move” in linguistic terms, as a speech act. As Ole Waever (1995: 55) argues, “By saying it [security], something is done (as in betting, a promise, naming a ship). . . . [T]he word ‘security’ is the act . . .” [emphasis added]. Securitization is a powerful discursive process that constitutes social reality. Countless articles and books have traced this process, and its consequences, in particular policy domains.

Securitization presents itself as a causal account. But its mechanisms remain obscure, as do the conditions under which it operates. Why is speaking security so powerful? How do mere words twist and transform the social order? Does the invocation of security prompt a visceral emotional response? Are speech acts persuasive, by using well-known tropes to convince audiences that they must seek protection? Or does securitization operate through the politics of rhetorical coercion, silencing potential opponents? In securitization accounts, speech acts often seem to be magical incantations that upend normal politics through pathways shrouded in mystery.

Equally unclear is why some securitizing moves resonate, while others ~~fall on deaf ears~~ [are ignored]. Certainly not all attempts to construct threats succeed, and this is true of both traditional military concerns as well as “new” security issues. Both neoconservatives and structural realists in the United States have long insisted that conflict with China is inevitable, yet China has over the last 25 years been more opportunity than threat in US political discourse—despite these vigorous and persistent securitizing moves. In very recent years, the balance has shifted, and the China threat has started to catch on: linguistic processes alone cannot account for this change. The US military has repeatedly declared that global climate change has profound implications for national security—but that has hardly cast aside climate change deniers, many of whom are ironically foreign policy hawks supposedly deferential to the uniformed military. Authoritative speakers have varied in the efficacy of their securitizing moves. While George W. Bush powerfully framed the events of 9/11 as a global war against American values, Franklin Delano Roosevelt, a more gifted orator, struggled to convince a skeptical public that Germany presented an imminent threat to the United States. After thirty years as an active research program, securitization theory has hardly begun to offer acceptable answers to these questions. Brief references to “facilitating conditions” won’t cut it. You don’t have to subscribe to a covering-law conception of theory to find these questions important or to find securitization’s answers unsatisfying.

A large part of the problem, we believe, lies in securitization’s ~~silence on~~ [disregard of] the politics of security. Its foundations in speech act theory have yielded an oddly apolitical theoretical framework. In its seminal formulation, the Copenhagen school emphasized the internal linguistic rules that must be followed for a speech act to be recognized as competent. Yet as Thierry Balzacq argues, by treating securitization as a purely rule-driven process, the Copenhagen school ignores the politics of securitization, reducing “security to a conventional procedure such as marriage or betting in which the ‘felicity circumstances’ (conditions of success) must fully prevail for the act to go through” (2005:172). Absent from this picture are fierce rhetorical battles, where coalitions counter securitizing moves with their own appeals that strike more or less deeply at underlying narratives. Absent as well are the public intellectuals and media, who question and critique securitizing moves sometimes (and not others), sometimes to good effect (and sometimes with little impact). The audience itself—whether the mass public or a narrower elite stratum—is stripped of all agency. Speaking security, even when the performance is competent, does not sweep this politics away. Only by delving into this politics can we shed light on the mysteries of securitization.

We see rhetorical politics as constituted less by singular “securitizing moves” than by “contentious conversation”—to use Charles Tilly’s phrase. To this end, we would urge securitization theorists, as we recently have elsewhere, to move towards a “pragmatic” model that rests on four analytical wagers: that actors are both strategic and social; that legitimation works by imparting meaning to political action; that legitimation is laced through with contestation; and that the power of language emerges through contentious dialogue.

#### Cyber securitization is inevitable AND good.

**Hersee 19** – PhD in Cyber Security, which focusses on the dispute between digital rights and national security in cyberspace.

Steven Hersee, “THE CYBER SECURITY DILEMMA AND THE SECURITISATION OF CYBERSPACE,” Royal Holloway University of London, 2019, https://pure.royalholloway.ac.uk/portal/en/publications/the-cyber-security-dilemma-and-the-securitisation-of-cyberspace(dcf65dd5-c75d-40ce-8994-6da979eaa1e7).html

5.2 SHOULD CYBERSPACE BE DESECURITISED?

Desecuritisation is the process by which an issue is removed from the security sphere and is no longer considered to be an urgent threat, requiring exceptional measures to counter. For the Copenhagen School, ‘it means not to have issues phrased as “threats against which me have countermeasures” but to move them out of this threat-defense sequence and into the ordinary public sphere’ (Busan, et al., 1998, p. 29).

But desecuritisation is difficult to achieve once an issue has been accepted as threatening and desecuritisation does not guarantee than an issue will become re- politicised and re-open to public debate. If securitising moves are rejected forcefully enough, then issues can become both de-securitised and de-politicised (See Figure 5.1). This means that not only are the issues considered non- threatening, but they are also closed for discussion. Islamic extremism and immigration are issues that are often difficult to discuss in a political environment because they are either securitised as existentially threatening or de-politicised because the responses to them are considered threatening, racist or intolerant.

Cyberspace scholars are in general agreement that cyberspace securitisation has mainly negative consequences. Kingsmith, for example, discusses the negative consequences that emerge from moves by states to securitise internet content.

Considering these securitising moves ... the more that filtering practices are withheld from public scrutiny and accountability, the more tempting it is for framing authorities to employ these tools for illegitimate reasons such as the stifling of both opposition and civil society networks (Kingsmith, 2013, p. 1).

Deibert also highlights the negative consequences of the securitisation of cyberspace, including the resultant threats to basic freedoms.

There has been a growing recognition of serious risks in cyberspace. The need to manage these risks has led to a wave of securitization efforts that have potentially serious implications for basic freedoms (Deibert & Rohozinski, 2010, p. 49).

Whilst arguing that the securitisation of cyberspace is negative and inevitable, Deibert also contends that the form of this securitisation can be influenced. ‘The securitization of cyberspace may be inevitable, but what form that security takes is not’ (Deibert, 2012, p. 274). He suggests that it is better to securitise threats to human rights than to securitise threats to national security. Mariya Georgieva takes this further, citing the Snowden disclosures as an example of the securitisation of digital rights, arguing that Snowden had ‘successfully shifted the focus of the securitisation of cyberspace from values such as the survival of the state and effective national security to the survival of privacy and personal choice’ (Georgieva, 2015, p. 44). Whilst she celebrates this shift she does not explain why it is better to securitise privacy rather than national security. Helen Nissenbaum is one author who does take a more consequentialist approach to cyberspace securitisation, arguing that it might be justified when the threat is as extreme as its proponents claim.

If those who subscribe to a conception of security as cybersecurity are right, particularly if the magnitude of threat is as great as those on the extremes claim, then an extraordinary response is warranted despite its chilling effects (Nissenbaum, 2005, p. 73).

However, this approach is rare and most literature is either critical of state surveillance and the securitisation of cyberspace, or is complimentary of Edward Snowden and supportive of the securitisation of individual privacy. Given that a narrow majority of the British public support greater efforts to protect national security it is surprising that academic literature is weighted so strongly towards criticisms of state surveillance and the securitisation of national security (Pew Research Centre, 2016). Even when cyberspace securitisation by non-state actors is addressed, such as in Georgieva’s work on Snowden as an alternative securitizing actor, these forms of securitisation are considered positive because they support human rights. In the US and UK, academics have also been politically active in opposing state surveillance. In 2014 over one thousand scholars from a wide range of disciplines formed the ‘academics against surveillance’ campaign, which published an open letter criticising state surveillance (Electronic Frontier Foundation, 2014).

Whilst there is disagreement over whether desecuritisation is always best and what types of securitisation should be reversed, there are a variety of means through which desecuritisation can be achieved.

### 2AC---Afropess K

#### Outweighs the K --- endlessly repeating that “heg causes violence” is NOT a *substitute for impact calculus* --- some violence matters more, and war is conceptually distinct!

Barkawi 12 (Tarak Barkawi, PhD in Political Science, Reader in the Department of International Relations, London School of Economics, “Of Camps and Critiques: A Reply to ‘Security, War, Violence’,” Millennium - Journal of International Studies September 2012 vol. 41 no. 1 124-130)

A final totalising move in ‘Security, War, Violence’ is the idea that the study of war should be subsumed under the category of ‘violence’. The reasons offered for this are: violence does not entail a hierarchy in which war is privileged; a focus on violence encourages us to see war in relational terms and makes visible other kinds of violence besides that of war; and that the analysis of violence somehow enables the disentangling of politics from war and a proper critique of liberal violence.22 I have no particular objection to the study of violence, and I certainly think there should be more of it in the social sciences. However, why and how this obviates or subsumes the study of war is obscure to me. Is war not historically significant enough to justify inquiry into it? War is a more specific category relative to violence in general, referring to reciprocal organised violence between political entities. I make no claims that the study of war should be privileged over that of other forms of violence. Both the violence of war, and that of, say, patriarchy, demand scholarly attention, but they are also distinct if related topics requiring different forms of theorisation and inquiry. As for relationality, the category of war is already inherently relational; one does not need the concept of violence in general to see this. What precisely distinguishes war from many other kinds of violence, such as genocide or massacre, is that war is a relational form of violence in which the other side shoots back. This is ultimately the source of war’s generative social powers, for it is amidst the clash of arms that the truths which define social and political orders are brought into question. A broader focus on violence in general risks losing this central, distinctive character of the violence of war. Is it really more theoretically or politically adequate to start referring to the Second World War as an instance of ‘violence’? Equally, while I am all for the analysis of liberal violence, another broad category which would include issues of ‘structural violence’, I also think we have far from exhausted the subject of liberalism and war, an important area of inquiry now dominated by the mostly self-serving nostrums of the liberal peace debates.

#### They need to defend and robustly define their alternative to US primacy – idealism masks inevitable power struggles and abandons the only known system for international stability

Kagan ’18 - Stephen & Barbara Friedman Senior Fellow with the Project on International Order and Strategy in the Foreign Policy program at Brookings

Robert Kagan, “The World America Made—and Trump Wants to Unmake,” POLITICO Magazine, September 28, 2018, <https://politi.co/2zB3qCg>.

So, yes, the liberal order has been flawed, with its share of failure and hypocrisy. Liberal goals have sometimes been pursued by illiberal means. Power, coercion and violence have played a big part. The order has been the product of American hegemony and it has also served to reinforce that hegemony. But to note these facts is hardly to condemn the order. No order of any kind can exist without some element of hegemony. The Roman order was based on the hegemony of Rome; the British order of the 18th and 19th centuries was based on the hegemony of the Royal Navy; such order as existed briefly in Europe after the defeat of Napoleon—the so-called Concert of Europe—rested on the collective hegemony of the four victorious great powers. The idea of a peaceful, stable multipolar world where no power or powers enjoy predominance is a dream that exists only in the minds of one-world idealists and international relations theorists.

The same is true of those who would condemn the liberal world order because of the persistence of violence, coercion, hypocrisy, selfishness, stupidity and all the other evils and foibles endemic to human nature. Perhaps in the confines of academia it is possible to imagine a system of international relations where our deeply flawed humanness is removed from the equation. But in the real world, even the best and most moral of international arrangements are going to have their dark, immoral aspects.

The question is, as always, compared to what? Patrick Porter, the author of a widely discussed critique of the liberal world order, acknowledges that “if there was to be a superpower emerging from the rubble of world war in midcentury, we should be grateful it was the United States, given the totalitarian alternatives on offer. Under America’s aegis, there were islands of liberty where prosperous markets and democracies grew.” Indeed, that would seem to be the key point. At any given time there are only so many alternatives, and usually the choice is between the bad and the worse.

Are the alternatives on offer so much better now? Graham Allison, dismissing any return to the “imagined past” when the United States shaped an international liberal order, proposes that we instead make the world “safe for diversity” and accommodate ourselves to “the reality that other countries have contrary views about governance and seek to establish their own international orders governed by their own rules.” Others, such as Peter Beinart, similarly argue that we should accommodate Russian and Chinese demands for their own spheres of interest, even if that entails the sacrifice of sovereign peoples such as Ukrainians and Taiwanese. This wonderfully diverse world would presumably be run partly by Xi Jinping, partly by Vladimir Putin, and partly, too, by the Ayatollah Khamenei and by Kim Jong Un, who would also like to establish orders governed by their own rules. We have not enjoyed such diversity since the world was run partly by Hitler, Stalin and Mussolini.

The idea that this is the solution to our problems is laughable. Porter points out American policy has led to “multiplying foreign conflicts” and put the United States “on a collision course with rivals.” Setting aside the fact that multiplying foreign conflicts and collisions between rivals is the natural state of international relations in any era, it is hard for any student of history to imagine that these problems would lessen if only we returned to the competitive multipolar world of the 19th and early 20th centuries. To suggest that there could be a world with no collisions and no foreign conflicts, if only the United States would pursue an intelligent policy, is the very opposite of realism.

Strikingly absent from all these critiques of the liberal world order, too, is any suggestion of an alternative approach. The critiques end with lists of questions that need to be answered. Allison calls for a “surge of strategic thinking.” Others call for “new thinking” about “difficult trade-offs.” Some critics even complain that so long as people continue to talk about a U.S.-dominated liberal order, it will be “impossible for us to construct a reasonable alternative for the future.”

The most the critiques will offer are suggestions that sound more like attitudes than policies. They throw around words like “realism,” “restraint” and “retrenchment.” Allison proposes that the United States “limit its efforts to ensuring sufficient order abroad.” Beinart comes closest to offering an alternative, but he clearly has not yet thought it through fully. He wants to grant other powers their spheres of interest, for instance, but he mentions only Russia and China. Does this mean Russia should be granted full sway in, say, Ukraine, the Balkans, the Baltics and the Caucuses? Should China be able to impose its will on the Philippines and Vietnam?

And what of the other great powers? Does Japan get its own sphere of interest? Does India? Do Germany, France and Britain? They all had their spheres a century ago, and of course it was the clashes over those inevitably overlapping spheres that led to all the great wars. Is Beinart suggesting we should return to that past?

Of course, we may be moving toward that world, anyway. That is the implication of Trump’s “America First” foreign policy philosophy, his attacks on “globalism” and his recent suggestion that all nations look out strictly for themselves. Trump’s speech at the U.N. was an invitation to global anarchy, a struggle of all against all. His boasting about American power put the world on notice that the United States was turning from supporter of a liberal order to rogue superpower. This breakdown may be our future, but it seems odd to choose that course as a deliberate strategy, as Allison and others seem to do. Little wonder that they don’t wish to spell out the details of their alternative but prefer to carp at the inevitable failures and imperfections of the liberal world we have. As John Hay once remarked, “Our good friends are wiser when they abuse us for what we do, than when they try to say what ought to be done.”

No honest person would deny that the liberal world order has been flawed and will continue to be flawed in the future. The League of Nations was also flawed, as was Woodrow Wilson’s vision of collective security. Yet the world would have been better had the United States joined in upholding it, given the genuine alternative. The enduring truth about the liberal world order is that, like Churchill’s comment about democracy, it is the worst system—except for all the others.

#### Competition policy---wide array of empirical evidence shows it solves inequality, economic growth, and consumer welfare---that’s 1AC Volpin.

