# 1AC

## 1AC---Blockchain

### 1AC---Blockchain ADV

#### Contention 1 is BLOCKCHAIN.

#### Blockchain development is inevitable, but beyond the scope of antitrust---the narrow focus on the ‘firm’ is fundamentally inapplicable, creating an anticompetitive environment that’ll centralize applications and limit uptake.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 134-136

5 A WIN-WIN THEORY

The creation of a legal fiction around blockchain nuclei will benefit both antitrust and blockchain communities. By facilitating the enforcement of the rule of law, blockchain participants will indeed be able to enforce antitrust laws or be sanctioned when infringing them.

5.1 A Win for Antitrust

The theory of granularity helps create a legal fiction for public permissionless blockchains and private ones (whose governance is not vertical). Surely, other legal fictions will be proposed in the coming years. Regardless of its name, creating a legal fiction is a prerequisite for applying the rule of law to blockchain layer 1. The ability to do so is crucial.

First, the creation of a legal fiction ensures that blockchains do not escape antitrust enforcement for theoretical reasons. This is a prerequisite before discussing the technical barriers to enforce antitrust against illegal practices (see the following chapters). Second, assigning liability to the right entity ensures that whoever controls blockchains will have a strong(er) incentive to comply with legal requirements. The urge to play by the rules is always stronger when one knows that the rules could actually be enforced. As such, antitrust will not only protect actors that lie outside of blockchain ecosystems; it will also protect those inside the blockchain who cannot stop the anticompetitive practices. Antitrust will free blockchain layer 1 from these practices.

5.2 A Win for Blockchain

Creating a distinct legal fiction centered on blockchains’ nucleus will present an important step forward for related ecosystems. First, the creation of such fiction will attribute rights to blockchains’ nuclei. This will legitimize collaboration between blockchain participants in the nucleus that would otherwise have been prohibited. Indeed, I have explained that antitrust law defines a legal fiction (e.g., the firm) and then applies only to the effects that occur outside of it. Decisions that produce an effect outside of the blockchain nucleus will be submitted to antitrust law. In contrast, decisions taken by the nucleus whose effects are purely internal to that entity will be exempt from antitrust scrutiny.98

Second, creating a legal fiction will increase legal certainty pertaining to the application of antitrust law and regulation. Decades of research suggest that doing so will encourage investments,99 and will make entrepreneurs want to “embark” on the creation of innovative products and services.100 Blockchain communities say so themselves: regulatory issues and accompanying legal uncertainty are the most important reasons preventing greater investment and adoption of blockchain technology.101 The sooner a legal fiction is created, the better for the ecosystem. In its absence, one could imagine court decisions holding all blockchain participants liable for wrongdoings, even though most of them will not have the power to prevent these illegal practices.

Finally, the creation of a legal fiction will give the nucleus the right to institute legal actions and claim damages in cases of antitrust violation, whether caused by another nucleus or a non-blockchain entity. Going back to Christopher Stone’s writing, blockchain’s legal fictions will be able to institute legal actions in their name; courts will calculate injury to them, and relief will be run to their benefit. For example, one could imagine that a blockchain layer 1 (illegally) excluded from the market by another blockchain that engaged in predatory pricing could introduce a valid claim before the courts or antitrust agencies. In the following chapters, I will explain how this will play out when it comes to collusion and monopolization practices.

For all these reasons, creating an antitrust-related legal fiction will be invaluable for blockchain ecosystems and, ultimately, for decentralization. It will protect them from illegal practices that could hinder blockchain’s capacity to decentralize the economy. There is no doubt that centralized companies will multiply illegal behaviors toward blockchain ecosystems in the years to come, as we will see in the coming chapters. Being recognized as a legal entity will allow them to protect their interests and innovate toward decentralization.

6 CHAPTER SUMMARY AND BEYOND

In this chapter, 1 have used the theory of granularity to open the blockchain “black box.” First, I have discussed blockchain governance and shown how the influence of different participants neutralize their position. As no block- chain participant can control the blockchain by itself - and ensure its survival - I have explained that a group of participants may want to come together to achieve common goals. By doing so, they free themselves from other participants’ constraints and end up forming the blockchain nucleus.

The blockchain nucleus gives rise to an entity that should benefit from rights, but could also be held liable for illegal conducts. I have shown how this would work by analyzing relevant markets and market power, evaluating anticompetitive practices and assigning liability.

#### Anticompetitive exclusions and lack of legal certainty over the applicability of antitrust dry up investment and innovation, artificially consolidated digital ecosystems---applying antitrust solves.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 74-77

2 THE SPECTER OF NEUTRALIZATION

I hope to have convinced readers that antitrust law and blockchain contribute to similar, if not identical, objectives (i.e., preserving agents’ ability to act freely in the market, which entails the decentralization of decision-making processes).42 For that reason, one might expect that both communities would work hand in hand to achieve decentralization. And yet, despite pursuing a common goal, blockchain and antitrust may end up canceling each other out. Here’s why.

2.1 One Goal, Two Methods

Blockchain seeks the decentralization of decision making by eliminating intermediaries, while antitrust aims to achieve it by eliminating anticompetitive practices. They converge toward the same objective. That said, one should not be candid about how easy it will be to make them cooperate. First, the Sherman Act is concerned with trusts43 - hence the name “anti-trust”. Since there is no trustee in the sense of a third-party fiduciary in blockchain’s first layers, the target of antitrust laws is absent.44 Blockchain may thus undermine the *raison d'etre* of antitrust law, which will trigger epidermal reactions.

Furthermore, blockchain and antitrust may at times attack each other. Blockchain may be used to implement anticompetitive practices and be enforcement resistant, while antitrust may reinforce the role of intermediaries in the economy (by protecting them from different forms of anticompetitive exclusions) and label various blockchain behaviors as anticompetitive - regardless of the overall usefulness of these blockchain features.

In fact, antitrust law and blockchain ecosystems seek decentralization at two different levels. Antitrust law prohibits certain categories of conduct, creating tensions with tech communities without focusing much on digital architectures. Blockchain, on the contrary, seeks to decentralize by providing its users with a specific digital architecture. It does not prohibit (anticompetitive) practices where code allows. This creates tensions between them, as I show in Part 2 of this book. Their cooperation will require the identification of ways to deal with these mutual provocations, as I will explain in Part 3.

As things stand, both of these communities exhibit what Veblen called “trained incapacity” - the difficulty to think beyond a set of constraints and assumptions. Policymakers tend to believe that the law should be the most important constraint organizing our lives. For that reason, legal rules are often applied without looking for ways to coordinate with other constraints, including digital architectures.45 In the meantime, blockchain communities tend to view legal enforcement as an adversary, and not as an ally. As John Perry Barlow stated in 1996: “I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.” After all, the law liberates, but it also implies illegality, lawsuits, liability assignment and sanctions. The antitrust and blockchain communities will gain from over- coming these biases.

2.2 The (Long) Road Ahead

If we want antitrust and blockchain to collaborate on a long-term basis, we need to talk about the problems that their cooperation will encounter along the way. The challenge before us is intricate.46 On the one hand, it is a matter of getting legal minds to recognize that technology can help achieve objectives that the law cannot achieve on its own. There are three reasons for this. First, blockchain provides a technical approach to the subject. It serves as a framework for decentralizing the economy by default, while antitrust mostly applies ex post by correcting past behaviors.47

Second, antitrust agencies’ detection rate remains low, meaning that illegal behavior often goes unpunished.48 And enforcement is costly, which makes it impossible to pursue all potentially illegal practices. This is particularly problematic in a world where illegal practices can be implemented through coding that quietly and immediately affects billions of users. Also, the rule of law is (unfortunately) inapplicable in some places. This is the case when the state bypasses legal constraints,49 and when jurisdictions are mutually unfriendly and do not enforce foreign laws.50 For example, enforcement of U.S. court judgments abroad can prove especially difficult in light of divergent rules on jurisdiction, requirements for special service of process, reciprocity and some foreign countries’ public policy concerns,51 including in Europe.52

Finally, antitrust law is complex and cannot be fully mastered by all companies - the compliance costs are high and many firms unwittingly infringe the law. Blockchains could therefore supplement antitrust by creating an architecture that leads to fewer anticompetitive practices.

On the other hand, blockchain communities would gain from working with (not against) antitrust law enforcers. That is because antitrust would eliminate practices that artificially centralize blockchain ecosystems and that blockchain architecture cannot stop or prevent. 1 will analyze them in Part 2. Doing so would also provide legal certainty, thus fostering investments and benefiting all the actors involved in commercial activities that rely on blockchain. For these reasons, one should think of antitrust and blockchain as allies - not enemies - as they both seek the same objective, while presenting complementary strengths and defects. Doing so would lead policymakers to promote and implement a new “law + technology” approach that recognizes that the benefits of cooperation outweigh those of one-off confrontations. A game theorist would represent that approach as illustrated in Figure 5.1.

#### Averting the consolidation the blockchain allows scalable transaction validation.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 271-273

2 BLOCKCHAIN INTERNAL FACTORS

The evolution of blockchain also depends on internal balances in terms of design and governance. Overall, choices that will be made within each blockchain will prove important for their evolution. As I show, it all comes down to human interactions.

2.1 The Trifecta: Intra-blockchain Evolution

A blockchain trilemma has emerged in the literature over the last several years. It can be summed up as follows: ensuring blockchain’s decentralization, scal- ability and security entails tradeoffs, at least in the short term. Although this makes sense on a technical level, it does not capture the entirety of our subject. Let us take a closer look. I have discussed decentralization at length through- out this book. It is blockchain’s central feature, in terms of both architecture and philosophy. “Scalability” refers to the ability to validate large volumes of transactions rapidly. Last, blockchain’s security hinges upon its ability to maintain integrity: that only desirable transactions take place - for example, by preventing double spending.42

To a certain extent, we have seen together that the mechanisms that ensure decentralization at different blockchain layers may conflict with security.43 This is what Awemany’s story in Chapter 1 revealed. Decentralization implies the distribution of power, limiting the ability to act unilaterally in case of an emergency. At the same time, decentralization can also affect the scalability of blockchain: Proof of Work is decentralized by nature, but it prevents the rapid validation of large transaction numbers. Conversely, a private blockchain can restrict access to the ledger or certain functions, raising security and scalability issues.44

In the long run, however, these three objectives are mutually reinforcing. The more a blockchain is decentralized, the more it stands out from the centralized platforms and services that readers know only too well. By differentiating themselves, blockchains attract users by offering a different value proposition. In turn, this generates scalability. The same goes for security, as the more participants use a public blockchain, the harder it becomes to alter the registry or perform a 51 percent attack. The blockchain trilemma is thus useful for thinking about what needs to be done, but it cannot provide a coherent analytical framework in the long term. It will become less relevant with technical advances, to the point where some blockchains will maximize these three objectives. Those who manage to do so will prosper.

#### Scaling blockchain unlocks its use for energy, waste, and supply chain sustainability---extinction.

Richard H. deVries 20, Managing Director of Geber Consulting, BA from University of Waterloo in Canada, MBA from National Cheng Chi University (NCCU), Degree in AI (Artificial Intelligence), Machine Learning, and Robotics from MIT Sloan, “How Blockchain Will Save The World”, Geber Brand Consulting, 12/3/2020, https://www.geberconsulting.com/blog/how-blockchain-will-save-the-world

Two years ago nobody talked about blockchain. Now the distributed ledger technology behind cryptocurrencies like bitcoin is suddenly everywhere.

Enthusiastic experts predict that in the coming 10 years, blockchain will change the way we do everything, from financial markets to health records to supply chain management, and so much more. It's near impossible to name all the applications for the new technologies, but here are a few that will contribute to making our world a better place (or even save the planet).

Energy

Most visible for average users will be the impact of blockchain on the energy sector. The power grids of today are usually centralized oligopolies dependent on a very small selection of power sources (i.e. a few nuclear plants, augmented by oil and gas).

That means long distribution lines, bad management of demand, and susceptibility to power outages during earthquakes and other natural disasters.

A peer-to-peer blockchain-based energy system would reduce the need to transmit electricity over long distances. It will certainly reduce the need to store energy in inefficient ways, which means fewer batteries, for example, which are expensive and need a lot of raw materials whose extraction often causes massive pollution. Imagine if every house had a solar panel and a wind turbine, or produced electricity from new smart materials on the outer walls.

Add road surfaces that produce kinetic or solar energy, and add in all the existing infrastructure like nuclear plants, oil or coal. Now imagine every one of these sources could trade with every other source, all managed automatically by a computer system, with unfalsifiable records based on blockchain. And everyone gets paid for it into their digital wallet. This is the future of energy.

Waste Recycling

Current systems for recycling are often cumbersome and don't give enough incentives to participate. Even the best intentions fall foul to human greed and laziness.

Here then is the future of recycling: you identify yourself with your smartphone at any recycling station and deposit your empty bottles (or batteries etc.). The system scans what you deposit and credits your electronic wallet.

If done right, this system could enable users in countries without local recycling industries to get paid the same way as users in locations with large recycling operations.

Companies could set up recycling plants and literally collect garbage from anywhere in the world. It would make it easy to transparently track data like volume, cost, shipping data, and profit, and to evaluate the impact of each location, company, or individual participating in the program.

Think one step further and the recycling containers could be fitted with solar drone technology and fly themselves to the recycling center when full.

Supply Chain Management

The way we transport goods around the world is wasteful and damages the environment. Industry 4.0 is bringing us a revolution of already connected devices; 3D printing means more decentralized manufacturing in much smaller batches.

Blockchains can be used to track products from the manufacturer to the shelf and help prevent waste, inefficiency, fraud, and unethical practices by making supply chains more transparent.

