# 1AC

## 1AC — KU HW

### 1AC — Advantage

#### The Advantage is Developing Economies:

#### The Supreme Court’s ruling in *Empagran* denied standing to foreign plaintiffs seeking remedy for antitrust injury sustained abroad.

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In F. Hoffman LaRoche Ltd. v. Empagran S.A., 542 US 155 (2004), the Supreme Court limited access to American courts by foreign plaintiffs suing under the Sherman Act based on foreign transactions. Jurisdiction over foreign antitrust claims is governed by the Foreign Trade Antitrust Improvements Act (“FTAIA”). However, rather than parsing this opaque and poorly drafted statute, the Court drew on the doctrine of prescriptive comity and held that where a statute is vague, it should be construed narrowly so as not to interfere with the prerogatives of co-sovereigns. Alternatively, the Court concluded that if the conduct in question would have been beyond the reach of the Sherman Act prior to the enactment of FTAIA, it would not be cognizable under the FTAA because that statute was designed to limit—not expand—jurisdiction over foreign claims. The Court found that there were no pre-FTAIA cases to support jurisdiction.

On remand, the D.C. Circuit ruled that even if foreign plaintiffs could show that “but for” participation of U.S. firms in the conspiracy, they would not have been injured, their claims would still be barred. The FTAIA contemplates that (1) the illegal foreign have a “direct, substantial and reasonably foreseeable effect” on U.S. commerce; and (2) such adverse effect on foreign commerce gives rise to claims by foreign plaintiffs. Incidental or “but for” linkage does not suffice; proximate cause is the standard.

Moreover, foreign claims based on foreign transactions are also barred under the doctrines of standing and antitrust injury. Antitrust courts have traditionally denied standing to firms that were neither competitors nor consumers in the U.S. market. Similarly, the doctrine of antitrust injury limits the universe of antitrust plaintiffs to those who have suffered injury of the kind that the antitrust laws are met to protect against and that flows from that which makes the conduct unlawful. The U.S. antitrust laws were not meant to protect plaintiffs who were not participants in the U.S. market. Empagran may not eliminate antitrust actions by foreign purchasers, but the decision is a major hurdle to their successful prosecution.

IN EMPAGRAN, 1 THE SUPREME COURT construed the Foreign Trade Antitrust Improvements Act 2 (FTAIA) to severely limit the extraterritorial reach of the Sherman Act. In the wake of Empagran and the D.C. Circuit’s subsequent ruling on remand in that case, 3 foreign plaintiffs asserting claims under U.S. antitrust laws for injuries based on transactions consummated abroad have been largely shut out of federal courts. Foreign plaintiffs, however, have not abandoned their efforts to obtain relief in American courts for anticompetitive acts committed in the international arena. Rather, they have turned to claims under various state laws, including state antitrust laws, state unfair trade practice laws, and common law relief under theories of unjust enrichment and restitution.

This article analyzes the viability of these state law claims and concludes that state law remedies are likely to be unavailable for injuries based on transactions consummated abroad, for the same reasons the FTAIA bars antitrust claims under federal law. Additionally, these state law claims are barred by the Supremacy Clause of the U.S. Constitution, the Foreign Commerce Clause, the Due Process Clause, and the doctrine of prescriptive comity.

Background

Historically, U.S. courts have been hesitant to apply American antitrust laws to conduct occurring outside of the country. In American Banana Co. v. United Fruit Co., the Supreme Court ruled that the Sherman Act must be “confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”4 As American traders became increasingly involved in the international arena, courts began to relax the hard-line view of American Banana. In Alcoa, the Second Circuit held that the Sherman Act does proscribe extraterritorial acts that are “intended to affect imports [into the United States] and did affect them.”5 At the same time, Alcoa made clear that “[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”6 Still, the court made no attempt to identify the point at which foreign acts were qualitatively and quantitatively sufficient to affect domestic commerce to confer jurisdiction on U.S. courts.

Congress enacted the FTAIA in 1982 to clarify the reach of the Sherman Act in matters involving foreign commerce. The statute, however, was inartfully drafted and led to more confusion than clarity among courts and litigants. The Supreme Court in Empagran granted certiorari to resolve a dispute among the circuits on construction of the FTAIA. 7 The D.C. Circuit had concluded that the FTAIA allowed subject matter jurisdiction over claims by plaintiffs located in the Ukraine, Australia, Ecuador, and Panama, each of whom alleged that they had suffered injuries from a global price-fixing cartel when they bought vitamins for delivery outside of the United States. The Supreme Court vacated, holding that the FTAIA bars the exercise of subject matter jurisdiction over Sherman Act claims by foreign plaintiffs claiming illegal conduct that “significantly and adversely affects both customers outside the United States and customers within the United States” if “the adverse foreign effect is independent of any adverse domestic effect,” that is, if “the conduct’s domestic effects did not help to bring about that foreign injury.”8

The Court articulated a two-pronged rationale for its interpretation of the FTAIA. First, under principles of prescriptive comity, ambiguous statutes—and the FTAIA is, at the very least, ambiguous—should generally be interpreted so as to “avoid unreasonable interference with the sovereign authority of other nations.”9 The Court concluded that the Sherman Act may not supersede a foreign nation’s determination of how best to protect its citizens in cases where foreign conduct causes foreign injury independent of domestic injury and that foreign injury alone gives rise to foreign plaintiffs’ claims. 10 The Court further observed, citing amici filings by foreign governments, that allowing foreign plaintiffs to proceed with treble damage claims under these circumstances “would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.”11

Second, the Court found plaintiffs’ argument for expansive construction of the FTAIA unpersuasive. As a threshold matter, the FTAIA was meant to limit—not to expand—the reach of the Sherman Act in matters involving foreign commerce. Moreover, the Court found no case decided prior to the enactment of the FTAIA that would have upheld the exercise of jurisdiction over similar foreign claims. 12 Although the Court acknowledged that plaintiffs’ argument favoring jurisdiction presented “the more natural reading of the statutory language,” considerations of comity and history made clear that plaintiffs’ reading “is not consistent with the FTAIA’s basic intent.”13 Instead, the Court adopted the narrower reading championed by defendants because “[t]hat reading furthers the statute’s basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.”14 The Court emphasized that its holding “assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct’s domestic effects did not help to bring about that foreign injury.”15

On remand, the plaintiffs argued that their injury was not unrelated to the anticompetitive effects of the cartel on U.S. commerce, urging that but for defendants’ price-fixing activities in the United States, the international cartel would have collapsed. The plaintiffs maintained that, given the fact that vitamins are fungible and readily transportable, without U.S. participation in the conspiracy, foreign purchasers would have bought vitamins in the United States at competitive prices, instead of dealing with the cartel at supracompetitive prices. By incorporating the U.S market, the cartel cut off that avenue of arbitrage. Accordingly, the plaintiffs argued that the domestic effect of the cartel caused the plaintiffs’ foreign injury.

The D.C. Circuit disagreed. The court did acknowledge that the plaintiffs had painted a plausible scenario that but for supracompetitive prices in the United States resulting from cartel activities in the United States, they would not have been injured. 16 Nevertheless, the court held that “ ‘but-for’ causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anticompetitive conduct within the FTAIA exception.”17 Rather, the statutory formulation calls for “a direct causal relationship, that is, proximate causation,” between domestic effects and foreign injury, a standard that is not satisfied by establishing a mere “but-for ‘nexus.’”18 The proximate cause standard under the FTAIA has proven to be a formidable barrier to foreign plaintiffs who seek to bring antitrust suits under U.S. law in American courts.

#### Where foreign entities are unwilling or unable to prosecute cartels, the presumption against extraterritoriality leaves developing economies defenseless to anticompetitive predation and widens gaps in international cartel enforcement.

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Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?1

Thus asked Justice Breyer in his 2004 opinion in F. Hoffman-La Roche, Ltd. v. Empagran, SA,2 a case brought in U.S. federal court as a class action on behalf of purchasers of certain vitamin products on foreign (non-U.S.) markets against members of a cartel. The question was, of course, rhetorical. There seems to be, at least prima facie, no good reason to impose U.S. antitrust law on other highly developed countries with their own functioning antitrust regimes, especially without or even against these countries’ will.3

But the question was also strangely misplaced. Although Canada, Great Britain, and Japan—the countries Breyer named—had urged the Court to dismiss the claims by foreign plaintiffs,4 the countries from which the named plaintiffs stemmed—Ecuador, Panama, and Ukraine—had remained silent.5 These last three countries are representatives of less developed countries, many of which do not have very effective antitrust regimes.6 With this in mind, Breyer’s question would better have read something like this: Why should American law supplant, for example, Ecuador, Panama, or Ukraine’s antitrust regimes, insofar as these countries are unable to protect their customers from anti-competitive conduct engaged in significant part by foreign companies?

This question is harder to dismiss. Arguably, supplanting these countries’ ineffective competition regimes would serve a purpose. The question would not be one of superseding foreign regimes when there are none. The question would be one of filling regulatory gaps. Vis-à-vis countries with functioning antitrust regimes, the question is which of several countries should regulate the cartel. Vis- à-vis countries without functioning antitrust regimes, the question is whether the cartel is regulated at all. If the developed country does not regulate, no other country does. Hence, the issue is not whether to defer to a foreign antitrust agency. Instead, the question is whether to defer to the cartel’s impunity. This policy decision would require quite a different justification.

Developing countries would likely do better if they had effective antitrust regimes, and other articles in this issue discuss what is required for success. But we also need solutions for situations in which developing countries do not (yet) have such regimes, or in which they are for other reasons incapable of dealing with an international cartel. This is the situation this article addresses. It develops an argument for when and why a developed country’s antitrust regime should supplant the regime of a developing country. The question is, essentially, when and why the developed country should take over, in part, regulation of the developing country’s market.

Some limitations should be mentioned. First, the article focuses on the regulation of cartels. Although supplanting antitrust law might well work also for other issues—for example, merger control or abuse of a dominant position— these issues would require different considerations, which the article does not address. Second, for purposes of the article, a developed country is defined as a country with, and a developing country as a country without, a functioning antitrust regime. The analysis is therefore not directly applicable to developing countries that have effective regimes. By contrast, some of the arguments may be applicable to small developed countries with limited resources.7

Part II begins by laying out the tension between the need for antitrust in developing countries and the obstacles these countries face in building their own regimes. It then argues for the possibility of one country’s antitrust institutions regulating another country’s market, as long as a jurisdictional basis exists. Part III discusses this idea of supplanting antitrust, its legal background, and the factors relevant for its justifiability. Part IV applies the idea of supplanting antitrust in three constellations: multinational cartels that affect markets in both developed and developing countries; transnational cartels in which cartels from developed countries target markets in developing countries; and domestic cartels that remain confined within the boundaries of the developing country. Part V discusses a number of possible objections.

II DEVELOPING COUNTRIES AND ANTITRUST REGULATION

A. Challenges

Once, establishing antitrust regimes was thought not to benefit developing countries.8 That view is no longer prevalent. Today, more than half of the developing countries in the world have antitrust regimes.9

Having laws on the books represents, however, only a first step. A greater problem for many developing countries lies in building institutions 10 and enforcing existing antitrust laws. Here, the data are somewhat unclear. Levenstein and Suslow found in 2004 that actual enforcement of existing antitrust law was widely lacking.11 Waked, by contrast, suggests that developing countries do allocate resources to the enforcement of antitrust laws, though the degree depends on, amongst others, general macroeconomic development, openness to trade and imports, and level of corruption.12 Büthe and Aydin identify several factors that constrain developing countries: limits in financial resources and expertise, unsupportive or hostile political–legal environments, limitations to legal culture, a lack of competition culture, and underdeveloped markets 13

The enforcement problem is exacerbated for transboundary cartels with actors from outside the developing countries targeting the country’s markets.14 Often, less developed countries do not even appear to recognize the impact these cartels have on their economies.15 If cartel members act outside the country, agencies have difficulties detecting and scrutinizing the cartel.16 Where they do, the global market power of firms is often badly matched by the antitrust regimes of developing countries.17 Even if developing countries have the resources and expertise to regulate small and midsize local cartels, they may well be unable to regulate bigger and transnational or multinational cartels.18 It may often be preferable for them to allocate scarce resources to the regulation of domestic cartels.

#### It creates an exclusive club that bars the Global South from reaping the benefits of international law. Empagran is a form of legal imperialism that restricts necessary protection beneath U.S. antitrust, which privileges the profits of Western, transnational cartels over the genuine interests of developing countries.

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IV. A HEGEMONIALIST READING:

THE ABSENCE OF THE DEVELOPING WORLD

A problem remains. The idea of decentralized regulation – each regulates its own markets, so all the world is regulated – can succeed only if regulatory authority exists everywhere on the checkerboard. This is a problem in antitrust law. Although the United States is no longer the only country with effective antitrust enforcement, many countries still lack the capacity or political will (or both) to crack down on cartels. None of these considerations, however, can be found in the Empagran decision. The most striking passage in the opinion is one in which Justice Breyer suggests such a checkerboard world of regulation: “Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct…?”60

This is a strange way of putting the problem. In Empagran, the named plaintiffs were not “Canadian, or British or Japanese customers”– they came from Ukraine, Ecuador, and Panama. Yet throughout the opinion, Justice Breyer never addresses the sovereign interests of those countries. When he states that application of U.S. law “would undermine foreign nations' own antitrust enforcement policies,”61 he is not speaking of Ecuador (which may be quite happy if the United States cracks down on cartels impacting that country).62 Instead, he speaks of Germany and Canada. When he fears that “to apply our remedies would unjustifiably permit [foreign nations’] citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody,”63 the balance of competing considerations he has in mind is that of Germany, Canada, and Japan, not that of Ukraine. In the end, Justice Breyer is not allowing Canada, Great Britain, or Japan to determine how best to protect their consumers as he proclaims. Instead, he is protecting Canadian, British, and Japanese corporations against their overcharged customers abroad.64 All named plaintiffs come from developing countries; all defendants and all amicus briefs come from developed countries. The court will apparently listen to the latter, and ignore the former.

In doing so, the Court adopts not only the nineteenth century idea of neatly distinguished territorial entities; it also adopts the old idea of an international law limited to European and North American countries.65 Developed countries regulate their markets, and the rest of the world remains unregulated – with the consequence that European and American defendants can retrieve the money they lose to American and European plaintiffs and regulators. Justice Breyer’s harmony among countries creates quite an exclusive club. In the name of avoiding U.S. hegemony over other developed countries, the Supreme Court endorses hegemony of developed over undeveloped countries. It avoids the imperialism of imposing U.S. law on others, but it endorses the imperialism of restricting access to U.S. law.

The exclusive focus on the sovereign interests of Western countries is best demonstrated, ironically, by the near absence of non-Western countries in Western discourse, especially in the United States. But it has a long and well-known history in international law. An uneasy relation to developing countries characterized the Court’s first major opinion on international antitrust American Banana.66 There, Justice Holmes suggested that the presumption against extraterritoriality might not apply to “regions subject ... to no law that civilized countries would recognize as adequate,”67 but he did not ultimately apply this exception to Costa Rica, which for the time has aptly been characterized as a “Banana Republic”. 68 One explanation can perhaps be found in a citation to a passage in Dicey’s work on conflict of laws dealing with “law governing acts done in uncivilized countries.”69 Dicey realized that deference to uncivilized countries could hardly be justified by principles of civility . Nonetheless, he suggested applying the rules governing relations with civilized countries by analogy, as far as possible. 70 In other words, the inclusion of non-Western nations in the family of nations does not alter the concept of a state in international law. Instead, that concept, crafted after Western models, is imposed on non- Western countries by analogy.

We can see even more striking similarities in the treatment of Africa in the slave trade cases. In Le Louis, Sir Walter Scott was aware that deference to the interests of France operates to the detriment of Africa – “peace in Europe will be war in Africa.” 71 In the end, however, relations with France were more important than those with Africa. Scott asked: “Why is the British judge to intrude himself in subsidium juris, when everything requisite will be performed in the French Court in a legal and effectual manner?” 72 . The ensuing move from natural law to positivism foreshadowed the U.S. Supreme Court’s similar move, beginning with Marshall’s opinion in The Antelope.73 Less often discussed is how the move leads to a reduction in international law’s reach: if only the interests and positions of states count, then states that are unable to have their positions heard will be ignored.

Justice Breyer does not play out the developing against the developed world in the same way. Rather, he seems to imply that all countries share the same sovereign interest in self- determination, which must be respected, even if most developing countries lack the means to crack down on big international cartels. This equation among sovereigns is reminiscent of Chief Justice Marshall’s argument why a universally shared law of nations against slavery does not exist: “The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.” 74 Of course, this curious “gesture towards including Africa within the law of nations” 75 was of little use to Africa, or at least to its inhabitants subject to the slave trade. Moreover, Marshall confined the judge’s standard of international law to “the general assent of that portion of the world of which he considers himself as a part”76 – in other words, the Western world, which has long supported the slave trade. In such a world, which treats slavery as either a sovereign choice by sovereign African states, or as a given fact of African customs that Western nations are free to accept or reject, a genuine African interest in the abolition of slavery is absent from any analysis.