#### Their ethics are tautological --- competing rights claims collapse --- the only option is to maximize lives saved.

Greene 10 (Joshua Greene, Associate Professor of Social science in the Department of Psychology at Harvard University, “The Secret Joke of Kant’s Soul published in Moral Psychology: Historical and Contemporary Readings,” Historical and Contemporary Readings, [www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf](http://www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf))

What **turn-of-the-millennium science is telling us is that** human **moral judgment is not a** pristine **rational enterprise**, that our moral judgments are driven by a hodgepodge of emotional dispositions, which themselves were shaped by a hodgepodge of evolutionary forces, both biological and cultural. Because of this, it is exceedingly unlikely that there is any rationally coherent normative moral theory that can accommodate our moral intuitions. Moreover, anyone who claims to have such a theory, or even part of one, almost certainly doesn't. Instead, what that person probably has is a moral rationalization. It seems then, that we have somehow crossed the infamous "is"-"ought" divide. How did this happen? Didn't Hume (Hume, 1978) and Moore (Moore, 1966) warn us against trying to derive an "ought" from and "is?" How did we go from descriptive scientific theories concerning moral psychology to skepticism about a whole class of normative moral theories? The answer is that we did not, as Hume and Moore anticipated, attempt to derive an "ought" from and "is." That is, our method has been inductive rather than deductive. We have inferred on the basis of the available evidence that the phenomenon of rationalist deontological philosophy is best explained as a rationalization of evolved emotional intuition (Harman, 1977). Missing the Deontological Point I suspect that rationalist deontologists will remain unmoved by the arguments presented here. Instead, I suspect, they will insist that I have simply misunderstood what Kant and like-minded deontologists are all about. Deontology, they will say, isn't about this intuition or that intuition. It's not defined by its normative differences with consequentialism. Rather, deontology is about taking humanity seriously. Above all else, it's about respect for persons. It's about treating others as fellow rational creatures rather than as mere objects, about acting for reasons rational beings can share. And so on (Korsgaard, 1996a; Korsgaard, 1996b). This is, no doubt, how many deontologists see deontology. But this insider's view, as I've suggested, may be misleading. The problem, more specifically, is that it defines deontology in terms of values that are not distinctively deontological, though they may appear to be from the inside. Consider the following analogy with religion. When one asks a religious person to explain the essence of his religion, one often gets an answer like this: "It's about love, really. It's about looking out for other people, looking beyond oneself. It's about community, being part of something larger than oneself." This sort of answer accurately captures the phenomenology of many people's religion, but it's nevertheless inadequate for distinguishing religion from other things. This is because many, if not most, non-religious people aspire to love deeply, look out for other people, avoid self-absorption, have a sense of a community, and be connected to things larger than themselves. In other words, secular humanists and atheists can assent to most of what many religious people think religion is all about. From a secular humanist's point of view, in contrast, what's distinctive about religion is its commitment to the existence of supernatural entities as well as formal religious institutions and doctrines. And they're right. These things really do distinguish religious from non-religious practices, though they may appear to be secondary to many people operating from within a religious point of view. In the same way, I believe that most of the standard deontological/Kantian self-characterizatons fail to distinguish deontology from other approaches to ethics. (See also Kagan (Kagan, 1997, pp. 70-78.) on the difficulty of defining deontology.) It seems to me that consequentialists, as much as anyone else, have respect for persons, are against treating people as mere objects, wish to act for reasons that rational creatures can share, etc. A consequentialist respects other persons, and refrains from treating them as mere objects, by counting every person's well-being in the decision-making process. Likewise, a consequentialist attempts to act according to reasons that rational creatures can share by acting according to principles that give equal weight to everyone's interests, i.e. that are impartial. This is not to say that consequentialists and deontologists don't differ. They do. It's just that the real differences may not be what deontologists often take them to be. What, then, distinguishes deontology from other kinds of moral thought? A good strategy for answering this question is to start with concrete disagreements between deontologists and others (such as consequentialists) and then work backward in search of deeper principles. This is what I've attempted to do with the trolley and footbridge cases, and other instances in which deontologists and consequentialists disagree. If you ask a deontologically-minded person why it's wrong to push someone in front of speeding trolley in order to save five others, you will get characteristically deontological answers. Some will be tautological: "Because it's murder!" Others will be more sophisticated: "The ends don't justify the means." "You have to respect people's rights." But, as we know, these answers don't really explain anything, because if you give the same people (on different occasions) the trolley case or the loop case (See above), they'll make the opposite judgment, even though their initial explanation concerning the footbridge case applies equally well to one or both of these cases. Talk about rights, respect for persons, and reasons we can share are natural attempts to explain, in "cognitive" terms, what we feel when we find ourselves having emotionally driven intuitions that are odds with the cold calculus of consequentialism. Although these explanations are inevitably incomplete, there seems to be "something deeply right" about them because they give voice to powerful moral emotions. But, as with many religious people's accounts of what's essential to religion, **they don't** really **explain** what's distinctive about **the philosophy in question**.

#### Liberalism, while flawed, is contingent and are appropriate cites for struggle. It provides the only effective grammar for understanding and combatting harms to person. AND, the NEGs burden must be to establish some alternative basis for ethics that they can prove solves their offense and ours.

Mills 17

(Charles W. Mills is a Distinguished Professor of Philosophy at The Graduate Center, City University of New York,“Black Rights/White Wrongs: The Critique of Racial Liberalism,” 2017, Oxford University Press, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190245412.001.0001/acprof-9780190245412-chapter-3)

For me, then, racial liberalism (analogous to patriarchal liberalism) is a liberalism in which key terms have been written by race and the discursive logic shaped accordingly. This position expresses my commitment to what has been called the “symbiotic” view of racism, which sees race as historically penetrating into liberalism’s descriptive and normative apparatus so as to produce a more-or-less consistent racialized ideology, albeit one that evolves over time, rather than seeing race as being externally and “anomalously” related to it.5 Unlike my post-structuralist and post-colonial colleagues, however, I see this penetration as contingent, not a matter of a pre-ordained logic of liberalism itself, but a consequence of the mandates for European liberal theorists of establishing and maintaining imperial and colonial rule abroad, and nonwhite racial subordination at home.6 Hence the hope of redeeming liberalism by self-consciously taking this history into account: recognizing the historic racialization of liberalism so as better to deracialize it—thereby producing a color-conscious, racially reflexive, anti-racist liberalism on the alert for its own inherited racial distortions.7 Abstract Platonized liberalism erases actual liberalism’s racist history, a blinding white Form that, in pretending a colorlessness that it did not and does not achieve, obfuscates more than it illuminates. The problem is not abstraction as such but a problematic mode of idealizing abstraction that abstracts away from social oppression, and in that way both conceals its extent and inhibits the development of the conceptual tools necessary for understanding and dealing with its workings.8 Identifying the historically hegemonic varieties of liberalism as racialized and white alerts us to the erasure, the whiting-out, of the past of racial subordination that current, seemingly genuinely inclusive varieties of liberalism now seek to disown. (p.xvi)

As the title of this book signifies, then, it is an enterprise based on the inversion of the standard metaphors in which white is right and black is wrong. It urges us to recognize how the historically exclusionary rights of white liberalism (a.k.a. “liberalism”), based on the suppression of equal black rights, have left a legacy of white wrongs. These wrongs have thus been not merely material but also normative and conceptual, wrongs within the apparatus of liberalism itself—as summarized by the two famous judgments about white “moderates” (in context roughly equivalent to “liberals”) made by Martin Luther King Jr. and Dick Gregory that I have used as my epigraphs. Hence the need for their black righting.

Part I of the book covers the overarching themes of epistemology, personhood, and property, all central to the liberal project, and all, in my opinion, distortionally shaped by race. Liberal enlightenment presumes an objective perception of things as they are and as they should be, factually and morally, for political communities characterized by reciprocally respecting relations among equally recognized persons in agreement on the fair terms for the appropriation of the world. But racial domination interferes with objective cognition, denies equal racial personhood, and generates rationalizations of unjust white acquisition. Thus they are all negatively transformed by the dynamic of racial liberalism.

The opening chapter sets the stage with a 2012 interview I did with Tom Mills (no relation, so far as I know) of the British New Left Project. For the benefit of a transatlantic audience less familiar with critical race theory, I explain the rationale for retaining “race” as a crucial category, suitably transformed, and what I see as its historic link with imperial domination and its relation to the conceptually distinct, if empirically overlapping, systems of gender and class. Racial liberalism is introduced as homologous with the far more familiar “patriarchal liberalism” identified by feminist theory.

Chapter 2, “Occupy Liberalism!,” locates the project within the broader context of the need to transform liberalism for a progressive political agenda. Invoking the slogan of the (then) recent “Occupy!” movement, I argue—against radical orthodoxy—that liberalism has an under-appreciated radical potential that is masked by the long complicity of its hegemonic varieties with plutocratic, patriarchal, and white-supremacist structures of power. But this complicity, I argue, is a function of dominant group interests and the successful political projects of the privileged, not the consequence of any ineluctable immanent conceptual dynamic of liberalism as a political ideology. Once we pluralize liberalism into liberalisms (both actual and hypothetical), we should be able to see how many claims about liberalism’s putatively problematic ontology and alleged incapacity to recognize and/or theorize social oppression really depend on the contingent features (p.xvii) of its historically dominant (but not inevitable) incarnations. An emancipatory liberalism can, I contend, be reconstructed that is not theoretically constrained in these unfortunate ways.

With this background established, I go on in chapter 3, “Racial Liberalism,” to make a detailed case for the usefulness of the construct. I point out the global hegemony of liberalism in a post–Cold War world and the triumph in the academy over the last few decades of Rawlsian contractarian liberalism in particular. But in the wide range of political responses to the work of John Rawls, the historic racialization of the contract apparatus and of the dominant varieties of liberalism will rarely be a topic of inquiry. Yet insofar as racism (ostensibly) violates the moral norms of modern political theory in general, liberal theorists across the spectrum, however much they disagree on other issues, should be able to converge on the necessity for purging contemporary liberal theory of its racist ancestry. Contra the exponents of color-blindness, however, I argue that this project can only be accomplished through a color-conscious investigative genealogy and reconstruction. Thus I urge a self-conscious deracializing of liberalism that would begin by recognizing the centrality of a social ontology of race to the modern world and the acknowledgment of a corresponding history of racial exploitation that needs to be registered in liberal categories and addressed as a matter of liberal social justice.

Oppositional bodies of political thought are often preoccupied with epistemological questions, in part for the simple reason that they are trying to explain how a dominant but misleading body of ideas (classist, sexist, racist) continues to perpetuate itself. One wants to understand both how the privileged can continue to deny the unfairness of their privilege and how (perhaps) one was oneself originally taken in by these ideas. I suggest that this pattern of denial and misapprehension can in the case of race be thought of as a “white ignorance,” an elaboration of the concept I introduced in The Racial Contract of an “epistemology of ignorance.”9 Chapter 4, “White Ignorance,” locates white miscognition as a structural phenomenon rather than a matter of individual white myopias. It is the result (not unavoidably, but as a strong psychological tendency) of racial location. Because of racial privilege, an inherited racialized set of concepts and beliefs, differential racial experience, and racial group interest, whites tend to get certain kinds of things wrong. As such, the chapter can be seen as a contribution from critical philosophy of race to the new “social” epistemology that has emerged in recent decades, a welcome turn away from the solipsistic Cartesian meditations that have typically characterized modern epistemology.

Chapter 5, “ ‘Ideal Theory’ as Ideology,” takes a critical look at what could be called the epistemology of normative theory, specifically the normative (p.xviii) apparatus of “ideal theory” liberalism. Like chapter 2, it also adopts a broader perspective, reminding us that a focus on race should not exclude a concern with gender and class privilege also, all of which are indeed always in the modern world in intersection and interaction with one another. First written as a contribution to a feminist collection on moral psychology, it was then reprinted in a special symposium of the feminist philosophy journal Hypatia, stimulating widespread discussion. The chapter expressed a frustration I and many others at the time (as it turned out) had begun to feel with “ideal theory” in ethics and political philosophy, most notably, of course, though not exclusively, in the work of Rawls. “Ideal theory” is not just normative theory, which by definition is a prerequisite for ethics and political philosophy, but the normative theory of a perfectly just society. The rationale was that developing such a perspective was crucial to doing non-ideal justice theory properly later on. But to many of us at the time it became increasingly questionable whether this “later on” was ever going to arrive, and that in reality ideal theory—whatever its original motivation—was functioning as a way of avoiding the hard facts of class, gender, and racial oppression; how they shape the human agents enmeshed in these relations of domination; and what our normative priorities should be. So the essay was an early effort in what has since become a growing wave of criticism of ideal theory, and I would like to think that it made at least a small contribution to getting things going.

No Western Enlightenment philosopher can equal the standing of Immanuel Kant, the luminary par excellence of eighteenth-century thought, with stellar accomplishments not merely in ethics and political philosophy, but in metaphysics and aesthetics also. Yet Kant, the pre-eminent theorist of personhood, whose work through his appropriation by John Rawls and Jürgen Habermas has become central to normative political philosophy as well as ethics, has also a more dubious accomplishment to his (dis)credit: being one of the founders—or (for some theorists) the founder—of modern “scientific” racism. As such, he wonderfully illustrates the combination of light and darkness in the “white” Enlightenment’s racial liberalism. Until recently, when the challenge from scholars of race made some response unavoidable, mainstream white political philosophers and ethicists had for the most part scrupulously avoided any mention of his racist writings in anthropology and physical geography. Now the dominant line of argument is that they are embarrassing and should of course be condemned, but they form no part of his philosophy. In chapter 6, “Kant’s Untermenschen,” I challenge this conceptual segregation and ask whether it would not be more theoretically fruitful to explore the possible presence in Kant’s work of a philosophical anthropology of persons and sub-persons, thereby inevitably raising questions about the standard (p.xix) interpretations of the prescriptions of his ethics, political philosophy, and teleology.

The seeming demise of Marxism—though as I write this introduction in 2016, the worsening conditions of plutocracy, not merely in the United States but globally, must surely be fostering a rethinking10—has taken “exploitation” off the table as a subject for moral analysis. Exploitation is assumed to be necessarily tied to the labor theory of value, long repudiated not merely by mainstream economists but by even most contemporary Marxists. But a concept of exploitation can easily be developed that is straightforwardly condemnable by respectable liberal criteria: exploitation as the “using” of people for illicit benefit and unjust enrichment. Marx famously contrasted the transparent exploitation of slave and feudal societies with the more opaque exploitation of capitalism, which, resting as it did on “free” wage-labor and voluntary consent, generally needed theoretical work to uncover. But racial exploitation in modernity was originally as transparently exploitative as (or even more transparently exploitative than) exploitation in pre-modern systems. Racial chattel slavery, aboriginal expropriation, colonial forced labor, and so forth are paradigms of non-consensual coercive systems directed by liberal polities at home and abroad. Yet they have not received the attention they deserve in liberal descriptive and normative theory for what they say about the actual architecture of the liberal state and its supervision of the wrongful transfer of wealth and opportunities from people of color to whites. In chapter 7, “Racial Exploitation,” I argue for a revival of the concept of exploitation in philosophical discourse that could be brought into fruitful engagement with the by now large body of literature in sociology and economics on racial differentials in wealth and how they serve to perpetuate racial inequality.