They improve shipping ways, volumes, avoid empty shipments and will thus allow for fewer ships and trucks. Combined with drones and solar-powered airships we could even see pollutant-free solar shipments of individual consignments over long distances, secured, tracked and paid for through blockchain technology.

Or think about this: a blockchain enabled 3D-printer as a public service, secured, tracked, and monetized through blockchain.

The food industry is forging ahead hear with the tracking of origin and transportation paths of food.

Environmental Protection

From waste and transportation, it is an easy jump to the overall enforcement of environmental protection. Blockchain is ideally suited to manage records and incentives.

In can be difficult to track the real impact of environmental protection plans, agreements, or even international treaties. Very often incentives are misaligned, or corporate interests and even criminal elements prevent successful implementation.

Blockchain could discourage stakeholders from reneging on their commitments, misreporting progress, or giving in to pressure from nefarious players, because the technology would allow the reliable tracking of important environmental data.

After all, data in the public ledger of the blockchain is transparent and traceable forever. Environmental protection is at its core a contractual problem. Just like blockchain will revolutionize the storage and manipulation of legal records, it will reduce or eliminate fraud and manipulation of environmental schemes.

Development programs

Like environmental protection, development programs are contracts between remote parties that need to be enforced.

When you donate to a charity, non-profit, development program or similar entity, you hardly ever know what really happens with your money. Bureaucracy, corruption, and inefficiency are still common in the charity space. Blockchain technology can ensure that money intended to be a reward for conservation, or a payment to a specific cause, does not disappear into unintended pockets through bureaucratic labyrinths.

Blockchain-based money could even be released automatically to the correct parties in response to meeting specific environmental targets. This is particularly relevant in countries without modern banking structures. In particular, there are several schemes under consideration for the tracking of water usage in very dry areas of the planet.

Carbon Tax

In the current system, the environmental impact of each product is difficult to determine, and its carbon footprint is not factored into the price.

This means that there is little incentive for consumers to buy products with a low carbon footprint, and little incentive for companies to sell such products.

Tracking the carbon footprint of each product using the blockchain would protect this data from tampering, and it can be used to determine the amount of carbon tax to be charged on at the point of sale. If a product with a big carbon footprint is more expensive to buy, this would encourage buyers to buy products that are more environmentally friendly, and would therefore encourage companies to restructure their supply chains to meet the demand for such products.

Such a blockchain-based reputation system would compute a score for each company and product. This would make manufacturing more transparent, and discourage wasteful and environmentally unfriendly practices.

You could automatically see (e.g. by scanning a barcode on a product), if it was made by an environmentally sound low-carbon facility, or a wasteful polluter.

Access to credit

Just as it tracks financial payments and all the data mentioned above, blockchains could be configured to manage access to credit.

This would enable millions of people to escape poverty, by giving them easy access to small amounts of money and start their own business. Unlike the micro-finance banking model, such a credit blockchain would be entirely transparent and thus safe from abuse.

Summary

In short, blockchain technology allows the management of incentives.

Consumers, companies, and governments would immediately see the direct effects of their actions on the planet. The blockchain can be used to transparently track a variety of data like the carbon footprint of each product, the greenhouse gas or waste emissions of a factory, or a company's overall history of compliance to environmental standards.

Companies and individuals can be incentivized to act in an environmentally sustainable way through the availability of information, tokenized credits being issued for taking certain actions, or blockchain-based reputation systems.

There are many hurdles to overcome. We still do not know if the blockchain is really as safe and unhackable as promised. As a cybersecurity consultant I spoke to for this article said: "sooner or later, everything will be hacked."

There are still doubts about the usability of blockchain for micro-transaction, due to the time proof-of-work takes, and the energy cost associated with computing.

The final hurdle is the willingness of governments to change, and the willingness of participants to live in such a transparent world.

But I believe that managing incentives on the micro-level with blockchain could completely change the drivers of our economy, and benefit not only us but the future generations living on our planet.

#### Cryptocurrency reach a wide rollout---that builds resilience to survive inevitable existential filters.

Alex McShane 21, Writer and Head of Video for Bitcoin Magazine, BA from the University of Iowa, Degree from the University College Dublin, Degree from Kirkwood Community College, “Bitcoin and Existential Risk”, Bitcoin Magazine, 9/5/2021, https://bitcoinmagazine.com/culture/bitcoin-and-existential-risk-alex-mcshane

TL;DR - An existential risk is the possibility of an event or series of events that could drastically curtail humanity’s potential. A hypothetical global catastrophe could be anthropogenic or non-anthropogenic and internal or external in nature. The adoption of Bitcoin will better position us to address these risks as a society.

EXTERNAL NON-ANTHROPOGENIC

A catastrophic collision with an astronomical object, such as an asteroid impact would be an external non-anthropogenic risk. This has already occurred here several times. During the Permian Triassic period (ending 250 million years ago) an astronomical impact killed 90 percent of the species on Earth. It took tens of millions of years for life on Earth to repopulate and Earth’s intelligence potential to recover.

One interesting external non-anthropogenic risk is Earth’s reflected light, which could be measured by an external intelligence who then come to extinguish us. (The topic of our own signal bringing about this death by misadventure is discussed further below.)

What does this have to do with Bitcoin?

Generally, hard money facilitates greater innovation and technological process. At this point one might argue that if we do not migrate to some degree from Earth as a species, and are subsequently wiped out by an astronomical object impact or a super-volcanic event, the risk becomes anthropogenic in nature. We are a centralized species on a grand scale, and at this point one could say we have through consensus chosen to remain vulnerable to a single vector of attack by staying here.

Bitcoin is not only the hardest money known to man, it is the most responsible from this standpoint. Bitcoin as it currently operates is currency that can provide a monetary framework on which humans can achieve greater capital growth, collaboration, resource allocation, and therefore technological progress. Because the terminal supply of Bitcoin is capped, we can store value in it indefinitely as a society.

66 Million years ago the Cretaceous-Paleogene Extinction Event extinguished the life and intelligence potential of the non-avian dinosaurs. This series of events was external, and broadly non-anthropogenic in the sense that no form of life on Earth at the time contributed to its own demise, but more specifically, at the time of those astronomical impacts the first humans hadn’t split from chimpanzee lineages. This split is thought to have occurred between between 4 and 8 million years ago.

An important distinction between astronomical impacts or super-volcanic events of the past and such events if they were to happen today is that one could argue that our intelligence potential is now mature enough to tackle certain of the external existential risks. Today, the risk posed by an asteroid impact or something similar would still be external in its origin, but at what point does the burden of responsibility to migrate off of the planet fall upon our population? We can surely solve for some external existential risks, and in any case, no one is going to do it for us. You could say that failing to collectively pursue a solution when technically we could have would recategorize a civilization-extinguishing asteroid impact as an external but anthropogenic risk.

At what point do innovation dampening authoritarian states and their mandated broken money cause society to stall at a local optimum? Surely the government has already caused this. It’s only a matter of time before another object strikes the Earth with devastating consequence. I would argue it is irresponsible to continue life here with government money. Government money is an existential risk. Bitcoin is not only a solution, it is a societal responsibility.

INTERNAL ANTHROPOGENIC

Nuclear war is one example of an internal anthropogenic risk. That is, should nuclear war arise, it would be both self destructive, and relatively self contained on a cosmic scale. It follows that biological warfare is an internal anthropogenic risk, the reality of which we as a species can surely understand now. If I were to hazard a guess I would say virtual emergencies and cyber pandemics are next. These self constructed catastrophes are the government’s misguided attempts at proof of work. This is a topic for another time. Do not surrender your ability to think and speak freely.

The second law of thermodynamics can summed thus, processes that involve the transfer or conversion of heat energy are irreversible. The law indicates we have not observed a spontaneous transfer of energy from cold to hot. Another way to think of this is that there is no such thing as cold, only lesser degrees of hot. Nothing cannot transfer. So broadly, within a closed system, the second law of thermodynamics would indicate that all differences tend to level out.

So what has this got to do with Bitcoin?

Well firstly, all hardware is subject to entropy. The distributed nature of the blockchain increases the probability that it will survive centralized entropy. At Bitcoin’s inception, imagine a failure because Satoshi’s computer randomly crashed. Distributed networks are inherently hedged against this particular centralized form of existential risk.

The second law of thermodynamics also suggests that on a grander scale, relatively isolated (centralized) systems will degenerate more and more into disordered states. Proof of work, and network growth are two ways Bitcoin fights against falling into disrepair.

Bitcoin uses proof of work to stave off entropy. The system cannot stay dormant. It must continue to use proof of work to advance the state of the chain, and to fight entropy to secure the monetary value all of the users have stored in the network. The U.S. dollar, as many have pointed out, relies on proof of war, or distributed political energies to maintain dominance. Its methodology can be described as haphazard at best.

INTERNAL NON-ANTHROPOGENIC

One internal non-anthropogenic risk is that of a super-volcanic eruption, provided it wasn’t humans who brought about the eruption. Just like with external non-anthropogenic risks, Bitcoin alone cannot prevent them, but it can help humans prepare for them such that we may survive these relatively small intelligence filters the universe throws our way.

Bitcoin allows for fundamental capital accumulation and human innovation, and promotes collaboration to such a degree that we will find an increased collective problem solving power as humans the further Bitcoin adoption spreads. It is worth mentioning that Bitcoin also maintains and appreciates wealth to such a degree that often those of us to chose to live our lives on a Bitcoin standard will experience relatively greater freedoms, and vastly greater amounts of free time than our peers who chose to continue their lives on a fiat standard, and are perpetually working to outpace their chronic debt. Many Bitcoiners will likely forego that newfound free time to work and continue to provide value to others in whatever area interests them, because Bitcoin incentivizes the collaborative accumulation of capital but also the responsible reallocation of it.

EXTERNAL ANTHROPOGENIC

An external anthropogenic risk has the least probability of occurring. This is a problem of reach. Imagine human intelligence being sent into the cosmos and signaling or generally causing an external intelligence or astronomical object to come back to extinguish us. This is a most improbable extinction by misadventure.

The probability that we send messages of consequence into the cosmos that in turn cause some other far-flung intelligence, with knowledge enough to reach us, to come and bring about our own destruction is next to zero, but it isn’t zero.

I would posit that the probability increases every day that Bitcoin survives, with each person that chooses to hold Bitcoin over fiat, because on a fiat standard we are again, stuck at a local optimum at best, and each day the global monetary system devolves further into chaos. The fiat world may continue to be habitable chaos, but our technological progress and our greatest capacity for innovation cannot be achieved on a fiat standard.

A Bitcoin standard is not only our current best bet, it is the only monetary vehicle that will take us from here, or enable us to build technology that can effectively communicate with places in the universe where other intelligence has emerged. The other reason this fatal miscommunication is unlikely to occur is that once through a Bitcoin standard we have manage to build a society that can effectively reach and communicate at greater depths of the cosmos we will at that time have already become a multi-planetary, if not transitory, if not multi-solar system species. The topic of Bitcoin in space and planetary interoperability will be discussed in a later essay.

The most distant human made object from the earth is the Voyager 1, which is over 13 billion miles away. (For perspective, Apha Centuri, the nearest star system to Earth, is 25 trillion miles away.) Human radio signals have announced our presence and our intelligence to the cosmos since around 1900. The first human radio signals have all ready traveled 114 light years, that is 681,920,540,000,000 miles. Although the reach of our radio signals is very great, the probability of us being heard and subsequently extinguished is negligible. External anthropogenic risks are the least of our concerns at the moment.

As Bitcoin adoption grows, it serves to promote advances in artificial intelligence and nanotechnology. External anthropogenic risks will become more relevant to human intelligence at a much later time. External non-anthropogenic risks are similarly out of our hands for the time being. That is, at the moment there is nothing we can do to prevent the Sun from becoming a red giant star and subsuming the Earth.

But we do already have the monetary technology upon which to engineer solutions to some of these problems. We have the potential as humans to prevent internal global catastrophes, both those set on by us and not. Survival and longevity is arguably our greatest task as a species. Adopting Bitcoin, and protecting this network is proceeding with diligence and a long eye toward the future in all of our political and scientific affairs. The existential risks of living are great, though it is human nature for our ambitions to out pace our current abilities. The only evidence of life is change. To change is to exit fiat currency, it is to use Bitcoin instead.

#### Decentralized and competitive blockchain’s vital to IoT effectiveness.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 269-270

1.2 Blockchain and Other Technologies (Collaboration)

1.2.1 Blockchain and the Internet of Things

Technologies tend to accelerate each other,30 and for that reason, it is useful to analyze how they interact. Blockchain has direct implications for quantum computing, 3D printing, biotech and nanotechnologies, among others.31 In the subsequent developments, I will limit myself to discussing the IoT and AI, as blockchains may serve as an infrastructure for these two technologies, therefore shaping their use and developments.

To put it simply, the IoT is all about connecting the analog world to the digital one. Physical products are equipped with sensors or connectors that can send information or be controlled by online applications. There are over 20 billion IoT devices in circulation today and this number will likely triple by 2025.32 Each of these devices generates information that is then turned into data, thus accelerating the already exponential production of data. In fact, the world is expected to produce six times as much data in 2025 as in 2019.33

Blockchains could boost IoT. First, blockchains could be used as the infrastructure layer on top of which IoT ecosystems are built. Second, blockchains, combined with algorithms, could help monitoring devices and spot anomalies. Should, for example, a product malfunction, blockchain ledgers could help identifying why-without permitting the constructor to tamper it. Third, smart contracts could allow IoT devices to interact with each other on specified terms and ensure that they stick to them.34 Most of all, blockchain technology provides IoT systems with security. By eliminating a single point of failure, blockchains ensure continuity even when a server is down. Not so surprisingly, 86 percent of blockchain adopters are combining the technology with IoT solutions and this number will likely grow in the future.35

If blockchain technology does indeed become the infrastructure upon which most IoT systems are built, it will be necessary to ensure that the technology’s internal layers are free from economic coercion. If not, artificial forms of centralization will impact IoT markets - for example, notably through anticompetitive practices that affect the validation of transactions or that raise prices. We can find a direct relationship between these external applications and blockchain’s fourth and fifth layers.