This suggests that the role of sovereignty for developing countries may be more complex than is often argued. Traditionally, the extraterritorial application of developed countries’ laws is criticized for stripping developing countries of their own regulatory independence, 77 with U.S. courts “as agents of U.S. hegemony.” 78 The underlying assumption is that developing countries’ sovereignty is merely formal: they lack the economic and political power to be truly independent. Even if this assumption is correct, the conclusion does not necessarily follow. Cases from The Antelope through Empagran suggest that the refusal to apply law extraterritorially -- especially regarding conduct that is almost universally condemned (slavery, price-fixing) – can also be a problem, because it leaves third world countries unprotected against the power of transnational commercial actors. If developing countries lack the domestic means to regulate those actors themselves, they may depend on developed countries’ willingness to regulate their own actors.

The Court’s real choice in Empagran is not between imperialism and international harmony. Rather, the choice is between two kinds of imperialism: one that comes from imposing U.S. law on the rest of the world, and the other from rejecting access to the courts necessary for protection against Western corporate actors. The Court avoids one kind of imperialism, but Justice Breyer’s pride seems unwarranted, because the Court falls, perhaps unavoidably, for another kind.

#### Encouraging foreign plaintiffs to rely on trickle-down enforcement is patchwork and creates impunity for a host of transboundary and multinational cartels.

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III. PART III: SHORTCOMINGS OF THE STATUS QUO

The current regulatory patchwork works relatively well for the key developed countries. The established competition agencies could overcome the hurdles of transnational cases if they so choose.[48](javascript:;) They have the necessary financial and human resources and expertise. This state of affairs may explain why the developed world stopped investing efforts in finding a multilateral solution to the problem of transnational anticompetitive conduct such as international cartels.

Even when foreign violators do not have assets in the developed states, they are unlikely to react to unfavourable enforcement outcomes by exiting the market because such markets are too important. The economic weight of a market helps to realize the potential of extraterritoriality. Economies that are less important from the violators’ perspective face a particularly uphill and unequal battle when challenging anticompetitive conduct.

In this regulatory context, the smaller and less developed countries are advised to focus their enforcement on domestic violations.[49](javascript:;) When it comes to transnational violations, such as international cartels, they are often recommended to rely on the enforcement efforts of developed regimes.[50](javascript:;) That is, they are to depend on what can be called ‘trickle-down enforcement’. The implicit argument is: should an international cartel be investigated and sanctioned by one or more developed agencies, it will be disbanded and cause no further competitive harm. In other words, enforcement by more developed agencies can generate positive externalities, or spill-over effects for other regimes. Hence, there is an opportunity for enforcement free-riding. While this certainly happens, this proposition assumes that transnational violations affect developed and developing countries in a similar manner. This may be true when it comes to violations affecting virtually all world markets; in such casesprosecution effectively deals with the totality of the underlying anticompetitive conduct. For example, in the case of the Southeast Asian cartel of LCD screen manufacturers, enforcement by a number of agencies led to the restoration of competition.[51](javascript:;) Similarly, the operation of the vitamins cartel was global and attracted significant attention of enforcers in several jurisdictions.[52](javascript:;) However, not all transnational violations are omnipresent with sufficient impact on key economies to provoke vigorous enforcement and a complete discontinuation of the harmful practice. For example, the American Soda Ash Export Cartel (ANSAC), a U.S.-based export cartel, was found in breach of EU competition law in 1990.[53](javascript:;) However, this decision did not lead to its abandonment. ANSAC reorganized its activities in relation to the EU and continued operating in a business-as-usual manner in other markets. In 1996 it was challenged in India. The case failed due to the lack of an explicit textual basis in Indian law allowing for extraterritoriality. The judgment was rendered under severe pressure exerted by the United States. In 1999 the same cartel was challenged in South Africa, where—after nearly ten years of litigation—ANSAC settled.

Enforcement in the EU, India and South Africa did not lead to the break-up of ANSAC, which continues operating in various markets. This case underlines the gaps in the current regulatory framework. It shows that enforcement free-riding will not necessarily work. There may be no trickle-down benefit to countries that forego domestic enforcement.

Moreover, reliance on enforcement activities of developed countries by other states is not always an option. While some transnational violations are truly global, many types of anticompetitive conduct are more limited in scope, depending on the nature and characteristic of the goods or services involved. There may be regional arrangements (for example, a regional cement cartel) or arrangements that affect only a specific group of countries (for example, a cartel concerning a good which is no longer sold in the developed economies, but which is still offered in developing countries). In such cases there would be no enforcement by developed agencies to piggy-back on and therefore no trickle-down benefit, given that markets in developed economies would not be affected.

Due to the existing gaps in the regulatory framework, the recommendation to focus on domestic violations has had perhaps unintended, and somewhat perverse, consequences. Domestic infringements—which typically do not lead to transfer of wealth abroad—are pursued while transnational violations escape scrutiny, despite generally causing much greater harm [54](javascript:;) and often leading to outflow of wealth from the domestic economy. Even in cases of successful reliance on enforcement by agencies of other states (for example, in cases of truly global cartels) the transfer of wealth is not remedied. The rents extracted through supra-competitive prices are not even partially remedied by fines imposed on the violators, given that no sanctions are imposed in relation to the harm to the domestic market. Rather, the benefit is the prevention of future harm. This is only a partial success, but even this is not present in cases in which the foreign enforcement is either not robust enough to lead to discontinuation of the anticompetitive conduct in question or when such enforcement is simply missing. Hence, passive reliance on trickle-down enforcement is unsatisfactory.

Furthermore, even if free-riding on enforcement by other states can prevent future harm, this setup provides no deterrence, which is considered crucial in modern competition law. Transnational violators can feel safe and act with impunity. Any sanctions they may face will relate only to harm caused in the enforcing jurisdictions. Hence, there is no reason for them not to continue with existing—and not to create new—anticompetitive arrangements that extract wealth from markets in states that do not challenge transnational violations.[55](javascript:;) The situation is particularly grim in the case of anticompetitive practices that do not affect any major jurisdiction enforcing competition law robustly, since there will be no agency to piggy-back on and no possibility of a trickle-down benefit. The violation may remain completely off the radar should domestic agencies focus solely on domestic conduct. Moreover, even if the viability of a particular anticompetitive arrangement requires it to be global in scope, prospective violators may still find it profitable, even after taking into account any sanctions they may face in the key jurisdictions that actively challenge such transnational violations. Profits extracted from the non-enforcing jurisdictions may offset ‘related’ costs, that is sanctions imposed in the relatively few jurisdictions which do pursue such cases. This argument was made before the US Supreme Court in Empagran.[56](javascript:;) Such sanctions—especially if only financial in nature—can be seen as no more than just a selectively imposed tax on transnational anticompetitive activities. The availability of individual criminal sanctions in the form of imprisonment in some countries changes that dynamic, but does not fundamentally resolve the problem.

#### Cartels undermine good-faith market competition---that’s a precondition for recurrent economic development.

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Introduction

Microeconomic theory defines the market as perfect competition when firms provide goods at a price that equals their marginal cost. Some common characteristics of a perfectly competitive market include homogenous products, all buyers and sellers as price takers, there is complete information, and no entry and exit barriers. Under the assumption of prices equal marginal costs, firms would have no or little incentive to innovate.

It is reasonable to expect that most industries are characterized by some degree of heterogeneity and product differentiation. In this situation, the competition encourages profit-maximizing firms to innovate to achieve abnormal returns.

Rooted in management literature known as the resource-based view of the firm, Barney (1991) argues that sustainable competitive advantage derives from the resources and capabilities a firm controls that are valuable, rare, imperfectly imitable, and not substitutable. It is arguable that the firm's sustainable competitive advantage should be connected with the environment where the firm operates. Good faith competition incentivizes firms to build sustainable competitive advantages through R&D investments, product differentiation, advertising, and capital- and cost-efficiencies. Firms need to invest in tangible and intangible resources to create competitive advantages and generate abnormal returns (returns on equity higher than the cost of equity). Firms also need to continue investing in maintaining those advantages over time to create long-term value.

Kline and Rosenberg (2010) define the process of innovation as a series of changes that affect not only hardware but also production, markets, and organizations. In fair competition markets, a firm's search for creating competitive advantages provides a continuous investment process and stimulates innovation, providing economic growth, employment, and welfare enhancement (Baumol and Strom 2007, OECD 2007, Daniels 1996).

Sustainable economic growth has important implications for society. In the long run, economic growth is mainly explained by technological progress. Sustained economic growth has an amplified effect on per capita income, and it is an effective mechanism to reduce poverty rates (Barro and Sala-i-Martin 2004, Sala-i-Martin 2006, Dollar et al. 2013). United Nations' 2030 Agenda for Sustainable Development1 includes eradicating poverty as an indispensable requirement for sustainable development. In fair markets, firms competing for competitive advantages take a crucial role, bringing the power of innovation that generates economic growth, resulting in an improved standard of living for the wider society. However, some firms may have incentives to collude to obtain extra-profits, harming consumers and, at the same time, negatively affecting the power of innovation. Regulators have to ensure the fair functioning of markets.

II. Advantages of good faith competition

The positive effect on society of firms' rivalry is based on three central ideas. The first one is that firms pursue a profit maximization strategy and expect to achieve abnormal returns. The second one is that industries have some degree of heterogeneity and product differentiation. Lastly, firms compete in fair markets. In this scenario, firms pursuing abnormal returns will make investments in order to develop competitive advantages. Investment in R&D is one of the most important activities driving competitive advantage, and firms in competitive industries enter into innovation races to differentiate their products. Innovation affects long-term economic growth through technological progress. The European Central Bank supports innovation as an essential driver of economic progress that benefits consumers, businesses, and the economy as a whole.

Fair market competition is one of the pillars for obtaining positive effects from rivalry. National and supranational organizations acknowledge the benefits of good faith competition. The Autorité de la concurrence, the competition regulator in France, argues that competition forces companies to be innovative and to stimulate growth and jobs. The European Union states that having firms competing fairly in the market benefits society. Consumers receive higher quality products at better prices, and competition incentivizes firms to innovate to differentiate their products and make firms more competitive in global markets.

In fair markets, the search for competitive advantages stimulates innovation and strengthens long-term economic growth. The Presidency Report to the Council of the EU (September 20th, 2019) on developing long-term strategies of sustainable growth identifies Research and Innovation (R&I) as a critical driver in response to the main challenges of the European economic growth model. Economic growth does not need to be explosive but recurrent over the long term. An example of the positive effects of long-term economic growth on income per capita is the U.S. economy. The US GPD per capita grew at a yearly rate of 1.8% between 1870 and 2000, resulting in an increase of 10 times, from $3,340 to $33,330 measured in 1996 dollars. However, reducing the yearly growth rate to 0.8%, the per capita rent in 2000 would have been $9,450, only 2.8 times the value of 1870, and the U.S. would be ranked in 45th position instead of 2nd out of 150 countries (Barro and Sala i Martin 2004). Arguably, designing good faith competition markets is a natural mechanism to promote sustainable economic growth.

Fair competition stimulates innovation, which is the main contributor to sustainable economic well-being.

III. Market failures and the need for regulation to avoid firms' misconduct

Collusion is a market failure that occurs when firms in a market coordinate, restricting competition and negatively affecting prices, outputs, and innovation. Public institutions are making a great effort in detecting firms' collusion practices that harm competition. Research on cartel overcharge shows a significant increase in price attributable to collusion (Connor 2010; Smuda 2014; Boyer and Kotchoni 2015). Among other adverse effects, collusion may provoke an extraction of consumers' welfare in favor of the cartel firms, reducing firms' incentives to invest in innovation. It is important to contextualize the relevance of collusion agreements. Private International Cartels (PIC) database, developed by Professor John M. Connor, contains detailed information for price-fixing cartels detected between 1990 and 2017. Relative to the GDP, cartels operating in Europe are triple those operating in North America, while the affected sales' size is equal between both markets, with affected sales' totaling about $900 billion, of which global cartels account for 37%.

One clear example of market manipulation is the truck cartel. In July 2016, the European Commission ("E.C.") imposed a record fine of €3 billion to MAN, Volvo/Renault, Daimler, Iveco, and DAF for continuing collusion in the medium and heavy truck market. Over 14 years, the firms colluded on pricing, the introduction of new emission technologies, and passing on compliance costs with stricter emission rules. Scania was part of the cartel practices but did not accept the fine and initiated a separate legal proceeding to defend itself from the accusations. Scania was eventually declared guilty by the E.C. and received a fine of €880m2.

One essential piece to improving good faith competition is an efficient competition law that avoids firms' misconduct. Antitrust is considered as one of the most important public policies that has aimed at protecting a public good as well as protecting consumers from predatory business practices: good faith competition. There are substitute arguments on the necessity of governments' intervention. The theory of "public interest" is based on the assumption that government can solve inefficiencies caused by monopolistic conduct and externalities through intervention. The second stream of thought states that competition and private enforcement mitigate market failures within strong legal systems and well functioning courts (Coase 1960). Shleifer (2005) highlights that the enforcement environment determines the optimal intervention system (public regulation or court-based system).

In antitrust cases, victims can initiate an action from scratch (stand-alone) or after the competition body adopts an infringement decision (follow-on). Claimants initiating a standalone action have to prove the infringement, while in follow-on actions, the claimants benefit from the antitrust resolutions. Stand-alone damage actions have high barriers for victims due to the difficulties obtaining evidence of the infringement conduct. These actions are highly costly and risky. Therefore, it may not achieve the deterrence function for colluding firms.

Private enforcement is the necessary complement for public enforcement to have efficient competition law. However, a study commissioned by the EU in 2004 identified actions for damages against antitrust infringement were totally undeveloped. In 2014, the EU adopted antitrust actions for damages to eliminate obstacles to compensation for antitrust victims and better define the relationship between public and private enforcement. The Directive 2014/104/EU facilitates private enforcement through follow-on actions for damages on European Commission or national competition bodies' resolutions.

Among other changes, the Directive establishes that the competition regulators' final decision is binding before courts. It also states that there is a presumption that cartels cause harm3 , and cartel victims have to prove in national courts the amount of loss they suffered from an infringement. The Directive establishes a time-barred period of five years to bring cases to courts since the infringement has ceased, so victims will have had sufficient time to bring an action. Before the Directive enaction, limitation periods differed considerably among member states, and the starting period cannot be precisely identified.

While this new regulation facilitates victims' actions and incentivizes private enforcement, it is still complex in time and cost. The main difficulties that claimants face are related to proving and quantifying this misconduct's effects on their specific situation. The quantification of the economic effects usually requires a large sample of data and a high level of expertise to deal with it properly. It is difficult to prove the economic effects of the misconduct with single-case data.

The limitations associated with single enforcements have generated an opportunity for funds who are willing to invest in damage claims. Currently, litigation funds provide complete financing for the process under a profit-sharing structure, and even some investors are directly acquiring such claims4 .

In December 2020, the European Union adopted the Directive 2020/1828 on representative actions to protect consumers' collective interests. It is one additional step in the regulation process to protect consumers' interests against infringement actions.

The new regulation, jointly with the interest of funds to support these claims, enhances private enforcement in Europe, and it is an important element in promoting the good faith competition disincentivizing firms to collude.

IV. Conclusion

Within perfect competition, profits are zero at the maximum, and firms have little or no incentives to innovate because they cannot create sustainable competitive advantages. However, most industries have some degree of heterogeneity and differentiation. In product-differentiation markets and under good faith competition, profit-maximization firms have incentives to obtain abnormal returns through value-creating strategies that competitors cannot replicate. This search for competitive advantage creates a virtuous cycle of innovation, which is the pillar for economic growth, employment, and welfare enhancement.

Poverty reduction is one of the main goals of governments and multilateral organizations. Sustained economic growth is a powerful mechanism to reduce poverty providing new employment opportunities and making education more accessible to the wider population. It also incentivizes entrepreneurship. All these factors improve competitiveness, which results in more economic growth.

Markets have to operate in good faith to achieve the advantages of innovation. Governments have to ensure the fair-functioning of the markets. However, firms may try to extract consumers' welfare through anti-competitive agreements. Cartels are situations in which firms decide to cooperate and not compete, thereby injuring customers by rising prices, restricting production, or reducing their investments in R&D. These anti-competitive agreements reduce innovation and negatively affect economic growth.

Competition law plays an essential role in disincentivizing firms to collude. The interaction of antitrust regulation and private enforcement is a powerful instrument in deterring future antitrust violations and supporting good faith competition.

Sustainable growth is one dimension of sustainable development. The evaluation of sustainable development requires the inclusion of other relevant factors in the equation, such as reducing carbon emissions and global warming, reducing « with-in » countries' inequality, and ensuring equal opportunities for all.

There is an open discussion on the correct balance between the three dimensions of sustainable development- economic, environmental, and social. One example of the adequacy of the sustainability indicators is the recent research developed by Einsenmenger et al. (2020) that criticizes the overweight of economic growth versus ecological integrity in the SDGs of the U.N.'s 2030 Agenda for Sustainable Development. Some economic models offer a new approach for including sustainability factors in the equation. The so-called Doughnut Economy (Raworth 2017) includes planetary and social as upper and lower boundaries for economic growth. The planetary boundaries assure that economic growth does not put too much pressure on the planet's health and includes, among other concepts, climate change, ocean acidification, and the loss of biological diversity. The social boundaries include life's essentials, from food to healthcare and education. Lastly, there is a sweet spot area for economic growth within those two boundaries, environmentally friendly and socially.