Part II of the book focuses on Rawls, Rawlsianism, and white political philosophy more generally. My claim is that most of this work either exemplifies the racial liberalism I am critiquing or adopts strategies for addressing and correcting it that are, in my opinion, going to be inadequate.

Chapter 8, “Rawls on Race/Race in Rawls,” examines the writings of the person generally regarded (certainly in Anglo-American analytic philosophical circles) as the most important American political philosopher of the twentieth century, and, for some, the most important political philosopher, period, of the twentieth century. I try to bring out the absurdity of the leading American philosopher of justice having nothing substantive to say over his working lifetime about what has historically been the most salient form of American injustice, racial domination. Moreover, by analyzing the underpinnings of Rawlsian ideal theory, I try to make the stronger case not merely that Rawls and Rawlsians have not addressed the issue of racism, but that the apparatus itself hinders them from doing so adequately, (p.xx) not merely contingently but also structurally. In the conclusion, I point the reader to my own work in my 2007 book with Carole Pateman, Contract and Domination, where I argue that retrieving the Rawlsian apparatus for racial justice and non-ideal theory will require radical changes in it.11

The natural follow-up is a look at the work of Tommie Shelby, since he—as a black philosopher at Harvard, Rawls’s home institution for most of his career—is the most prominent African American representative of the position that, contra my claims, Rawls’s apparatus as is can indeed be used to tackle racial injustice. In chapter 9, “Retrieving Rawls for Racial Justice?,” I do a detailed analysis of one of Shelby’s articles and explain why I think his attempted appropriation of Rawls (an extension to race of Rawls’s “fair equality of opportunity” principle) cannot work. I should emphasize here that I do not, of course, see Shelby as himself an exponent of racial liberalism but rather as a philosopher trying, as I am, to correct it. But my contention is that the racial liberalism that for me Rawls represents is more deeply embedded in the apparatus and thus requires more conceptual rethinking and reworking of that apparatus than Shelby recognizes.

Chapter 10, “The Whiteness of Political Philosophy,” takes a retrospective look at the evolution (and non-evolution) of the field in the many years since my graduation. Commissioned by the hyperactive (in a good way) George Yancy for a volume bringing together seventeen black and Hispanic/Latino philosophers to reflect on their experiences in the profession, it offers both an account of how much progress has been made in recent decades in Africana philosophy and race as legitimate philosophical areas of research, and how far we still have to go. Though there has been a burgeoning of literature in the discipline, the low demographic numbers of black philosophers and people of color generally, and the radicalness of the challenge race poses to conventional ways of doing philosophy, somewhat temper one’s optimism about its future. Using a well-known companion to political philosophy as a representative target, I point out how “white” its conceptual framework and underlying assumptions are, paying virtually no attention to the large body of work in post-colonial theory and critical race theory not just in philosophy but across many other disciplines.

Finally, in an epilogue that is simultaneously a prologue (in gesturing toward what I intend to be a future project), I sketch the contours of what I am calling a “black radical liberalism.” Taxonomies of Africana political thought have traditionally opposed black radicalism and black liberalism, the latter seen as necessarily committed to mainstream white norms and assumptions, even if adjusted somewhat for racial difference. But in keeping with the overall line of argument of this book, I make a case here for a different variety of black liberalism, one radicalized by taking seriously (in a way that mainstream black liberalism does not) the shaping of the modern (p.xxi) world by white supremacy. Black radical liberalism as an emancipatory ideology will of course have to be supplemented and modified by the experience of other racially subordinated communities. But given the centrality of African slavery and subsequent anti-black oppression to the making of modernity, it represents a crucial step toward the comprehensive theorization and reconstruction of the deracialized, color-conscious liberalism for which I am calling.

#### Materially---a confluence of statistical factors prove racial progress is possible and occurring.

Hochschild 17 (Jennifer L. Hochschild , Professor of Government, African and African American Studies, and the Chair of the Department of Government (Harvard University), Chair in American Law and Governance at the Library of Congress, President of the American Political Science Association, “Left Pessimism and Political Science,” Perspectives on Politics, Volume 15, Issue 1, March 15th, p. 6-19, DOI: <https://doi.org/10.1017/S1537592716004102> \*\*modified to allow for more humanizing frames)

Is Pessimism the Only Sensible or Empirically Warranted Response in these Two Arenas? It is easy to find evidence to support pessimism about American racial dynamics or the societal deployment of genomic science. The United States is notorious for its racially- and ethnically-inflected poverty and excessive levels of incarceration; undocumented migrants live in legal limbo; new genomics techniques such as CRISPR-Cas9 tempt humankind into hubristic manipulation of nature, and scientists’ promises to cure cancer through genetics knowledge ring hollow to many. The question for this article is whether there are also strong grounds for optimism in my two illustrative realms, such that one could plausibly and persuasively choose to be “centered on advancement concerns” rather than “centered on security concerns.” The answer is yes. Again I can point only to illustrative, suggestive evidence. First, the gap between ~~blacks’~~ [black people’s] and whites’ life expectancy declined from seven years in 1990 to 3.4 years in 2014. That is an astonishing, perhaps unprecedented, rate of change given the usual slow pace of demographic transformation. It is important in itself, of course, and also as a summary statement about an array of other social phenomena in which racial disparities are declining. ~~Blacks~~ [Black people] are living longer mainly because of declining rates of homicides, HIV mortality, infant mortality, cancer and heart disease, and suicide among black men.19 A lot of things have to go right for a group’s life expectancy to rise rapidly. Second, applications for U.S. citizenship rose from the previous year in ten of the fifteen years from 2000 to 2015, while declining in four (and remaining stable in one). That is an important indicator of immigrant incorporation, and especially relevant to political scientists because “Hispanics and Asians who are naturalized citizens tend to have higher voter turnout rates than their U.S.-born counterparts.” 20 Third, non-white Americans themselves tend to feel pretty good about their lives. Gallup Poll asked in 2016, “Where do you expect your life satisfaction to be in five years?” If whites’ response is standardized at 1, then ~~blacks~~ [black people’s] are at 2.97, and Hispanics at 1.29. Only Asian Americans, at 0.97, were less optimistic than whites. Gallup also asked about one’s level of stress in the previous day. If whites are again standardized at 1, then ~~blacks~~ [black people] are at 0.48; Hispanics at 0.53; and Asian Americans at 0.75. Middle-class ~~blacks~~ [black people] were half as likely as middle class whites to report stress during the previous day.21 In the arena of genomics also, one can point to grounds for optimism rather than pessimism. The Innocence Project, “dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice,” has enabled about 350 people to be released from prison. (Not so parenthetically, seven out of ten are African American or Latino, mostly poor men.) More extensive DNA testing might lead to many more exonerations; one careful analysis of serious crime convictions found that “in five percent of homicide and sexual assault cases DNA testing eliminated the convicted offender as the source of incriminating physical evidence.” Previous estimates had pegged the share of wrongful convictions at no more than one to two percent.22 More generally, “DNA profiling [of convicted felons] reduces the probability of future convictions by 17% for serious violent offenders and by 6% for serious property offenders .... These are likely underestimates of the true deterrent effect of DNA profiling.” 23 Genomic scientists can point to impressive successes with regard to Mendelian (single-gene) diseases, and they focus even more on diagnoses and cures yet to come. Eric Lander, director of the Broad Institute, likens the trajectory of genomic medicine to the development of medicine based on the germ theory of disease, which “took about 75 years. With genomics, we’re maybe halfway through that cycle.” In his view, “the rate of progress is just stunning. As costs continue to come down, we are entering a period where we are going to be able to get the complete catalogue of disease genes.” Cancer is a prime target, almost in sight:“If you understand that this is a game of probability, and there is only a finite number of cancer cells and each has only a certain chance of mutating, and if we can put together two or three independent attacks on the cancer cell, we win. If we invest vigorously in this and we attract the best young people into this field, we get it done in a generation. If we don’t, it takes two generations.” Lander is “not Pollyanna .... [I]t’s not for next year. We play for the long game. I don’t want to overpromise in the short term, but it is incredibly exciting if you take the 25-year view.” 24 This is a classic statement of optimism, or being centered on advancement concerns. It begins with expertise and perspective, sees dangers and weaknesses, and nonetheless asserts empirical grounds for faith. President Obama’s insistence that “if you had to choose a moment in human history to live ... you’d choose now” has the same quality. My point is not that left pessimism is wrong—only that there are grounds, perhaps equally strong, for left optimism. One can choose either, and then find good evidence for that choice. Why Is Left Pessimism Problematic? That wily politician, Barney Frank, offers the best answer from the vantage point of the public arena: “When you tell your supporters that nothing has gotten better, and that any concessions you’ve received are mere tokenism, you take away their incentive to stay mobilized. As for those you’re negotiating with, if you denigrate anything they concede as worthless, they will soon realize they can obtain the same response by giving nothing at all.” 25 One can offer the same type of answer from the vantage point of a teacher. Many of us have had the experience of teaching a course—about civil war, inequality and politics, environmental policy, or the meaning of liberty—only to have our students politely request on the last day of class some idea or piece of information about which they can feel good or which they can use in their public engagement. We need to offer answers. Optimism may also be associated with academic success; one careful study found that“although achievement in mathematics was most strongly related to prior achievement and grade level, optimism and pessimism were significant factors. In particular, students with a more generally pessimistic outlook on life had a lower level of achievement in mathematics over time.” 26A study of college students similarly found that “dispositional and academic optimism were associated with less chance of dropping out of college, as well as better motivation and adjustment. Academic optimism was also associated with higher grade point average.” 27 And for those of us of a certain age, it is heartening to discover that “after adjusting for covariates, the results suggested that greater optimism [among middle-aged, predominantly white Americans] was associated with greater high-density lipoprotein cholesterol and lower triglycerides .... In conclusion, ... optimism is associated with a healthy lipid profile; moreover, these associations can be explained, in part, by the presence of healthier behaviors and a lower body mass index.” 28

#### Theoretically---anti-black racism is not ontological---it’s a product of socialization and capitalism.

Harari 15 [Yuval Noah Harari, Israeli historian and a tenured professor in the Department of History at the Hebrew University of Jerusalem, specializing in World History, Doctorate in Philosophy from Oxford University, and an acclaimed author whose first book, Sapiens, was an international bestseller that received lavish praise by figures ranging from Barack Obama to Bill Gates, *Sapiens: A Brief History of Humankind,* tr. by Yuval Harari with help from John Purcell and Haim Watzman, HarperCollins: Broadway, NY, 2015, p. 133-144]