#### IoT prevents pollinator collapse---extinction.

Tash Bandeira 20, Reporter at Ubibots, an Engineering Services Firm, “Saving the Bees with IoT”, Ubidots, 7/15/2020, https://ubidots.com/blog/saving-the-bees-with-iot/

Sometime in late 2006, beekeepers across North America started seeing drastically high losses among their western honey bee colonies. Less dramatic disappearances were also observed in Europe and around the world, causing significant losses in agricultural crops that depend on bee pollination to survive.

Now known as Colony Collapse Disorder (CCD), these sudden losses occur when most of a colony’s worker bees leave their queen and plenty of honey and pollen reserves behind. With few dead bees found nearby, the phenomena didn’t correspond to any previously known causes of bee death.

Without worker bees, hives die out and the repercussions go far beyond honey shortages. We see significant agricultural losses and accompanying economic effects worldwide. Approximately 75% of our food supply depends directly on honey bee pollination, which corresponds to a global worth of hundreds of billions of dollars. And with no end in sight for CCD, there’s a lot at stake in the bee crisis.

Scientists have yet to settle on a single cause for the decline - attributing it to a combination of pesticides, disease, nutritional deficiencies, and commercial beekeeping itself - so it’s unlikely there’ll be a simple resolution. The EU voted to ban the use of neonicotinoid pesticides in 2018 but in lieu of global policy change, innovative IoT solutions have already shown serious promise for helping bees survive.

The Internet of Stings

Being able to know when a colony is in trouble and act quickly is imperative to beekeeping. Traditionally, this has meant regular check-ins with the hive, a practice that comes with some disruption to bee life. But with IoT solutions that incorporate wireless in-hive sensors, beekeepers can better keep tabs on their colonies in real time and from a distance.

At the Polytech Sorbonne University in Paris, a student developed a precision beekeeping box that can take temperature, humidity and weight readings, as well as detect the presence of a queen bee. With the data displayed on their Ubidots dashboard, beekeepers can then take steps to decrease resource consumption and increase productivity.

In Costa Rica, college students developed the Ubidots-powered Internet De Las Abejas, a project aimed at controlling varroa mites. Varroas stick to bees, suck their hemolinph, and spread the diseases they carry - posing a major threat to honey bee health. In better controlling them, beekeepers can improve the quality of life of their hives, while also increasing honey production and pollen mobility.

Another approach, developed by researchers in Manchester, is the tagging of bees with RFID chips to track their movements. With location data, beekeepers can follow their comings and goings to better understand and predict their behavior. Grad students in Canada have also been studying the use of sensor data to listen in on beehives and detect communication patterns in the buzz.

But easily the biggest buzz in IoT-enabled solutions is the development of robot bees, or pollination drones. Straight out of a “Black Mirror” episode, RoboBees were introduced by Harvard University researchers in 2013. While their first iterations were limited to flying and hovering, they can now swim underwater and stick to various surfaces. Robotic bees of the future could potentially work farms like their natural counterparts, pollinating crops and helping offset population losses.

No matter what form our ‘IoBees’ solutions take, the collecting and sharing of data will give us profound insights into their lives. Researchers and IoT Entrepreneurs all over the world are realizing the potential of aggregating this data into IoT dashboards, creating IoT solutions that can be commercially offered to either the farmers or research institutions.

Such array of projects aimed at tackling the bee crisis shows the powerful potential for IoT to help save the bees that feed our world.

#### Federal antitrust signals a balanced, light-touch approach that reinvigorates U.S. global leadership on blockchain.

Matt Sandgren 21, Former Staff Director of the Senate Republican High-Tech Task Force, Former Senior Counsel on the Senate Judiciary Committee, Final Chief of Staff to Senator Orrin G. Hatch, Executive Director of the Orrin G. Hatch Foundation, “How New Regulations from Washington Could Lead to a Blockchain Brain Drain”, The Hill, 10/27/2021, https://thehill.com/blogs/congress-blog/technology/578834-how-new-regulations-from-washington-could-lead-to-a-blockchain

The internet is what it is today—with its ability to connect people across countries, time zones, and cultures—thanks to the friendly regulatory climate it was born into. Sadly, the regulatory climate of 2021 is far less welcoming to disruptive technologies. This is bad news for the future of U.S. innovation and the emerging blockchain industry.

Whether Washington takes a heavy-handed or a light-touch approach to crypto regulation over the next few months could make a multitrillion-dollar difference over the next few years. To understand how much we stand to lose as a result of bad blockchain policy, it’s first important to understand just how much we have gained as a result of good internet policy in the ’90s.

It’s easy to forget that the success of today’s internet behemoths was anything but certain in the early years of the tech boom. During the Dotcom Bubble of the late '90s, for example, many companies were dismissed as scams (and some of them were). But even the most promising companies were still seen as speculative bets, and their stock prices were subject to extreme volatility.

It’s also easy to forget that the very concept of the internet was foreign to most people in its early years. By today’s standards, it was slow, overly complex, and difficult to use by anyone without a strong technical background. Many dismissed the internet as a fad, including Nobel Prize-winning economist Paul Krugman, who made this prediction in 1998: “By 2005 or so, it will become clear that the internet’s impact on the economy has been no greater than the fax machine’s.”

Noted.

“A scam,” “a fad,” “a bubble,” “overly complex,” “too volatile.” Does any of this sound familiar? History doesn’t rhyme so much as it plagiarizes. And it’s impossible to ignore that the crypto skeptics of today use the same vocabulary as the internet naysayers of yesteryear.

Now imagine if U.S. policymakers had heeded the words of the internet’s critics in the mid-to-late ’90s. Imagine if they had cracked down on e-commerce, digital publishing, and fledgling social media platforms to preserve the old way of doing things. Imagine if they had shaped regulations to stem the free flow of physical goods, ideas, and information made possible by the internet.

The American people would have missed out on trillions of dollars in economic opportunity—and the bounties of the digital age would have gone to countries with more tech-friendly policies.

This is the risk we face today.

We find ourselves at the dawn of a new age of American innovation. Like the internet before it, crypto has the potential to redefine everything we know about how business, politics, media, finance, and even relationships work. But if legislators give in to crypto’s critics by taking a draconian approach to regulation, the U.S. will fail to reap the economic rewards of this world-changing technology—and entrepreneurs will flee to friendlier shores.

Even now, the stage is being set for a blockchain brain drain. Take the Senate-passed infrastructure bill, which includes a provision that would define crypto miners, validators, and even software developers as “brokers,” requiring them to report information to the IRS about anonymous blockchain participants that they would have no way of obtaining. In effect, this provision would kill the nascent DeFi (decentralized finance) industry and make it almost impossible for everyday Americans to invest in new cryptocurrencies. In other words, this latest move sends a hostile message to blockchain advocates: “We don’t want you here.”

At best, the Senate proposal belies a gross misunderstanding of how cryptocurrencies work; at worst, it exposes regulatory capture and the willingness of legislators to give in to special interests.

Sadly, the threat of bad regulation doesn’t end there. SEC Chair Gary Gensler has expressed his belief that many digital assets are not commodities but securities and should be regulated as such. Following this same logic, he’s signaled his intent to crack down on the use of stable coins—cryptocurrencies pegged to the value of the U.S. dollar. Americans are using stable coins to earn 4 to 8 percent APY on their savings through various lending programs. But the SEC wants to put a stop to these lending programs, ostensibly “to protect investors.” (What’s unclear is which government agency will protect investors from the unlimited money printing that is devaluing their dollar savings at a rate of 5.3 percent per year.)

Washington has gotten off on the wrong foot when it comes to crypto. But it’s not too late to correct course.

Regulation of crypto is not necessarily a bad thing. In fact, it’s a key step on the path to mainstream adoption. It’s critical, however, that policymakers shape regulation in a way that minimizes the risks of this new technology without eliminating its benefits. Congress found a way to do this with the internet in the ’90s. Section 230—while far from perfect and in need of reform today—paved the way for a flexible regulatory environment that allowed for many online companies to thrive. In the famous words of Jeff Kosseff, Section 230 contains “the 26 words that created the internet” (and, it’s worth adding, “trillions of dollars in economic wealth”).

Indeed, regulatory clarity is key to extracting maximum value from the emerging crypto economy, whether that value comes from DeFi protocols, decentralized forms of social media, tokenized assets, NFTs, or some other application of blockchain technology that we can’t even imagine today.

As policymakers seek to find the right balance on regulation, they should remember that the U.S. didn’t become the tech capital of the world by choking innovators with red tape. The U.S. became what it is today by taking a prudential approach to regulation—one that enabled the entrepreneurial spirit.

This is the same entrepreneurial spirit that inspired the private sector technological advances that made the Apollo moon landing possible. It’s the same spirit that brought about smartphones millions of times more powerful than the Apollo 11 guidance computers. And it’s the same spirit that has motivated a group of visionaries to push the boundaries of the digital frontier through blockchain technology.

Will Washington’s leaders stifle that spirit to the detriment of our economy and our reputation as a global leader in innovation? Or will they nourish that spirit to usher in the next chapter of the digital revolution?

Let’s hope they choose the latter.

#### That allows international standard-setting that leverages it for public benefits internationally.

Lou Kerner 18, Head Crypto Analyst at Quantum Economics, Partner at Blockchain Coinvestors Acquition Corp, MBA from the Stanford University Graduate School of Business, BA in Economics from UCLA, “A Call For U.S. Leadership in Crypto”, Medium, 7/6/2018, https://loukerner.medium.com/a-call-for-u-s-leadership-in-crypto-4b74d6deb4ad

Despite the striking fact that most of the programmers the U.S. has ever known are alive and working today, despite the fact that the U.S.’s technical capabilities are growing exponentially, despite that, the vast stretches of the unknown and the unanswered and the unfinished still far outstrip our collective comprehension.

No man can fully grasp how far and how fast we have come, but condense, if you will, the 50,000 years of man’s recorded history in a time span of but a half-century. Stated in these terms, we know little about the first 40 years, except at the end of them man had learned to use the skins of animals to cover them. Then 10 years ago, under this standard, man emerged from his caves to construct other kinds of shelter. Five years ago man learned to write and use a cart with wheels. The printing press came this year, and two months ago, the steam engine provided a new source of power. Last month electric lights and telephones and automobiles and airplanes became available. Only last week did we develop penicillin and television. Two days ago the internet browser was introduced. And earlier today, Satoshi wrote his white paper.

This is a breathtaking pace, and such a pace cannot help but create new ills as it dispels old, new ignorance, new problems. Now, when refer to “Crypto”, I mean the four technologies (blockchain, cryptocurrency, smart contracts, and zero knowledge proof), which collectively enable decentralization, all fueled by community. Surely these technologies promise disruption and high reward.

So it is not surprising that when it comes to Crypto our government would have us stay where we are a little longer to rest, to wait. But this city of New York, and this country of the United States was not built by those who waited and rested and wished to look behind them. Technological breakthroughs are driven by those who move forward — and we will continue to do so.

If this capsule history of our progress teaches us anything, it is that man, in his quest for knowledge and progress, is determined and cannot be deterred. The development of Crypto will go ahead, whether the U.S. regulators joins in or not. And I believe Crypto is one of the great adventures of all time, and no nation which expects to lead the world in technology can expect to lead while staying behind in the development of Crypto.

Our forefathers made certain that the U.S. rode the first waves of the industrial revolutions, the first waves of modern invention, and the first wave of the internet. This generation does not intend to founder in the backwash of the coming age of Crypto. We mean to be a part of it — we mean to lead it. For the eyes of the world will increasingly look at Bitcoin and blockchain and beyond. And those of us in Crypto are working to see it governed by a banner of freedom. We have vowed that we shall not see Crypto filled with scammers, but with scalable protocols that make the world a better place.

Yet the promise of Crypto can best be fulfilled if we in this Nation are there, and leading the way. In short, our leadership in technology, our hopes for a better future, our obligations to ourselves as well as others, all require us to make this effort, to solve these mysteries, to solve them for the good of all men, and to become the world’s leading Crypto nation.

We set sail on this new sea because there is new knowledge to be gained, and new rights to be won, and they must be won and used for the progress of all people. For Crypto, like all of technology, has no conscience of its own. Whether it will become a force for good or ill depends on [hu]man[s], and only if the United States occupies a position of pre-eminence can we help decide how this new technology evolves. I do not say that we should or will go unregulated against the misuse of Crypto any more than we go unprotected against the hostile use of cyber warfare. But I do say that Crypto can be developed and mastered without repeating the mistakes of past regulatory overreach.

Crypto’s development deserves the best of all [hu]mankind and its opportunity for community. But why, some say, Crypto? Why choose this as our next computing platform? And they may well ask why climb the highest mountain? Why, 75 years ago, fly the Atlantic?

We choose to to develop Crypto, and do the other things, not because they are easy, but because they are hard, because the goal of decentralization will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win.

It is for these reasons that I’m concerned by the inaction of our government to provide greater regulatory clarity. In the last months, we’ve seen progress in scaling like the Lightning Network. We’ve seen securities infrastructure like Templum and OpenFinance and Polymath being built.