In sum, there are multiple potential trade-offs between economic growth and social and environmental impacts, and each generation will have to decide what is the right balance. But whatever the chosen balance is, we argue that good faith competition is still a minimum requirement to promote long-term sustainable growth that helps reduce poverty and improve people's standard of living and well-being around the world.

#### The upside of market competition outweighs and solves alt causes to economic development---alleviates poverty and inequality.

Khameni 7, \*R. Shyam, Advisor, Competition Policy, in the Financial and Private Sector Development Vice-Presidency of the World Bank Group, Washington D.C., 2007, (“Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries,” (<https://documents1.worldbank.org/curated/en/397801468174885108/pdf/413340FIAS1Competition1Policy01PUBLIC1.pdf>)

A persistent challenge that faces the governments of least-developed countries as well as policy advisors at the Bretton Woods Institutions, the United Nations, and aid agencies is: how to foster sustainable broad-based economic growth, development, and poverty reduction. During the past two decades or more, various policy approaches have been explored. In the “first-generation reforms,” the World Bank Group and the International Monetary Fund (IMF), among others, focused on promoting the macroeconomic stability and trade integration of countries. Second-generation reforms moved from the broad policy environment to encourage more microeconomic changes, namely, improvements in the administrative, legal, and regulatory functions of the State. Of late, particular emphasis has been placed on the role of the public sector in establishing an “investment climate” conducive to promoting private sector-led investment, growth, and poverty alleviation.

The quality of a country’s investment climate determines the risks and transaction costs of investing in and operating a business. These risks and costs are in turn determined by the legal and regulatory framework, barriers to entry-exit, and conditions prevailing in markets for labor, finance, infrastructure services, and other productive inputs. Essentially, the quality of the investment climate will determine the mobility and speed with which resources can be redeployed from lower to higher productive uses. For this to occur effectively, the nature and degree of competition in markets plays a pivotal role. In this regard, there is significant economic evidence suggesting that private investment has grown faster in countries with better investment climates. Also, economies with competitive domestic markets tend to attract more domestic and foreign direct investment, have higher levels and rates of growth in per capita gross domestic product (GDP), and lower rates of poverty.1

Promoting effective competition is often argued on grounds that it spurs firms to focus on efficiency and improve consumer welfare by offering greater choice of higher-quality products and services at lower prices. However, it also promotes greater accountability and transparency in government-business relations and decision making, and contributes to reducing corruption, lobbying, and rent-seeking behavior. Additionally, by lowering barriers to entry, it provides opportunities for broad-based participation in the economy and for sharing in the benefits of economic growth. Without effective competition, firms are more likely to possess considerable market power, which enables them to earn excess profits and wield political influence to tilt public policy in their favor. There are also likely to be distorted price and profit signals and increased risk of misguided investment and output decisions, which can lead to economy-wide repercussions.

The merits and benefits of fostering open and competitive markets have been recognized in many countries that have adopted various macro- and microeconomic reforms. However, there is wide variation in the economic growth and development of nations. Casual observations indicate that there is also a wide variation in the nature and extent of competition prevailing within and across countries. Moreover, notwithstanding the merits and benefits of competition, there is no consensus or widespread support for promoting competition within and across countries—especially developing nations. This stems in part from the lack of understanding or appreciation of what effective competition can tangibly contribute to the betterment of the lives of ordinary citizens, and in part from ideological differences and the influence wielded by vested interest groups in both government and the economy at large. Although the differences in the economic growth and development of nations cannot purport to be explained by the differences in the prevailing degrees of competition, this paper argues that it is one of the important, if not critical explanatory factors. It is well established that least-developed economies are encumbered by limitations of human and physical capital, governance and institutional structures, and other resource constraints. But they are also prevented from achieving their potential by various types of public policy-based and private sector anticompetitive business practices. The primary message of this paper is that these countries need to take concrete, consistent, and coherent measures to integrate and promote effective competition policy as part of their overall government economic and regulatory framework. An effective competition policy should be viewed as the “fourth cornerstone” of this framework— along with sound monetary, fiscal, and commercial (international trade) policies.

#### Economic development deflates wars globally.

Cortright 16, \*David Cortright, Director of the Global Policy Initiative; Special Advisor for Policy Studies; Professor Emeritus of the Practice, Kroc Institute for International Peace Studies; (May 18th, 2016, “Linking Development and Peace: The Empirical Evidence”, https://peacepolicy.nd.edu/2016/05/18/linking-development-and-peace-the-empirical-evidence/)

The connections between development and peace are firmly supported by social science research. All the standard indicators of economic development, including per capita income, economic growth rates, levels of trade and investment, and degree of market openness, are significantly correlated with peace. Virtually every study on the causes of war finds a strong connection between low income and the likelihood of armed conflict. Economist Edward Miguel describes this link as “one of the most robust empirical relationships in the economic literature.” Irrespective of all other variables and indicators, poverty as measured by low income bears a strong and statistically significant relationship to increased risk of civil conflict.

No one has made this point more convincingly over the years than Paul Collier. He and his colleagues have shown that civil conflict is heavily concentrated in the poorest countries. The risk of civil war is strongly associated with joblessness, poverty and a general lack of development. They famously [conclude](https://openknowledge.worldbank.org/handle/10986/13938), “The key root cause of conflict is the failure of economic development.” They also make the reverse point. Raising economic growth rates and levels of per capita income may be “the single most important step that can be taken” to reduce the likelihood of armed conflict.

War is reverse development. It undermines economic well-being and reduces income levels. War may bring profit for the few, those ‘masters of war’ as Bob Dylan called them, but it creates economic misery for many. Once started, war becomes a self-sustaining system, an “economy of war” Mary Kaldor calls it in New and Old Wars, a feeding trough for profiteers, warlords and mobsters that becomes exceedingly difficult to stop.

War reduces life expectancy and destroys education and public health systems. It tears apart the social fabric. The [World Development Report 2011](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf) calculates the cost of a major civil war as equivalent to more than 30 years of typical growth for a medium-size developing country. Trade levels take 20 years to recover. The negative economic impact of conflict helps to explain why countries at war are often caught in a deadly conflict trap, why the chief legacy of a civil war is another war.

#### And, development is responsible for drastic improvements in global living standards, and is the only path for future improvements.

Cowen 18, \*Tyler Cowen is a Holbert L. Harris Professor at George Mason University and Director of the Mercatus Center; (October 16th, 2018, “Stubborn Attachments: A vision for a society of free, prosperous, and responsible individuals”, <https://www.goodreads.com/en/book/show/31283667-stubborn-attachments>)

How good is growth, anyway ?

The history of economic growth indicates that, with some qualifications, growth alleviates misery, improves happiness and opportunity, and lengthens lives. Wealthier societies have better living standards, better medicines, and offer greater personal autonomy, greater fulfillment, and more sources of fun. While measured wealth does not exactly correspond to Wealth Plus, these two concepts have come pretty close to one another in the past, especially across the range of outcomes we have observed (as opposed to hypothetical thought experiments and counterfactuals).

We often forget how overwhelmingly positive the effects of economic growth have been. Economist Russ Roberts reports that he frequently polls journalists about how much economic growth there has been since the year 1900. According to Russ, the typical response is that the standard of living has gone up by around fifty percent. In reality, the U.S. standard of living has increased by a factor of five to seven, estimated conservatively, and possibly much more, depending on how we measure prices and the values of outputs over time, a highly inexact science.

The data show just how much living standards have gone up. In 1900, for instance, almost half of all U.S. households (forty-nine percent) had more than one occupant per room and almost one quarter (twenty-three percent) had over 3.5 persons per sleeping room. Slightly less than one quarter (twenty-four percent) of all U.S. households had running water, eighteen percent had refrigerators, and twelve percent had gas or electric lighting. Today, the figures for all of these stand at ninety-nine percent or higher. Back then, only five percent of households had telephones, and none of them had radio or TV. The high school graduation rate was only about six percent, and most jobs were physically arduous and had high rates of disability or even death. In the mid-nineteenth century, a typical worker might have put in somewhere between 2,800 and 3,300 hours of work a year; that estimate is now closer to 1,400 to 2,000 hours a year. 6

Until recently, polio, tuberculosis, and typhoid were common ailments, even among the rich. U.S. presidents George Washington, James Monroe, Andrew Jackson, Abraham Lincoln, Ulysses S. Grant, and James A. Garfield all caught malaria during their lives. Antibiotics and vaccines have existed for only a tiny fraction of human history, and it is no coincidence that they emerged in the wealthiest time period humanity has ever seen. There is also a strong and consistent relationship between wealth and rates of infant mortality; small children do best when they are born into wealthier countries, and that is because wealth supplies the resources to take better care of them.

As recently as the end of the nineteenth century, life expectancy in Western Europe was roughly forty years of age, and food took up fifty to seventy-five percent of a typical family budget. The typical diet in eighteenth-century France had about the same energy value as that of Rwanda in 1965, the most malnourished nation for that year. One effect of this deprivation was that most people simply did not have much energy for life.

In earlier time periods, most individuals performed hard physical labor, and a college or university education—or even a high school education—was a luxury. Leisure time has risen with economic growth. In 1880, about four-fifths of individuals’ discretionary time was spent working, according to economist Robert Fogel. Today we spend about fifty-nine percent of our time doing what we like, and that may rise to seventy-five percent by 2040. 8

The splendors of the modern world are not just frivolous baubles; they are important sources of human comfort and well-being. Imagine that a time traveler from the eighteenth century were to pay a visit to Bill Gates today. He would find televisions, automobiles, refrigerators, central heating, antibiotics, plentiful food, flush toilets, cell phones, personal computers, and affordable air travel, among other remarkable benefits. The most impressive features of Gates’s life, seen from the point of view of a person from the eighteenth century, are those shared by most citizens of wealthy countries today. My smartphone is as good as his. The very existence of an advanced civilization—the product of cumulative economic growth—confers immense benefits to ordinary citizens, including their ability to educate and entertain themselves and choose one life path over another. For further arguments along these lines, I recommend Steven Pinker’s recent book, Enlightenment Now: The Case for Reason, Science, Humanism, and Progress . 9

The economic growth of the wealthier countries benefits the very poor as well, though sometimes with considerable lags. The distribution of wealth changes over time, and not all growth trickles down, but as an overall historical average, the bottom quintile of an economy shares in growth. 10 You can see this by comparing the bottom quintile in, say, the United States to the bottom quintile in India or Mexico.

The richer economy can also do more to elevate the living standards of immigrants. Poor people who move to rich countries usually receive higher incomes and have better living conditions, and their children do better still. The richer the receiving country, the more new immigrants tend to benefit. Central American immigrants to the United States do better than Central American immigrants to Mexico or Nepalese immigrants to India. Immigrants also send remittances back home at a rate that far exceeds governmental foreign aid. Actual upward mobility in the United States far exceeds what the usual numbers indicate, because published statistics on upward mobility do not typically include a comparison with pre-immigration outcomes.

But the chain of benefits does not stop there. Migrants will often return to their home countries, bringing new skills and new business connections. Both India and Israel have developed vibrant technology and software scenes precisely because of their close ties with the start-up scene of the United States. English-language universities in English-speaking countries have trained many thousands of Asian students in science and engineering, again leading to new businesses and, eventually, higher economic growth in their home countries.

New medicines and technologies developed in wealthy nations also make their way to the rest of the world, as illustrated most conspicuously by the rapid spread of the cell phone and now the smartphone. One study predicts that if the leading twenty-one industrial countries were to boost their R&D by half a percentage point of GDP, U.S. output alone would grow by fifteen percent. But it doesn’t end there: output in Canada and Italy would grow by about twenty-five percent, and the output of all industrial nations would increase by 17.5 percent, on average. In the less economically developed countries, output would increase by about 10.6 percent on average. 11

Although these historical processes have often embodied unfairness and long lags of decades or more, economic growth has nonetheless brought wealth to the poor and elevated their status. The Greek city-states and the Roman Empire benefited from maritime trade across the Mediterranean; those regions in turn spread growth-enhancing institutions around Europe, Northern Africa, and the Middle East. The commercial revolution of the late Middle Ages and Renaissance reopened many of the trade routes of antiquity, and eventually human beings started to climb out of the Malthusian trap of very low per capita incomes at subsistence. The wealth of the West helped to enable the export miracles of the East Asian economies. Today, most poor countries seek greater access to wealthier Western and Asian markets, and flourish if they can achieve it. 12

For all the recent increases in inequality within individual nations, global inequality has declined over the last few decades, in large part because of growth in China and India. And the growth in these emerging nations was largely driven by earlier growth in the West and in East Asia. China, for instance, engaged in “catch-up” growth by adopting Western technologies and exporting to the wealthier nations. China has gone from being a quite poor nation to a “middle-income” nation with a sizable middle and upper class.

Although recent media coverage has focused almost exclusively on within-nation magnitudes, recent world history has been an extraordinarily egalitarian time. It is above all else a story about how global economic growth helps the poor. There has been a squeezing of the middle class in the wealthier nations, in part because of increasing global competition. Still, we have seen economic growth, aggregate wealth, and global income equality all rising together over the last twenty-five years. Many citizens in East Asia, South Asia, and Latin America have seen significant gains in their standard of living, and much of this has been a trickle-down effect from the earlier growth of the wealthier countries. Much of Africa is now following suit, bolstered in part by China’s demand for raw materials, and also by the spread of modern technologies such as affordable cell phones. 13

Sometimes extended periods of growth do not confer full or fair benefits to the poor or lower classes, for instance during the early phase of the British Industrial Revolution in the late eighteenth century. Still, the historical record suggests that it was better for Britain to push ahead with economic growth, as this eventually drove the greatest boost in living standards the world has ever seen. To be sure, there were probably better policies which, had they been adopted, would have distributed the benefits of growth more widely (e.g., fewer wars and Poor Law reform and free trade for the British). But even taking misguided policies into account, Britain fared better by pursuing economic growth rather than turning its back on the idea, even though significant real wage gains for the working class often did not arrive until the 1840s.

Nobel Laureate Amartya Sen has promoted the idea of “capabilities” as, if not quite a substitute for economic growth, then an alternative focus. Sen points out that our positive opportunities in life often matter more than the amount of cash in our bank accounts. He also notes that some parts of the world, such as the state of Kerala in India, have relatively good health and education indicators, even though their per capita incomes are relatively low.

Sen’s points are well taken, but they do not put a fundamental dent in the relevance of wealth, or, as I am calling it here, Wealth Plus. The significant benefits accrued from capabilities, such as health benefits, are accounted for in Wealth Plus, even if they are not properly represented in current GDP measures. In other words, Kerala is wealthier than some limited statistical measures imply. Wealth and good social outcomes are still strongly correlated on average, and this correlation is stronger over longer time horizons. For instance, if Kerala does not grow much in more narrow economic terms, it is unlikely to look so impressive in its social indicators fifty or one hundred years from now. Even today, Kerala manages as well as it does in large part because so many Keralans take jobs in wealthier countries, especially in the Gulf States, and send money back home. And compared to other Indian states, Kerala has an above-average measure of wealth, as well as above-average consumption expenditures, both of which are accounted for in traditional statistics. 14

The truth is that economic growth is the only permanent path out of squalor. Economic growth is how the Western world climbed out of the poverty of the year 1000 A.D. or 5000 B.C. It is how much of East Asia became remarkably prosperous. And it is how our living standards will improve in the future. Just as the present appears remarkable from the vantage point of the past, the future, at least provided growth continues, will offer comparable advances, including, perhaps, greater life expectancies, cures for debilitating diseases, and cognitive enhancements. Billions of people will have much better and longer lives. Many features of modern life might someday seem as backward as we now regard the large number of women in earlier centuries who died in childbirth for lack of proper care.

I myself have written of the great stagnation, a slowdown in growth which overtook the Western world starting in about 1973. It would be a failure of imagination, however, to believe that human progress has run its course. The more plausible view is that progress is unevenly bunched, we have been in a slow period as of late, various new developments are percolating, and we should do our best to help them along. Whether we like it or not, economic growth and technological progress do not always arrive at a steady pace.

World history offers various precedents for the idea of a “great transformation” leading to enormous increases in the quality and quantity of human lives. Our ancestors did not foresee the evolution of humans, the agricultural revolution, the “urban revolution” (Sumeria and Mesopotamia, circa 4000 B.C.), or the Industrial Revolution. For that matter, the East Asian revolution in economic growth was not widely anticipated. Each development development dramatically changed the human condition over time, and eventually very much for the better. The history of economic growth, to some extent, is the history of working out the consequences of such unforeseen transformations. It is unlikely that we have seen the last of such revolutions, at least provided that civilization manages to stay afloat.

Looking into the more distant future makes the question of the economic growth rate all the more important. For instance, a two percent rate of economic growth, as opposed to a one percent rate, makes only a small difference across the time horizon of a single year. But as time passes, the higher growth rate eventually brings about a very large boost to well-being. To make this concrete, here’s an experiment: redo U.S. history, but assume the country’s economy had grown one percentage point less each year between 1870 and 1990. In that scenario, the United States of 1990 would be no richer than the Mexico of 1990. 15

It is also worth pondering some comparisons with higher rates of economic growth, of the sort we often see in emerging economies. At a growth rate of ten percent per annum, as has been common in China, real per capita income doubles about once every seven years. At a much lower growth rate of one percent, such an improvement takes about sixty-nine years.