UNDERSTANDING HUMAN HISTORY IN THE millennia following the Agricultural Revolution boils down to a single question: how did humans organise themselves in mass-cooperation networks, when they lacked the biological instincts necessary to sustain such networks? The short answer is that humans created imagined orders and devised scripts. These two inventions filled the gaps left by our biological inheritance. However, the appearance of these networks was, for many, a dubious blessing. The imagined orders sustaining these networks were neither neutral nor fair. They divided people into make-believe groups, arranged in a hierarchy. The upper levels enjoyed privileges and power, while the lower ones suffered from discrimination and oppression. Hammurabi’s Code, for example, established a pecking order of superiors, commoners and slaves. Superiors got all the good things in life. Commoners got what was left. Slaves got a beating if they complained. Despite its proclamation of the equality of all men, the imagined order established by the Americans in 1776 also established a hierarchy. It created a hierarchy between men, who benefited from it, and women, whom it left disempowered. It created a hierarchy between whites, who enjoyed liberty, and blacks and American Indians, who were considered humans of a lesser type and therefore did not share in the equal rights of men. Many of those who signed the Declaration of Independence were slaveholders. They did not release their slaves upon signing the Declaration, nor did they consider themselves hypocrites. In their view, the rights of men had little to do with Negroes. The American order also consecrated the hierarchy between rich and poor. Most Americans at that time had little problem with the inequality caused by wealthy parents passing their money and businesses on to their children. In their view, equality meant simply that the same laws applied to rich and poor. It had nothing to do with unemployment benefits, integrated education or health insurance. Liberty, too, carried very different connotations than it does today. In 1776, it did not mean that the disempowered (certainly not blacks or Indians or, God forbid, women) could gain and exercise power. It meant simply that the state could not, except in unusual circumstances, confiscate a citizen’s private property or tell him what to do with it. The American order thereby upheld the hierarchy of wealth, which some thought was mandated by God and others viewed as representing the immutable laws of nature. Nature, it was claimed, rewarded merit with wealth while penalising indolence. All the above-mentioned distinctions – between free persons and slaves, between whites and blacks, between rich and poor – are rooted in fictions. (The hierarchy of men and women will be discussed later.) Yet it is an iron rule of history that every imagined hierarchy disavows its fictional origins and claims to be natural and inevitable. For instance, many people who have viewed the hierarchy of free persons and slaves as natural and correct have argued that slavery is not a human invention. Hammurabi saw it as ordained by the gods. Aristotle argued that slaves have a ‘slavish nature’ whereas free people have a ‘free nature’. Their status in society is merely a reflection of their innate nature. Ask white supremacists about the racial hierarchy, and you are in for a pseudoscientific lecture concerning the biological differences between the races. You are likely to be told that there is something in Caucasian blood or genes that makes whites naturally more intelligent, moral and hardworking. Ask a diehard capitalist about the hierarchy of wealth, and you are likely to hear that it is the inevitable outcome of objective differences in abilities. The rich have more money, in this view, because they are more capable and diligent. No one should be bothered, then, if the wealthy get better health care, better education and better nutrition. The rich richly deserve every perk they enjoy. People with lighter skin colour are typically more in danger of sunburn than people with darker skin. Yet there was no biological logic behind the division of South African beaches. Beaches reserved for people with lighter skin were not characterised by lower levels of ultraviolet radiation. Hindus who adhere to the caste system believe that cosmic forces have made one caste superior to another. According to a famous Hindu creation myth, the gods fashioned the world out of the body of a primeval being, the Purusa. The sun was created from the Purusa’s eye, the moon from the Purusa’s brain, the Brahmins (priests) from its mouth, the Kshatriyas (warriors) from its arms, the Vaishyas (peasants and merchants) from its thighs, and the Shudras (servants) from its legs. Accept this explanation and the sociopolitical differences between Brahmins and Shudras are as natural and eternal as the differences between the sun and the moon.1 The ancient Chinese believed that when the goddess Nü Wa created humans from earth, she kneaded aristocrats from fine yellow soil, whereas commoners were formed from brown mud.2 Yet, to the best of our understanding, these hierarchies are all the product of human imagination. Brahmins and Shudras were not really created by the gods from different body parts of a primeval being. Instead, the distinction between the two castes was created by laws and norms invented by humans in northern India about 3,000 years ago. Contrary to Aristotle, there is no known biological difference between slaves and free people. Human laws and norms have turned some people into slaves and others into masters. Between blacks and whites there are some objective biological differences, such as skin colour and hair type, but there is no evidence that the differences extend to intelligence or morality. Most people claim that their social hierarchy is natural and just, while those of other societies are based on false and ridiculous criteria. Modern Westerners are taught to scoff at the idea of racial hierarchy. They are shocked by laws prohibiting blacks to live in white neighbourhoods, or to study in white schools, or to be treated in white hospitals. But the hierarchy of rich and poor – which mandates that rich people live in separate and more luxurious neighbourhoods, study in separate and more prestigious schools, and receive medical treatment in separate and better-equipped facilities – seems perfectly sensible to many Americans and Europeans. Yet it’s a proven fact that most rich people are rich for the simple reason that they were born into a rich family, while most poor people will remain poor throughout their lives simply because they were born into a poor family. Unfortunately, complex human societies seem to require imagined hierarchies and unjust discrimination. Of course not all hierarchies are morally identical, and some societies suffered from more extreme types of discrimination than others, yet scholars know of no large society that has been able to dispense with discrimination altogether. Time and again people have created order in their societies by classifying the population into imagined categories, such as superiors, commoners and slaves; whites and blacks; patricians and plebeians; Brahmins and Shudras; or rich and poor. These categories have regulated relations between millions of humans by making some people legally, politically or socially superior to others. Hierarchies serve an important function. They enable complete strangers to know how to treat one another without wasting the time and energy needed to become personally acquainted. In George Bernard Shaw’s Pygmalion, Henry Higgins doesn’t need to establish an intimate acquaintance with Eliza Doolittle in order to understand how he should relate to her. Just hearing her talk tells him that she is a member of the underclass with whom he can do as he wishes – for example, using her as a pawn in his bet to pass off a jower girl as a duchess. A modern Eliza working at a jorist’s needs to know how much effort to put into selling roses and gladioli to the dozens of people who enter the shop each day. She can’t make a detailed enquiry into the tastes and wallets of each individual. Instead, she uses social cues – the way the person is dressed, his or her age, and if she’s not politically correct his skin colour. That is how she immediately distinguishes between the accounting-firm partner who’s likely to place a large order for expensive roses, and a messenger boy who can only afford a bunch of daisies. Of course, differences in natural abilities also play a role in the formation of social distinctions. But such diversities of aptitudes and character are usually mediated through imagined hierarchies. This happens in two important ways. First and foremost, most abilities have to be nurtured and developed. Even if somebody is born with a particular talent, that talent will usually remain latent if it is not fostered, honed and exercised. Not all people get the same chance to cultivate and refine their abilities. Whether or not they have such an opportunity will usually depend on their place within their society’s imagined hierarchy. Harry Potter is a good example. Removed from his distinguished wizard family and brought up by ignorant muggles, he arrives at Hogwarts without any experience in magic. It takes him seven books to gain a firm command of his powers and knowledge of his unique abilities. Second, even if people belonging to different classes develop exactly the same abilities, they are unlikely to enjoy equal success because they will have to play the game by different rules. If, in British-ruled India, an Untouchable, a Brahmin, a Catholic Irishman and a Protestant Englishman had somehow developed exactly the same business acumen, they still would not have had the same chance of becoming rich. The economic game was rigged by legal restrictions and unoɽcial glass ceilings. The Vicious Circle All societies are based on imagined hierarchies, but not necessarily on the same hierarchies. What accounts for the differences? Why did traditional Indian society classify people according to caste, Ottoman society according to religion, and American society according to race? In most cases the hierarchy originated as the result of a set of accidental historical circumstances and was then perpetuated and refined over many generations as different groups developed vested interests in it. For instance, many scholars surmise that the Hindu caste system took shape when Indo-Aryan people invaded the Indian subcontinent about 3,000 years ago, subjugating the local population. The invaders established a stratified society, in which they – of course – occupied the leading positions (priests and warriors), leaving the natives to live as servants and slaves. The invaders, who were few in number, feared losing their privileged status and unique identity. To forestall this danger, they divided the population into castes, each of which was required to pursue a specific occupation or perform a specific role in society. Each had different legal status, privileges and duties. Mixing of castes – social interaction, marriage, even the sharing of meals – was prohibited. And the distinctions were not just legal – they became an inherent part of religious mythology and practice. The rulers argued that the caste system rejected an eternal cosmic reality rather than a chance historical development. Concepts of purity and impurity were essential elements in Hindu religion, and they were harnessed to buttress the social pyramid. Pious Hindus were taught that contact with members of a different caste could pollute not only them personally, but society as a whole, and should therefore be abhorred. Such ideas are hardly unique to Hindus. Throughout history, and in almost all societies, concepts of pollution and purity have played a leading role in enforcing social and political divisions and have been exploited by numerous ruling classes to maintain their privileges. The fear of pollution is not a complete fabrication of priests and princes, however. It probably has its roots in biological survival mechanisms that make humans feel an instinctive revulsion towards potential disease carriers, such as sick persons and dead bodies. If you want to keep any human group isolated – women, Jews, Roma, gays, blacks – the best way to do it is convince everyone that these people are a source of pollution. The Hindu caste system and its attendant laws of purity became deeply embedded in Indian culture. Long after the Indo-Aryan invasion was forgotten, Indians continued to believe in the caste system and to abhor the pollution caused by caste mixing. Castes were not immune to change. In fact, as time went by, large castes were divided into sub-castes. Eventually the original four castes turned into 3,000 different groupings called jati (literally ‘birth’). But this proliferation of castes did not change the basic principle of the system, according to which every person is born into a particular rank, and any infringement of its rules pollutes the person and society as a whole. A persons jati determines her profession, the food she can eat, her place of residence and her eligible marriage partners. Usually a person can marry only within his or her caste, and the resulting children inherit that status. Whenever a new profession developed or a new group of people appeared on the scene, they had to be recognised as a caste in order to receive a legitimate place within Hindu society. Groups that failed to win recognition as a caste were, literally, outcasts – in this stratified society, they did not even occupy the lowest rung. They became known as Untouchables. They had to live apart from all other people and scrape together a living in humiliating and disgusting ways, such as sifting through garbage dumps for scrap material. Even members of the lowest caste avoided mingling with them, eating with them, touching them and certainly marrying them. In modern India, matters of marriage and work are still heavily influenced by the caste system, despite all attempts by the democratic government of India to break down such distinctions and convince Hindus that there is nothing polluting in caste mixing.3 Purity in America A similar vicious circle perpetuated the racial hierarchy in modern America. From the sixteenth to the eighteenth century, the European conquerors imported millions of African slaves to work the mines and plantations of America. They chose to import slaves from Africa rather than from Europe or East Asia due to three circumstantial factors. Firstly, Africa was closer, so it was cheaper to import slaves from Senegal than from Vietnam. Secondly, in Africa there already existed a well-developed slave trade (exporting slaves mainly to the Middle East), whereas in Europe slavery was very rare. It was obviously far easier to buy slaves in an existing market than to create a new one from scratch. Thirdly, and most importantly, American plantations in places such as Virginia, Haiti and Brazil were plagued by malaria and yellow fever, which had originated in Africa. Africans had acquired over the generations a partial genetic immunity to these diseases, whereas Europeans were totally defenceless and died in droves. It was consequently wiser for a plantation owner to invest his money in an African slave than in a European slave or indentured labourer. Paradoxically, genetic superiority (in terms of immunity) translated into social inferiority: precisely because Africans were fitter in tropical climates than Europeans, they ended up as the slaves of European masters! Due to these circumstantial factors, the burgeoning new societies of America were to be divided into a ruling caste of white Europeans and a subjugated caste of black Africans. But people don’t like to say that they keep slaves of a certain race or origin simply because it’s economically expedient. Like the Aryan conquerors of India, white Europeans in the Americas wanted to be seen not only as economically successful but also as pious, just and objective. Religious and scientific myths were pressed into service to justify this division. Theologians argued that Africans descend from Ham, son of Noah, saddled by his father with a curse that his offspring would be slaves. Biologists argued that blacks are less intelligent than whites and their moral sense less developed. Doctors alleged that blacks live in filth and spread diseases – in other words, they are a source of pollution. These myths struck a chord in American culture, and in Western culture generally. They continued to exert their influence long after the conditions that created slavery had disappeared. In the early nineteenth century imperial Britain outlawed slavery and stopped the Atlantic slave trade, and in the decades that followed slavery was gradually outlawed throughout the American continent. Notably, this was the first and only time in history that slaveholding societies voluntarily abolished slavery. But, even though the slaves were freed, the racist myths that justified slavery persisted. Separation of the races was maintained by racist legislation and social custom. The result was a self-reinforcing cycle of cause and effect, a vicious circle. Consider, for example, the southern United States immediately after the Civil War. In 1865 the Thirteenth Amendment to the US Constitution outlawed slavery and the Fourteenth Amendment mandated that citizenship and the equal protection of the law could not be denied on the basis of race. However, two centuries of slavery meant that most black families were far poorer and far less educated than most white families. A black person born in Alabama in 1865 thus had much less chance of getting a good education and a well-paid job than did his white neighbours. His children, born in the 1880S and 1890s, started life with the same disadvantage – they, too, were born to an uneducated, poor family. But economic disadvantage was not the whole story. Alabama was also home to many poor whites who lacked the opportunities available to their better-off racial brothers and sisters. In addition, the Industrial Revolution and the waves of immigration made the United States an extremely fluid society, where rags could quickly turn into riches. If money was all that mattered, the sharp divide between the races should soon have blurred, not least through intermarriage. But that did not happen. By 1865 whites, as well as many blacks, took it to be a simple matter of fact that blacks were less intelligent, more violent and sexually dissolute, lazier and less concerned about personal cleanliness than whites. They were thus the agents of violence, theft, rape and disease – in other words, pollution. If a black Alabaman in 1895 miraculously managed to get a good education and then applied for a respectable job such as a bank teller, his odds of being accepted were far worse than those of an equally qualified white candidate. The stigma that labelled blacks as, by nature, unreliable, lazy and less intelligent conspired against him. You might think that people would gradually understand that these stigmas were myth rather than fact and that blacks would be able, over time, to prove themselves just as competent, law-abiding and clean as whites. In fact, the opposite happened – these prejudices became more and more entrenched as time went by. Since all the best jobs were held by whites, it became easier to believe that blacks really are inferior. ‘Look,’ said the average white citizen, ‘blacks have been free for generations, yet there are almost no black professors, lawyers, doctors or even bank tellers. Isn’t that proof that blacks are simply less intelligent and hard-working?’ Trapped in this vicious circle, blacks were not hired for whitecollar jobs because they were deemed unintelligent, and the proof of their inferiority was the paucity of blacks in white-collar jobs. The vicious circle did not stop there. As anti-black stigmas grew stronger, they were translated into a system of ‘Jim Crow’ laws and norms that were meant to safeguard the racial order. Blacks were forbidden to vote in elections, to study in white schools, to buy in white stores, to eat in white restaurants, to sleep in white hotels. The justification for all of this was that blacks were foul, slothful and vicious, so whites had to be protected from them. Whites did not want to sleep in the same hotel as blacks or to eat in the same restaurant, for fear of diseases. They did not want their children learning in the same school as black children, for fear of brutality and bad influences. They did not want blacks voting in elections, since blacks were ignorant and immoral. These fears were substantiated by scientific studies that ‘proved’ that blacks were indeed less educated, that various diseases were more common among them, and that their crime rate was far higher (the studies ignored the fact that these ‘facts’ resulted from discrimination against blacks). By the mid-twentieth century, segregation in the former Confederate states was probably worse than in the late nineteenth century. Clennon King, a black student who applied to the University of Mississippi in 1958, was forcefully committed to a mental asylum. The presiding judge ruled that a black person must surely be insane to think that he could be admitted to the University of Mississippi. The vicious circle: a chance historical situation is translated into a rigid social system. Nothing was as revolting to American southerners (and many northerners) as sexual relations and marriage between black men and white women. Sex between the races became the greatest taboo and any violation, or suspected violation, was viewed as deserving immediate and summary punishment in the form of lynching. The Ku Klux Klan, a white supremacist secret society, perpetrated many such killings. They could have taught the Hindu Brahmins a thing or two about purity laws. With time, the racism spread to more and more cultural arenas. American aesthetic culture was built around white standards of beauty. The physical attributes of the white race – for example light skin, fair and straight hair, a small upturned nose – came to be identified as beautiful. Typical black features – dark skin, dark and bushy hair, a flattened nose – were deemed ugly. These preconceptions ingrained the imagined hierarchy at an even deeper level of human consciousness. Such vicious circles can go on for centuries and even millennia, perpetuating an imagined hierarchy that sprang from a chance historical occurrence. Unjust discrimination often gets worse, not better, with time. Money comes to money, and poverty to poverty. Education comes to education, and ignorance to ignorance. Those once victimised by history are likely to be victimised yet again. And those whom history has privileged are more likely to be privileged again. Most sociopolitical hierarchies lack a logical or biological basis – they are nothing but the perpetuation of chance events supported by myths. That is one good reason to study history. If the division into blacks and whites or Brahmins and Shudras was grounded in biological realities – that is, if Brahmins really had better brains than Shudras – biology would be sufficient for understanding human society. Since the biological distinctions between different groups of Homo sapiens are, in fact, negligible, biology can’t explain the intricacies of Indian society or American racial dynamics. We can only understand those phenomena by studying the events, circumstances, and power relations that transformed figments of imagination into cruel – and very real – social structures.