To be sure, from a regulatory standpoint, we are behind. But we should not stay behind. This year, we should make up and move ahead. The growth of our science and education will be enriched by new knowledge of Crypto, by new decentralized governance mechanisms, by new token economics.

The Crypto community itself, while still in its infancy, has already created a great number of new companies, and tens of thousands of new jobs. Crypto is generating new demands in investment and skilled personnel, and New York and the U.S. can share greatly in this growth.

To be sure, all this comes with uncertainty of the role of government and fiat in the future. I recognize that the belief in Crypto’s potential is in some measure an act of faith , for we do not now know what benefits await us.

But I believe that we can develop a decentralized currency that can be used as a means of exchange. I believe we can leverage blockchain technology to provide identity for the 23 million children on this planet without identity papers. I believe we can use these technologies for voting purposes, and ensuring our elected officials follow through on their promises.

However, if we’re going to do all those things, and countless other positive things for mankind, then we must pass accommodating regulations. I‘m encouraged that New York and the United States are playing a big part in the development of Crypto,. With more regulatory clarity, we can solidify our leading position in Crypto, the greatest adventure on which [hu]man[ity] has ever embarked.

#### Globally collaborative blockchains prevent nuclear war from miscalc, accidents, and arms racing AND build global co-op, stopping existential threats.

Dr. Lyndon Burford 21, PhD in Politics and International Relations from the University of Auckland, Visiting Research Associate at the Centre for Science and Security Studies at King’s College London, Member of the New Technologies for Peace Working Group, a Part of the Vatican’s COVID-19 Commission, “Could Blockchain Technology Help Advance Nuclear Disarmament?”, Medium International Affairs Blog, 2/19/2021, https://medium.com/international-affairs-blog/could-blockchain-technology-help-advance-nuclear-disarmament-6efaab35e277

New and maturing technologies are often seen as possible drivers of conflict, not least in the context of rising nuclear risks. In 2019, for example, the UK House of Lords Select Committee on International Relations concluded, “The risk of the use of nuclear weapons has increased, in the context of rising inter-state competition, a more multipolar world, and the development of new capabilities and technologies.” In a recent policy report published by the Centre for Science and Security Studies at King’s College London, I explored the flipside of that coin. The trust machine: blockchain in nuclear disarmament and arms control verification looks at how blockchain technology could help to reduce nuclear risks, by strengthening systems to verify the dismantlement of nuclear warheads.

The ‘trust machine’

Blockchain is best known as the technology that underpins the cryptocurrency Bitcoin, but it already has a wide range of alternative uses in areas such as medicine, transport, manufacturing, finance and governance. During the COVID-19 crisis, blockchain was used to produce a cheap, reliable solution for contact tracing. In Syria, blockchain is being used to create a permanent record of potential war crimes, increasing the security and integrity of the data and strengthening its admissibility as evidence in future war crimes prosecutions.

Contests of legitimacy and value: the Treaty on the Prohibition of Nuclear Weapons and the logic of…

Blockchain is a de-centralized, digital record-keeping technology. It combines cryptography and social/economic incentives to build a shared, permanent, and virtually un-hackable record of events, without needing to trust a third party authority to manage the data. Unlike Bitcoin, which is a ‘public’ network that allows anyone to interact with it, a private blockchain creates a ‘permissioned’ network of participants who collectively store and manage data in a way that allows them to maintain extremely high confidence in the integrity of the data. The result is a shared, digital record of events — a blockchain — that is practically immutable, establishing a single, collective, and irrefutable ‘truth’ about the nature and sequence of events within the network. In a post-truth world, blockchain thus offers an invaluable technical foundation for cooperation among parties that have a limited basis to trust each other, leading to its nickname, ‘the trust machine’.

Blockchain as a disarmament mechanism

At present, extremely low levels of international trust hamper efforts to advance nuclear disarmament. The ongoing development of new nuclear weapons, warheads and increasingly capable ballistic missile defences are undermining the theories and practices of deterrence, and point to the resurgence of a spiral of mistrust that characterized the Cold War nuclear arms race. Developing robust, multilateral verification tools and processes could help to mitigate the trust deficit. It would enable countries to pursue their shared interests in nuclear disarmament — reduced costs, less chance of escalation and nuclear use, greater scope to cooperate on global threats like climate change and pandemics — by increasing confidence that other countries are fulfilling their disarmament commitments in good faith. One way to strengthen verification would be to use a private blockchain to manage and store the data that a disarmament process creates.

In a verified disarmament process, parties need to track and record things like the status and movements of individual inspectors and weapon parts, and the status and material holdings of different facilities. These activities create large amounts of data that need to be stored in a secure, permanent and transparent manner that also allows for its easy retrieval by permissioned actors. The core attributes of blockchain correspond closely to these requirements. The technology would allow parties to maintain very high confidence in the immutability of verification data, creating a strong technical foundation for future cooperation from a shared, trusted baseline.

International collaborations like the 25-country International Partnership for Nuclear Disarmament Verification and the Quad Nuclear Verification Partnership (made up of Norway, Sweden, the United Kingdom and the United States) are already exploring how nuclear-armed and non-nuclear-armed states can cooperate in verifying the dismantlement of nuclear warheads without revealing sensitive information. Blockchain could complement their approach, enabling countries to create a permanent, immutable record of verification data.

Nuclear weapons threaten the survival of humanity and divert tens of billions of dollars each year away from efforts to address other collective security challenges like mitigating and adapting to climate change and responding to pandemics like COVID-19. As such, we all share an interest in disarmament processes that can reduce the likelihood of deliberate or accidental nuclear explosions and free up urgently needed resources for other global security priorities. We owe it to ourselves and to future generations to consider all options that could help to advance nuclear disarmament. In addressing the regular obstacle of distrust between the nuclear powers, blockchain is one technological option that we should be exploring.

#### Blockchain ensures a credible verification system---that restores the NPT AND momentum for disarm.

Michal Onderco & Madeline Zutt 21, Associate Professor, International Relations, Erasmus University Rotterdam; Research Associate, Erasmus University Rotterdam, "Emerging Technology and Nuclear Security: What Does the Wisdom of The Crowd Tell Us?" Contemporary Security Policy, Vol. 42, Issue 3, pg. 299-302, 2021, T&F.

Our third finding focuses on whether emerging technologies could enhance or impede nuclear disarmament efforts. Some work has already exposed how new technologies have the potential to strengthen nuclear disarmament and verification measures. A prototype “SLAFKA” was recently jointly developed by a nuclear regulator in Finland (STUK), the University of New South Wales in Australia, and the Stimson Center in the United States which tests whether a distributed ledger technology (DLT) can effectively safeguard nuclear material (Stimson Center, 2020). A DLT platform is “a system of electronic records that enables independent entities to establish consensus around a “ledger”—without relying on a central coordinator to provide the authoritative version of the records” (Rauchs et al., 2018, p. 23). Blockchain is the most well-known type of distributed ledger. Importantly, blockchain is structured in such a way that all who participate in the shared ledger must agree upon a set of records or data, and this data cannot be changed or tampered with by one actor alone (Rockwood et al., 2018). When it comes to accounting for nuclear materials, blockchain could be used by member states to confidentially and securely provide data to the IAEA (Vestergaard, 2018). By using a shared ledger system, the transmission of data by a member state would be visible to other member states, while maintaining the anonymity of participants (Rockwood et al., 2018).

In a recent report, Burford (2020) notes that the characteristic features of blockchain, namely its immutability and security as a data management tool, are uniquely suited to “help to build technical capacity among [non-nuclear weapons states] and habits of cooperation among NPT parties, while protecting proliferation-sensitive data” (p. 21). Finally, others have noted that advances in image-recognition software combined with the increased sophistication in and availability of satellite imagery could open up space for more actors to get involved in verification activities (Kaspersen & King, 2019). This would make verification more robust by allowing a greater number of states to participate in what has traditionally been the domain of states that are more technologically superior.

The security, transparency, and confidence-building features of these emerging technologies could thus enhance verification by strengthening the safeguards system as well as increasing trust and cooperation among states normally suspicious of one another. These features could prove useful in helping to close both institutional and compliance gaps within the non-proliferation regime. That said, as with any other global governance regime, a compliance gap is very difficult to fully bridge. On this point, Sagan notes that even with advances in verification technology “there will remain the problem of what to do if an erstwhile nuclear nation is caught secretly preparing to rearm” (see Sagan in Sagan & Waltz, 2010, p. 90). While the inclusion of new technologies in verification and safeguards will not wipe away the challenges associated with verification, emerging technologies can play a role in strengthening verification and safeguarding measures.

Since we were interested in whether the experts and policymakers considered the positive applications of new technologies on disarmament efforts, our final question in the survey asked experts to express their views on nuclear disarmament.

Table 3 illustrates that the majority of our experts across regions agreed that complete nuclear disarmament would happen when leaders are confident that technology will allow for its verification, underlining the pivotal role verification plays in disarmament. This was echoed by some of the policymakers whom we spoke to who said that AI and remote sensing could help make verification measures more robust (Interviewee I & F). On the other hand, Table 3 also highlights that European and American experts are more skeptical (than experts in other regions) of the fact that nuclear disarmament will occur when leaders believe new technologies make nuclear weapons unnecessary.

#### Policy must be certain and originate at the federal level to signal U.S. commitment to accommodative blockchain policy.

Michele Benedetto Neitz 21, Professor of Law at the Golden Gate University School of Law, Member of the California Blockchain Working Group, Affiliated Scholar at LexLab at the U.C. Hastings College of the Law, “How to Regulate Blockchain's Real-Life Applications: Lessons from the California Blockchain Working Group”, Jurimetrics Journal, 61 Jurimetrics J. 185, Winter 2021, Lexis

A. Why Create Laws Related to Blockchain Technology?

1. Protecting the Public from Harm

Blockchain technology is a complicated field, and innovation in this space is developing rapidly. This innovation will occur regardless of a legislature's reluctance or willingness to draft laws to regulate this industry. As state and federal legislators are struggling to define a regulatory scheme, members of the public who are excited about the possibilities of investing in something new like digital assets may suffer from harm.

This has, of course, already happened in various ways. In a recent high-profile example, members of the public were invited to invest in initial coin offerings (ICOs), buying tokens as a way to invest in start-up companies. 25 One study reported that approximately 78 percent of the ICOs offered in 2017 were actually scams. 26 In the United States, 33 percent of ICO investors believe that ICO operators "deceived them or withheld information from them." 27 The ICO market significantly cooled as federal prosecutors and the SEC began aggressively taking action against leaders of fraudulent ICOs, demonstrating how regulatory enforcement can indeed protect investors from harm. 28

[\*190] However, cryptocurrency scams are persisting beyond the ICO craze. The FTC recently warned the public that scammers are continually finding new ways to "trick people." 29 Members of the public are clearly at risk of a multitude of foreseeable--and unforeseeable--problems as applications of this technology develop, including fraudulent investments, breaches of privacy on blockchain platforms, digital identity theft, and insufficient data protection. Given these threats to the public, it is not appropriate for regulators to dawdle as blockchain applications continue to rapidly advance.

2. Attracting Innovation

While they work to protect the public, legislators and regulators can also use laws to signal their commitment to attracting blockchain-related companies to their locations. Some jurisdictions, including countries like Estonia and Switzerland 30 and U.S. states like Wyoming, 31 have already implemented regulatory schemes designed to win the interjurisdictional competition for blockchain business. 32

The resulting tension between protecting the public while promoting innovation lies at the heart of regulating digital assets and other applications of blockchain technology, as discussed in more detail in Section III.A. Despite the need for blockchain-related regulation, numerous challenges exist for lawmakers seeking to draft laws in this area--starting with the fact that the word "blockchain" does not have a commonly understood definition.

B. The Legislative Definition Problem

What is the legal definition of blockchain? This simple question has proved to be exceedingly difficult to answer. States considering blockchain legislation have focused on different characteristics of this new technology, meaning that "[d]efinitions in legislation introduced in 2018 in California, Florida, Nebraska and Tennessee differ[ed] from those of industry groups and from each other." 33 In some cases, the definitions were in conflict. 34 These inconsistent definitions [\*191] are problematic, as they "actually introduce legal uncertainty where it did not previously exist, and invite unnecessary and expensive litigation." 35

A clear definition of blockchain is necessary for legislative purposes as well, as it is required to help a jurisdiction create clear policies. 36 Moreover, a state's definition should enable policymakers and the public to focus on "the most unique value that the technology can deliver. It should be accessible to and understandable by the public, and yet technically specific enough to ensure that the [jurisdiction] can reap maximum benefit." 37 With such a high bar, legislators have understandably struggled to construct a working definition for this new technology.

The California Blockchain Working Group, after much discussion and debate, created a new definition of blockchain in 2020 for state legislative purposes:

"Blockchain" is a domain of technology used to build decentralized systems that increase the verifiability of data shared among a group of participants that may not necessarily have a pre-existing trust relationship.