Robert E. Lucas, Nobel Laureate in Economics, put the point succinctly: “The consequences for human welfare involved in questions like these are staggering: once one starts to think about [exponential growth], it is hard to think about anything else.” 16

Even if you don’t regard material wealth as central to human well-being, economic growth brings many other values, including, for instance, much greater access to the arts and education. Economic growth also gives individuals greater autonomy and minimizes the chance that their destiny will be determined by the time and place in which they were born. It remains true that many individuals are born poor or are born into families that do not much respect formal education or are born far away from cities. Still, ask yourself a simple question: has there ever been a time in human history when so many individuals had such a good chance of becoming world-class scientists ?

Individuals today are more able to shape their futures, choose their friends, communicate with the outside world, and weave together diverse cultural strands when building out their personal narratives. Benjamin M. Friedman, in his brilliant The Moral Consequences of Economic Growth , shows just how many of the virtues of the modern world depend on higher and indeed growing levels of wealth. 17

The bottom line is this: the more rapidly growing economy will, at some point, bring about much higher levels of human well-being—and other plural values—on a consistent basis. If some set of choices or policies gives us a higher rate of economic growth, those same choices or policies are akin to a Crusonia plant.

### 1AC — Plan

#### Plan: The United States federal government should substantially increase prohibitions on anticompetitive private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative fora.

### 1AC — Solvency

#### Finally, solvency:

#### The plan permits jurisdiction over *Empagran*-type cases only in instances where foreign plaintiffs don’t have an alternative forum for recovering damages---that maximizes cartel deterrence through harmonization of antitrust laws and preserves judicial economy.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

5. A New Approach to the Empagran Problem: Legislative Authorization to the Executive Branch To Limit Jurisdiction Based on the Principles of Foreign Non Conveniens

A better approach would systematize the executive branch's review of other countries' antitrust regimes, apply that executive determination categorically over a class of cases, and remove judicial discretion with respect to complying with that executive determination. Accordingly, I recommend that the DOJ 2 7 6 should annually review other countries' antitrust regimes to determine whether they provide private parties an adequate forum to recover damages from cartel activities. Congress should amend 277 section 12 of the Clayton Act to bar jurisdiction in cases involving international cartels in which (1) neither the plaintiff nor the defendant is a national of the United States, and (2) the plaintiff or defendant is a national of a country that the DOJ currently lists as one that provides plaintiffs with an adequate private remedy in the antitrust claim, except (3) when that country permits United States jurisdiction for reasons of judicial economy. Such a law would promote international judicial economy in a transparent and predictable manner that prevents forum shopping without greatly reducing the deterrent effect of United States law.

The principles underlying this proposed law are those of the doctrine of forum non conveniens as articulated in Piper. Thus, if plaintiffs can secure relief in their domestic courts for antitrust violations that involve foreign harms, they should not be able to sue a foreign defendant in U.S. courts simply because the damages available there may be more favorable. However, when a foreign plaintiff cannot secure relief in her domestic courts--either because the courts do not permit jurisdiction over the claims or because the statutory relief is not actually available-she should first turn to the court system in which the foreign defendant is located. Again, this result would accord with a concern for convenience and judicial economy. Only if the plaintiff cannot receive adequate relief in her home forum or the defendant's home forum should U.S. courts exercise jurisdiction, assuming the requisite showing of a link to domestic effect is made. Such an exercise of jurisdiction would not be an act of charity toward the plaintiff; it would recognize that affording such plaintiffs an opportunity for relief somewhere is necessary to deter the international cartels that harm American consumers and businesses.

Such a restriction of jurisdiction would not affect the ability of American plaintiffs to bring antitrust claims against anyone in the world, nor would it prevent U.S. courts from exercising jurisdiction over cases involving American defendants. Instead, this restriction on jurisdiction would apply only when neither the plaintiff nor the defendant was an American. In such situations, the United States retains an interest in ensuring that plaintiffs can receive adequate compensation because of its deterrent effect on international cartels that affect the United States. However, if such claims could be better heard before a foreign court, the United States should decline jurisdiction because of convenience and judicial economy.279

The DOJ's annual review of other countries' private antitrust remedies should be more than a broad "thumbs-up, thumbs-down" review; it should distinguish the types of claims for which a country's relief is adequate from those for which it is inadequate. For example, although Canada has a strong anti-cartel regime, it also protects its domestic export cartels.280 Such protectionist policies-of which the FTAIA is one-do not enhance worldwide deterrence,28' and when implemented by foreign governments, they specifically do not deter conduct harming American consumers. Therefore, the DOJ would list Canada as a country that provides an adequate forum except in cases involving Canadian export cartels. Similarly, other countries may not permit foreign plaintiffs to sue their domestic firms for participating in an international cartel, though domestic plaintiffs can bring such actions. In these situations, the DOJ would list those countries as providing an adequate forum for domestic plaintiffs, but U.S. jurisdiction would be permitted if the plaintiffs were foreigners who also lacked an adequate forum in their home country.

The definition of "adequate" relief is an important component of this proposal. Consistent with the principles of forum non conveniens articulated in Piper, the United States should not require that countries provide treble damages. The United States should decline jurisdiction in anti-cartel actions so long as plaintiffs can recover at least compensatory damages. America's mandatory treble damages regime is based on a policy choice in the United States regarding the proper mix of public and private enforcement. The fact that other governments do not provide treble damages may reflect other aspects of their systems, such as greater public fines, the availability of punitive damages, or the cost to plaintiffs of bringing actions for damages. The United States should not require treble damages as the sole mechanism of deterrence.

Refusing jurisdiction in international antitrust suits may sacrifice some global judicial economy. The nature of international cartel activities increases the possibility that the same defendants will simultaneously face multiple lawsuits in many countries. By splitting the plaintiffs' actions, these multiple lawsuits could complicate the suits, delay them, and make them more 282 expensive. For this reason, the U.S. courts could exercise jurisdiction if the nations implicated in the case ask it to do so. Admittedly, this is only a partial solution to the issue of global judicial economy. A more comprehensive solution will require additional political solutions, such as an international agreement permitting some form of transnational transfer or consolidation of cases. Such agreement is foreseeable, as informal collaboration already occurs with respect to public lawsuits against international cartel members.

This proposal would help achieve America's three goals with respect to international antitrust. First, the U.S. government would have a national policy with respect to jurisdiction in international cartel cases that distinguishes between those foreign antitrust regimes that are effective and those that are not. Second, such a policy would be consistent and predictable, facilitating international trade. Plaintiffs and defendants would know whether jurisdiction could be exercised before bringing a case. Plaintiffs from countries that the United States deems to have an effective antitrust regime would have no reason to bring a case in U.S. courts, and they would therefore need to turn to their home jurisdiction. In this manner, the policy would encourage other jurisdictions to enact policies that would be in harmony with those of the United States. For example, with respect to Canada, the exercise of U.S. jurisdiction with respect to a Canadian export cartel may cause Canadian lawmakers to tear down their measures protecting such cartels, especially if they wish to protect Canadian defendants from America's treble damages regime.283

[FOOTNOTE 283]

283. Indeed, America's treble damages regime would provide an incentive for foreign companies to lobby their countries to enact antitrust policies sufficiently strong to remove them from U.S. jurisdiction in Empagran-type suits.

[END FOOTNOTE 283]

Upon such action, the DOJ would determine that U.S. jurisdiction should no longer be granted in such cases. Thus, this proposal, like my suggested reforms of national amnesty programs, seeks to harmonize international antitrust policies and to do so in a manner that most effectively deters international cartels.

#### Only international, private antitrust enforcement maximizes deterrence---it enhances the cartel’s likelihood of being detected and makes operation in multiple countries cost-prohibitive.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

II. BACKGROUND

A core aspect of America's antitrust regime is its encouragement of private litigation as an enforcement device. Private litigation is thought to be particularly effective against cartels, as the consumers in a cartel market may often be among the first entities to detect the cartel's damaging collusive behavior, and awarding damages-particularly a multiple of the cartel's profits-may make the illegal conduct cost-prohibitive. Thus, private litigation is viewed as an important mechanism for achieving one of the fundamental goals of the antitrust acts: the maximum deterrence of cartels.26

Initially, the application of America's antitrust regime was contained within its borders. But as commerce became increasingly international after World War II, U.S. courts applied the antitrust laws extraterritorially. America's extraterritorial application of its antitrust laws created tension with its trading partners, who disagreed with the American approach of relying on private litigation and treble damages as an enforcement device. They viewed the extraterritorial application of U.S. law as an anticompetitive maneuver aimed at furthering U.S. trade objectives. In the late 1970s and early 1980s, many of these countries passed legislation to frustrate the extraterritorial application of America's antitrust laws. The U.S. Congress responded by passing the FTAIA. This law barred foreigners from using America's laws against American companies when American consumers were not harmed. The Empagran decision-and the governments' amici briefs-must be understood within this context of antitrust policy as trade policy.

A. The Sherman and Clayton Acts

The Sherman and Clayton Acts are the statutory foundation for private antitrust litigation in the United States. The Sherman Antitrust Act outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations., 27 Violations are felonies, with corporations and individuals facing civil and criminal penalties, including imprisonment.29

To expand the enforcement of the antitrust laws and to facilitate the compensation of the victims of antitrust harms, Congress adopted the Clayton Act. Section 4 of the Clayton Act creates a private cause of action for individuals and companies harmed by antitrust violations, 30 and section 12 grants jurisdiction over these lawsuits to any district in which the defendant does business.3' Plaintiffs in such lawsuits act as "private attorneys general, 32 who help alert authorities to violations of the antitrust laws while also punishing those violations. The Clayton Act allows private litigants to sue for treble damages. Treble damages enhance deterrence in two ways-they encourage private suits, which raise the probability the cartel will be detected,33 and they increase the penalty imposed on defendants found guilty of violating the acts.34 The Clayton Act has succeeded in encouraging such suits. 35

B. Cartels-An Introduction

Cartels are "unambiguously bad' 36 and "the most egregious violations of competition law."3 7 The collusion they engage in the "supreme evil of antitrust. ' '3s A cartel is a group of firms in an industry that should be competitors but have instead agreed to coordinate their activities so that they can raise prices and earn profits above competitive market levels. Cartels utilize a number of mechanisms to coordinate their activities, including horizontal price fixing,39 bid rigging, territorial division,40 non-territorial customer division, and market-share agreements. In addition to harming the consumers of their products by charging supra-competitive prices, cartels also reduce economic efficiency by causing consumers to purchase less of a product than they otherwise would buy and by reducing the competitive pressures that member firms face to control costs and to innovate.41

A cartel must overcome four challenges to operate successfully. First, the cartel's members must reach agreement to restrict the supply of a product and increase its price. A cartel restricts supply so that the loss from the lower quantity of sales is more than offset by the increase in the price of each remaining sale. The optimal cartel quantity and price is that of a monopoly producer, but cartels rarely achieve that optimal level because cheating by members and market entry by new producers increases market supply. Thus, a second challenge for a cartel is to ensure that its members follow the agreed course of action. Each cartel member has an incentive-to sell more than the agreed quantity of the product-at the cartel price or one slightly below it-to gain even more profit.42 Because cheating threatens the cartel's viability, cartels must monitor their members and punish cheating.4 3 But monitoring is difficult because of the third challenge inherent to cartels: their illegal actions force them to operate in secrecy to avoid detection.44 Yet even if, while operating in secret, cartels are able to monitor and punish cheaters, they still must prevent entry by other firms into the market. Entrants will be enticed by the opportunity to earn profits due to the extra-competitive cartel prices, and their entry will drive down the cartel's profits. To maintain its hold on the market, the cartel must prevent new entry, again without making the cartel visible. The complexity of addressing these four challenges leads many economists to conclude that cartels are "inherently unstable."43

Certain market characteristics are conducive to collusive activity. Cartels often operate in concentrated markets with few firms, permitting easier coordination and more reliable confidentiality.46 Markets with high initial investment costs are also conducive to cartel activity. These costs deter other firms from quickly entering the market to take advantage of the cartel's artificially high prices.47 Products that are homogenous and fungible also facilitate cartel activity. a Such products are usually uniformly priced, making it easier for cartels to monitor member prices. Finally, market structures, such as public disclosure laws regarding prices and quantities, can help cartels monitor their members' activities.

Market characteristics alone cannot sustain a cartel; cartel members must adopt a variety of practices to avoid detection and to enforce compliance. Cartels avoid detection by holding secret meetings, using code names, and creating legitimate-appearing trade associations to share information.49 Generally, cartel members meet periodically to review public and private sales and price figures from prior periods. They also force members who exceed their quotas to compensate the other members.50 Thus, cartels overcome their inherent instability by successfully providing supra-competitive profits to their members while maintaining the secrecy of their collusion and punishing any deviations. Indeed, based on the fact that twenty-four of the forty international cartels prosecuted in the 1990s had operated for at least four years, one study concluded, "market forces alone may be unable to quickly undermine attempts to fix prices, rig bids, allocate quotas, and market shares; perhaps implying a potential role for national anti-cartel enforcement." 51

C. International Cartels

Certain characteristics of the global marketplace increase the ability of international cartels to monitor their members and maintain secrecy. The publication of official import and export data facilitates the cartel's monitoring of its members. National differences in accounting, reporting requirements, and other legal mandates help cartels to hide their activities and profits. 53 National borders mask agreements to divide a product market among competitors,54 and they can facilitate the punishment of cheaters.55 Cartel members also frustrate the efforts of effective policing authorities by meeting and retaining records outside their jurisdictions.56

Almost invariably, any international cartel harms consumers in all of the countries in which its product is sold. If an international cartel does not raise prices everywhere, a product sold at a cheaper price in one country can be resold in another country where the price is higher. This arbitrage threat exists as long as transaction costs, including transportation costs, are low and the product is undifferentiated across the various countries. If the cartel's product is sold in the United States, the cartel must raise its price in the United States sufficiently so that it is not profitable to buy the product in the United States, ship it to another market, and sell it at or below the cartel price. Thus, because cartels must address the arbitrage threat by raising prices in all of the markets in which they operate, the harms caused by the cartels in those markets are interconnected.

To effectively deter cartels, the total expected penalty must at least equal the supra-competitive profits from participating in the cartel.57 Because an international cartel enjoys supra-competitive profits from its sales in other countries, "[tihe relevant expected penalty depends on the sum of the expected penalties in each nation., 58 According to the OECD, sanctions against cartels "are, on the whole, still inadequate" 59 in most countries. Therefore, cartels will raise their prices in the United States even though doing so increases the likelihood of the cartel's detection due to the United States's more rigorous antitrust regime. The international cartel will still harm American consumers because it can offset its expected American losses with its supra-competitive profits from countries where it has little fear of penalty. As a result, "the deterrent required to prevent a global cartel from including the United States is generally larger than the deterrent required to prevent a purely domestic cartel from forming." 60

#### States have a common interest in coordinating antitrust---they prefer to cooperate, rather than resist, extraterritorial enforcement.

Lim 17, \*Daniel Lim, Corporate Associate at Ropes & Gray LLP. Ropes & Gray LLP; (2017, “State Interest as the Main Impetus for U.S. Antitrust Extraterritorial Jurisdiction: Restraint Through Prescriptive Comity”, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1180&context=eilr)

II. FROM RESENTMENT TO COOPERATION

Following the Alcoa decision, none of the nearly 250 foreign antitrust actions brought by the DOJ had been dismissed under the intended effects test.108 As a result, foreign states began adopting “blocking” statutes. Some of these frustrated U.S. application of antitrust laws by preventing discovery, requiring foreign courts to refuse recognition of treble-damages awards, and permitting defendants to receive “clawback” judgments, 109 which allow defendants to retrieve the damages award they paid in their home courts. 110 However, members of the international community began changing their approach; instead of resisting, they began to formulate their own antitrust laws. Bilateral and multilateral agreements gave rise to cooperative regimes to harmonize and enforce antitrust laws. However, the effects of these regimes were limited to common interests between states.