#### Pessimism overdetermines human actions within a changeable, human system, and conflates an antiblack world with the antiblack world---they rely on predictions that don’t hold water and misread failure---political commitments are key

Gordon 17

(Lewis R Gordon is a Professor of Philosophy and Africana Studies at the University of Connecticut, “Thoughts on Afropessimism”, December 2017, Contemporary Political Theory, pg: 1-9)

“Afropessimism” came out of “Afro-pessimism.” The elimination of the hyphen is an important development, since it dispels ambiguity and in effect announces a specific mode of thought. Should the hyphen remain, the ambiguity would be between pessimistic people of African descent and theoretical pessimism. The conjoined, theoretical term is what proponents often have in mind in their diagnosis of what I shall call ‘‘the black condition.’’ The appeal to a black condition is peculiarly existential. Existentialists reject notions of human ‘‘nature’’ on the grounds that human beings live in worlds they also construct; they produce their so-called essence. That does not mean, however, human beings lack anchorage. Everyone has to start from somewhere. Existentialists call that somewhere a condition or conditions for these reasons, and the world human beings produce or through which we live is sometimes called ‘‘human reality.’’ Critics of existentialism often reject its human formulation. Heidegger, for instance, in his ‘‘Letter on Humanism,’’ lambasted Sartre for supposedly in effect subordinating Being to a philosophical anthropology with dangers of anthropocentrism (Heidegger, 1971). Yet a philosophical understanding of culture raises the problem of the conditions through which philosophical reflections could emerge as meaningful. Although a human activity, a more radical understanding of culture raises the question of the human being as the producer of an open reality. If the human being is in the making, then ‘‘human reality’’ is never complete and is more the relations in which such thought takes place than a claim about the thought. The etymology of existence already points to these elements. From the Latin ex sistere, ‘‘to stand out,’’ it also means to appear; against invisibility in the stream of effects through which the human world appears, much appears through the creative and at times alchemic force of human thought and deed. Quarrels with and against existential thought are many. In more recent times, they’ve emerged primarily from Marxists, structuralists, and poststructuralists, even though there were, and continue to be, many existential Marxists and even existentialists with structuralist and poststructuralist leanings. I begin with this tale of philosophical abstraction to contextualize Afropessimism. Its main exemplars, such as Jared Sexton and Frank Wilderson III, emerged from academic literary theory, an area dominated by poststructuralism even in many cases that avow ‘‘Marxism.’’ Sexton (2010) and Wilderson (2007) divert from a reductive poststructuralism, however, through examining important existential moves inaugurated, as Daniel McNeil (2011, 2012) observed, by Fanon and his intellectual heirs. The critical question that Afropessimism addresses in this fusion is the viability of posed strategies of Black liberation. (I’m using the capital ‘‘B’’ here to point not only to the racial designation ‘‘black’’ but also to the nationalist one ‘‘Black.’’ Afropessimists often mean both, since blacks and Blacks have a central and centered role in their thought.) The world that produced blacks and in consequence Blacks is, for Afropessimists, a crushing, historical one whose Manichaean divide is sustained contraries best kept segregated. Worse, any effort of mediation leads to confirmed black subordination. Overcoming this requires purging the world of antiblackness. Where cleansing the world is unachievable, an alternative is to disarm the force of antiblack racism. Where whites lack power over blacks, they lose relevance – at least politically and at levels of cultural and racial capital or hegemony. Wilderson (2008), for instance, explores my concept of ‘‘an antiblack world’’ to build similar arguments. Sexton (2011) makes similar moves in his discussions of ‘‘social death.’’ As this forum doesn’t afford space for a long critique, I’ll offer several, non-exhaustive criticisms. The first is that ‘‘an antiblack world’’ is not identical with ‘‘the world is antiblack.’’ My argument is that such a world is an antiblack racist project. It is not the historical achievement. Its limitations emerge from a basic fact: Black people and other opponents of such a project fought, and continue to fight, as we see today in the #BlackLivesMatter movement and many others, against it. The same argument applies to the argument about social death. Such an achievement would have rendered even these reflections stillborn. The basic premises of the Afropessimistic argument are, then, locked in performative contradictions. Yet, they have rhetorical force. This is evident through the continued growth of its proponents and forums (such as this one) devoted to it. In Bad Faith and Antiblack Racism, I argued that there are forms of antiblack racism offered under the guise of love, though I was writing about whites who exoticize blacks while offering themselves as white sources of black value. Analyzed in terms of bad faith, where one lies to oneself in an attempt to flee displeasing truths for pleasing falsehoods, exoticists romanticize blacks while affirming white normativity, and thus themselves, as principals of reality. These ironic, performative contradictions are features of all forms of racism, where one group is elevated to godlike status and another is pushed below that of human despite both claiming to be human. Antiblack racism offers whites self-other relations (necessary for ethics) with each other but not so for groups forced in a ‘‘zone of nonbeing’’ below them. There is asymmetry where whites stand as others who look downward to those who are not their others or their analogues. Antiblack racism is thus not a problem of blacks being ‘‘others.’’ It’s a problem of their not-being-analogical-selves-and-not-even-being-others. Fanon, in Black Skin, White Masks (1952), reminds us that Blacks among each other live in a world of selves and others. It is in attempted relations with whites that these problems occur. Reason in such contexts has a bad habit of walking out when Blacks enter. What are Blacks to do? As reason cannot be forced, because that would be ‘‘violence,’’ they must ironically reason reasonably with forms of unreasonable reason. Contradictions loom. Racism is, given these arguments, a project of imposing non-relations as the model of dealing with people designated ‘‘black.’’ In Les Damne´ de la terre (‘‘Damned of the Earth’’), Fanon goes further and argues that colonialism is an attempt to impose a Manichean structure of contraries instead of a dialectical one of ongoing, human negotiation of contradictions. The former segregates the groups; the latter emerges from interaction. The police, he observes, are the mediator in such a situation, as their role is force/violence instead of the human, discursive one of politics and civility (Fanon, 1991). Such societies draw legitimacy from Black non-existence or invisibility. Black appearance, in other words, would be a violation of those systems. Think of the continued blight of police, extra-judicial killings of Blacks in those countries. An immediate observation of many postcolonies is that antiblack attitudes, practices, and institutions aren’t exclusively white. Black antiblack dispositions make this clear. Black antiblackness entails Black exoticism. Where this exists, Blacks simultaneously receive Black love alongside Black rejection of agency. Many problems follow. The absence of agency bars maturation, which would reinforce the racial logic of Blacks as in effect wards of whites. Without agency, ethics, liberation, maturation, politics, and responsibility could not be possible. Afropessimism faces the problem of a hidden premise of white agency versus Black incapacity. Proponents of Afropessimism would no doubt respond that the theory itself is a form of agency reminiscent of Fanon’s famous remark that though whites created le Ne`gre it was les Ne`gres who created Ne´gritude. Whites clearly did not create Afropessimism, which Black liberationists should celebrate. We should avoid the fallacy, however, of confusing source with outcome. History is not short of bad ideas from good people. If intrinsically good, however, each person of African descent would become ethically and epistemologically a switching of the Manichean contraries, which means only changing players instead of the game. We come, then, to the crux of the matter. If the goal of Afropessimism is Afropessimism, its achievement would be attitudinal and, in the language of old, stoic – in short, a symptom of antiblack society. At this point, there are several observations that follow. The first is a diagnosis of the implications of Afropessimism as symptom. The second examines the epistemological implications of Afropessimism. The third is whether a disposition counts as a political act and, if so, is it sufficient for its avowed aims. There are more, but for the sake of brevity, I’ll simply focus on these. An ironic dimension of pessimism is that it is the other side of optimism. Oddly enough, both are connected to nihilism, which is, as Nietzsche (1968) showed, a decline of values during periods of social decay. It emerges when people no longer want to be responsible for their actions. Optimists expect intervention from beyond. Pessimists declare relief is not forthcoming. Neither takes responsibility for what is valued. The valuing, however, is what leads to the second, epistemic point. The presumption that what is at stake is what can be known to determine what can be done is the problem. If such knowledge were possible, the debate would be about who is reading the evidence correctly. Such judgment would be a priori – that is, prior to events actually unfolding. The future, unlike transcendental conditions such as language, signs, and reality, is, however, ex post facto: It is yet to come. Facing the future, the question isn’t what will be or how do we know what will be but instead the realization that whatever is done will be that on which the future will depend. Rejecting optimism and pessimism, there is a [an] supervening alternative: political commitment. The appeal to political commitment is not only in stream with what French existentialists call l’intellectuel engage´ (committed intellectual) but also reaches back through the history and existential situation of enslaved, racialized ancestors. Many were, in truth, an existential paradox: commitment to action without guarantees. The slave revolts, micro and macro acts of resistance, escapes, and returns help others do the same; the cultivated instability of plantations and other forms of enslavement, and countless other actions, were waged against a gauntlet of forces designed to eliminate any hope of success. The claim of colonialists and enslavers was that the future belonged to them, not to the enslaved and the indigenous. A result of more than 500 years of conquest and 300 years of enslavement was also a (white) rewriting of history in which African and First Nations’ agency was, at least at the level of scholarship, nearly erased. Yet there was resistance even in that realm, as Africana and First Nation intellectual history and scholarship attest. Such actions set the course for different kinds of struggle today. Such reflections occasion meditations on the concept of failure. Afropessimism, the existential critique suggests, suffers from a failure to understand failure. Consider Fanon’s notion of constructive failure, where what doesn’t initially work transforms conditions for something new to emerge. To understand this argument, one must rethink the philosophical anthropology at the heart of a specific line of Euromodern thought on what it means to be human. Atomistic and individual substance-based, this model, articulated by Hobbes, Locke, and many others, is of a non-relational being that thinks, acts, and moves along a course in which continued movement depends on not colliding with others. Under that model, the human being is a thing that enters a system that facilitates or obstructs its movement. An alternative model, shared by many groups across southern Africa, is a relational version of the human being as part of a larger system of meaning. Actions, from that perspective, are not about whether ‘‘I’’ succeed but instead about ‘‘our’’ story across time. As relational, it means that each human being is a constant negotiation of ongoing efforts to build relationships with others, which means no one actually enters a situation without establishing new situations of action and meaning. In

stead of entering a game, their participation requires a different kind of project – especially where the ‘‘game’’ was premised on their exclusion. Thus, where the system or game repels initial participation, such repulsion is a shift in the grammar of how the system functions, especially its dependence on obsequious subjects. Shifted energy affords emergence of alternatives. Kinds cannot be known before the actions that birthed them. Abstract as this sounds, it has much historical support. Evelyn Simien (2016), in her insightful political study Historic Firsts, examines the new set of relations established by Shirley Chisholm’s and Jesse Jackson’s presidential campaigns. There could be no Barack Obama without such important predecessors affecting the demographics of voter participation. Simien intentionally focused on the most mainstream example of political life to illustrate this point. Although no exemplar of radicalism, Obama’s ‘‘success’’ emerged from Chisholm and Jackson’s (and many others’) so-called ‘‘failure.’’ Beyond presidential electoral politics, there are numerous examples of how prior, radical so-called ‘‘failures’’ transformed relationships that facilitated other kinds of outcome. The trail goes back to the Haitian Revolution and back to every act of resistance from Nat Turner’s Rebellion in the USA, Sharpe’s in Jamaica, or Tula’s in Curacao and so many other efforts for social transformation to come.

#### Perm—*Amex* is the apex of the consumer welfare fallacy—rejecting it is a precondition for structural critique

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(John, “The Output–Welfare Fallacy,” 107 Iowa L. Rev. (forthcoming))

In practice, the Output–Welfare Fallacy would yield bizarre outcomes in some cases, systematically biased outcomes in others, and is nonsensical and unworkable in still others. If the Fallacy is taken seriously, the very same conduct would often be both the supreme good and the supreme evil of antitrust—a modern antitrust paradox. Where it has been deployed, it has caused massive societal harm. That said, the Output–Welfare Fallacy fails to describe substantial portions of doctrine and practice. As the following discussion explains, it is fortunate that the Fallacy largely fails in this latter regard, given the havoc it can wreak when it is actually deployed. Moreover, this disconnect from reality will make it easier to excise outputism from the antitrust enterprise. It is to that task that we now turn.

IV. ESCAPING THE NEW ANTITRUST PARADOX

Recognizing the Output–Welfare Fallacy as such offers immense payoffs. First, harmful outputist decisions—most pressingly the Supreme Court’s 2018 *AmEx* opinion—warrant swift overruling, whether judicially or via legislation. Even if AmEx is not explicitly overruled, it should be relegated to the dustbin of history alongside other similarly low-quality opinions. Second, evolving beyond outputism allows a much-needed correction of antitrust law’s substantive burdens of proof. Analysis of market power, anticompetitive effects, and procompetitive justifications can all be improved considerably by moving beyond the narrow confines of outputism.

A. Burying AmEx: Bad Law, Worse Economics

The Output–Welfare Fallacy reached its apex in the Supreme Court’s recent AmEx opinion. As the following discussion explains, AmEx warrants immediate reversal, whether by the Court itself or via legislation.288 At the very least, it can safely be relegated to the dustbin of history, as often happens to especially shoddy antitrust opinions.289

AmEx began as a suit by the United States against the three largest credit-card companies, Visa, AmEx, and MasterCard. The Government sought to enjoin “no-steering” rules contractually imposed by these networks on all card-accepting merchants.290 The rules forbid merchants from presenting any network in a differentiated way to customers. Merchants cannot offer discounts for using a particular brand of card, tell customers “We prefer” a certain card, or inform customers of the costs associated with each brand.291 Visa and MasterCard quickly settled, but AmEx—which generally charged the highest merchant fees—fought to keep its rules in place.292

At trial, the Antitrust Division proved that AmEx’s no-steering rules had stifled competition and increased card-acceptance prices across all networks.293 When Discover tried to compete by lowering prices to merchants, for example, AmEx’s rules prevented those merchants from encouraging their customers to pay with Discover’s less-expensive cards.294 Discover predictably abandoned its efforts to compete and instead raised card-acceptance fees—which it was able to do with “impunity,” again due to AmEx’s restraints.295 Facing higher across-the-board acceptance costs, merchants pass along some of those costs to consumers in the form of higher across-the-board retail prices.

296 In other words, AmEx’s restraints increase the cost of nearly every good and service sold to consumers in the United States.297

Despite the abundant evidence of harm in the trial record, a divided Court declared that the Government had failed to carry its burden because it had not proven that AmEx’s conduct reduced output. Justice Thomas, writing for the majority, began by quoting the leading treatise for the proposition that “[m]arket power is the ability to raise price profitably by restricting output.”298 (Thomas added the emphasis.) The majority opinion begrudgingly admitted that AmEx’s restraints had caused higher prices.299 Nonetheless, credit-card usage—i.e., output—had increased over the relevant time period.300 As a result, the Court held for the defendant. Justice Thomas’s opinion also endorsed “consumer welfare” as antitrust’s goal.301 Thus, for the first time in a Supreme Court decision, the conflation of output with welfare—the Output–Welfare Fallacy—was on clear display.

Not only did AmEx embrace the Output–Welfare Fallacy, it did so in exactly the type of case where output and welfare can and will diverge. The facts implicated at least three of the categories discussed above: the challenged restraints (1) maintained an information asymmetry; (2) externalized costs; and (3) caused simultaneous and conflicting output effects and simultaneous and conflicting welfare effects, i.e., the Push–Pull Effect.

First, AmEx’s merchant restraints maintained an information asymmetry.302 Credit-card networks and merchants know how much it costs to accept credit cards. But AmEx’s contractual restrictions prevent merchants from communicating that information to their customers.

303 Such restraints can increase output, yet reduce welfare.304 By keeping cardholders in the dark about acceptance costs, AmEx’s restraints propped up demand for its products. Indeed, AmEx conceded that if its cardholders were given accurate information about acceptance costs, at least some of them would decrease their usage of AmEx cards or switch to a different network.305 Some would likely switch to less costly forms of payment, like debit cards. Per standard assumptions regarding revealed preferences, that output reduction would have increased, not decreased, consumer welfare. Thus, the lack of a demonstrable output reduction did not undercut the plaintiffs’ case—if anything, the fact that credit-card usage increased during the relevant time period buttressed the theory of harm.

Second, AmEx’s challenged restraints allowed both it and its cardholders to externalize costs.306 This can harm consumers writ large; it can also harm consumers of the relevant product.307 By stifling competition among card networks, the restraints increase costs for merchants. Yet AmEx’s restraints prevent merchants from passing the additional costs on to the cardholders who trigger them. As a result, merchants are forced to raise prices to all of their customers, including those who pay with cash, checks, money orders, and food stamps.308 AmEx’s merchant restraints allow it to stimulate demand for its product by externalizing the costs of credit-card rewards onto other, more vulnerable segments of society.

Moreover, AmEx’s restraints effectively turn credit cards into a “combatant good.”309 Faced with the choice between paying higher retail prices without receiving any rewards and paying higher prices while receiving some rewards, each individual consumer is incentivized to “defect” and begin using credit cards. But AmEx does not pass all of its supracompetitive profits to cardholders as rewards. Thus, the rewards paid out will not necessarily fully offset the retail price increases—even for cardholders. Especially in sectors where fewer non-cardholders are available to subsidize rewards points, even cardholders can suffer.310 Again, the lack of a demonstrable output reduction in AmEx did not signal that the restraints were procompetitive—to the contrary, it was perfectly consistent with the theory of harm.