Any such system must include one or more "distributed ledgers," specialized datastores that provide a mathematically verifiable ordering of transactions recorded in the datastore. It may also include "smart contracts" that allow participants to automate pre-agreed business processes. These smart contracts are implemented by embedding software in transactions recorded in the datastore. 38

The New York Senate took a simpler approach, defining blockchain as "a mathematically secured, chronological, and decentralized consensus ledger or database, whether maintained via internet interaction, peer-to-peer network, or otherwise used to authenticate, record, share and synchronize transactions in their respective electronic ledgers or databases." 39

Both of these definitions are technically correct, and they both reflect the policy decisions of their respective states. For example, California deliberately used the more flexible term "datastore," instead of "record" or "log," to reflect the verifiability of data shared amongst participants, the many use cases of this type of ledger, and the fact that many datastores could exist at once. 40

[\*192] One could argue that the lack of a uniform statutory definition is partly responsible for the patchwork nature of state blockchain regulation. After all, without a similar definition, it is nearly impossible to set policy goals and pass parallel legislation in multiple jurisdictions. However, the problem of inconsistent definitions is just the tip of the iceberg of interjurisdictional competition. 41 This competition is unlikely to subside even if the federal government or the Uniform Law Commission enacted a well-accepted, standardized definition of blockchain technology.

C. The Fast Pace of Blockchain Technology Development

Law always moves slower than technology. 42 This is partly because lawmakers and agencies can "struggle to capture emerging technologies in dusty regulatory frameworks." 43 For example, securities laws drafted in the 1930s could not have anticipated the sale of digital assets. 44 Even more recently drafted laws and regulations relating to the Internet do not fit blockchain technology. 45 Lawmakers must decide whether to fit this revolutionary technology within existing legal frameworks or start all over with new legislative schemes.

The constantly evolving nature of blockchain technology presents another challenge. This "industry is in its early stages of maturation," making it difficult to determine the initial policy choices that would lead to effective regulation. 46 There are also technical concerns still lurking within blockchain technology, such as locating the "weak points" that might be "gamed by bad actors," which could give rise to unanticipated legal problems. 47

Finally, even at this early stage, lawmakers must consider which aspects of the technology are important enough to regulate. Some of these are obvious, such as cryptocurrency and other forms of digital assets that involve sales to members of the public. But even within this category, it is "still too early to tell exactly which of the drivers of digital asset excitement is dominant," putting [\*193] "regulatory bodies in a tough position." 48 In this way, the wide variety of blockchain projects and the speed at which they are developing creates an additional barrier to effective regulation.

As an example, imagine a developer creates a brand-new digital asset and offers it to the public. How should regulators approach the regulation of this asset? Should regulators first consider the substance of the project, its connection to a decentralized ledger, its effect on consumers' privacy and security, or its potential to evade anti-money laundering and "[k]now [y]our [c]ustomer" laws 49 (or all of the above)? An effective regulatory scheme would need to include rules that are flexible enough to manage future technical developments as well as today's technologies. Otherwise, laws may need to be reconsidered and amended whenever a new technical application emerges.

D. Blockchain Technology's High Learning Curve for Lawmakers

Blockchain technology can be complicated and intimidating, and few lawmakers have training in computer science. A 2016 survey found only that only four of the 535 members of Congress had formal computer science degrees. 50 While the technical aspects of blockchain can be difficult to explain, most legislators can learn enough to understand the fundamentals. 51

New York's State Senate offers a case in point. The Senate's technical advisor reported that in 2019, "staffers and senators asked basic questions about blockchain and distributed ledger technology, prompting [the technical advisor] to develop an explainer presentation." 52 One year later, in 2020, many of the senators "appear more comfortable with the technology, which helps them see the value of [potential] legislation." 53

Legislators need not dive into minor technical details of blockchain to be able to regulate it. It is more important for legislators to focus on the function of blockchain and its practical applications, asking not "what is blockchain?" but [\*194] "what can blockchain do?" 54 Policymakers should focus on the use cases of blockchain, rather than its underlying technology. 55

Professor Angela Walch offered prescriptive recommendations for regulators learning about blockchain, advising them to cultivate their expertise (including self-education), consult with other regulators, follow the activity of standards organizations and academia, and "[w]atch and [l]earn" as the technology stabilizes. 56 Professor Walch also counsels lawmakers to "[a]dopt a [c]ritical [m]indset" in this educational process, to ensure they are not unduly influenced by hype or unreliable sources. 57

Legislators could also learn more about blockchain through the use of legislative working groups or task forces. For example, California's Blockchain Working Group drafted a report in accessible language, enabling state legislators to learn more about the technology and its potential applications for California in one comprehensive document. 58 The federal government has tried to follow this path. In 2019, a bipartisan group of senators proposed a bill directing the Secretary of Commerce to establish a federal Blockchain Working Group in 2019. 59 However, the bill, entitled the "Blockchain Promotion Act," is still currently in committee. 60

As a law professor who taught the first Blockchain and the Law class in San Francisco, I can anecdotally report that blockchain and cryptocurrencies are not easy concepts for nontechnical learners to grasp. However, over the course of one semester, my law students (most of whom did not have any technical training beforehand) were able to draft final reports and presentations not just describing the technology, but also analyzing the use cases deploying the technology. With a bit of time and effort, state and federal lawmakers can understand the potential for blockchain to transform their jurisdictions.

II. FIVE FACTORS FOR LEGISLATIVE CONSIDERATION

In light of the difficult nature of regulating blockchain, this Part offers five factors lawmakers should consider as they work to draft blockchain and crypto regulation.

[\*195] A. Policy Decision: Innovation vs. Protecting the Public Interest

In an ideal world, governments would be able to promote both innovation and the public interest. In reality, however, legislators usually need to debate and choose whether they will prioritize innovative technological development or consumer/public protection. This is especially true in the context of blockchain, since the public perception of blockchain varies widely. Many members of the public first heard of blockchain through Bitcoin, the digital currency. But early illegal use cases of blockchain technology also made headlines, including the infamous Silk Road darknet marketplace 61 and repeated cases of fraudulent theft through Initial Coin Offerings. 62 While the technology is neutral, blockchain can be used in malicious ways that harm the public. 63 Even well-meaning technology can implicate privacy and data protection concerns. 64

It is therefore "essential for both the industry and society that consumers and the capital market are protected from abuse." 65 No state or federal jurisdiction should enable blockchain technology to develop without guardrails to protect the public. The question is where those guardrails should lie. If states wait too long to regulate, the public may be harmed, and the costs of imposing requirements on industries that have already been established will be too great. However, if states develop restrictive regulations too early or the laws "become onerous," 66 businesses will relocate to more friendly jurisdictions. States in this position risk killing off innovation or pushing it to other states. 67 [FOOTNOTE] Blockchain businesses will move for regulatory reasons. See Daniel Kuhn, The Cryptocurrency Act of 2020 Is 'Dead on Arrival,' Washington Tells Sponsors, COINDESK (Mar. 11, 2020, 1:19 P.M.), https://www.coindesk.com/the-cryptocurrency-act-of-2020-is-dead-on-arrival-washington-dc-tells-sponsors [https://perma.cc/AP8X-KULR] ("Many projects are simply choosing to move elsewhere" because of regulatory uncertainty.). [END FOOTNOTE]

Part of the reason blockchain technology's applications are so challenging to regulate is that it "is difficult, if not impossible, for regulators to construct a framework that achieves clear rules, market integrity, and financial innovation." 68 This complex question explains the spirit of experimentation among states discussed in Part V, with some choosing restrictive regulatory structures, some choosing permissive approaches, and others choosing the middle. Regardless [\*196] of a jurisdiction's ultimate direction, legislators drafting blockchain legislation must evaluate how to protect the public while encouraging creative technological development.

B. Ethical Considerations

California was the first (and so far, the only) state to consider ethical considerations in the early stages of regulation. This author published the first law review article analyzing ethics in the blockchain industry in December 2019, 69 and also served as the primary drafter of the Ethical Considerations section in California's Blockchain Working Group report. 70

Depending on the type of blockchain at issue, numerous ethical issues may come up for regulators. For example, the increasing centralization of permissionless blockchains and the rise of permissioned blockchains may raise concerns about personal ethics, such as bias and conflicts of interest. As trends suggest that governance of blockchain systems is moving toward centralization, 71 individuals may have power to influence decisions made on that blockchain. If so, there is a potential for that individual's bias and conflicts of interest to come into play. 72

Although ethical discussions around blockchain appear slower to develop than the technology itself, several paradigms have been put forth advocating ethical considerations in this industry. 73 For example, the World Economic Forum recently asked participants and policymakers to sign on to its "Presidio Principles," an agreement to consider transparency and accessibility, agency and interoperability, privacy and security, and accountability and governance. 74 MIT's Digital Currency Initiative included the topic of blockchain ethics at its 2019 "Cryptoeconomics Systems Summit." 75

[\*197] In addition, the Beeck Center for Social Impact + Innovation at Georgetown University published the "Blockchain Ethical Design Framework," with a focus on six "root issues": "governance, identity, access, verification and authentication, ownership of data, and security." 76 This structure more specifically applies to developers, and is not a code of conduct or a legislative model, but it reiterates the idea that "we all share the responsibility to . . . demand intentional ethical approaches in the design and application of data and technology for social good." 77

California's Blockchain Working Group considered ethical issues related to social impact, including fairness, equity, accessibility, trust and transparency, and sustainability. 78 The Group proposed an ethical framework for the adoption of blockchain technology that is directed toward lawmakers as well as industry players. 79 This framework encompasses three main principles:

i. Address key ethical design goals

a) Seek societal benefit: Maximize good and minimize bad. b) Equity: Does this benefit all Californians, or only a few? c) Efficiency and effectiveness: How can we achieve ethical design and use cases without slowing innovation?

ii. Consider ethical uses of blockchain technology

a) Fairness: Is this technology designed and deployed in a fair, nondiscriminatory manner? b) Accessibility: Design to include the most vulnerable user. c) Responsibility: Anticipate and design for all possible uses. d) Sustainability: Create technology to advance sustainability, public health, and corporate social responsibility.

iii. Minimize unintended consequences

a) Are there unintended biases or conflicts in the design or use of this technology? 80 [\*198] b) Are any populations being unintentionally harmed by the way this technology is developing? c) Does this technology promote violations of local, national, or international law? 81

This useful framework offers guidance to regulators seeking to make sure they do not inadvertently violate ethical considerations, especially with hastily drafted legislation. Two examples illustrate the usefulness of this approach. First, it could be relatively easy to create a certification process for blockchain developers who provide services to the State of California. But will that certification process limit approval to developers with degrees from elite institutions? This type of action would raise equity concerns, as the blockchain industry should be working more toward diversity in gender, cultural backgrounds, and perspectives of industry participants. Second, could companies who advance environmentally sustainable blockchain development receive tax credits from the state? Although different jurisdictions may embrace different ethical principles, legislators should discuss these issues as they contemplate ways to regulate this new technology.

C. Transparency

Since "the rule of law requires transparency," 82 jurisdictions in the United States are governed by transparency laws. The federal government's administrative agencies must abide by the Administrative Procedure Act, which (among other things) orders federal agencies to act "transparently and fairly." 83 California's Bagley-Keene Act requires state boards or commissions (including working groups) to "publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized to meet in closed session." 84

Legislators are likely already aware of the government transparency laws in their jurisdiction, but there are other reasons transparency is especially important in the context of blockchain regulation. First, all stakeholders should be given the opportunity to weigh in on laws governing this nascent industry. 85 The industry players on the front line have valuable perspectives to share with legislators, and input from various stakeholders will create more efficient regulation. Moreover, the technology is moving quickly, and there may be applications of blockchain in development that legislators do not even know about yet. As the Cryptocurrency Act of 2020 revealed, 86 drafting laws without the collaboration of diverse stakeholders is ineffective.

[\*199] Second, although blockchain technology may eventually touch all areas of business, members of the public may be unaware of blockchain technology's potential. Legislative debates could double as community education opportunities, allowing people who would not ordinarily be interested in blockchain to attend Working Group meetings, task force briefings, and other public discussions of this new technology. Such meetings could be advertised to nontechnical professions and community organizations, and should be held in easily accessible public places and online. Legislators themselves could reach out to their nontechnical constituents and offer ways to connect them to educators and leaders in the blockchain industry. Such transparency could create a culture of innovation in a particular jurisdiction, while increasing public credibility for whatever regulations eventually develop.

D. Interjurisdictional Competition

States have been competing with each other since the beginning of the republic, and the competition has not decreased as our economy has become more complex. 87 In corporate law, interjurisdictional competitions are a common affair. The state that "wins" the race, creating the environment to attract the most businesses to that state, can secure both tax revenue and additional jobs for state residents. Delaware indisputably won the fight for corporate charters among states, with over 1.5 million legal entities, including 67 percent of all Fortune 500 corporations, incorporated there. 88 The reasons for Delaware's success include specialized legislation that is updated each year to adapt to technical and other changes, as well as a corporate-specific chancery court that can move cases quickly along. 89

When Limited Liability Companies (LLCs) were created in Wyoming in 1977, another interjurisdictional race was on. 90 Despite concerns that interstate LLCs would have problems without uniform LLC statutes among the states, "most states enacted LLC statutes before efforts to develop standardize statutes came to fruition." 91 As a result, only twelve states ultimately adopted uniform acts, and there is less uniformity for LLC statutes than for other business forms. 92

The same is happening now with statutes related to blockchain technology. States who can win the race to attract blockchain businesses to incorporate and domicile in their state can earn more than just increased tax revenues from start-up companies. Such a state could also create a reputation for being friendly to [\*200] technological innovation, a reputation that would have impacts beyond blockchain technology. For this reason, some states (including Wyoming, the first state to draft LLC statutes in 1977) jumped out first to enact permissive blockchain-and crypto-friendly regulations. 93

Before enacting regulations, however, state legislatures should ensure they are clear on the policies underlying those regulations. For example, as discussed in Section II.A above, states should consciously strike a balance between protecting the public and encouraging innovation. Without establishing prioritized policies in advance, a state may win the interjurisdictional competition in the short term but create unintended consequences, such as unnecessary litigation or public harm, in the long term.