A. Foreign Counteractions against U.S. Antitrust Laws

After the Seventh Circuit Court asserted jurisdiction over Australia, Canada, Great Britain, and South Africa in a uranium price-fixing case, the Westinghouse litigation, the foreign states passed blocking statutes. 111 The British Parliament passed the Shipping Contracts and Commercial Documents Act, which “authorized a Minister of the British Government to order British citizens not to comply with certain discovery requests from foreign States.” 112 The Canadian government also adopted a similar blocking statute by adopting a Uranium Information Security Regulation, which “prohibit[ed] a person from releasing any written matter or documentation relating to any phase of uranium mining, refining or marketing . . . unless required to do so by Canadian law, or by the Minister of Energy, Mines and Resources.” 113 The Australian government passed the Australian Foreign Antitrust Judgments Act providing that a judgment of a foreign court under antitrust law should not be satisfied if the Attorney General determined that it was inconsistent with international law or comity, or was not in the national interest.114

B. Development of Stricter Antitrust Laws in Foreign States

While the United States was initially the most aggressive in expanding the reach of its antitrust laws, other nations began to reciprocate U.S. antitrust extraterritorial jurisdiction. 115 This change in attitude came with the increasingly global nature of business activity and the realization that international comity principles posed no significant obstacle to extraterritorial application of antitrust laws. 116 The continuing liberalization of trade also encouraged the increasing number of competition statutes among various states.117

In particular, the EU began not only tolerating but also increasingly applying extraterritorial jurisdiction.118 Among other factors, the EU’s growing role as an economic actor contributed to its boldness in applying its antitrust extraterritorial jurisdiction.119 Today, the EU is considered to be engaging in “unilateral regulatory globalization” known as “The Brussels Effect.”120

Although the European Court of Justice (ECJ) never explicitly affirmed the effects doctrine, it developed doctrines that emulated the tests formulated by U.S. courts. 121 The Economic Entity Doctrine was used to assert jurisdiction over non-EU parent undertakings by attributing liability to them for the illegal price-fixing by their subsidiaries in the EU.122 The ECJ looked at the extent to which a non-EU parent undertaking controls its subsidiaries located in the EU to determine if a single economic entity was formed. 123 Because the court regarded the non-EU parent and its EU subsidiaries as a single economic entity, the non-EU undertaking fell within the scope of the EU competition law.124 The EU also developed the Implementation Doctrine, which is based on the territoriality principle.125 Under this doctrine, agreements and practices fall within the purview of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)126 if they are implemented within the EU and they affect trade between member states, regardless of their geographic origin.127

Other states, such as Australia and South Korea, adopted similar approaches to extraterritorial application of antitrust laws. In Australia, although the government enacted the Trade Practices Act, which rejected the U.S. and Canadian models, it eventually adopted antitrust legislation modeled after U.S. antitrust legislation. 128 South Korea enacted the Monopoly Regulation and Fair Trade Act (MRFTA), which was also modeled after U.S. antitrust laws.129 Today, the five most aggressive antitrust enforcement regimes are found in the EU, Brazil, Japan, South Korea, and the United States. 130 The EU is the leading entity in aggressive investigation of cartel activity. In 2014, it led the way in cartel fines, collecting over $2 billion. 131 In 2002, the Korean Fair Trade Commission (KFTC) made its first decision to apply extraterritorial jurisdiction in a case concerning international cartels. 132 In January 2015, the KFTC made a record fine of $123 million for bid-rigging.133 For the first time, it also imposed prison terms on individuals for cartel offenses in 2014. 134 In other states, such as Brazil, the jail sentence for anticompetitive behavior has been increasing, with sentences sometimes exceeding ten years.135

C. International Cooperative Regimes for Antitrust Enforcement

Along with an increasing application of extraterritorial jurisdiction of anti- competition laws, various states began cooperating and building global antitrust regimes. This movement began after World War II, when states attempted to achieve harmonization through multilateral agreements and international organizations.

In 1947, the Havana Charter and the International Trade Organization began contemplating adding provisions for the regulation of business practices. 136 In the early 1950s, the United Nations (U.N.) Economic and Social Council continued discussions on formulating an international agreement on business practices as well. However, these international endeavors were rejected by the United States. 137 Although the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” was adopt ed in 1980 with the efforts of developing countries, it did not have much meaningful effect due to the voluntary nature of the code.138

The formation of the World Trade Organization (WTO) in the 1990s reignited efforts to harmonize antitrust laws and enforcement. 139 This time, leaders of the European Commission tried to incorporate competition law into the WTO regime, but failed due to opposition from both developing countries and the United States. 140 Following years of failed negotiations, the WTO decided not to hold discussions on competition law.141

However, the stalemate for international cooperation was broken with the strong support of U.S. interest s through a different strategy. 142 In 1997, U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein formed the International Competition Policy Advisory Committee (ICPAC).143 This committee was commissioned to address worldwide antitrust problems and issued a report advising the creation of a “Global Competition Initiative” to realize a greater convergence of competition law, analysis, and common culture. 144 At the anniversary of the European Council Merge Control Regulation in 2000, Mario Monti, then-European Commissioner for Competition, and Joel Klein expressed their support for the initiative. 145 Finally, in 2001, top officials from Australia, Canada, the EU, France, Germany, Israel, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia launched the International Competition Network (ICN).146

One of the main features of the ICN is that participation is voluntary. 147 Although almost all of the competition authorities in the world are represented in the ICN, 148 ICN initiatives and cooperation will only be effective when the case involves jurisdictions without contradictory interests. The voluntary nature of the ICN and the bilateral agreements discussed below are all efforts initiated by states with power to coordinate a more effective competition law enforcement regime according to the standards of each respective state.

The United States continued to build an international community that would help support its competition law initiatives by entering into bilateral and regional agreements with other nations, rather than using international organizations as a forum for discussion. Initially, the United States was not receptive to cooperation with other states, 149 as evidenced by its rejection of the recommendation of the Organisation for Economic Co-operation and Development (OECD) in 1967 to limit state enforcement actions in light of legitimate foreign interests. 150 Today, the United States has entered into anticompetitive bilateral agreements with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan, Mexico, and Russia. 151 Mutual legal assistance treaties (MLATs) are other important tools of cooperation. 152 MLATs are bilateral agreements, which provide that each party will use its own criminal investigative resources to obtain information for an investigation being conducted by the other party. 153 To date, the United States has entered into an MLAT agreement with twenty-six different states, including Australia, Canada, Japan, South Korea, and the UK. 154 There have also been cooperative efforts on a regional level. Some of the most notable multilateral agreements are the Asia-Pacific Economic Cooperation (APEC), where the United States is a key participant, and the North American Free Trade Agreement (NAFTA).155 These agreements have gone beyond written form into action. Some of these coordinated efforts include cooperative dawn raids and the execution of search warrants in multiple jurisdictions.156

Nonetheless, these agreements did not play a major role in harmonizing antitrust policies, but instead acted mostly as non-binding agreements. 157 And even those agreements that were binding only had some rudimentary coverage of competition policy matters. 158 Most importantly, these international agreements were not effective in restraining extraterritorial jurisdiction, but they did support cooperative efforts that were aimed towards reinforcing each state’s interest by sharing information, coordinating dawn raids, and executing multi-jurisdictional search warrants. 159 The nature of these agreements shows that international cooperation in antitrust laws is not motivated by a desire of restraint, but by a desire to effectively enforce each state’s own antitrust laws. In other words, international anti-competitive cooperation is realized by the gathering of various states that have common interests in preventing similar “anti-competitive” actions.

#### Antitrust can and should be used liberally to open markets in developing economies and reduce prices---it’s the most important tool we have to counter globalization-induced poverty and inequality.

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Ill. THE STACK OF THE DECK: A FEW SYMBOLS

In the mid-1990s, the symbol of globalization was both cast and burnished by a concept and epithet called the "Washington Consensus."' 4 The Washington Consensus prescribed deregulation, privatization, liberalization, clear property rights, and fiscal discipline. Following this prescription, it predicted enhanced growth for the economies of developing countries.' 5

Citizens and advocates of the developing world quickly observed the other side of the coin. Globalization also tended to increase the disparity of wealth and opportunity to the harm of some of the poorest people.16 In certain least developed countries it made many producers worse off as their exported commodities faced more competition in world markets, their value-added exports faced high tariffs, 17 and the prices demanded for value-added imports were often supra-competitively high.

Moreover, while talking the talk of liberalization, developed countries often liberalized where convenient and resisted liberalization where inconvenient. This has been particularly true in the case of agriculture, where developing countries often have significant comparative advantage. Industrialized countries flooded African markets with deeply subsidized cotton, displacing and threatening the livelihoods of African farmers who produced cotton at two-thirds of the importers' cost." Thus, even though developed countries gave millions of dollars for development 19 and insisted that the poor should work to help themselves, they continued to block opportunities for efficient but poor foreign producers who attempted to help themselves by competing on the merits.2 ° Journalist Martin Wolf calls this phenomenon the "Hypocrisy of the Rich.' 2 1

Persistent world-game strategies tend to keep the advantaged on top and the disadvantaged on bottom. 22 For this, there are several symbols. One is "Seattle. '2' 3 Seattle evokes the memory of the riots that opposed the prospect of freer trade under the aegis of the World Trade Organization ("WTO") without giving the usual losers a significant voice; the losers are those who consistently get an unfair and meager share of the gains from trade unleashed by globalization and liberalization.

In the wake of Seattle and subsequent flash points, the greatest economic problem in the world - deep systemic poverty and its link to inequality - could no longer be pushed to the margins. Nearly twenty percent of the world's population lives on less than one dollar a day, and in sub-Saharan Africa this figure rises to more than forty percent.24 Persistent poverty reduces the physical and mental capabilities of large populations.2 5 It saps the work force and productivity in the poorest nations, undermining their promise of efficiency (no less, humanity). It increases spending on health care, which decreases savings and investment.26 Moreover, income inequality breeds corruption.27 It activates a spiral that leads to more economic and political inequality.28

In the year 2000, the heightened global concern with poverty produced the United Nations' Millennium Development Goals (MDGs). The MDGs aspired to halve the percentage of the world's severely poor by 2015. We are halfway there by years but not by performance, although rates of extreme poverty are falling, especially in Asia.29

Most of the specified strategies for reaching the anti-poverty goal are in the nature of benefits and public goods - health, school meals, education, infrastructure, debt forgiveness.3 ° This paper, however, will focus on MDGs and markets.3 "MDGs" is a gripping symbol.

It is fair to ask: Have we met a clash of symbols?

This paper argues:

1. Market tools are a very important part of the panoply of tools needed to address world poverty and should be used liberally. These market tools include market-freeing measures that reduce prices. They also include antitrust priority-setting that targets conspiracies that raise the price of staples, such as milk, bread, transportation and utilities, helping the poor 32 as well as those who are better off. Moreover, as observed by Professor Simon Evenett, "the conceptual arguments and available empirical evidence by and large support[ ] the view that promoting inter-firm rivalry enhances.

2. At the same time, outside of the area of cartels, there are limits to the modern Western antitrust framework, especially when applied to developing countries and populations mired in poverty. For macroeconomics, the limits of the neo-liberal approach have been well-documented. 34

The deck is stacked in favor of those on high rungs of the ladder in skill, education, capital, and mobility; it is stacked in favor of those who live in an economy with a supportive infrastructure, composed of non-corrupt and well-funded institutions. Moreover, certain modern versions of industrialized countries' antitrust, and even qualified versions that recognize the weaknesses of institutional structures and markets, focus only on the allocation of resources and the size of the pie. The guiding concern is that inefficient anticompetitive practices may cause the pie to shrink, even while it is posited that non-cartel acts almost never cause the pie to shrink. 36 Proponents of this per spective on aggregate efficiency or wealth do not grapple with deontological questions of power and how opportunity is distributed. They normally presume that an antitrust approach on the distribution of opportunity and wealth will shrink the size of the pie and make even the poorest worse off. Developing countries, however, may disagree.37

By contrast, the Millennium Development Goals are centrally about distribution. 38 Achieving the goals is perceived to be central to the well-being of the developing world and indirectly, all the world. This article argues that if policy is to be friendly to economic development, it must look dire poverty in the eye. 39 This means not only harnessing market forces to keep prices competitive; it also means building a ladder of mobility from the lowest rung up to enable mobility, incentivize entrepreneurship," and stimulate invention.41 It implies a consciousness about not expanding the moat between rich and poor, the enabled and the powerless. The mobility imperative 42 applies to economic policy. In particular, it applies to competition law and policy. If competition law in developing countries threatens to widen or preserve the inequality moat rather than build the mobility ladder, there is a serious question whether free-market competition law beyond anti-cartel law43 should be advocated for the developing world.

#### The exponential expected value of economic growth to future well-being makes securing it a moral imperative.

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So often we are tempted to put pleasure first and postpone our chores and our pains. The present is so real and vivid, and the future seems so distant and abstract. Many people cannot fully grasp that when the future comes, it will be as real as the present is right now.

I am struck by how people respond when they are given a choice between the immediate present, the future, and the more distant future. Very often they are biased toward the immediate present. For instance, a person might realize that a benefit in two years’ time is about the same in value as that same benefit in three years’ time. That’s a rational posture. That same person, however, may prefer a dollar today to three dollars three weeks from now. 1 But when the comparison is between ten years from now and twenty years from now, people exhibit much more patience, and many people would even say that a benefit ten years from now is about as valuable as the same benefit twenty years from now.

In other words, individual time preference usually focuses on the immediate vs. the only somewhat distant. If we can get over our initial impatience for receiving a reward now, our intellect is very often capable of seeing that we should care about the more distant future as much as we should care about the less distant future. For the most part, we’re actually fairly rational about time, except for this fixation on the “now” moment and the “very soon/right away” horizon.

We are programmed for the now moment for reasons which are inapplicable to most of our public policy choices and obsolete as a fundamental tool of moral reasoning. Human beings evolved under brutal hunter-gatherer conditions; they had good reason to pay special attention to the now moment. If you didn’t get the “now” right, there might not be a tomorrow. If you let a piece of meat sit, it would spoil or be seized by your neighbor or consumed by marauding animals overnight. It wasn’t like sitting on T-Bills in your Fidelity account. So we may have an innate biological preference for the “now,” but we will do better if we can get past it, if we can tap into the part of ourselves that recognizes that a benefit in twenty years’ time is about as valuable as that same benefit in thirty years’ time.

If you are the kind of person who is inclined to seize the current benefit, you will do best if you can find a way to link these immediate rewards to a superior payoff in the future. Young people, uneducated people, and those with lower IQs and problems with cognition or self-control find it hardest to make this connection. Those same people are also more likely to have problems with obesity, gambling, impulse control, and even violence. These correlations don’t philosophically prove that their impatient choices are incorrect (maybe the gamblers are the wise ones and the rest of us are fools for missing out on their risky delights), but they do lend support to the idea that these individuals are making a mistake. They are failing to imagine the future and its import. Further evidence suggests that children who are more impatient have more trouble in school and are more likely to encounter disciplinary action. 2

Very often the choice between the present and the future takes place at the social level. Many social policies influence whether benefits and costs come sooner or later, and if we are to make a choice, we need to decide how impatient we are going to be. I worry about the logical implications of impatience, if we were to apply such impatience to a longer time horizon. Together with Derek Parfit, I once wrote: 3

Why should costs and benefits receive less weight, simply because they are further in the future? When the future comes, these benefits and costs will be no less real. Imagine finding out that you, having just reached your twenty-first birthday, must soon die of cancer because one evening Cleopatra wanted an extra helping of dessert. How could this be justified ?

Economists and other social scientists often speak of a “discount rate.” A discount rate tells us how to compare future benefits to current benefits (or costs) when we make decisions. When the discount rate is high, we are counting future costs and benefits for less. Let’s speak in terms of pleasure (or pain) as a magnitude that corresponds, however roughly, to a real number scale. A five percent discount rate, defined annually, means that 100 units worth of pleasure today is equal to 105 units worth of pleasure a year from now. A ten percent discount rate would set this equality at 110 units worth of pleasure a year from now, and so on.

A discount rate of zero means that a future benefit (or cost) counts for as much as a comparable benefit in the present. A person with a zero discount rate would not see any point in putting off going to the dentist. There’s no reason not to get it over with.

If there’s one thing we’ve learned, it’s that discount rates matter. In your personal life it affects how hard you work, how much you drink and gamble, and what kind of education you get. At the social level, the discount rate pertains to questions of how hard we should be fighting climate change and how much we should invest in preserving biodiversity. If we dismiss the importance of the distant future, action will not seem imperative. But if we pay heed to the distant future, we will see these as major concerns.

Discounting also matters for how hell-bent we are on pursuing a higher rate of economic growth. A higher growth rate means that the future, at some point in time, will be much richer than it would be otherwise, and, as I argued earlier, it also means that human beings will be much better off. How compelled should we feel to bring about this wealthier state of affairs ? If you only care about today, you won’t be as motivated to act in favor of higher sustainable growth.

Most of us are altruistic, especially toward our own children and grandchildren. But this form of partial altruism does not make us care much about other people’s grandkids. When people vote or otherwise make choices that affect future generations as a whole, they often behave quite selfishly. Political time horizons tend to be very short, often extending no further than the next election or the next media cycle. Voters are keen to receive more government spending now and postpone the required taxes to the more distant future. Few governments do everything they can to promote economic growth for the more distant future. The bottom line is that caring about the future is not something that happens automatically, even if you dearly love, or will dearly love, your grandchildren. When it comes to the discount rate for social decisions, we need to choose wisely.

For certain decisions, such as whether or not to cut down a tree, market forces induce even selfish people to think about the more distant future. If you leave the tree standing, it might be worth more money. If you own a Rembrandt painting, you’ll probably keep it in decent shape, even if you’re a selfish, uncultured bastard who doesn’t care about the artistic patrimony of the Dutch. These kinds of examples, however, apply only when there are well-defined property rights to specific assets. The motivations behind these behaviors won’t spur us to preserve the environment or maximize the rate of sustainable economic growth. Once again, the proper depth of concern for the more distant future does not come to us automatically, at least not in a wide variety of cases.