Third, the challenged restraints are of a type that will simultaneously push output higher and lower—the Push/Pull Effect. Credit-card networks offer different services to merchants and cardholders, such that the two are not economic substitutes. A merchant faced with higher interchange fees cannot “substitute” to carrying a credit card, nor can a cardholder paying high interest rates “substitute” to accepting credit-card payments.311 AmEx’s restraints increased the price of card-acceptance services for merchants.312 This, in turn, put downward pressure on output of those services. Thus, for example, a massive program of merchant price increases caused some merchants to stop accepting AmEx cards.313 Yet the restraints also allowed AmEx to pass some—though not all—of its supracompetitive profits on to its cardholders as rewards points. By increasing the incentive to pay with credit cards, the restraints put upward pressure on output of cardholder services.314

Nonetheless, Justice Thomas’s opinion required the plaintiffs to prove that AmEx’s restraints caused a net “output reduction.” But the Push/Pull Effect meant that overall output effects were necessarily indeterminate as to the core question of harm. And, given that the challenged restraints maintained an information asymmetry and facilitated a negative externality, the fact that credit-card usage had been increasing actually supported—or was at least consistent with—the plaintiffs’ theory of harm.

*AmEx* is a shoddy opinion. Unless and until it is overruled, it will continue to have harmful consequences for the real-world individuals who bear the brunt of the challenged conduct. In the interim, the antitrust enterprise can safely disregard it as bad law, based on bad economics. Antitrust, more so than most other areas of law, is willing to treat especially bad judicial opinions as lacking any force.315 AmEx should meet a similar fate.

This dark cloud may carry a silver lining. AmEx may continue to be useful as a *negative* illustration. The majority opinion’s double mistake makes it a perfect illustration of why the Output–Welfare Fallacy should be rejected. Not only did Thomas assume that output is the exclusive criterion for analyzing welfare effects, he did so in a case that actually exhibited not just one, but three separate factors that can cause output to diverge from welfare. From the perspective of those who endorse outputism, Thomas and his brethren could hardly have picked a worse case in which to formally embrace it. The du Pont case of an earlier era was flawed, but it is still used in classrooms to illustrate its own mistake—the (in)famous “Cellophane Fallacy.”316 AmEx can similarly be used as a teaching tool to exemplify its own error—the “AmEx Fallacy.”

#### Turn - The aff’s orientation towards the law matters—antitrust can be leveraged as a tool of structural *anti*racism, but failure to combat conservative right wing legal thought produces the opposite effect

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(John, “Racist Antitrust, Antiracist Antitrust,” The Antitrust Bulletin, Sagepub)

But a change in goals does not always yield an immediate change in implementation-put another way, choice of an end does not necessarily dictate the choice of means. The pair of cases discussed below frame the 1980s, a decade in which antitrust's end was fairly static, yet its means were still in flux. The first, Knights of the Ku Klux Klan ("KKK"), stands as one of the clearest, most admirable examples of antiracist antitrust in U.S. history. The second, Superior Court Trial Lawyers Association ("SCTLA"), is its opposite: the Sherman Act being deployed against an attempt to ensure adequate legal representation for indigent defendants, most of them being people of color.

Taken together, these two cases represent divergent paths. Which has the contemporary antitrust enterprise chosen to follow? The Supreme Court's most recent substantive decision, Ohio v. American Express ("AmEx"), suggests both room for hope and reason for concern. With the latter in mind, the essay concludes by offering four recommendations for how antitrust can retake the high road. By avoiding overemphasis on categorical labels or particular types of effects, and by recentering a focus on power, the antitrust enterprise can play a vital part in addressing-and avoid exacerbating-structural inequality.

A. Knights of the KKK: Antiracist Antitrust

After the U.S. military exited Vietnam in 1975, millions of Vietnamese, Laotian, and Cambodian people fled the region. 12 Rapid congressional action facilitated emigration to the United States for many of these displaced persons. 13 Many settled in coastal Texas, a designated resettlement site that offered a familiar opportunity for sustenance: fishing and shrimping. 14 Unsurprisingly, the refugees' integration into the local economy was met with hostility on the part of incumbents. One antiimmigrant tactic was political: at the behest of the Texas Shrimp Association, the state legislature passed a bill in early 1981 that imposed a 2-year ban on issuing new shrimping licenses. 15

But in the towns and cities along the Gulf coast, nativist locals were unsatisfied with what they perceived to be a half-measure by the state legislature. Boat merchants began charging premium prices to Vietnamese immigrants. 16 Bait shops refused to sell to them. 17 Rumors flew, with some locals suggesting the new shrimpers were being subsidized by the U.S. Government. 18 Incumbents suggested the new entrants were overfishing and underpricing. 19 A shaky cease-fire agreement was drawn up but quickly fell apart after the Federal Trade Commission warned that it violated the Sherman Act. 20 In January 1981, one of the nativist locals met with Louis Beam, a Grand Dragon of the Knights of the KKK, 21 to present the concerns of"a group of American fishermen." 22 The Klan moved swiftly. At a rally held on Valentine's Day in Santa Fe, Beam warned the crowd that it "may become necessary to take laws into our own hands." 23 The Grand Dragon went on to invite attendees to train at Klanorganized "military camps," inveighing that it would be necessary to "fight, fight, fight" and see "blood, blood, blood" for the salvation of the country. 24 Beam vowed to give the newcomers "a lot better fight here than they got from the Viet Cong. "25 The crowd watched a demonstration of how to bum a boat and later a cross.2 6 On a clear day in March, a shrimp boat owned by one of the long-term residents was seen carrying men garbed in the traditional white robes and pointed hats of the KKK. Most were visibly armed, and the boat had been fitted with-and was firing-a cannon. 27 Locals reported receiving threats that those who did business with Vietnamese immigrants would be viewed as "enemies." 28 A woman who had allowed an immigrant-owned fishing boat to use her docks was issued a warning: "You have been paid a 'friendly visit' do you want the next one to be a 'real one. "' 29 Klansmen burned crosses in the yards of immigrant shrimpers, 30 set their fishing boats ablaze, and firebombed a home. 31

Meanwhile, in Alabama, the cofounders of the Southern Poverty Law Center had been closely monitoring the Klan's activities. 32 In April 1981, Morris Dees and Joseph Levin filed a wide-ranging lawsuit in federal court, seeking to enjoin the Klan's reign of terror. Judge Gabrielle l(jrk McDonald, the first African American judge in the state of Texas, was assigned to hear the case. 33 The defendants called for her disqualification, referring to her supposed prejudice against the Klan. Beam publicly called her a racial slur. 34 Throughout the entire proceedings, Judge McDonald and her family received death threats and one-way tickets to Africa. 35

Among the fourteen counts pleaded were violations of Sherman Act   1 and   2. 36 The   1 claim formed the core of the antitrust case: plaintiffs alleged that the defendants-the Knights of the KKK, Beam, various anonymous members of the Klan, the "American Fishermen's Coalition," and several individual fishermen-had conspired "to force the Vietnamese fishermen class to terminate or at the very least curtail their commercial fishing business in the Galveston Bay area" and to try to "intimidate them into selling off sixty percent of their shrimping boats." 37 The conspiracy's goal, per the complaint, was to "eliminate or reduce competition" for incumbent fisherman in the area. 38 After granting class certification, Judge McDonald issued a preliminary injunction ordering the defendants to cease their campaign of violence, threats, and intimidation. The imbalance of societal and material power was subtly-and effectively---emphasized throughout Judge McDonald's opinion. Facts were presented without embellishment; they spoke for themselves. The reader learns, for example, of a Vietnamese shrimp seller who testified that "six weeks ago two American men drove up in a truck and pointed a gun at her" and that "her husband will not take out their shrimp boat on May 15, 1981 because she is afraid that he will be killed." 39

The antitrust analysis is notable for its clarity and brevity-indeed, to the contemporary observer, it is perhaps most remarkable for what it does *not* say. Although Judge McDonald began by stating that "the anti-trust laws" forbid a "lessening of competitive conditions in the relevant market," she went on to explain that plaintiffs could prove such a "lessening" by demonstrating an actual marketplace effect. 40 No formal market definition was required. Nor did the opinion engage in a protracted attempt to fit the defendants' conduct into a particular analytical category before deciding on the appropriate legal treatrnent. 41 Again, proof of actual harmful effects was sufficient, at least to receive a preliminary injunction. In August, the court made the injunction permanent and ordered it to be posted publicly in the Gulf Coast area. 42

B. FTC v. SCTL.A

SCTLA was another antitrust lawsuit targeting coordinated activity, but the similarities began-and ended-there. While Knights of the KKK was championed by civil-rights attorneys, SCTLA was the brainchild of a hard-right-wing economist. 43 In fact, the latter was filed against a group of publicinterest attorneys. Knights of the KKK exemplifies antitrust being used to counter coordinated power on behalf of displaced persons enduring personal and structural racism. SCTLA, on the other hand, exemplifies an antitrust enterprise oblivious to power imbalances and structural racism. James C. Miller III, President Reagan's first appointee to chair the Federal Trade Commission, was the first nonlawyer ever to hold that position. 44 Miller's doctoral studies were completed at the University of Virginia's economics department under James Buchanan, dubbed by some "the Architect of the Radical Right." 45 Buchanan had a controversial track record on racial issues-his academic center, formed amid Virginia's "Massive Resistance" to federally mandated school desegregation in the 1950s, was pitched as a means for preserving the state's "social order" and stymieing the "increasing role of government in economic and social life." 46

Buchanan was, according to Miller, one of his chief intellectual influences in the field of economics. 4 7 One of Miller's first actions as FTC chairman was to request a budget cut and a 10% reduction in personnel. 48 Unsurprisingly, the Agency's enforcement activity also plummeted. In just two years, antitrust actions dropped by nearly one-third, and consumer protection actions by more than onehalf. 49 But one particular type of litigation bucked the downward trend. Miller spearheaded an enforcement initiative aimed at professional associations-and he "particularly liked the idea of bringing some cases against lawyers." 50 The District of Columbia in the 1970s was a majority-minority city; over 70% of residents identified as Black. 51 More than 100,000 D.C. residents fell below the poverty line, with poverty rates exceeding 30% in some census tracts. 52 In a 1963 decision, the U.S. Supreme Court had held indigent defendants in criminal cases are constitutionally entitled to adequate representation. 53 D.C., like many jurisdictions, complied with this mandate via a dual system comprising a government-funded public defender's office and court-appointed private lawyers. 54 The District's public defenders handled just 8%-10% of indigent defendants, leaving court-appointed lawyers to take up the considerable slack, a situation "unique among major urban jurisdictions." 55 Despite the pressing need for quality representation-and despite runaway inflation rates throughout much of the 1970s-statutory rates for court-appointed work in the District stayed flat for more than sixteen years. 56 The D.C. Bar and the Judicial Conference of the D.C. Circuit released two reports finding that low compensation rates forced existing courtappointed lawyers to take on too many cases and dissuaded other attorneys from taking on any cases. 57 As the first report explained, "[A] system which is heavily weighed against the indigent defendant in terms of the compensation that [their] attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do." 58 Fed up with the situation, a group of court-appointed lawyers formed the SCTLA as a means of exerting political pressure. After initially casting about for the right tactical strategy, the Association was inspired to launch a strike by a suggestion from the dean of Howard University Law School: "[Y]ou will have to raise hell about this to attract somebody's attention." 59 The D.C. Governmentostensibly the intended "victim" of the planned stoppage-was supportive. At a meeting with Association lawyers, Mayor Marion Barry tacitly encouraged the strike, as he was "very sympathetic" to the cause. 60 And, once launched, the strike yielded rapid results: the City Council voted to increase

funding, thereby improving the "quantity and quality of representation received by ... indigent

clients. "61

Meanwhile, the Miller-helmed FTC had also been busy, opening an investigation into the Trial Lawyers Association before the strike had even begun. 62 On December 16, months after the strike had concluded, the Commission proceeded with a complaint against the lawyers' association and its four individual leaders. No practicable remedy was sought. 63 The local government had already voted to increase funding and, despite being the ostensible "victim," had neither asked the FTC to intervene nor sought to enjoin the boycotters under its own local antitrust authority. 64 Rather strikingly, FTC staff internally recognized that the Association's lawyers could not possibly have wielded market power. The Superior Court had the legal authority to order any member of the D.C. Bar to represent indigent defendants. 65 In fact, it had done just that during a prior strike in 1974. 66 Thus, the target of the strike could have simply ordered the attorneys to resume representation, ordered nonstriking attorneys to take on indigent clients, or both. The "victim" wielded all of the power. 67 Nonetheless, the FTC pursued the case all the way to the U.S. Supreme Court, which roundly censured the strike. (Justice Marshall, the only Black member of the Court, joined Justice Brennan in dissenting from much of the majority opinion. 68 ) The majority's reasoning was formalistic: categorize, then condemn. To the majority, the strike was a "price-fixing agreement, a 'naked restraint' on price and output." 69 Once categorized as such, the strike was deemed, ipso facto, illegal per se. 70 The fact that the boycotters clearly wielded no market power was irrelevant. The fact that the supposed "victim" had actively encouraged the strike was irrelevant. The fact that the strike benefited indigent defendants, many of whom were people of color who had endured decades of structural racism, was irrelevant. This was not antitrust's finest hour.

C. Which Path Have We Taken? The Promise and Pitfalls of Ohio v. Arn Ex These bookends of the 1980s-Knights of the KKK and Superior Court Trial La Jlers-suggest divergent approaches to the question of how to administer the antitrust laws. Which path has the contemporary antitrust enterprise pursued? The highest profile case of the past decade, Ohio v. AmEx, suggests both room for hope and reason for concern. AmEx began as a suit by the U.S. Department of Justice Antitrust Division against the three largest creditcard companies, Visa, AmEx, and MasterCard. 71 The suit sought to enjoin "no-steering" rules contractually imposed by networks on all card-accepting merchants. 72 In general, the challenged rules forbid merchants from presenting any particular credit network in a unique or differentiated way to their customers. Thus, for example, merchants cannot offer discounts for using a particular brand of card, tell customers "We prefer" a certain card, or inform customers of the costs associated with each brand. 73 Visa and MasterCard quickly settled, but AmEx-which charged the highest merchant fees-fought to keep its rules in place. 74 At trial, the Antitrust Division proved that AmEx's no-steering rules had stifled competition and increased card acceptance prices across all networks. 75 Merchants, in turn, passed along whatever costs they could to their customers via across-the-board retail price increases. 76 To its credit, the Division brought to the trial court's attention one of the most unusual-and most pernicious-effects of AmEx's rules. Because merchants cannot treat higher-cost cards differently, they must raise retail prices to all of their customers, including those who pay with cash, checks, money orders, and food stamps. 77 Such customers tend to be far less wealthy than credit-cardholders, especially AmEx cardholders. 78 AmEx passes some, though not all, of its supracompetitive merchant fees through to its own cardholders in the form of cardmember rewards. In other words, AmEx' s rules force the least wealthy members of society to fund lavish travel points and perks for the most affluent. 79 In a careful, well-reasoned decision, the trial court held that AmEx's rules were unreasonable restraints of trade. Judge Garaufis's opinion resisted easy formalizing and conclusory reasoning. The agreements at issue were between trading partners, not direct competitors. Yet, as Garaufis explained, AmEx 's rules did not "fit neatly into the standard taxonomy" of vertical versus horizontal restraints. 80 The challenged agreements themselves may have been "vertical," but the effects on competition were horizontal. 81 AmEx' s rules prevented its rivals from attracting additional business by offering lower prices or higher quality, as Discover learned in the 1990s. 82 As to effects, the court did not insist on a showing of any particular type of harm. Instead, it found that AmEx's rules cause a wide variety of harms, including higher card acceptance costs for merchants, higher retail prices for consumers, and stifled innovation. The court also found the regressive forcedsubsidization effect to be anticompetitive: [A] lower-income shopper who pays for his or her groceries with cash or through Electronic Benefit Transfer ... is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base in the form of higher retail prices. The court views this extemality as another anticompetitive effect of Defendants' [rules]. 83 This particular effect technically occurred outside the relevant market ("general-purpose credit and charge card network services"). Again, however, the court refused to allow an artificial constructmarket definition-to distract from actual analysis of real-world effects.