E. Uniformity

As a member of the California Blockchain Working Group, this author asked industry leaders in late 2019 what they preferred to see in blockchain regulation. Each of them clearly and unequivocally stated that uniformity of regulation across the United States would be good for business. It would be much easier for blockchain businesses to plan and expand their operations if states were aligned on regulatory issues, particularly in the area of digital assets.

The Uniform Law Commission (ULC) has made several attempts to create a standardized approach to digital asset regulation. 94 In 2017, the ULC proposed the Uniform Regulation of Virtual-Currency Businesses Act to provide "a statutory framework for the regulation of companies engaging in 'virtual-currency business activity.'" 95 An accompanying "Supplemental Act" in 2018 provided rules related to commercial law and the Uniform Commercial Code. 96

These model acts had a short and controversial lifespan. No state enacted the model legislation, and only a handful of states introduced it. 97 Wyoming actively resisted the ULC's request to withdraw Wyoming's pending blockchain [\*201] legislation in favor of adopting the ULC's approach. 98 Wyoming's legislators noted that the ULC's model acts had not yet been enacted by any jurisdictions, and explained why they considered Wyoming's regulatory approach to be the superior one. 99 One month later, the ULC recognized the need to convene a committee to study how the Uniform Commercial Code could be amended in order to "deal with emerging technologies." 100 The ULC urged "states to refrain from enacting legislation pending the result of the committee's work," 101 an act suggesting that the ULC recognized flaws in its proposed acts. 102 Given the ongoing interjurisdictional race described in Section II.D, it seems absurd to ask states to wait on enacting blockchain legislation.

As of December 2020, only one state (Louisiana) had passed a virtual currency licensing statute based on the ULC's uniform act. 103 It is clear that, much like the race for corporate and LLC charters, the uniformity train has left this station. In the absence of federal legislation or effective model acts, states have already invested time and energy into drafting new laws. States like Wyoming, which has "actively decided to lead the charge in ensuring solvent, blockchain based" companies, 104 will not willingly give up their leading positions in this area.

III. THE CURRENT UNEASY MIX OF FEDERAL AND STATE BLOCKCHAIN REGULATION

Federal and state regulators are struggling to keep up with the fast pace of blockchain technology development. This Part will demonstrate how this struggle is creating a wide variety of regulatory approaches.

[\*202] A. Patchwork Agency Regulation

The federal government's attempt to regulate blockchain technology, particularly cryptocurrencies, is (to put it bluntly) a mess. Federal authorities interpret laws relating to blockchain and cryptocurrencies differently. 105 This confusing, piecemeal approach is epitomized by the struggle to determine how to even classify digital currency for regulatory purposes. The Internal Revenue Service (IRS) views cryptocurrency as property, the Securities and Exchange Commission (SEC) classifies such currencies as securities, and the Commodity Futures Trading Commission (CFTC) considers cryptocurrency to be a commodity. 106 There is clearly a need for a unified methodology, even just within blockchain's narrow use case of cryptocurrencies, but this confusion is not a surprising result when "neither Congress nor the SEC has formally elucidated which digital assets are securities and which are not." 107

Different agencies are sending different messages, creating "regulatory whiplash." 108 Some, like the CFTC, are inclined toward experimentation to support blockchain and cryptocurrency development, while others are more cautious. 109 All of the agencies seeking to regulate blockchain technology and its applications would benefit from consideration of the five factors listed in Part III. Below is a short explanation of three distinctive agency approaches.

[\*203] 1. SEC Safe Harbor Provision--A Work in Progress

The SEC missed its chance to establish a clear regulatory framework early in the life span of blockchain technology, instead adopting an approach characterized by delay and a series of reversals on important decisions. 110 The SEC's delay "simultaneously encouraged unscrupulous actors to take advantage of ambiguous regulations" and issue fraudulent tokens to Americans, while "driving away conscientious developers and entrepreneurs" to places with more developed laws. 111 The SEC's attempt to clarify its position in a limited area with the April 2019 issuance of a "Framework for 'Investment Analysis' of Digital Assets" has been called "too little too late." 112

In the meantime, SEC Commissioner Hester Peirce has earned the nickname "Crypto Mom." 113 In early 2020, she offered her take on the legislative problems related to blockchain technology, saying "[i]t is important to write rules that well-intentioned people can follow. When we see people struggling to find a way both to comply with the law and accomplish their laudable objectives, we need to ask ourselves whether the law should change to enable them to pursue their efforts in confidence that they are doing so legally." 114 Peirce clearly views law and regulation as a way to promote, not thwart, the development of blockchain and its use cases.

In February 2020, Peirce proposed a safe harbor provision for firms in the cryptocurrency space selling tokens to the public. 115 Peirce described her proposal as recognizing "the need to achieve the investor protection objectives of the securities laws, as well as the need to provide the regulatory flexibility that allows innovation to flourish." 116 The safe harbor proposal includes disclosure requirements for issuers and good faith obligations to ensure that token issuers are not fly-by-night companies. It also sets forth rules related to the purpose of token issuances and efforts to create liquidity for token users. 117

[\*204] The idea underlying the proposal is to "give new projects some breathing room where they can do their work without fear of being fined, arrested or having their offices raided." 118 This also filters "out the bogus projects that have no intention of building a workable, decentralized product." 119 Peirce appears to be seeking a way to protect consumers from unscrupulous token issuers while allowing companies to move forward with technical developments.

Many members of the blockchain industry welcomed the safe harbor proposal. The General Counsel for a cryptocurrency exchange declared, "Today we both congratulate and thank SEC Commissioner Hester Peirce . . . . This is a great day for the blockchain industry and the United States." 120 But the proposed safe harbor is just that: a proposal. It is not yet law, and may never become law. 121 Even so, the willingness of Commissioner Peirce to think outside of the box with this proposal has reinforced her reputation (and her nickname) within the blockchain community.

2. The Federal Reserve's Digital Dollar

The Federal Reserve revealed in February 2020 that it was working toward a potential central bank digital currency (CBDC). 122 A CBDC, colloquially [\*205] known as a "digital dollar," is not a token based on a decentralized blockchain. 123 It would instead be a "debt notation on a centralized ledger maintained by the Federal Reserve," which would use a centralized database to track consumer or business balances. 124 Individuals could "access funds through digital dollar wallets, which would also be managed by the Fed." 125

Although the digital dollar is different from a crypto asset on a blockchain, the policy issues at hand are quite similar. The Federal Reserve recognizes that these policies include financial stability and legal considerations, such as privacy concerns and protections for data and digital identity safety. However, the Federal Reserve clearly wishes to be on the cutting edge of the digital dollar debate, with one of its members noting that "it is essential that we remain on the frontier of research and policy development regarding CBDC." 126

At the time, there was pressure on the Federal Reserve to begin researching a digital dollar. China is creating a digital yuan, 127 and some argue that the United States is already "falling behind" other countries in developing a CBDC. 128 In addition, the surprise release of Facebook's Libra in 2019 (now rebranded as "Diem") apparently inspired the Federal Reserve to accelerate its research on the potential of a CBDC. 129 The arrival of the COVID-19 pandemic expedited the discussion, as millions of people around the world moved toward cashless payments. 130

The discussion of a digital dollar jumped quickly during the pandemic from the Federal Reserve to Congress. Drafts of congressional emergency pandemic relief legislation in March 2020 included a digital dollar concept to speed up the delivery of stimulus payments. 131 A Congressional Task Force on Financial [\*206] Technology held hearings on the issue in June 2020. 132 Indeed, "the question might be not if digital currencies will find their way into the financial system, but when--and how." 133 As federal lawmakers move toward the creation and regulation of a CBDC, they should be pondering how to encourage innovation while protecting consumers. In addition, anyone involved with the CBDC should consider transparency issues involving the input of multiple stakeholders, as well as ethical considerations such as concerns for unbanked populations.

3. Treasury Department Regulations to Increase Cryptocurrency Transparency

Unlike SEC Commissioner Hester Peirce and the Federal Reserve, U.S. Treasury Secretary Steven Mnuchin has taken a more cautious (and arguably negative) approach to cryptocurrency. 134 In February 2020, Secretary Mnuchin told the Senate Finance Committee that the Treasury Department would be enacting "stricter regulations around digital currencies to help expose 'secret' accounts and other nefarious activities." 135 Although Mnuchin acknowledged that "[w]e want to make sure that blockchain technology moves forward," he also noted that "[w]e want to make sure cryptocurrencies aren't used for the equivalent of old Swiss secret number bank accounts." 136

The goal of Treasury regulations will be to "ensure law enforcement can see where the money is flowing, and that it's not used for money laundering." 137 A March 2020 press release from the Treasury Department announced that the Department had held a meeting of "industry thought leaders and compliance [\*207] experts" on the issue of cryptocurrency regulation. 138 The press release also explained that as these regulations develop, Treasury will remain focused on preventing illegal conduct by "money launderers, terrorist financiers, and other bad actors." 139 The repeated use of such negative terms indicates the Department's adverse stance toward cryptocurrencies, as well as an example of lawmakers and regulators "still cling[ing] to an outdated trope where cryptocurrencies are used to underwrite criminal activity." 140

What can we make of this patchwork approach to regulation among U.S. federal agencies? Some may argue that it is better for the federal government to allow the blockchain industry and cryptocurrency markets to evolve before finalizing a regulatory structure. There can also be benefits to regulatory divergence, such as enhanced innovation as agencies compete to become the preferred regulator in a particular field. However, the absence of "intelligent rules and regulations that provide a clear and predictable framework for investors, issuers, and their lawyers" is complicating that evolution. 141 How can lawyers advise clients--such as start-up companies desiring to operate in the cryptocurrency sphere or offer tokens to investors--if it is unclear how such assets would be regulated? Policymakers are not sufficiently considering important factors, including transparency and uniformity, under this current approach.

Perhaps the problem is a lack of unity among federal agencies, who appear to be tripping over themselves to get in on the digital asset regulatory action. Federal policymakers may be concerned that they are not yet educated enough to make cohesive decisions about overarching regulatory frameworks, or they are waiting for Congress to step up. In any case, this confusion at the federal level is wreaking havoc on the blockchain industry in the United States. Innovative companies must risk inadvertently violating regulations (and having to pay the ensuing fines) just to push the industry forward. 142 Alternatively, companies are choosing to leave the U.S for other jurisdictions with better regulatory [\*208] clarity. 143 Piecemeal regulation among federal agencies is "not a substitute for transparent legislation or judicial rulings to guide market participants." 144

### 1AC---FTC ADV

#### Contention 2 is FTC.

#### FTC credibility is tanked by both unwillingness to launch bold antitrust AND a track record of losing in court, but Khan’s appointment is a window to revamp its policy.

Jessica Rich 21, Of Counsel at Kelley Drye & Warren LLP, Former Director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), JD from the New York University School of Law, AB from Harvard College, Former Distinguished Fellow at Georgetown University’s Institute for Technology Law and Policy, “How Lina Khan’s FTC Does Business – What We’ve Learned So Far”, JD Supra, 11/9/2021, https://www.jdsupra.com/legalnews/how-lina-khan-s-ftc-does-business-what-3596839/

Since taking over at the FTC, Khan has quickly begun to remodel it. Some of these changes look like technical internal reforms, while others are major policy statements. Almost all have been fiercely opposed by Republicans and the business community.

In the past few weeks, Khan has begun holding commission meetings in public - something Democrats say makes the commission more open to scrutiny, but which the two Republican commissioners say makes it harder for them to negotiate compromises.

She has banned staff from making public appearances such as conference panel sessions, saying the commission has too much work to do. She has passed a rule which allows FTC staff greater leeway to pursue investigations in certain priority areas, giving them the power to issue their own subpoenas for documents and testimony.

Khan is also promising to help rewrite the US merger guidelines, a complex set of documents laying out what kinds of evidence regulators look for when deciding whether a merger is illegal.

And, in a pair of crucial decisions, she and her fellow Democratic commissioners voted to rescind two key FTC policy statements.

The first was written in 1995 during Bill Clinton's first term as president, and deemed that companies that had previously proposed unlawful mergers no longer had to notify the FTC before completing future transactions in the same market.

By undoing that policy, Khan said she hoped to stop companies simply trying again and again to complete a merger even after it had been rejected by regulators. The second statement was written in 2015 during the Obama administration and set down limits on when the FTC would prosecute a company for socalled "unfair methods of competition".

"These changes are going to make dealmakers think about things differently," says one senior Democrat working for the commission. "They are not filing an application, we are investigating as to whether there is a violation of the law. That is a fundamentally different way of thinking about things."

Meanwhile, the White House has given the FTC the even bigger task of helping rewrite the rules that underpin the American economy. Under the terms of a sweeping order signed by Biden last month, the commission has been asked to devise rules which would ban companies from stopping employees moving to rivals, and prevent pharmaceutical companies from paying generic rivals not to enter a certain market for a period of time.

The moves have delighted progressives, who say Khan's willingness to push through reform quickly shows she is serious about putting the commission back at the heart of Washington rulemaking and enforcement.

"The commission has been lazy," says Matt Stoller, director of research at the American Economic Liberties Project and a former colleague of Khan at the Open Markets Institute. "It has been a place where you send political cronies who don't have to do any work if they don't want to.

"This is such a different form of politics from the normal bullshit."

Republican concerns But if the reforms have pleased Khan's supporters, they have worried conservatives who say the commission lacks both the legal authority and the institutional capacity to do what is being asked of it.