Expressed differently, when it comes to non-tradable and storable assets, markets do not reflect the preferences of currently unborn individuals. The branch of economics known as welfare economics holds up perfect markets as a normative ideal, yet future generations cannot contract in today’s markets. If we were to imagine future generations engaging in such contracting, current decisions might run more in their favor. Circa 2018, the future people of 2068 can’t express their preferences across a lot of the choices we are making today, such as how

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rapidly to boost future wealth or how much to mitigate the risk of serious catastrophes. 4

Let’s now consider some basic choices about how to value the distant future. Again, think of a decision-maker weighing present and future interests, in this case human lives. The way discounting works, if we discount the future by five percent, a person’s death today is worth about thirty-nine billion deaths five hundred years from now. Alternatively, at that same discount rate, one death two hundred years from now is equal in value to 131.5 deaths three hundred years from now. Upon reflection, few people, putting aside their selfish interest in the current time period, would share these conclusions as a basis for ethical decision-making. 5

Or consider the comparison prospectively. Under any positive discount rate, no matter how low, one life today could be worth more than one million lives in the future. It could even be worth the entire subsequent survival of the human race, if we use a long enough time horizon for the comparison. At the very least, we should be skeptical that positive discount rates apply to every choice before us. Sometimes we should be less impatient and pay the future greater heed.

Even if you think that individual impatience is sometimes justified, impatience will not justify the positive discounting of well-being across generations. Time preference may mean that an individual prefers to have a good steak dinner sooner rather than later. Even if this is rational—after all, you’re getting hungrier by the minute—this kind of time preference doesn’t apply across longer time frames, including future generations. Our still-unborn great-great-grandchildren will not receive benefits for some time. But in the meantime they are not sitting around, waiting impatiently with rumbling stomachs. It cannot be argued that their forthcoming slice of time is worth less simply because they must wait for it. Similarly, it cannot be argued that Medieval peasants benefited from having been born before us and thus having eaten their bread sooner. When we consider long periods of time and count the years before individuals are born, we need to discard impatience as a factor of relevance because it just doesn’t apply. Time preference therefore does not justify the significant discounting of the distant future, even if it justifies Tom’s wanting to have his steak dinner sooner rather than later. 6

Another way of thinking about why a high time discount rate is wrong involves a somewhat unusual—some would say kooky—thought experiment. Einstein’s theory of relativity suggests that there is no one factual answer to the question, “What time is it ? ” Any measurement of time (when is “now” ? ) is relative to the perspective of an observer, and to the velocity of that observer relative to the speed of light. In other words, if you are traveling very fast, you are moving into the future at an especially rapid rate. Yet it seems odd, to say the least, to discount the well-being of people as their velocity increases. If, for instance, we sent off a spacecraft at nearly the velocity of light, the astronauts would return to Earth, hardly aged, many millions of years hence. Should we pay less attention to the safety of our spacecraft, and thus to the welfare of our astronauts, the faster those vehicles go ? Should we—as a result of positive discounting—not give them enough fuel to make a safe landing ? And if you decline to condemn these brave astronauts to death, how are they different from other residents of the distant future ?

Instead of letting our speedy astronauts die, we can think of the universe as a block of four-dimensional space-time. We would not discount human well-being for temporal distance per se any more than we would discount well-being for spatial location per se . In moral terms, maybe time really is an illusion, as Buddha suggested thousands of years ago.

That said, discounting for risk is justified in a way that discounting for the pure passage of time is not. If a future benefit is uncertain, we should discount that benefit accordingly because it may not arrive. But such a practice does not dent a deep concern for the distant future. It is precisely because we discount for risk that we seek to protect our future against great tragedies, thereby making that future less risky. If we boost the long-term sustainable growth rate, for instance, we are indeed making the future less risky. Rather than ignoring risk, a future-oriented perspective takes long-term risk into account and attempts to lower it. The factor of risk might encourage you to spend your money now, otherwise someone might steal it. But it won’t discourage us from caring a lot about long-term sustainable growth.

Before moving on, let’s consider the relevance of the numerical comparisons presented above of events which lie one hundred, two hundred, or even five hundred years into the future. It might seem that nothing we do today can affect the world that far out, most of all when it comes to policy issues. Yet the most recent evidence suggests that good (or bad) political and economic decisions, and the general existence of prosperity, have persistent effects that stretch for centuries into the future. Colonial policies from the sixteenth and seventeenth centuries have persistent effects on prosperity today, and there is even research suggesting that the prosperity of a region well before the birth of Christ holds predictive power for the prosperity of those regions today. 7

For whatever reason, good institutions and a history of prosperity tend to have enduring effects. Wealth can fund and enable better government, and that in turn gives rise to further wealth and better institutions. Institutional memories of economic success and good governance can persist for long periods of time. Cultural practices such as business savvy or an interest in external markets can last for centuries.

England, which led the Industrial Revolution, had positive institutional features stretching far back in its history, such as relatively free labor markets in Medieval times and the carving out of a coherent national unit with a language, an army, and a parliament. The practices of the empire then carried some of these institutions across the oceans, such as when the British settled much of North America and the Antipodes (though not every region benefited from the brighter side of British rule). It’s no accident that many of the original territories of the Roman Empire remain some of the world’s wealthiest and most successful nations. China was also a relatively wealthy nation in earlier times, and that prosperity is reemerging today. For centuries, Chinese entrepreneurs around the world have shown special commercial savvy; this again has something to do with history.

Of course, the persistence of prosperity does not apply in every case. Much of the Arab world is currently well below its historic relative standing; Baghdad might have been one of the best and most interesting cities to live in about a thousand years ago, but today it is struggling. Still, if we think in terms of averages, we see plenty of evidence that history can matter over very long time spans. Therefore, any act which strengthens good institutions today has, in expected value terms, a causal stretch running centuries into the future. Once again, this means that our choice of discount rate is of critical importance.

We can also see the importance of faith to the overall argument. To fully grasp the import of doing the right thing, and the importance of creating wealth and strengthening institutions, we must look very deeply into the distant future. As I have argued at length, this is a conclusion suggested by reason. But in the real world of actual human motivations, the application of abstract reason across such long time horizons is both rare and unhelpful when it comes to getting people to do the right thing. The actual attitudes required to induce an acceptance of such long time horizons are, in psychological terms, much closer to a kind of faith. We cannot see these very distant expected gains, but we must believe in them nonetheless, and we must hold those beliefs near and dear to our hearts. In this sense, we should strongly reject the modern secular tendency to claim that a good politics can or should be devoid of faith.

There are, of course, many bad forms of faith in politics, and we should not encourage political (or other) beliefs in willful disregard of reason. But we cannot kick away faith itself as a motivational tool, as politics is of necessity built on some kind of faith. The lack—and, indeed, the sometimes conscious rejection—of the notion of faith, as is common in secular rationalism, is one of the most troubling features of the contemporary world. It has brought us some very real gains in terms of personal freedom, but it also threatens to diminish our ability to make the very best choices.

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## Case

#### Antitrust restrains capitalism to reduce harmful effects

Parakkal et al 13 Raju Parakkal is Assistant Professor of International Relations, Philadelphia University, Sherry Bartz-Martinez is Visiting Assistant Professor, Department of Economics, University of Capitalism, democratic capitalism, and the pursuit of antitrust laws, Antitrust Bulletin; London Vol. 58, Iss. 4, (Winter 2013): 693-729.

An equally important reason why capitalism per se did not matter for antitrust adoption is that—notwithstanding some of their obvious links—capitalism and antitrust are “transactionally incongruent.” Capitalism demands freedom of trade and commerce. For its part, antitrust does seek to supply this freedom; however, antitrust goes further than that, and hence, the incongruity. Antitrust also aspires to create an equitable marketplace and to protect the less-empowered sections of society, typically the consumers and small and mediumsized businesses. The incongruity matters because these additional goals of antitrust are seemingly incompatible with a pure form of capitalism and therefore negate the possibility of a direct and automatic causal link between capitalism and antitrust. However, these additional goals that antitrust supplies—equity in the marketplace and protection of the weaker actors—unmistakably satisfy the demands of a democratic society. And that is why a democratic form of capitalism demonstrates a strong and positive impact on the adoption of antitrust laws. If we continue on this line of thought and analysis, we observe that an antitrust law truly embodies the goals of both capitalism and democracy by seeking to promote competition and free enterprise (largely a capitalistic goal) and protect society’s “little guys” (largely a democratic goal). 79 Therefore the synergistic nature of the relationship between capitalism and democracy easily manifests itself in an antitrust law. This synergy stems from their shared emphases on personal freedom and individual choice. It is due to this synergy that these two dominant systems can interact to produce a new kind of political economy that is called democratic capitalism. And that is the reason antitrust laws connect more intrinsically with democratic capitalism rather than with a pure form of capitalism. An antitrust law is not only compatible but it is also commensurate in its “normativity” with a political economy of democratic capitalism. The fact that antitrust laws go beyond the demands of capitalism and that democratic capitalism better explains antitrust adoption is evident from a closer examination of the national antitrust laws of some of the countries in the sample. For illustrative purposes, we focus on the competition laws enacted by India and South Africa. The Competition Act of 200280 enacted by India is an excellent illustration of the capitalism-democracy tango as reflected in its new antitrust law. Due to its above-average scores for both capitalism and democracy, India has a relatively high democratic capitalism score in the dataset used for this study. It therefore follows from the findings of this study that India would adopt an antitrust law that sought to promote the twin goals of both capitalism and democracy as discussed above. And that’s exactly what India did. In 2002, India enacted a new antitrust law that unequivocally states at the outset that its objectives are “to provide . . . for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets”. 81 Promoting and sustaining competition and freedom of trade are clearly capitalistic goals while protecting the interests of consumers and other market participants satisfy the democratic aspirations of equity and fairness. The repeated emphases on the protection and promotion of competition, consumers, freedom of trade, and other market participants point to how a democratically capitalistic society adopts an antitrust law that seeks to supply the society with the demands of both capitalism and democracy.

#### No link---championing competition policy is not a broader endorsement of markets.

Coniglio 20, \*Joseph V., antitrust attorney in the Washington, DC office of Sidley Austin LLP, (“Economizing the Totalitarian Temptation,” Santa Clara Law Review, Vol. 59, 2020, https://heinonline.org/HOL/Page?handle=hein.journals/saclr59&div=26&g\_sent=1&casa\_token=&collection=journals)

Indeed, a commonality that many critics of neoliberalism have with neoliberals in the broader social sense is the general reduction of social and political problems to economic forces. That is, regardless of the particular societal ill, these paradigms are all apt to define the root problems through economic discourses such as class conflict between rich and poor, monopoly versus competition, or a lack of economic growth. 146 Indeed, it appears true to say that whereas for the classical Marxist the capitalist exploitation of labor is the root of all evil, for the neoliberal more economic growth is almost always the summum bonum. 1 47 Of course, although neoliberalism is often critiqued along these lines as amounting to a belief in "market fundamentalism,' ' 48 alternatives like Marxism equally if not more constitute a religious ideology-namely, the dogmatic belief that a materialist and dialectical process of history will liberate the oppressed proletariat and establish rule by an intellectual class purportedly championing the interests of the fourth estate. 4 9

The justification for a consumer welfare standard, as well as for neoliberal political economy more generally, should be distinguished from a defense of this sense of neoliberalism as a comprehensive social order which, like its Marxist rival, shares in this totalitarianizing of the economic. 150 Put simply, notwithstanding its fruits, neoliberalism should not become the very sort of utopian and totalitarian ideology that it was designed to replace. The existence of a justification for neoliberal competition policy does not mean that the wealth maximizing logic of the market should be the organizing principle for society writ large' 5 ' -or even law, as a general matter. 52 To paraphrase Schum-peter, it is the higher order question of "Meaning," upon which the indictment of neoliberalism is likely most sound and most neededhowever difficult that may be to articulate.

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#### 2---consequentialism---any principled stance on the way the world ought to be must be coupled with a calculation of that stance’s outcomes---that’s the only to confront inevitable ethical trade-offs and avoid moral dogmatism that results in disaster.

Zanotti 17, \*Laura Zanotti, Associate Professor Department of Political Science, Virginia Tech, (January 13th, 2017, “Reorienting IR: Ontological Entanglement, Agency, and Ethics,” International Studies Review)

Furthermore, if we accept Barad’s position that we are “of the world” and not above the world, theorizing looks more like a practice endowed with performative political effects than a quest for the discovery of the “true nature” of what exists. Therefore, intellectual undertakings are a form of political agency and come with great responsibility. Such responsibility requires the need for exercising prudence in making truth statements about what is universally good or naturally inevitable. Assumptions about linearity of causal relations, universal laws of history, or ontological properties of entities yield two problematic effects. On the one hand, they may stifle political imagination; on the other hand, they could encourage actions based upon abstract prescriptions rather than upon careful diagnosis of the forces that obtain in the situation at hand. In an entangled world, there are no externalities. Arguments that divert responsibility by basing political choices upon abstract principles or aspirations and, as a result, that treat what happens on the ground as “unintended consequences” or “collateral damage,” are ethically thin and politically dangerous.

In fact, unintended consequences may well be the result of irresponsible political decision-making that does not include a competent assessment of the practical configurations that constitute the context of action and the means necessary to achieve stated goals. Such attitudes, Amoureux and Steele (2014) have suggested, have led to disastrous initiatives, such as the Bush administration’s invasion of Iraq. Likewise, Kennedy (2006) has shown that the bland rhetoric of jus in bello that provides standardized criteria regarding the number of acceptable civilian casualties (conveniently called collateral damage) produces the effect of diverting responsibility from those who conduct war while assuaging their consciences concerning the injuries and deaths their choices are inflicting. Kennedy (2004) has also shown that as a result of the preference for universal normativity, the human rights profession (which he calls “the invisible college”) is more concerned with protecting abstract norms than with acting politically so as to devise viable solutions to specific problems.

Universal norms and bureaucratic routines play a major role in prescribing and justifying UN peacekeeping interventions. As Jean Marie Guehe ́nno argued more than a decade ago, strategies of international intervention based upon assumptions of causal linearity and invariance may amount to hubris. Norms and rules can also offer grounds for appeasement. The massacres that occurred in Rwanda and Srebrenica in the 1990s provide examples of how, by uncritically following institutionalized rules, United Nations peacekeepers permitted atrocities. UN employees are not cold-blooded monsters or extremely callous individuals. They follow norms and rules, key examples of which include the principle of “impartiality,” Security Council mandates, and “rules of engagement.” By doing so, however, they have often fallen short of considering the possible consequences of decisions in specific situations. The United Nations’ failure to take action to prevent the Rwanda and Srebrenica genocide testifies to the fact that following universal norms (i.e., the imperative to preserve impartiality) and bureaucratic reasoning (i.e., the rules of engagement prescribing not to intervene to disarm any party of the conflict) set the stage for avoiding a careful assessment of what was at stake on the eve of the massacres. These ways of reasoning also appeased consciences for not making decisions accountable to the people in danger (Zanotti 2014).