The AmEx litigation thus yielded two bright spots: the Antitrust Division's decision to bring the case and Judge Garaufis's sophisticated decision. Both closely attended to structural power and inequity. Like Knights of the KKK, these were examples of antitrust directly confronting a power imbalance and seeking to redress its harmful effects.

But that success was short-lived. On appeal, the Second Circuit issued a sloppily reasoned decision for the defendant. (During oral arguments, one of the judges implied that the relevant market must also include cardholders because he personally received frequent credit card applications in the mail. 84 ) A disappointed Antitrust Division decided not to pursue the case further. A group of states led by Ohio, however, proceeded to appeal to the U.S. Supreme Court.

The majority opinion in Ohio v. AmEx carries all of the hallmarks of bad antitrust analysis, and poor-quality appellate review more generally. 85 It placed enormous weight on the "vertical vs. horizontal" dichotomy without appearing to recognize the horizontal nature of the restraints' effects. 86 Instead of analyzing the factual record before it, the majority simply ignored-and sometimes outright changed-inconvenient truths. 87 Instead of evaluating the relevant effects, the majority insisted on proof of one particular type of effect: an output reduction. 88 As to the regressive forced-subsidization effect-which was, again, part of the factual record-the majority opinion was silent. Instead, the majority conjured up a novel effect, positing without support the idea that AmEx's restraints were actually beneficial for "low-income customers. " 89

Today, the widely felt and regressive effects of AmEx's rules continue unabated. Given the racialized nature of wealth and income inequality in the United States, 90 those effects contribute to historically rooted structural inequity. A case that had begun so promisingly ended in ignominy-after something of a zenith at the trial-court level, AmEx now stands as a nadir of modem antitrust.

D. A Path Forward

As bookends for the turbulent 1980s, Knights of the KKK and SCTLA represent two paths for antitrust. AmEx offers a contemporary view of what traveling each of those paths can look like. The antitrust enterprise might take a flexible approach, cognizant of real-world power structures, always seeking to protect the relatively powerless against the more powerful. On the other hand, antitrust might ossify, placing more weight on assigning categorical labels than on assessing actual effects and narrowing the analytical lens until concentrated power-antitrust law's raison d'etre 91-becomes largely irrelevant.

Cases like SCTLA and *AmEx*, though troubling, may nonetheless offer useful insights. Set upon the right path, antitrust can serve as a useful tool in moving toward a more just society. Toward that end, four normative suggestions follow.

First, do not place undue weight on the "horizontal versus vertical" distinction. Some horizontal restraints are harmful, but not every horizontal agreement deserves hasty condemnation. The SCTLA majority allowed a label ("horizontal") to obscure a lack of power. Similarly, Justice Thomas's defendant-friendly reasoning in AmEx hinged in part on his statement that "vertical restraints are different" from horizontal ones. 92 But such broad pronouncements elide the fact that vertical restraints-like the ones at issue in AmEx-can cause effects identical to those caused by harmful horizontal restraints. 93

Second, do not place undue weight on categorizing conduct as "price-fixing," "a restraint on output," and the like. A classification system can offer value. But, like any other tool, it can be pushed far beyond its usefulness. Labeling the lawyers' strike "price-fixing" ( or, alternatively, a "naked restraint on output") was essentially the beginning and end of the SCTLA Court's analysis. Yet not all price-setting agreements are equally likely to cause harm, as most of those very same Justices had previously recognized. 94 A strike functions by temporarily disrupting the internal workings of a specific buyer of labor, 95 whereas the archetypical price-fixing cartel agreement functions by indefinitely controlling the market for a product. 96 From an economic perspective, it makes little sense to treat the two as analytically identical. Classification systems can obscure important nuance, in addition to posing the obvious risk of misclassification. 97

Third, do not artificially narrow the analytical lens by insisting on proof of a particular type of effect. Leading treatises, 98 law-school casebooks, 99 amicus briefs, 100 and journal articles 101 suggest that all of antitrust can be boiled down to simple analysis of output effects. 102 As Bork put it, "The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental. " 103 Antitrust law's output obsession may well have played a role in the SCTLA decision-recall the majority's characterization of the strike as a "naked restraint on price and output." The AmEx majority clearly fell into this trap, insisting that the plaintiffs demonstrate an output reduction despite abundant evidence of actual anticompetitive effects. This makes little analytical sense. Output reductions can be harmful or beneficial to consumers. Conduct can simultaneously push the output of multiple products in different directions. And anticompetitive conduct can be harmful without affecting output levels at all. 104 All of this counsels against overreliance on a single type of effect.

Like most disciplines, antitrust has developed a variety of labels and heuristics. But when analytical tools begin to consume the analysis, antitrust can sight of its target. An analytical tool is just that: a tool, to be used when it is helpful and set aside when it is not. To be clear, this is not a call for the abandonment of economic methodology. It is instead a call for better economics, tailored to suit the task at hand. And what is that?

Fourth, antitrust analysis must center the overarching purpose of the law itself: countering concentrated power. 105 Amid the complexity of contemporary markets, it can be easy to lose sight of that goal. This may help to explain the SCTLA and AmEx opinions, both of which were regressive in nature. It may also help to explain the federal enforcement agencies' otherwise-puzzling decisions to weigh in against efforts by rideshare drivers-disproportionately people ofcolor 106 -to organize. 107 Through a narrow lens, collective organizing by workers can be viewed as "horizontal price-fixing" or "outputreducing," as it was in SCTLA. 108 But, stepping back for a moment, is there any reason to worry that rideshare drivers will exercise dominance over Uber and Lyft, even if they receive limited collective bargaining rights? Keeping antitrust's goal in view is appropriate not only on deontological grounds but also on utilitarian ones: It allows scarce enforcement resources to be more helpfully allocated.

Divergent paths lay open. The first leads to ossification and erroneous outcomes. 109 When antitrust analysis is overly constricted, it risks exacerbating systemic inequality and becomes prone to harming those whom the laws were meant to protect. The alternative is a more flexible, robust approach attuned to economic realities, one that allows enforcers and judges to maintain focus on furthering the law's fundamental purpose. If-but only if-the antitrust enterprise does so, it can play a vital role in helping to correct structural imbalances of power.

#### Optimism is good for your health---better stats disprove battle fatigue

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Pessimism and health So, an article by Pauline Chen, MD, in which she describes an episode from her practice, caught my attention. The patient, a diabetic, had been hospitalized for a toe infection that should have responded to a simple course of IV antibiotics. But, in this case, it did not. Instead, the patient required a series of amputations—each one higher up the foot—in an attempt to stem the infection. He started losing weight and eventually required nutritional support. Then, one day, his heart stopped. Dr. Chen wondered if he was depressed? “He’s not,” a consulting psychiatrist told her, “it’s just the way he is.” In other words, he was a pessimist by nature. These are interesting anecdotes, you might be thinking, but is there any evidence that optimism or pessimism can impact health outcomes? The scientific evidence There is real scientific evidence, accruing at an accelerating rate, that optimistic disposition leads to better health; the converse is true for pessimism. Here are but a few findings, out of dozens of articles on the subject: Optimists are twice as likely to be in ideal cardiovascular health, according to a study led by Rosalba Hernandez, a professor of social work at the University of Illinois. Further, optimistic individuals recover more quickly following cardiac-related events, such as coronary artery bypass surgery and myocardial infarction, with a more rapid return to a normal lifestyle and a better-reported quality of life. Optimism also appears to be associated with lower levels of distress, slower disease progression, and improved survival rates in patients with HIV. Numerous studies, reviewed by Smith and Mckenzie of the University of Illinois, show that subjective well-being is associated with improved longevity compared to individuals who maintain a negative disposition regarding their health, their relationships, or their prospects for the future. All these are association studies and are, therefore, subject to the dilemma of cause and effect. For instance, optimistic people are more likely to have a healthier lifestyle, including eating better diets, avoidance of drug or excessive alcohol, and exercising more. Could that be the reason for better health and longer longevity rather than their optimistic outlook? The biochemistry of optimism & pessimism Stick with me. I am going to make this simple. The direct evidence of the impact of optimism on health reaches down to the molecular level. People with optimistic attitude have lower levels of Interleukin 6 (IL6), a peptide hormone that is responsible for much of the damage caused by inflammation. Now, inflammation per se is not all bad. It protects us from infection, for instance. But it’s a two-edged sword. For example, it is the underlying mechanism of vascular plaque formation, atherosclerosis, and cardiac disease. On the other hand, certain types of lymphocytes—cells involved in the inflammatory process—protect us from cancer. Stress hormones simultaneously suppress lymphocytes and increase inflammatory mediators such as IL6 and TNF (tumor necrosis factor)—a double whammy. Edna Maria Vissoci Reiche and colleagues have found that pessimists are prone to higher levels of stress hormones, lowered immune response, and increased levels of cancer. Do optimists live longer? The good news is that there are several studies showing just that. For instance, a study from the University of Illinois shows that subjective well-being is associated with longer longevity as compared to individuals who maintain a negative disposition regarding their health, their relationships, or their prospects for the future. In order to ascertain if optimistic people have longer life spans than their pessimistic counterparts, a team of researchers from the Netherlands interviewed approximately 1,000 men and women between the ages of 65 and 85 about health, self-respect, morale, optimism and contacts, and relationships. The study, which was led by Erik Giltay, MD, Ph.D., of Psychiatric Center GGZ Delfland, Delft, the Netherlands, included two key questions regarding optimism: “Do you often feel like life is full of promise,” and “Do you still have many goals to strive for?” Answering yes to these questions revealed a sense of optimism. During the nine-year follow-up period, Dr. Giltay and his colleagues found that those participants who reported higher levels of optimism were 55% less likely to die from any cause and 23% less likely to die from a heart-related illness as compared to the pessimistic group. Another study, led by Dr. Hilary Tindle of the University of Pittsburgh, found similar results. The researchers used data from the Women’s Health Initiative, an ongoing government study of more than 100,000 women over age 50 that began in 1994. Participants completed a standard questionnaire that measured optimistic tendencies based on their responses to statements like, “In uncertain times, I expect the worst.” Their results showed that eight years into the study, women who scored the highest in optimism were 14% more likely to be alive than those with the lowest, most pessimistic scores. The pessimists were more likely to have died from any cause, including heart disease and cancer. Drilling down, they found that pessimistic black women were 33% more likely to have died after eight years than optimistic black women, whereas white pessimists were only 13% more likely to have died than their optimistic counterparts. As Dr. Tindle notes, pessimistic women tended to agree with statements like, “I’ve often had to take orders from someone who didn’t know as much as I did” or “It’s safest to trust nobody.” She accounted for confounding factors such as income, education, health behaviors like controlling blood pressure, degree of physical activity, drinking, and smoking and still found that optimists had a decreased risk of death compared to pessimists.