For example, Khan says she wants to renew the commission's appetite for bringing cases against companies for "unfair methods of competition" - a vague category of corporate behaviour which allows the FTC to act even when there is no merger in question or when a company is not large enough to be a monopoly. She and fellow progressives argue that by not pursuing such cases the FTC has taken away one of its most powerful weapons.

Such behaviour is often very hard to prove, however. When the FTC charged Abbott Labs in 1994 with trying to rig a bid to supply the Puerto Rico government with infant formula, for example, it alleged the company's choice not to bid in one of the rounds provided evidence of collusion with rivals. Abbott Labs' lawyers, however, successfully used game theory to explain why a "no bid" could in fact have made rational economic sense.

More controversial is the idea that the commission is going to start writing wide-ranging new rules of its own, as envisioned in Biden's competition order. This would test the limits of the FTC's powers in both court and on Capitol Hill, critics say, and could end in Congress clipping its wings as it did in 1980 when the FTC was forced to subject its rules to Congressional review.

Sean Heather, senior vice-president for antitrust at the US Chamber of Commerce, says: "The FTC is writing its own rules and acting as prosecutor, judge and jury. This is deeply concerning for a regulatory agency with broad powers."

Christine Wilson says: "I believe competition rulemaking is institutional suicide."

If Khan wanted an indication of how courts might view her approach, she got one within weeks of taking over the commission. In June, a federal judge dismissed the commission's complaint against Facebook, its most high-profile in years.

The commission had argued the social media company had engaged in anti-competitive conduct for years, including by buying up potential rivals such as WhatsApp and Instagram. In June, however, a federal judge ruled the commission had failed to prove that Facebook had monopoly power.

Khan's critics worry that if the commission loses a series of high-profile court cases it will fatally undermine its authority. "If you lose enough cases your credibility evaporates," says William Kovacic, a former Republican chair of the commission. "You can lose it all - not right away, but you can lose it all."

For Khan's supporters, however, this criticism borders on the absurd. "Don't you think the FTC is already seen as weak?" says Rohit Chopra, a Democratic commissioner.

Progressives argue the FTC has for years only enforced competition rules against large companies in a fraction of the cases it should have. "Do you think there are only 10 anti-competitive mergers a year?" says Chopra. "I'm not sure it can get any worse."

"The FTC can put together legal teams that can match the best in the bar, punch for punch, in a major case," says Kovacic. "But the number of those teams is a couple, it is not 10."

For years the commission's budget and staffing levels have been chipped away. It now has roughly 50 per cent of the staff it had in 1980 and is currently trying to review a record number of mergers. In the first nine months of this fiscal year, the FTC received 2,573 notifications ahead of a large merger - already 50 per cent more than were received in the whole of last year.

Last week, the commission published a statement warning that it would not be able to review all mergers within 30 days of a notification being made, as required by law. Instead, the FTC said, if it had not had time to review a merger before it took place, it would reserve the right to take action even after it had been completed.

The commission is also facing an uphill battle to retain staff. Some people say they feel demoralised by the pace of change and irritated they have not yet met their new chair - something Khan's allies say is an unfortunate result of the pandemic. "There are only so many times you can hear that your institution has failed for years before you start to doubt your place in it," says one staff member.

#### Specifically---blockchain is a key priority.

Dr. David Morris 21, PhD in Media Studies from the University of Iowa, Former Academic Sociologist of Technology, CoinDesk’s Chief Insights Columnist, “Biden’s New FTC Chair Could Be a Big Web 3.0 Ally”, The Crypto Daily News, 6/16/2021, https://thecryptodailynews.com/2021/06/bidens-new-ftc-chair-could-be-a-big-web-3-0-ally/

Yesterday, the Biden administration named Lina Khan, a 32-year-old Columbia Law professor, as the brand new head of the Federal Trade Commission. Khan, who would be the youngest FTC head ever, is called a fierce critic of massive tech monopolies like Amazon. While there’s typically a knee-jerk resistance to regulation and regulators amongst blockchain advocates, Khan’s considerations make her a potential ally on huge points like privateness. Her antimonopoly work might additionally create substantial market alternatives for brand new sorts of tech companies – together with these constructing decentralized techniques and “Web 3.0.”

Enforcing U.S. antitrust regulation is a main a part of the FTC’s mandate, and Khan might be greatest identified for serving to redefine simply what a “monopoly” is. She has been essential, together with throughout seven years on the Open Markets Institute, in growing and selling the concept a firm could be a monopoly even when its practices drive prices down – even, the truth is, if its product is free to customers. That principle largely hinges on how the companies collect and use knowledge: Khan has been among the many loudest critics of the way in which Amazon makes use of knowledge gathered by its storefront, akin to by leveraging sales data to compete with third-party sellers who’re, a minimum of buyers, its prospects.

#### Failing to control blockchain violations will outstrip federal enforcement capacity, making traditional antitrust completely ineffective.

Drew Stanko 21, JD Candidate at St. John's University School of Law, BS in Economics from Villanova University, “Recent Developments and the Need for Nuance”, Journal of Civil Rights & Economic Development, 4/8/2021, https://www.jcred.org/shortreads/efforts-to-modernize-antitrust

I. IS NEW SCHOOL OFFICIALLY HERE?

In January 2007, the Economic Analysis Group at the Department of Justice Antitrust Division published a Discussion Paper entitled "Does Antitrust Need to be Modernized?" The paper reviewed whether "globalization and rapid technological change" necessitated changing federal antitrust laws. This Discussion Paper has proven prescient; it identified as a "key issue" the growing need for improving antitrust enforcement of alleged exclusionary conduct related to intellectual property.

Bipartisan support for antitrust reform has grown immensely since January 2007 due to heightened market concentration and Mergers & Acquisitions (M&A) rates in an increasingly complex digital economy. Senator Amy Klobuchar introduced antitrust reform legislation in February that would provide substantial funding increases to the FTC and the DOJ Antitrust Division, and the Biden Administration appears to be supporting efforts to modernize antitrust enforcement.

Recently, President Biden indicated intent to name two prominent "New School" antitrust attorneys and scholars, Lina Khan and Tim Wu, to positions in his administration. Kahn, who rose to prominence as a student at Yale Law School for "Amazon's Antitrust Paradox" and has since held positions at the Open Markets Institute and the FTC, will reportedly be nominated to serve as the Commissioner of the Federal Trade Commission. Wu is famous for coining the term "net neutrality" and authoring "The Curse of Bigness: Antitrust in the New Gilded Age," and he will serve on the National Economic Council as a special assistant to the president for technology and competition policy. Kahn and Wu have helped establish and develop the "New School" of antitrust jurisprudence, and both have taught related courses at Columbia Law School. Generally, the New School aims to prioritize "innovation, entrepreneurship, privacy, freedom of the press, and economic and civil liberties" rather than strictly focusing on "consumer welfare."

II. SENATOR KLOBUCHAR'S COMPETITION AND ANTITRUST LAW REFORM ACT:

Senator Amy Klobuchar, who spoke passionately about her concerns related to antitrust enforcement throughout her Presidential campaign, introduced antitrust reform legislation in February.

Sen. Klobuchar's proposal, the Competition and Antitrust Law Reform Act, aims to "give federal enforcers the resources they need [to] . . . strengthen prohibitions on anticompetitive conduct and mergers, and make additional reforms to improve enforcement." In order to accomplish these goals, the proposal would provide increased funding for the DOJ Antitrust Division and the FTC and would create a new FTC "Market Analysis" Bureau. While these structural and administrative reforms may receive bipartisan support, Sen. Klobuchar's proposal would also substantially alter the legal standards used to evaluate antitrust challenges under the Sherman and Clayton Acts, a change likely to be met with pushback by conservative economists and lawmakers. Sen. Klobuchar's proposal aims to accomplish important goals, but some argue the Sherman and Clayton Act amendments included in the legislation would "add friction to M&A Activity, stalling capital markets, reducing innovation and investment, and frustrating economic growth."

1. CLAYTON ACT REFORMS

Senator Klobuchar's proposal would modify the Clayton Act to "restore its original intent by amending it to include reference to 'exclusionary conduct.'" The legislation would define exclusionary conduct as "any conduct that would materially disadvantage . . . actual or potential competitors, or foreclose the ability of or incentive to compete." Currently, antitrust challenges require the plaintiff provide prima facie evidence that alleged anticompetitive effects of proposed mergers would result, and "proponents of the merger are then permitted to rebut by providing evidence that the merger will not have the feared anticompetitive effects."

The amendments would shift the presumption that "exclusionary conduct" presents a violative "appreciable risk" where such conduct is taken by a firm with a market share greater than 50% or otherwise wields significant market power. In turn, the burden would be on firms to prove the procompetitive market effects of the challenged conduct or merger rather than on the challenging entity to establish the anticompetitive impacts of the conduct that would result.

While it is important that antitrust reform efforts prioritize enforcement of anticompetitive exclusionary conduct, the legislation arguably defines the term overbroadly. Accordingly, the proposal may result in disincentivizing innovation that would ultimately benefit consumers and the overall economy. By presuming the illegality of any conduct taken by large firms that disincentivizes market entry or competition, the proposal risks unintentionally penalizing firms for achieving beneficial economies of scale or otherwise innovating to provide higher quality products more cheaply than competitors. Arguably, threatening firms with costly antitrust litigation whenever they undertake innovative conduct that negatively impacts competitors risks disrupting market incentives and stalling economic growth.

2. SHERMAN ACT REFORMS

Similarly, the Sherman Act would be modified to allow civil penalties of either 15% or 30% of a firm's US revenues for anticompetitive exclusionary conduct. Sen. Klobuchar has indicated that civil penalties are necessary because the existing remedies—injunctions, equitable monetary relief, and private damages—have not sufficiently deterred anticompetitive conduct. This may be true, but civil penalties of this size likewise risk stifling and disincentivizing innovation.

3. FUNDING ENFORCEMENT AGENCIES, FINANCING NEW "MARKET ANALYSIS BUREAU"

While the Sherman and Clayton Act reforms are unlikely to garner significant support from conservative lawmakers, the funding increases and creation of the FTC Market Analysis Bureau are more likely to win bipartisan support.

Increasing the funding available to the FTC and the DOJ would enable the agencies to hire more attorneys and would finance the creation of the Market Analysis Bureau. The MA Bureau would supplement the FTC's existing Competition, Consumer Protection, and Economics Bureaus. It would be tasked with conducting market, industry, and retrospective merger analyses aimed at helping the FTC develop a better understanding of the competitive conditions and underlying economic dynamics affecting complex markets. The creation of the MA Bureau is likely to gain support because it would demonstrate a commitment to ensuring continued reliance on empirical analyses rather than judicial or political discretion. Accordingly, these reforms would likely bolster enforcement efforts without necessarily adopting the "Big is Bad" approach that has historically divided lawyers and economists.

III. MODERNIZING ANTITRUST ECONOMICS

The Market Analysis Bureau would theoretically improve enforcement agencies' understanding of the economics underlying complex markets. This would provide enforcers with the tools needed to prosecute anticompetitive conduct that may have otherwise skirted enforcement due to the difficulty of establishing the negative economic effects of the conduct in question.

The complexity of the digital economy and increasing market concentration has made it more difficult for prosecutors to prove these anticompetitive results, but advances in machine learning and computational antitrust may assist in identifying and consistently enforcing antitrust violations.

While computational antitrust is certainly in its nascent stages of development, the early returns from Stanford's new Computational Antitrust Project are promising. The project's seminal article, authored by Project Director Thibault Schrepel, defines computational antitrust as a "new domain of legal informatics which seeks to develop computational methods for the automation of antitrust procedures and improvement of antitrust analysis." There are more than fifty global antitrust enforcement agencies participating in the project, including both the US FTC and the DOJ Antitrust Division.

Schrepel situates computational antitrust within "Antitrust 3.0," which he explains "is emerging but remains incomplete." At the core of Antitrust 3.0 is the goal of developing consistent enforcement frameworks designed to combat anticompetitive conduct in digital markets.

IV. OUTLOOK

In "The End of Antitrust History Revisted," Kahn "reviews" Wu's The Curse of Bigness and explains that the "task facing reformers is to translate their critiques into a positive vision, including legal rules and analytical frameworks." These analytical frameworks will be critical to ensuring that antitrust law promotes free market economics, rather than subjects firms to inconsistent judicial interpretation and prosecutorial discretion.

The majority of federal antitrust law applicable today was authored prior to 1915, and the unique challenges associated with prosecuting exclusionary conduct in digital markets have presented concerns for nearly twenty years. While bipartisan support for antitrust reform and emerging scholarship both provide legitimate reason to be optimistic about efforts to modernize federal antitrust law, it is important that reforms are nuanced enough to confront the complex problems they are enacted to address.

Accordingly, while Senator Klobuchar's proposal is certainly "well-intentioned," the budgetary reforms and creation of the Market Analysis Bureau should be separated from and passed without the proposed Sherman and Clayton Act amendments included in the legislation. The newly-appointed experts in the Biden Administration should be afforded the requisite resources to capitalize on the promise of New School antitrust jurisprudence and the development of Antitrust 3.0. By providing these resources, those leading antitrust modernization efforts will be equipped with the tools needed to create nuanced legal frameworks that reflect modern critiques and ensure consistent enforcement practices.

#### This will create a legitimacy crisis that threatens the foundational credibility of the FTC.

Dr. Thibault Schrepel 19, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, “Collusion by Blockchain and Smart Contracts”, Harvard Journal of Law and Technology, 33 Harv. J. Law & Tec 117, Fall 2019, Lexis

V. CONCLUSION

Blockchain is a new and yet little-explored territory. It is, amongst other things, the Amazon 228 of tomorrow's collusive agreements: full of different life forms and new possibilities, the technology will give rise to unidentified creatures and dangerous species that we do not really know how to approach.