#### The perm solves – Pessimism is fundamentally compatible with the aff---you should vote aff to hope for a racially just world, while acknowledging that it is extremely unlikely---abandoning hope entirely leads to ressentement but interim hopes like the aff lead to life affirmation

Milona ’18 (Michael Milona – PhD in Philosophy @ USC, Instructor in Philosophy @ Auburn University, former Postdoctoral Fellow in Philosophy @ Cornell University “Finding Hope,” 8 February 2018, https://www.tandfonline.com/doi/abs/10.1080/00455091.2018.1435612)

5.2 Hope for Ideals: Lessons from the Depth of Hope Should we hope for ideals that are extremely unlikely to come about? I address this question through the lens of a specific case, namely that of whether to hope for a racially just society. Martin Luther King Jr. addresses this question in his sermon ‘Shattered Dreams’, observing that while racial justice is of incredible value, it is also incredibly improbable: What does one do under such circumstances? This is a central question, for we must determine how to live in a world where our highest hopes are not fulfilled. [2007: 518] He answers: On the one hand we must accept the finite disappointment, but in spite of this we must maintain the infinite hope. This is the only way that we will be able to live without the fatigue of bitterness and the drain of resentment. [2007: 522] In this sermon, King says, that ‘our ability to deal creatively with…blasted hopes will be determined by the extent of our faith in God’ [2007: 526]. But must we turn to the divine, or is there also a secular pathway to maintaining hope? In what follows, I explore whether it may be rational to maintain such a hope from within a secular worldview, taking for granted the revised standard theory and, in particular, my defense of it in the face of Martin’s and Pettit’s objections. To begin, the hope for a racially just world can seem foolish. The United States, for example, remains painfully distant from true racial equality, despite the end of slavery in the 19th century and de jure segregation in the 20th , among a variety of other achievements.16 Today’s United States is witness to the mass incarceration of black males and de facto segregation in schools. If a substantial hope for racial justice involves acting as if these and other obstacles will (likely) be overcome and some ideal of racial harmony realized, then hope can seem a failure to face up to the tragedy of the situation. But this is precisely what some theories – most notably Pettit’s cognitive resolve theory – would require. Given such an account of hope, one might think hopeless resistance would be a more honest and effective (by virtue of being realistic confrontation of the difficulties) approach.17 Yet given the revised standard theory, it seems as if holding onto hope for racial justice can be rational. On this approach, hopes are catalogued in a fine-grained way according to their influence on attention, motivation, and feeling; and hopes do not necessarily involve acting as if the hoped-for outcome will (likely) come about. Some people may be able to harbor idealistic hopes that exert a daily influence on their psyche; perhaps this is a characteristic of some inspirational leaders and activists (e.g., Martin Luther King Jr.). But this can be difficult given a clear-headed awareness of the minimal chances. Oftentimes, emotions such as sadness and grief seem more appropriate to the state of the world. Crucially, on my approach, these emotions are not incompatible with, or even necessarily in tension with, hope. A person can be deeply sad about racial injustice in the world and sad that a racially just world is a distant possibility; yet none of this rules out a deep hope for a morally ideal world. Even when sadness is more salient in one’s experience, there can still be a deep, patient hope for the distant possibility of justice. There is value in such a hope. It positions one to recognize opportunities to work toward the ideal. After all, on the revised standard theory, hope-constituting desires dispose the hoper to attend to the means to fulfilling the desire. Furthermore, a substantial hope for racial justice can, and I think often does, cultivate and explain “intermediate” hopes for, say, morally superior voting (de-)regulations, voter districting, and allocation of tax payer money. In other words, idealistic hopes can provide an effective psychological breeding ground for many of our more realistic day-to-day ethical hopes to emerge. By contrast, despairing over the ideal may make the pursuit of such intermediate projects, which ought to be pursued, more difficult. In general, the keys to the rationality of idealistic hopes are as follows: (i) hope is compatible with a variety of negative emotions such as sadness and grief that may also be appropriate to a situation, (ii) idealistic hopes needn’t be especially salient in one’s everyday experience but can be patient, and (iii) deeply rooted idealistic hopes fend off despair and can foster admirable patterns of more realistic socio-political hopes. There is an additional worry about hoping for racial justice, however. Katie Stockdale [2017] has recently argued, entirely correctly in my view, that bitterness is a justified response to racial injustice. But then what is bitterness? Stockdale defines it as follows: Bitterness involves anger, but it is, to varying degrees, hopeless anger. In bitterness, we remain committed to the moral expectations others have violated, and at the same time, begin to lose hope that they will attend to the harms about which we’re angry and abide by our moral expectations in the future. [2017: 6; Stockdale’s emphasis] Thus if we agree that bitterness is a justified response to much of the racial injustice in the world, then given Stockdale’s definition of bitterness, a loss of hope must also be justified. Indeed, Stockdale is explicit that this is her stance. Furthermore, King’s sermon quoted above appears to support Stockdale’s point that there is a choice between hope and bitterness (though King sides with hope). At least two kinds of solutions are available. The first is to argue that bitterness and hope on the part of the oppressed are compatible because their fitting targets are, upon closer inspection, distinct in key ways. 18 Bitterness is appropriately directed at, say, the current perpetrators (witting or unwitting) of injustice, while idealistic hopes are appropriately directed at those currently working to fix the problems and to future generations. Another response, which is the one that I favor, says that bitterness is not always hopeless anger but may also be pessimistic anger. According to the sense of ‘pessimism’ that I have in mind, one is pessimistic about something when one expects it not to come about. This form of pessimism is compatible with hope, since one can hope that something will occur despite not expecting that it will (cf. Bell [1992: x] on pessimism in the ‘victory sense’). Although I cannot argue for the view in full here, it seems to me that taking bitterness to involve pessimism, rather than hopelessness, better explains why (some) bitter people bother trying to convince the wrongdoers that morality requires that they repair the wronging. At the very least, adopting this alternative account of bitterness seems to be a reasonable move for those who maintain (as I think we should) that hope and bitterness are sometimes jointly appropriate. In general, patient hope, which the revised standard theory makes room for, is a serious form of hoping, yet not one that is psychologically consuming; it can reside alongside profound negative emotions, even bitterness.

#### Developed countries have a duty to accept responsibility for the facilitation of international cartels. Otherwise, they ossify the most pernicious effects of a balkanized global economy.

Fox 07, \*Eleanor Fox is Walter J. Derenberg Professor of Trade Regulation, New York University School of Law; (Eleanor M. Fox, “Economic Development, Poverty and Antitrust: The Other Path”, 13 Sw. J. L. & TRADE AM. 211 (2007), HeinOnline)

VII. THE DEVELOPED COUNTRY'S DUTY OF COOPERATION

Developing countries are hurt by international cartels and practices and are vulnerable to them. The violators know that developing countries have few resources to devote to antitrust (if any, after they serve other human priorities). Offshore firms direct exploitative practices at developing countries, often by acts taken and agreements made on their home shores.79

These anticompetitive practices launched from distant shores are likely to be beyond the practical reach of developing countries. To solve this problem, the European Union ("EU") has proposed a helpful framework,8" which could be or could have been implemented in the context of the WTO, but could also be implemented as a standalone project.

In the spirit of the EU proposal, developed countries with mature antitrust laws can and should help developing countries, especially when the developed country's own nationals are the violators of clear and shared principles of antitrust.8' The developed countries can and should revise their laws, extending jurisdiction so as to make hardcore export cartels illegal.82

An environmental convention provides a model. This is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,83 which the United States has signed. Under the Basel Convention, if a signatory country prohibits import of hazardous wastes, all other signatories must make the shipment of hazardous wastes to that country illegal. The United States and other developed countries could and should adopt this model for hardcore export cartels, which are the hazardous wastes of antitrust.

Failing that, the United States and other developed countries should amend their antitrust laws to provide jurisdiction for the discovery of documents and testimony from knowledgeable people. This should include subpoena power when the developed country's citizens are the alleged victimizers of the people of developing countries. 84

In antitrust law and enforcement, in the absence of international law, the world demands a cosmopolitan vision and a willingness by developed nations to accept responsibility for the harms they cause. The evolving case law of the United States does not demonstrate this vision and it does not reflect generosity of spirit. Instead it shows a retreat and puts the United States on a track towards solipsism and Balkanization.85

#### The state is inevitable – our obligation is to make it as ethical as possible

**Simmons 99**

William Paul, current Associate Professor of Political Science at ASU, formerly at Bethany College in the Department of History and Political Science, “The Third: Levinas' theoretical move from an-archical ethics to the realm of justice and politics,” Philosophy & Social Criticism November 1, 1999 vol. 25 no. 6

Since ‘it is impossible to escape the State’, 70 Levinas insists that the state be made as ethical as possible. The world of institutions and justice must be held in check by the an-archical responsibility for the Other. Levinas calls for both an-archy and justice. Alongside the an-archical responsibility for the Other there is a place for the realm of the said, which includes ontology, justice and politics. Levinas’ thought is not apolitical as many have charged. His harsh critiques of the political realm refer to a politics unchecked by ethics. For example, in Totality and Inﬁnity, Levinas sees politics as antithetical to an ethics based on the Other. ‘The art of foreseeing war and winning it by every means – politics – is henceforth enjoined as the very exercise of reason. Politics is opposed to morality, as philosophy to naïveté.’ 71 Politics unrestrained, by necessity, totalizes the Other by reducing him or her to abstract categories. Levinas will call for a politics that is founded on ethics and not on ontology. The state must be answerable to the an-archical relationship with the Other, it must strive to maintain the exteriority of the Other. Levinasian heteronomic political thought oscillates between the saying and the said, an-archy and justice, ethics and politics. The liberal state is the concrete manifestation of this oscillation. Levinas calls for a balance between the Greek and the Judaic traditions. Neither tradition should dominate. The fundamental contradiction of our situation (and perhaps of our condition) . . . that both the hierarchy taught by Athens and the abstract and slightly anarchical ethical individualism taught by Jerusalem are simultaneously necessary in order to suppress the violence.0020Each of these principles, left to itself, only hastens the contrary of what it wants to secure

#### Homogenization DA — their argument you should choose not to save lives because of afropess forces a view held by a small number of black academics on lal black and brown majorities and every person around the globe — Millions of black Americans vote and participate in politics and want the government to make better politicies and want to live — the alternative ignores their agency which turns the K

**gamEdze and** **gamedZe 19** are Thuli and Asher Gamedze, siblings, close friends, co-thinkers, and cowriters. They are both cultural workers involved in various art, education, and political collectives, including (previously) education and writing subcommittees of the Rhodes Must Fall movement. “Anxiety, Afropessimism, and the University Shutdown”, The South Atlantic Quarterly 118:1, January 2019//kd

gamEdze: I want to get a bit deeper into what you’re saying here, because I think it’s really important to consider the complex and somewhat **contradictory role of Afropessimism in student movements**. I’m interested in how these politics **have been instrumentalized in** the service of “shutdown” **protests, as well as** the ways that **the ideology which informs political strategy plays into and is given life in the internal world of the movement**. Before I get into the Afropessimism thing, though, let me set it up with an initial statement or belief that I hold. We are all externally vulnerable to the violence of capital-driven timespace, and **so it is the politics through which** we live that can potentially offer us healing or, on the other hand, **can exacerbate the problem.** A therapist once explained to me that anxiety and anger are placeholder emotions, and what she meant is that in order to explore the causes of our anxiety and anger and potentially soothe them, we must seek a place that is more internal, and perhaps less easy to understand and manage. This internal place is often one of deep sadness, and fear can render us reluctant to explore it. Thus anxiety and anger function to express our incapacity to manage the depth of ourselves in a given situation—they are ways the body defends and manages circumstances that hurt and can possibly damage us. Sadness, on the other hand, is a kind of giving up of the body to its own incapability to be okay—an abandonment of reactive behaviors to violent parameters, and an acceptance of a boundless present of despair. It is raw and difficult, but the experience of pain or sadness is often what allows us to come to terms with pervasive dissonances between our own spirit and the ways we are vulnerable to, and complicit in, the mismanagement of people in the world. My interest is in how our politics can contribute to, hinder, or interact with our emotional life, and how this has played out in the bits and pieces of the shutdown processes we know about.gamedZe: That’s really interesting, thinking about **the notion of a “placeholder politics”** and their emotional corollaries. I wonder if it’s useful here to get into Afropessimism, or at least how we saw, understood, and experienced it within student movement spaces? gamEdze: For sure, go ahead. gamedZe: As I see it, briefly, **Afropessimism** is one political lens, set of ideas, or a vocabulary that **has found significant traction in certain student movement spaces.** This traction has **brought with it a** particularly nihilistic approach to protest. It could be interesting to think through this tendency toward protest along with some of the ideas you have set up. gamEdze: Yes, so **Afropessimism** defines itself through **understanding the world’s fundamental structure as “antiblack,” and thus sees black people as** perpetually negated or **“socially dead”** and so **absent from any conception of humanity.** gamedZe: Uh huh. **And it** seems to **flatten out and homogenize Black people, reducing and owning the interpretation of Black peoples’ experiences by subordinating them to one supposedly absolute and** totalizing logic. gamEdze: It goes further by articulating that the maintenance of antiblackness is crucial in sustaining the psychic health of white people. In other words, **the binary created through the construction of blackness versus whiteness is the logic through which white people are able to recognize themselves as human, and through which black people, too, see white people as human, and negate themselves**. While **Afropessimism** can be useful in identifying systems of power—**for instance, the mutual relationship of the racist construct of “black people as criminals” with the legal system and the capitalist prison-industrial complex**—**it falls short itself by asserting that there exists no other state for the black body except perpetual death, so consistently caving in on itself.** gamedZe: So, in that, **it fails** on many levels **to make sense of the nuanced ways in which people, despite** their **supposed nonexistence, exist in and navigate through the world. How does Afropessimism understand its social death in relation to queerness or disability—forms of otherness that also generate gratuitous violence, exclusion, and oppression?** But also, this particular transplantation of the American thing (the origin of the school of thought) to the continent is pretty wack. Even as the Black radical tradition has largely been formulated and theorized in and from America, and even as it often falls prey to American exceptionalisms in its quest for forms of Black universalism, I think it holds radical potential for us on the continent. As many theorists and thinkers of the Black radical tradition have shown, African cultural practices have formed the basis of Black revolt across time and space. I see Afropessimism as a departure from that tradition’s dynamic foundations in African culture. **Afropessimism**, through its fixation on natal alienation, **tends to ignore the living connections to the continent**, seeming **to take the severance of African people** from the continent **through the middle passage as utter and complete**. It therefore seems **to understand Black people not as cultural subjects who brought entire cosmological worlds and practices** with them **but as hopeless**, utterly **dislocated beings only existing as the sum total of their position in white supremacy**. While I think that this can be challenged even in a diasporic context, this contradiction is even more pronounced here on the continent, because **although many of us are alienated from African cultural practices and contexts, those traditions persist and are more or less proximate whether or not one is immersed in them**. gamEdze: In this way, it can be difficult to move with the **Afropessimist, whose American-specific engagement with a particular history defines the functioning of antiblackness, seen as a mechanism that forms the foundational reality of every scenario of oppression. Afropessimism’s refusal to engage its own internal world**, **to abandon its reactive and defensive nature,** leads me to imagine **it as a “placeholder politics,” similar to the ways that anxiety and anger hold and protect us from entering the place existing beyond them**. This is not to offer a clean critique on Afropessimism but **to situate it as a politics that perhaps exists as external to something more effective in exploring and acknowledging the internal— the power and the pain. Afropessimism finds no way to its own sadness**. gamedZe: The idea of “holding” the “place” is quite a nice one. And interesting to think about how, **in relation to the continent, it is perhaps the anxiety or the anger of Afropessimism that holds the place that prevents or protects the descent into the deep sadness.** Perhaps this is what Fred Moten (2003: 94), through Amiri Baraka, might refer to as “the tragic,” which “is always in relation to a quite particular and material loss,” in this case being “the impossibility of a return to an African, the impossibility of an arrival at an American, home.” The sadness of the tragic is too great. gamEdze: Heavy . . . Let’s move back, or forward to the student movement, where we have seen Afropessimism function in a number of different ways. Because of the diverse and chaotic mixture of political ideologies under the “mustfall” umbrella, **Afropessimism,** like other politics, **has been a collaborator, mixing sometimes productively, but often aggressively, with other political schools in the space, such as Black feminism, Marxism**, and Charterism. No one ever decided that “mustfall” would adhere to a single way of navigating, and thus we could find ourselves having to hold a number of contradictions, jumping between politics as we navigated the trauma of the external, and the ways we chose to deal with emotions of the internal. In this way, sometimes the reactive nature, the anxiety and anger of the placeholder politic of Afropessimism, functioned to hold the outsides, as different political ideas played out on the inside of the shutdown. I know that this thought experiment seems far neater than the muddiness of any reality of shutdown and occupation could possibly be. But we are using it because as far as we both critique Afropessimism, the way it has catalyzed in the mix of mustfall politics seems to have opened it up to something beyond its own imagination. On the outside, **Afropessimism leads to a style of protest, to a style of retaliation, to a mode of policing, to a steering away of movements from initial strategy, to individualized acts of embodied resistance to the law.** gamedZe: On the barricades, forced into the form of protest that the state and security is prepared and equipped for—violent confrontation—**there is no possibility of Afropessimism evolving into anything else because we run into the militarized trap set for us, with no possible escape**. gamEdze: On the inside, **in the temporary “safety” offered by a successful shutdown, is the place where we can create**. gamedZe: That kinda comes back to what I think of as a classic revolutionary dialectic, of reaction and creation. It raises the question: was it necessary to react in that way in order to create? Did we have to adopt this nihilistic politics and dangerous bodily mode of protest to shut down the space such that we can then explore other possibilities? gamEdze: This is such a fundamental question, and I personally don’t necessarily think so. Afropessimism to a large extent really upset the growth of Black feminist thought, at least in the shutdowns I have been involved in. Instead of providing an entry point into various political schools, black feminism— particularly intersectionality—seemed optional, forming just one of several political collaborators within the shutdown space. This approach was often read by Afropessimism and even black consciousness as an aggressor, or a “distracting” force within the movement. But intersectionality makes collective work possible. Audre Lorde, much in keeping with intersectionality, is insistent on conscientizing difference, so that it escapes its usual trap of exploitation by the status quo. This approach to making activism is a depthy internal process of instrumentalizing and weaponizing one’s pain and power toward collective struggle (Audre Lorde 2012). It is in direct conflict with Afropessimism, which begins and ends through the arrest of blackness in singular form: a circular anxious reasoning that cannot explore its particularities and intersections, and so finds its imagination short-circuited by the binary understanding of power only through white supremacy. If Afropessimism went to therapy, it might find, beneath its repeated anxious mantra of social death, a network of connected histories that have created layers and layers of power and oppression. This painful conscientization is the beginning of a process of shaping tools that can be used to transcend the defensive limitations of placeholder politics and can, rather, soothe the internal while launching a fiery attack on the oppressor. Lorde’s tool was poetry. And ours right now is this.