#### Violence should be remedied on a material plane.

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ACADEMIC INJUSTICE DISCOURSE Just law can coexist with unjust practice and both are parts of “empirical law” or what Bendey called “the process of government.” Empirical law is constantly changing and some theorists are optimistic that verbal discourse has the ability to make written law more just, even though the same unjust practices recur or new ones emerge. These theorists, some of whom are or may aspire to become public intellectuals, hope that someday public political discourse on behalf of those who are treated unjustly will have the power to interrupt a cycle of just written law accompanied by continued unjust practice. That is, the “right” discourse perennially holds the promise of changing the beliefs, values, and goals of everyone in the public auditorium, so that the same kind of unjust practices do not perpetually chase the same kinds of just laws.11 This search for “magic words” is futile for academics who are professionally confined to dry and abstract prose. Our verbiage does not have the power to move the multitudes who do not read or listen to it anyway. But even when multitudes are inspired and emotionally stirred by great orators, action that follows is unlikely to result in lasting change, without the support of powerful interests. After the 1960s, academics began a robust practice of liberatory discourse about injustice that seems to grow more impassioned and intense each year. The quest for demographic diversity among students and faculty in higher education has weathered judicial defeat of explicit affirmative action policies, but only partly for the sake of justice. There are pragmatic prizes if the academy can justify itself by producing a racially integrated leadership and managerial class for business, politics, and the military. Top leaders throughout society realize that they need such racial diversity for broad consumption, voter support, and boots on the ground, and the expression of that need is evident in amicus curiae briefs submitted to the US Supreme Court as it has been torturously dismantling affirmative action, piece by piece, since Bakke in 1978.12 Academic political discourse has been deeper than polemics and debate, exactly because of its disciplined intellectual origins in different fields of study (i.e., discipline imposed by distinct “disciplines”). But it has been swimming upstream against a more rarefied and older academic tradition, particularly among many philosophers and their gate keepers outside of the profession. Even Hannah Arendt (see chapter 2) spoke approvingly of the life of the mind as cut off from real political activity that occurred in the realm of “opinion.” In her 1970 interview with Adelbert Reif, Arendt addressed the phenomenon of college-stu-dent protestors, noting that they had brought social change through optimistic belief in their ability to make a better world, while at the same time discovering joy in civic participation. Arendt credited such protests with the success of the civil rights movement and progress toward ending the Vietnam War.13 As discussed in chapter 4, it is doubtful that Arendt was correct that student protests caused the success of the civil rights movement. A historical analysis of the end to the Vietnam War is beyond the present scope, but what we already know about empirical Bentleyan analyses would warrant skepticism about Arendt’s causal thesis there as well. In the same interview, Arendt warned that demonstrations by student activists could be self-defeating in democratic Euro-American contexts, because in attacking their universities, they were attacking the very entities that made their protests possible, American universities, especially large state schools that were the sites of the protests Arendt had in mind, have perforce developed very different financial structures since 1970. These schools have become increasingly dependent on private corporate and philanthropic funding, with state government funds now a much reduced part of their budget. While this structural change is not generally viewed as an incursion on academic freedom, it has been coincident with a very flat era of student protest and activism. Still, Arendt's notion of the "life of the mind” remains useful if we consider that the progressive/change-seeking output of professional academics since 1970 has been professionally accepted in the institutions that employ its participants. Also, much of today’s liberatory academic discourse can be viewed as the legacy of earlier student protest, furthering a tradition that may have been founded when some of the 1960s student radicals became professors. This indicates that the connection between academic radicals and the hands that feed them is not as simple as Arendt thought. In the United States, everything now points to both the existence of real academic freedom and its real ineffectiveness. Progressive academic writers ply a craft of formal speech that deals with contemporary injustice through complex theoretical frameworks, with requisite scholarly apparatuses and without translation into more simple views of the world; there is often also a lack of translation from one discipline to another or between subdisciplines in the same field. The audience is other academics and students. Neither specialization nor the limited and partly captive audience should be viewed as problematic because that is the nature of academic work, given broad social divisions of labor. But there is a problem with the delusional nature of so much of this work. The delusion consists of a naive view of the power of academic speech to directly change reality. The rhetorical mode of address used by academics writing cultural criticism, political philosophy, social philosophy, or what is now called social-political philosophy (which combines the other subfield approaches), often proceeds as though its authors are making grand entries in a planetary cabala, where words have the immediate power to become their intended referents. Those who do not write and speak cabalistically may subscribe to the Trickle-Down Good Ideas Theory that can be traced from Plato to John Stuart Mill to John Rawls. Subscription to that theory is immediately self-flattering, but it lacks reliable empirical support.16 Although, after the US civil rights movement, there has been an uncanny coincidence of race-blind formal racial equality with the hegemony in political philosophy of Rawls’s requirement that those who plan fundamental social institutions do so in ignorance of their own societal environments. As we saw in chapter 1, Rawls was quite explicit about this: I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong.17 Both race-blind racial equality and Rawlsian ideals are compatible with race-based real inequality. There are, of course, counter-examples, such as Katherine MacKinnon’s work on sexual harassment in the workplace as expressed in current law and institutional policy.18 Nevertheless even very good academic political discourse about justice and injustice cannot be relied upon to attract implementation or application in real life. This may be because there has not been sufficient time for the development of training programs for a new profession of “bridgers,” who could translate good ideas in the academy for those who govern and make policy. An internal problem for such translators would be to decide where to anchor their bridges in fields—every humanistic field—where experts disagree. However, the current tradition of progressive academic writing and speech is less than half a century old and if and when such translators emerge, they will develop their own professional criteria for choosing among contending experts. Public media, as a democratic analogue to disagreement within academic discourse, supports the idea that expressing and airing views in day-to-day practices or special “national conversations” also have immediate practical results. It is not evident how there could be such results, when opposing views and opinions are treated with the same respect and have equal access to the same mass auditorium that lacks rules for evidence or valid argument. As with academic discourse, there is no structured connection to official decision processes. The only reliable result of participation in such unbinding referenda is that those who participate are able to express themselves and get attention that may benefit them in the marketplace of their related endeavors. Public expression also serves to, represent and create collective atmospheres of belief, attitude, and opinion. These atmospheres are implicitly known by a majority of people in the culture, even though such knowledge is difficult to validate. Ambiguities cannot be resolved by recourse to public opinion polls, because understanding the results of those polls requires creative interpretive skills that draw on what is already known about relevant atmospheres. For example, suppose that more blacks than whites believe that white privilege is real and that O.J. Simpson was innocent, or that more whites than blacks believe that white American police officers are not, in general, racially biased. Are the views of whites evidence of racial bias or racial oblivion? Are the views of blacks evidence of racial preference or paranoia? Moreover, such polls almost always have a large racial overlap of opinion: If 29 percent of blacks compared to 71 percent of whites believe X, then 71 percent of blacks and 29 percent of whites do not believe X. Does this mean that the percentages of each group that does not contribute to the discrepancy in belief recorded in the polls are in some degree of agreement? Experiments in social psychology could be designed to answer such questions and others like them, but it is important to decide beforehand why the data is important and what it does and does not indicate. For instance, testing the claim that white privilege is a reality of contemporary life requires some prior definition of what is meant by “white privilege,” which can range from injustice to social courtesies. In a widely discussed 2013 experiment conducted in Queensland, Australia, economists Redzo Mujcic and Paul Frijters found that the majority of free bus rides, based on conductor generosity, were dispensed to whites, with blacks least likely to receive this courtesy, compared to all other racial groups among commuters. Journalist Britni Danielle, writing for a general audience on Yahoo News, touted this study as evidence that “white privilege is real,” without distinguishing between an amenity such as a free bus ride and recognition of one’s rights by not being subject to arbitrary stops and frisks by police officers.19 Conservatives reading Mujcic and Frijter’s study might say that the bus driver may have been acting rationally based on past experience with unruly black passengers. From a progressive perspective, more specifics would need to be introduced to defend the claim that this study revealed white privilege, such as controls for the apparent social class and gender of passengers, as well as the preexisting racial climate among bus commuters in Queensland, as well as the broader racial atmosphere throughout Australia in 2013. The 2015 Academy Awards What is racial atmosphere and climate? A US example that is also global could help clarify these vague ideas, provided that it is understood beforehand that in this context, as in most public references to "race," ‘racial” means “pertaining to racism.” From beginning to end, the 2015 Academy Awards ceremony hit racist notes that slid by unchecked, because it was an occasion of celebration. Neil Patrick Harris, the host, began with what might have been a critical remark about the lack of racial diversity among audience members and award winners: “Tonight we honor Hollywood’s best and whitest, sorry, bright est.” For those who were uncomfortable with the lack of robust racial diversity among audience members and award winners, his remark might have validated their unease. But those who would have been uncomfortable with more racial diversity may have been heard “best and whitest” as support for their social values. (The discourse of white privilege as a critique of contemporary anti-nonwhite racism is, as indicated, that kind of double-edged sword.) Midway through the ceremony, Patricia Arquette called for people of color and members of the lesbian, bisexual, gay, and transgender (LBGT) community to support legislation for equal pay for women and to commit themselves to supporting women, thereby overlooking the women who were either or both people of color and members of the LGВТ community. This kind of oversight may perhaps be excused by Arquette’s ignorance of what academics have been for decades analyzing as “intersectionality.” But Sean Penn’s remark at the grand finale awarding for Best Picture to Alejandro Gonzalez Inarritu, the Mexican director of Birdman, was simply, explicitly, racist: "Who gave this son of a bitch a green card?” Inarritu later brushed off the insult by saying he found it "hilarious,” because “Sean and I have that kind of brutal relationship. I think it was very funny.”20 Inarritu attempt at a “save” for Penn does not address the impact of Penn’s insult on other Mexicans and Mexican Americans, including those without green cards who struggle to remain employed in the face of anti-immigrant prejudice and discrimination. (That such a moment of maximum recognition was brought so low by a racist crack is not unusual in US culture, where the nastiest forms of racist insult are often let loose on people of color who have succeeded.) As a spectacle watched by almost thirty-four million, the 2015 Oscars, despite ratings lower than recent years, was a global public event.21 Symbolically, it has no peer for the display of beauty, talent, and artistic creativity. Its subtext inevitably has implications about current American race relations, which influence their future. The racial implications of the Oscars replays in millions of minds at countless other public celebrations and entertainment venues, as well as in private interactions (for a year at least). Such spectacles are forms of public discourse and what they represent or fail to represent about US racial demographics and the attitude of the dominant white group creates or augments a specific racial climate that in 2015 is part of a more general racial atmosphere of ambiguity and indeterminacy. At the 2015 Academy Awards, for many critical observers, the issue or subject pertaining to race (insofar as it is understood that subjects of race are subjects of racism), was recognition.22 The beauty, talent, and artistic creativity of people of color was not fully recognized. Some people of color did get awards and some audience members were people of color, so recognition, along with diversity, was not completely absent. But there appeared to be insufficient racial diversity for audience and award winners to be considered racially integrated. And that appearance was symbolic. However, the symbolic meaning is ambiguous: Were there people of color who were deserving of awards but did not get them because they were people of color? Is race a factor in who I becomes a member of the Academy of Motion Picture Arts and Sciences? In the future, will the racial makeup of award winners become more or less representative of their proportions in the motion picture industry? If the proportion of people of color in the motion picture industry is not proportional to their presence in the population at large, why is that? The answers to these questions are undetermined in the symbolic spectacle of the 2015 Academy Awards. The observer does not know if recognition of the achievements of people of color in the movie industry will improve, stay the same, or get worse, and she does not know how to find out. The racial (i.e., in regards to racism) climate of the Academy Awards is cloudy, subject to many different interpretations, some of them conflicting. It is an epistemologically unstable racial climate, because people of color do not know what the weather is in that climate, as a basis for prediction, and neither do they know how to find out. The shared judgment throughout the American atmosphere of race in the early twenty-first century is that racism is morally bad. This judgment is a general principle that leaves the nature of racism undefined throughout the atmosphere and most of the climates and subclimates of race. The overriding shared judgment is a bitter and ineffective refuge for nonwhites, because it does not protect them from either First Amendment-protected racist expressions or actions that turn out to be indirectly racist. Energetic self-aware racist whites can try to evade the judgment that they are racist through coded language for racial difference, and the use of intermediate activities and traits as subjects of direct action. That is, something other than race, which nonetheless does a good job of picking out members of a specific racial group, can be used instead of the race of that group to maintain prejudice and legitimize discrimination. The term “racial climate” has a history of meaning “micro-aggressions” based on race, small cuts, insults, and slights that can have a cumulative effect of individual harm.24 In using the term “racial atmosphere,” reference may be made to other issues of harm to people of color, such as ignorance of black history and contemporary racism or discrimination in career advancement.25 The implication of these meanings is that the micro-aggressions add up to what is perceived as a general predisposition of white people to treat people of color in unjust ways. But, at this time, ideas of racial atmosphere and climate also work as metaphors for what is unknown about race relations and attitudes; they capture the vagueness and unpredictability of racial prejudice and discrimination that occur in a society where nonwhites remain disadvantaged, even though there is formal equality. This “vague weather” aspect of atmosphere and climate is an epistemological condition of indecision that may or may not constitute a lasting crisis, although some syndromes of political injustice should be viewed as crises. A crisis is a period of indecision and uncertainty that requires a resolution before life can go on. Will blacks and other people of color achieve more equality with whites, or is the United States—and with it the world, because US racism is exported with business practices, tour-ism, and entertainment products—on the brink of a new era of explicitlу direct oppression of people of color? Are most white Americans, whose race-neutral economic and social activities have racist effects on nonwhites, genuinely ignorant of how the system in which they operate works, or are they secretly but knowingly hearts-and-minds not clear that this indeterminate aspect of present racial atmosphere and climates must be resolved now. We do not know if life can go on if it is not resolved or what it means for life to go on, or not. We do not even know if the putative crisis can be resolved at this time, because there is as yet no systematic and sustained, impassioned, liberatory dis- course for our condition of ambiguity, a time with a black president and police killing with impunity of unarmed black youth, a time of voting rights for everyone but new restrictions and requirements that disproportionately affect African Americans.26 Except for what academics write and say and how important they think their discourse is (among themselves), American discourse of racial liberation is at a standstill. And insofar as academic discourse is uttered and received in a closed system, with a semicaptive audience and no reliable means for it to affect the real world, that standstill remains at the disposal of history, where history is understood to be the unpredictable result of contingent events. However, if academic oppositional political discourse can be related to a longer historical trend, a more coherent and optimistic picture might emerge. Cornel West's ideas about the American black prophetic tradition appears to be a relation to such a trend.

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**Libidinal investments can manifest themselves in degrees---pure psychoanalytic explanations ignore specific social and cultural value systems and confuse habit with instinct.**

Peter **Hudis 15**, Professor of English and History @ Queens College, 2015, “Frantz Fanon: Philosopher of the Barricades,” Pg. 35-37

Fanon’s vantage point upon the world is his situated experience. He is trying to understand the inner psychic life of racism, not provide an account of the structure of human existence as a whole. Racism is not, of course, an **integral part** of the human psyche; it is a **Social construct** that has a **psychic impact**. Any effort to comprehend social distress that accompanies racism by reference to some a priori structure- be it the Oedipal Complex or the Collective Unconscious- **is doomed to failure.** Carl Jung sought to deepen and go beyond Freud's approach by arguing that the subconscious is grounded in a universal layer of the psyche- which he called "the collective unconscious:' This refers to inherited patterns of thought that exist in all human minds, regardless of specific culture or upbringing, and which manifest themselves in dreams, fairy tales, and myths. Jung referred to these universal patterns as "archetypes:' It may seem, on a superficial reading, that 1 Fanon is drawing from Jung, since he discusses how white people tend to unconsciously assimilate views of blacks that are based on negative stereotypes. Even the most "progressive" white tends to think of blacks a certain way (such as "emotional;' "physical," or / "aggressive"), even as they disavow any racist animus on their part. However, Fanon denies that such collective delusions are part of a psychic structure; they are not **permanent features of the mind**. They are **habits** acquired from a series of social and cultural impositions. While they constitute a kind a collective unconscious on the part of many white people, they are not grounded in any **universal** "archetype." The unconscious prejudices of whites do not derive from genes or nature, nor do they derive from some form independent of culture or upbringing. Fanon contends that Jung **"confuses habit with instinct."** Fanon objects to Jung's "collective unconscious" for the same reason that he rejects the notion of a black ontology. His phenomenological approach brackets out ontological claims on both a social and psychological level insofar as the examination of race and racism is concerned. He writes, "Neither Freud nor Adler nor even the cosmic Jung took the black man into consideration in the course of his research.” This does not mean that Fanon rejects their contributions tout court. He does not deny the existence of the unconscious. He only denies that the inferiority complex of blacks operates on an unconscious level. He does not reject the Oedipal Complex. He only denies that it explains (especially in the West Indies) the proclivity of the black "slave" to mimic the values of the white "master." And as seen from his positive remarks on Lacan's theory of the mirror stage, he does not reject the idea of psychic structure. He only denies that it can substitute for an historical understanding of the origin of neuroses .23 Fanon adopts a socio-genetic approach to a study of the psyche because that is what is adequate for the object of his analysis. For Fanon, it is the relationship between the socio-economic and psychological that is of critical import. He makes it clear, insofar as the subject matter of his study is concerned, that the socio-economic is first of all **responsible for affective disorders**: "First, economic. Then, internalization or rather epidermalization of this inferiority."24 Fanon never misses an opportunity to remind us that racism owes its origin to specific economic relations of domination- such as slavery, colonialism, and the effort to coopt sections of the working class into serving the needs of capital. It is hard to mistake the Marxist influence here. It does not follow, however, that what comes first in the order of time has conceptual or strategic priority. The inferiority complex is originally born from economic subjugation, but it takes on a life of its own and expresses itself in terms that surpass the economic. Both sides of the problem-the socio-economic and psychological-must be combatted in tandem: "The black man must wage the struggle on two levels; whereas historically these levels are mutually dependent, any unilateral liberation is flawed, and the worst mistake would be to believe their mutual dependence automatic:''5 On these grounds he argues that the problem of racism cannot be solved on a psychological level. It is not an **"individual"** problem; it is a **social** one. But neither can it be solved on a social level that ores the psychological. It is small wonder that although his name never appears in the book, Fanon was enamored of the work of Wilhelm Reich. This important Freudian-Marxist would no doubt feel affinity with Fanon's comment, "Genuine disalienation will have been achieved only when things, in the most materialist sense, have **resumed their rightful place**:'27