#### The concept of social death re-entrenches the power of whiteness and makes political change impossible – avoiding biological death and achieving a reformist politics is more productive

Mbembe 15

(Achille, “Achille Mbembe on The State of South African Political Life,” September, http://africasacountry.com/2015/09/achille-mbembe-on-the-state-of-south-african-politics/)

**To demythologize whiteness, it will not be enough to force “bad whites” into silence or into confessing guilt and/or complicity. This is too cheap**. To puncture and deflate the fictions of whiteness will require an entirely different regime of desire, new approaches in the constitution of material, aesthetic and symbolic capital, another discourse on value, on what matters and why. The demythologization of whiteness also requires that we develop a more complex understanding of South African versions of whiteness here and now. This is the only country on Earth in which a revolution took place which resulted in not one single former oppressor losing anything. In order to keep its privileges intact in the post-1994 era, South African whiteness has sought to intensify its capacity to invest in what we should call the resources of the offshore. It has attempted to fence itself off, to re-maximize its privileges through self-enclaving and the logics of privatization. These logics of offshoring and self-enclaving are typical of this neoliberal age. **The unfolding** new/old **trial of whiteness won’t produce much if whites are forced into a position in which the only thing they are ever allowed to say** in our public sphere **is**: “Look, **I am** so **sorry**”. It won’t produce much if through our actions and modes of thinking, we end up forcing back into the white ghetto those whites who have spent most of their lives trying to fight against the dominant versions of whiteness we so abhor. Furthermore, we must take seriously the fact that “to be black” in South Africa now is not exactly the same as “to be black” in Europe or in the Americas. After all, we are the majority here. Of course to be a majority is a bit more than the simple expression of numbers. But surely something has to be made out of this sheer weight of numbers. We can use this numerical force to create different dominant standards by which our society live; paradigms of what truly matters and why; entirely new social forms; new imaginaries of interior life and the life of the mind. We are also in control of arguably the most powerful State on the African Continent. This is a State that wields enormous financial and economic power. In theory, not much prevents it from redirecting the flows of wealth in its hands in entirely new trajectories. As it has been done in places such as Malaysia or Singapore, something has to be made out of this sheer amount of wealth – something more creative and more decisive than our hapless “black economic empowerment” schemes the main function of which is to sustain the lifestyles of the new élite. The neurotic misery of our age Finally, **it is crucial for us to understand that we are** a bit **more than just “suffering subjects”. “Social death” is not the defining feature of our history. The fact is that we are still here** **– of course at a very high price and most likely in a terrible state, but we are here. We are here** – and **hopefully** we will be here **for a very long time** – **not as anybody else’s creation, but as our own-creation**. **To demythologize whiteness is to dry up the mythic,** symbolic and immaterial **resources without which it can no longer dabble in** self-righteousness or in the **morbid delight** with which, as James Baldwin put it, it contemplates “the extent and power of its own wickedness.” **It is to not be put in a position in which we die hating somebody else**. On the other hand, politicizing pain is not the same thing as advocating dolorism. In fact, it must be galling to put ourselves in a position such that those who look at us cannot but pity us victims. **One way of destroying white racism is to prevent whiteness from becoming a deep fantasmatic object of our unconscious**. **We need to let go off our libidinal investments in whiteness** if we are to squarely confront the dilemmas of white privilege. Baldwin understood this better than any other thinker. “**In order really to hate white people**”, he wrote, “**one has to blot so much out of the mind** – and the heart – that **this hatred itself becomes an exhausting and self-destructive pose**” (Notes of a Native Son, 112). This is what we have to find out for ourselves – in a black majority country in which blacks are in power, what is the cost of our attachment to whiteness, this mirror object of our fear and our envy, our hate and our attraction, our repulsion and our aspirations? Part of what racism has always tried to do is to damage its victims’ capacity to help themselves. For instance, **racism has encouraged its victims to perceive themselves as powerless**, **that is, as victims even when they were actively engaged in myriad acts of self-assertion**. **Ironically among the emerging black middle class**, current **narratives of selfhood and identity are saturated by the tropes of** pain and **suffering. The latter have become the register through which many now represent themselves to themselves and to the world. To give account of who they are**, or to explain themselves and their behavior to others, **they increasingly tend to frame their life stories in terms of how much they have been injured by the forces of racism**, bigotry and patriarchy. Often **under the pretext that the personal is political, this type of autobiographical** and at times self-indulgent “petit bourgeois” **discourse has replaced structural analysis. Personal feelings now suffice. There is no need to mount a proper argument. Not only wounds and injuries can’t they be shared, their interpretation cannot be challenged by any known rational discourse. Why? Because, it is alleged, black experience transcends human vocabulary to the point where it cannot be named**. **This** kind of **argument is dangerous**. **The self is made at the point of encounter with an Other**. There is no self that is limited to itself. **The Other is our origin by definition**. **What makes us human is our capacity to share our condition** – including our wounds and injuries – **with others**. **Anticipatory politics – as opposed to retrospective politics – is about reaching out to others. It is never about self-enclosure**. **The best of black radical thought has been about how we make sure that in the work of repair**, certain compensations **do not become pathological phenomena**. **It has been about nurturing the capacity to resume** a **human life** **in the aftermath of irreparable loss**.

#### It's also not permanent, but pessimism locks it in by setting an upper limit on agency

Scott 10 – Associate Professor of African American Studies & African Diaspora Studies at UC Berkeley (Darieck, *Extravagant Abjection: Blackness, Power, and Sexuality in the African American Literary Imagination*, 51-52)

**Declarations of the absolute decimation of the preexisting psyche of the colonized in the event of conquest** thus **can be read as** versions of the past—**historically inaccurate** versions, to be sure, invocations of Verges’s "original innocence”—that stand in rhetorically for the blank slate of the future. **The future's slate** is not really blank, of course, but it **can be written**; the words already on it are not vouchsafed by anything transhistoric like God or nature. If **Fanon**’s rhetoric proposes at times a truly blank slate, then his considered examinations of the process of cultural and subjective transformation (or, more modestly, reformation) suggest rather that he **employs the absolute of “total” cultural loss and the like only to mark a place for the successful achievement of a future utopia; neither the absolute past as defeat nor the absolute future as liberation and victory are the areas of anything other than directional emphasis—it is instead the fact that there can be movement toward one or another that is truly to be grasped** and that demonstrates for us what the power of sociogeny is. The interarticulation of temporal frames that underwrites Fanon's approach to the problem of history is nicely demonstrated in a curious form of logical proof he offers for the transformative psychological effects of colonialism: when arguing that the European's arrival in Madagascar utterly eviscerated the pre-Malagasy “earlier psychic whole,” Fanon says, “If. . .Martians undertook to colonize the earth men—not to initiate them into Martian culture but to colonize them—we should be doubtful of the persistence of any earth personality.” This bit of speculative futurism, the conﬂation of historical Europeans with space-trekking Martians, partaking as it does of anxieties and fantasies running rife in the 1950s because of the competition between the United States and the Soviet Union to put men into space, represents the way that Fanon sees the past (European arrival on the shores of what they will call Madagascar) as a mirror of the future. We might say that Fanon gestures both backward and forward when he tries to wrestle with history—backward to the loss that occasioned the originary act of self-fashioning or cultural reinscription (and this for him has to do with the notion that the precolonial world is utterly obliterated) and forward toward the new productivity that has its foundation in the example of the old rupture. Thus, **when Fanon asks, “Have I no other purpose on earth, then, but to avenge the Negro of the seventeenth century?”** and **when he remonstrates** with the historicist reader, “Moral anguish in the face of the massiveness of the Past? I am a Negro, and tons of chains, storms of blows, rivers of expectoration ﬂow down my shoulders. . . . But I do not have the right to allow myself to bog down. . . .**I do not have the right to allow myself to be mired in what the past has determined,” we need not read these statements as mere rallying cries to turn one’s back on history in order to meet a present emergency**, or as an entirely wishful leaping over the persistent effects of the 17th century—effects which, after all, Fanon elucidates as the psychopathologizing properties of blackness itself.” **We can rather see such rhetoric as suggesting that the determinative powers of the past do not lie solely in the dominion of past events; for Fanon, the present is like the past in its capacity to determine the future. In this sense, there is not only one past, forever lost to us but nevertheless enslaving present and future, but also the past being made (and ever receding) in the now, which, as future anterior, has the capacity retroactively to reﬁgure even the more remote, traumatic past that we have no access to. Fanon’s rhetoric identiﬁes a leap in the construction of the human world in the past and uses this as a basis for proposing another such leap in the present, oriented toward a more humanist future.**

#### Ontological claims homogenize black experience, which displaces pragmatic practices that challenge violence

Kline 17, PhD candidate at Rice (David Kline, 2017, “The Pragmatics of Resistance: Framing Anti-Blackness and the Limits of Political Ontology,” Critical Philosophy of Race, 5.1, Political Ontology and the Limitation of Social Analysis and Legitimate Praxis)

Wilderson’s critique of Agamben is certainly correct within the specific framework of a political ontology of racial positioning. His description of anti-Black antagonism shows a powerful macropolitical sedimentation of Black suffering in which Black bodies are ontologically frozen into (non-) beings that stand in absolute political distinction from those “who do not magnetize bullets” (Wilderson 2010, 80). In the same framework, Jared Sexton, whose work is very close to Wilderson’s, is also right when he shows how biopolitical thought—specifically the Agambenian form centered on questions of sovereignty—and its variant of “necropolitics” found in Mbembe has so often run aground on the figure of the slave (see Sexton 2010).5 Locating the reality of anti-Blackness wholly within this account of political ontology does provide an undeniably effective analysis of its violence and sedimentation over the modern world as a whole. However, in terms of a general structure, I understand Wilderson’s (and Sexton’s) political ontology to remain tied in form to Agamben’s even as it seemingly discounts it and therefore remains bound to some of the problems and limitations that beset such a formal structure, as I’ll discuss in a moment. Despite the critique of Agamben’s ontological blind spots regarding the extent to which Black suffering is non-analogous to non-black suffering, as I’ve tried to show, Wilderson keeps the basic contours of Agamben’s ontological structure in place, maintaining a formal political ontology that expands the bottom end of the binary structure so as to locate an absolute zero-point of political abjection within Black social death. To be clear, this is not to say that the difference between the content and historicity of Wilderson’s social death and Agamben’s bare life does not have profound implications for how political ontology is conceived or how questions of suffering and freedom are posed. Nor is it to say that a congruence of formal structure linking Agamben and Wilderson should mean that their respective projects are not radically differentiated and perhaps even opposed in terms of their broader implications and revelations. Rather, what I want to focus on is how the absolute prioritization of a formal ontological framework of autonomous and irreconcilable spheres of positionality—however descriptively or epistemologically accurate in terms of a regime of ontology and its corresponding macropolitics of anti-Blackness—ends up limiting a whole range of possible avenues of analysis that have their proper site within what Deleuze and Guattari describe as the micropolitical. The issue here is the distinction between the macropolitical (molar) and the micropolitical (molecular) fields of organization and becoming. Wilderson and Afro-pessimism in general privilege the macropolitical field in which Blackness is always already sedimented and rigidified into a political onto-logical position that prohibits movement and the possibility of what Fred Moten calls “fugitivity.” The absolute privileging of the macropolitical as the frame of analysis tends to bracket or overshadow the fact that “every politics is simultaneously a macropolitics and a micropolitics

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(Deleuze and Guattari 1987, 213). Where the macropolitical is structured around a politics of molarisation that immunizes itself from the threat of contingency and disruption, the micropolitical names the field in which local and singular points of connection produce the conditions for “lines of flight, which are molecular” (ibid., 216). The micropolitical field is where movement and resistance happens against or in excess of the macropolitical in ways not reducible to the kind of formal binary organization that Agamben and Wilderson’s political ontology prioritizes. Such resistance is not necessarily positive or emancipatory, as lines of flight name a contingency that always poses the risk that whatever develops can become “capable of the worst” (ibid., 205). However, within this contingency is also the possibility of creative lines and deterritorializations that provide possible means of positive escape from macropolitical molarisations. Focusing on Wilderson, his absolute prioritization of a political onto-logical structure in which the law relegates Black being into the singular position of social death happens, I contend, at the expense of two significant things that I am hesitant to bracket for the sake of prioritizing political ontology as the sole frame of reference for both analyzing anti-Black racism and thinking resistance within the racialized world. First, it short-circuits an analysis of power that might reveal not only how the practices, forms, and apparatuses of anti-Black racism have historically developed, changed, and reassembled/reterritorialized in relation to state power, national identity, philosophical discourse, biological discourse, political discourse, and so on—changes that, despite Wilderson’s claim that focusing on these things only “mystify” the question of ontology (Wilderson 2010, 10), surely have implications for how racial positioning is both thought and resisted in differing historical and socio-political contexts. To the extent that Blackness equals a singular ontological position within a macropolitical structure of antagonism, there is almost no room to bring in the spectrum and flow of social difference and contingency that no doubt spans across Black identity as a legitimate issue of analysis and as a site/sight for the possibility of a range of resisting practices. This bracketing of difference leads him to make some rather sweeping and opaquely abstract claims. For example, discussing a main character’s abortion in a prison cell in the 1976 film Bush Mama, Wilderson says, “Dorothy will abort her baby at the clinic or on the floor of her prison cell, not because she fights for—and either wins or loses—the right to do so, but because she is one of 35 million accumulated and fungible (owned and exchangeable) objects living among 230 million subjects—which is to say, her will is always already subsumed by the will of civil society” (Wilderson 2010, 128, italics mine). What I want to press here is how Wilderson’s statement, made in the sole frame of a totalizing political ontology overshadowing all other levels of sociality, flattens out the social difference within, and even the possibility of, a micropolitical social field of 35 million Black people living in the United States. Such a flattening reduces the optic of anti-Black racism as well as Black sociality to the frame of political ontology where Blackness remains stuck in a singular position of abjection. The result is a severe analytical limitation in terms of the way Blackness (as well as other racial positions) exists across an extremely wide field of sociality that is comprised of differing intensities of forces and relational modes between various institutional, political, socio-economic, religious, sexual, and other social conjunctures. Within Wilderson’s political ontological frame, it seems that these conjunctures are excluded—or at least bracketed—as having any bearing at all on how anti-Black power functions and is resisted across highly differentiated contexts. There is only the binary ontological distinction of Black and Human being; only a macropolitics of sedimented abjection. Furthermore, arriving at the second analytical expense of Wilderson’s prioritization of political ontology, I suggest that such a flattening of the social field of Blackness rigidly delimits what counts as legitimate political resistance. If the framework for thinking resistance and the possibility of creating another world is reduced to rigid ontological positions defined by the absolute power of the law, and if Black existence is understood only as ontologically fixed at the extreme zero point of social death without recourse to anything within its own position qua Blackness, then there is not much room for strategizing or even imagining resistance to anti-Blackness that is not wholly limited to expressions and events of radically apocalyptic political violence: the law is either destroyed entirely, or there is no freedom. This is not to say that I am necessarily against radical political violence or its use as an effective tactic. Nor is to say that I think the law should be left unchallenged in its total operation, but rather that there might be other and more pragmatically oriented practices of resistance that do not necessarily have the absolute destruction of the law as their immediate aim that should count as genuine resistance to anti-Blackness. For Wilderson, like Agamben, anything less than an absolute overturning of the order of things, the violent destruction and annihilation of the full structure of antagonisms, is deemed as “[having nothing] to do with Black liberation” (quoted in Zug 2010). Of course, the desire for the absolute overturning of the currently existing world, the decisive end of the existing world and the arrival of a new world in which “Blacks do not magnetize bullets” should be absolutely affirmed. Further, the severity and gratuitous nature of the macropolitics of anti-Blackness in relation to the possibility of a movement towards freedom should not be bracketed or displaced for the sake of appealing to any non-Black grammar of exploitation or alienation (Wilderson 2010, 142). The question I want to pose, however, is how the insistence on the absolute priority of framing this world within a rigid structure of formal ontological positions can only revert to what amounts to a kind of negative theological and eschatological blank horizon in which actually existing social sites and modes of resisting praxis are displaced and devalued by notions of whatever it is that might arrive from beyond. It seems that Wilderson, again, is close to Agamben on this point, whose ontological structure also severely delimits what might count as genuine resistance to the regime of sovereignty. As Dominick LaCapra points out regarding the possibility of liberation outside of Agamben’s formal ontological structure of bare life and sovereignty, A further enigmatic conjunction in Agamben is between pure possibility and the reduction of being to mere or naked life, for it is the emergence of mere naked life in accomplished nihilism that simultaneously generates, as a kind of miraculous antibody or creation ex nihilo, pure possibility or utterly blank utopianism not limited by the constraints of the past or by normative structures of any sort. (LaCapra 2009, 168) With life’s ontological reduction to the abjection of bare life or social death, the only possible way out, it seems, is the impossible possibility of what Agamben refers to as the “suspension of the suspension,” the laying aside of the distinction between bare life and political life, the “Shabbat of both animal and man” (Agamben 2003, 92). It is in this sense that Agamben offers, again in the words of LaCapra, a “negative theology in extremis . . . an empty utopianism of pure, unlimited possibility” (LaCapra 2009, 166). The result is a discounting and devaluing of other, perhaps more pragmatic and less eschatological, practices of resistance. With the “all or nothing” approach that posits anything less than the absolute suspension of the current state of things as unable to address the violence and abjection of bare life, there is not much left in which to appeal than a kind of apocalyptic, messianic, and contentless eschatological future space defined by whatever this world is not.

#### Science proves optimism is better for health

Dov **Michaeli 17**, professor at the University of California San Francisco before leaving to enter the world of biotech. He served as the Chief Medical Officer of biotech companies, including Aphton Corporation, “The Scientific Evidence that Optimism Leads to Better Health,” 7/18, https://thedoctorweighsin.com/do-optimists-live-longer/

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.