I have first shown that blockchain will be used to enhance the functioning of collusive agreements as we know them and that new forms of collusion linked to the technology conditions of access and use will appear as well. Second, blockchain will increase the stability of collusive agreements, providing them with a good life. Depending on whether the blockchain is public or private, a double paradox could emerge. One paradox is related to the visibility of all practices to colluders while ensuring their opacity to non-colluders. The other is associated with the fact that collusive agreements will be more robust during their lifetime by eliminating a large proportion of deviant behaviors, but will die in more brutal ways.

For these reasons, one can expect an increase in the number of collusive agreements along with an increase in their profitability, but not necessarily in their duration. The number of leniency applications may also drop because blockchain will reinforce trust during the lifetime of collusive agreements. This is largely due to the potential use of smart contracts because once again, "[o]ne of the greatest checks on crime is not the cruelty of punishments, but their inevitability," 229 which is precisely what smart contracts provide by automating punishments.

[\*164] The time has now come to detect collusion by blockchain and smart contracts, however difficult that may be. I have shown that some blockchains are more likely to induce collusive agreements than others. Antitrust and competition authorities may start with focusing their efforts on these blockchains and creating safe harbors for the others, for instance, by ensuring that no sanction will be imposed under antitrust and competition law for a specified number of years. Antitrust and competition authorities may also, when sending questionnaires to undertakings, ask whether they use blockchain, and if so, what type of blockchain, using which consensus, and for what purpose.

But perhaps it is even more urgent to adapt existing legal toolboxes before they become entirely ineffective, which implies considering a "law is code" approach and, generally speaking, transforming part of antitrust and competition law to become allies to blockchain core developers rather than mere threats. 230 It is said that "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." 231 As true as this statement is, all we have in existing laws is one size of pliers. With the wrong tools, the most sophisticated technology requiring great precision will not be as adjusted as it could be. Antitrust and competition agencies are currently not equipped to fight collusive agreements by blockchain. This may cause a legitimacy crisis for antitrust and competition law that may become ineffective sooner than expected. Indeed, it is more than likely that the use of current regulatory tools will be prevented by the technical characteristics of blockchain. Agencies further need to start analyzing code and software programming. Without doing so, most illegal activities on blockchain will remain safe. The same is true for all practices outside of blockchain which use the Internet. To date, antitrust and competition agencies refuse to analyze the programming of platforms and software. This creates a legal loophole and encourages companies to commit anti-competitive strategies precisely here. 232

Without fundamental research on this subject, palliatives will continue to be present, risking the survival of blockchain 233-- or antitrust [\*165] and competition law. 234 Some propose the creation of an identity management system so that the real identities of blockchain users can be revealed. 235 Others have suggested "adding a regulatory node in the blockchain" to spy on it 236 or imposing fines to the core developers when blockchain is used for illegal activities. 237 Going even further, it has been said that public blockchains "governed by international institutions from the legal tradition" such as the United Nations should be created. 238 But in fact, these solutions are either ineffective or would jeopardize the utility of the technology as its applications rely on the key characteristics that I have exposed in our introduction and that would be challenged by these various initiatives. Let us recall first and foremost that blockchain is a fundamental technology that may create good for the world. 239 The creation of safe harbors 240 and regulatory sandboxes 241 will enable competition agencies to respond quickly to the challenges posed by blockchain, but in the end, only a re-conceptualization of the law will provide a satisfactory answer. 242 Without it, antitrust and competition law will face a second legitimacy crisis arising from the absence of decentralized regulatory mechanisms. After all, how can decentralized transactions be properly regulated by pyramidal rules and institutions?

#### Failure of FTC legitimacy crushes the effectiveness of the agency.

William E. Kovacic 15, Global Competition Professor of Law and Policy at the George Washington University Law School and Non-Executive Director of the United Kingdom Competition and Markets Authority, “Creating A Respected Brand: How Regulatory Agencies Signal Quality”, George Mason Law Review, 22 Geo. Mason L. Rev. 237, Lexis

Introduction

One determinant of a government agency's effectiveness is its reputation, or "brand." Much like a commercial enterprise, an agency develops a brand that signals quality to various observers. A good reputation can help the agency recruit skilled personnel, gain deference from courts, build credibility with business managers, and build popular support that can yield larger budgets and enhancements to its powers. An agency with a strong brand stands a greater chance of being effective than one with a weak brand.

This Essay considers how branding can affect the performance of the Federal Trade Commission ("FTC") and other agencies responsible for economic regulation. It analyzes how investments in building a good brand enable the regulatory agency to signal quality to various observers - insiders such as agency staff and outsiders such as businesses, consumer groups, courts, and legislators. Part I of this Essay defines the concept of a brand for public agencies. Part II then discusses why an agency's brand can be important to its effectiveness and identifies what types of agency activities either enhance or degrade an agency's brand.

The examination of agency branding has several purposes. One aim is to improve our understanding of how public agencies build a reputation, and to study the role of reputation in determining effectiveness. A closely related goal is to give public officials a better understanding of how they should approach the task of deciding what their agencies must do to prosper.

A further aim is to underscore the impact of institutional design and managerial incentives on agency performance and to illuminate how design choices and incentive schemes influence the development of a well-respected, coherent agency brand. Various design choices - for example, whether to give the competition agency a single function or a multi-purpose substantive mandate, whether to govern the agency by a single executive or [\*238] by a board, whether to integrate the tasks of prosecution and adjudication in a single body or to unbundle them among distinct entities - affect the capacity of the agency to enhance the quality of its brand. Incentives that give incumbent leaders reason to make investments in long-term agency capacity and quality have the same effects.

I. Brands and Public Institutions

Public institutions, such as competition or consumer protection agencies, build reputations or "brands" that the agency's own employees and external observers associate with the agency. 1 Brands perform two functions for the public agency. The first function is informational. 2 A good brand conveys a good sense of what an agency does. It communicates, at least in a general way, the scope of the agency's responsibilities and the aims that motivate the agency in the exercise of its powers.

A brand also signals institutional quality. For an agency such as the FTC, the foundations for a good brand are sound substantive programs (e.g., cases, regulations, reports), sound procedures (e.g., meaningful disclosure of information, rigorous testing of evidence, regular assessment of outcomes), strong capabilities (e.g., deep expertise in economics and law), and a healthy culture (e.g., thoughtfulness, integrity, courage, and a commitment to continuous improvement). 3 For several reasons, explained below, a strong brand is a valuable asset for a regulatory agency.

#### FTC credibility’s key to global cooperation to contain spyware

Ari Schwartz 12, Deputy Director of the Center for Democracy and Technology, “Federal Trade Commission Reauthorization”, Hearing Before the Subcommittee on Interstate Commerce, Trade, and Tourism of the Committee on Commerce, Science, and Transportation United States Senate One Hundred Tenth Congress First Session, Government Printing Office, https://www.govinfo.gov/content/pkg/CHRG-110shrg75970/html/CHRG-110shrg75970.htm

Mr. Schwartz. Thank you very much, Chairman Dorgan. Thank you for holding this public hearing today and inviting CDT to participate.

As more consumers' services move online, consumer protection agencies are facing new challenges. The Federal Trade Commission has played a leadership role to meet these challenges, including overcoming such difficulties as locating the perpetrators of online schemes, keeping up with the rapid pace of technological evolution, and following the increasing financial motivation of Internet fraudsters.

In particular, the FTC has been the lead law enforcement agency in the world in the fight against spyware. Spyware has become one of the most serious threats to the Internet's future. Consumer Reports magazine estimates that consumers will lose $1.7 billion this year to spyware attacks alone. The magazine estimates that almost 1 million consumers simply gave up fixing their spyware-riddled computers and had to throw them away.

The good news is that consumer losses are down dramatically from 2006, when they peaked at $2.6 billion. The main reasons for this decrease in the spyware threat are, first, the improvement in anti-spyware technology; second, the public pressure on companies advertising with nuisance or harmful adware; and, finally, the enforcement of consumer protection law, led by the work of the FTC and some State attorneys general.

The FTC recognized the profound threat posed by the rising tide of spyware early, and actively moved to limit its spread. The Commission has been the leading enforcer against spyware, pursuing 11 cases to fruition in the past two and a half years, including three based, at least in part, on the petitions brought my organization, the Center for Democracy and Technology. CDT has learned, through our own research, that, as consumer fraud increases, the FTC's ability to work internationally becomes more important. Congress passed the SAFE WEB Act late last year to provide the FTC powers to promote international cooperation. The FTC's ability to use this new law, and staff resources that it will need, will be very important to monitor.

#### Spyware norms are solidifying but require strong U.S. leadership---success stops human rights crackdowns that escalate to global war

Marietje Schaake 11-10, International Policy Director at Stanford University’s Cyber Policy Center, Senior Advisor for Tech & Geopolitics at Eurasia Group, President of the Cyberpeace Institute, “We Need a New Global Standard to Curb Intrusive Spyware”, Financial Times, 11/10/2021, Lexis

After more than a decade, democratic governments are finally waking up to the hazards of commercial spyware. Recent media coverage has exposed how authoritarian regimes are using NSO Group’s Pegasus software to spy on journalists and politicians. The EU has now tightened its rules on the export of surveillance technology, and the US Department of Commerce last week determined that Israel-based NSO Group and three other hacking companies were “engaging in activities that are contrary to the national security or foreign policy interests of the United States”. However, these modest steps do not go far enough: what’s needed is a global standard to reign in technologies that violate the rights to privacy, free assembly as well as free expression.

From ~~crippling~~ [devastating] ransomware to questionable neural algorithms which use AI to identify suspicious non-verbal activity, to face and emotion-detecting technologies, there is a proliferation of software applications which conflict with liberal democratic values.

Traditionally, export controls are imposed on products that threaten national security, such as those that could boost the manufacture of nuclear weapons. The EU has recently extended its export regime to include spyware technologies, and added human rights violations as a criterion for potential harm. But since the NSO Group is based outside the EU, it lies outside Brussels’ jurisdiction. Without a wider international agreement, options for curbing these companies are limited.

The absence of global restrictions brings further credibility risks: how can liberal democracies lobby against human rights abuses by authoritarian regimes, when they are in effect permitting the development and marketing of digital weapons?

While restricting exports may help prevent the flow of intrusive technologies from democracies to dictatorships, imports and domestic uses remain unaddressed. The Pegasus Project revealed how, in the heart of the EU, Hungarian prime minister Viktor Orban has deployed commercial surveillance systems to target the few remaining independent media outlets within his own country.

Even some democratic states, such as the Netherlands, are guilty of procuring hacking and surveillance systems, but do not disclose which ones. Undoubtedly, they will claim these are only ever used to track down the most serious criminal and terror suspects. Yet this lends credibility and capital to an exceedingly harmful industry. If democracies are serious about curbing surveillance, they should exercise greater transparency and lead by example.

More than ad hoc measures or restrictions applied to individual companies, the US should partner with the EU and other willing countries to set a new international standard for the use of, and trade in, spyware. This would be a tangible outcome for President Biden’s upcoming Summit for Democracy, a US-led virtual meeting in early December aimed at preventing authoritarianism, fighting corruption, and promoting human rights.

Beyond spyware, a variety of other technologies deserve greater scrutiny and regulation. Illegitimate mass surveillance systems, facial recognition software and tools used for illegal cyber operations are traded across borders to facilitate repression, conflict, and instability. Poor cyber security is now a source of systematic risk which threatens national resilience. Greater co-ordination is necessary to ensure that technologies which are currently legal do not provide the means for widespread rights violations.

Moreover, an international agreement between democratic states against malicious uses of technology will help set multilateral norms. UN human rights experts this week raised the alarm once more about how tech companies serve as modern-day “mercenaries”. “Private actors provide a wide range of military and security services in cyber space, including data collection, intelligence and surveillance,” they warned.

In the future, a licensing requirement should be the default for tech companies that contravene the human rights standard of democratic states. This would ensure better controls of end use and exports. Regulation would also allow for mapping of how software is being deployed, and enable greater transparency. Equally, companies should strengthen their own risk-management. The very credibility of democracies is at stake when tech companies can undermine global security unhindered.

#### Containing spyware prevents the complete erosion of Indian democracy

Mauktik Kulkarni 21, Trained in Engineering at the University of Pune, Biophysics at the University of Illinois at Urbana-Champaign, and Neuroscience at Johns Hopkins University, Author at The Fair Observer, Writer for National Public Radio, All India Radio, BBC Marathi, National Geographic, LiveMint, Times of India, and The Hindu, “Why Americans Should be Alarmed by the Pegasus Spyware Controversy in India”, Scroll, 8/2/2021, https://scroll.in/article/1001373/why-americans-should-be-alarmed-by-the-pegasus-spyware-controversy-in-india

Under a collaboration called the Pegasus Project, 17 media organisations from around the world have recently released startling information about the way several governments have allegedly used spyware made by Israeli firm NSO to snoop on perceived adversaries.

Pegasus spyware, classified as a weapon to be used against criminals and terrorists, was allegedly used in India to spy on opposition politicians, bureaucrats and journalists, among others. While the Indian government has denied the charges, all the evidence points to the executive branch running amok.

The unravelling of Indian democracy offers important lessons for the United States, especially with recent revelations regarding former President Donald Trump’s final days in office and the reluctance of his Republican Party in the legislature to hold him accountable.

The destruction of Indian democratic institutions under Narendra Modi since he came to power in 2014 is well documented. If these new allegations are left unaddressed, which is the most likely outcome, their chilling effect on society will ensure India’s swift decline into a sham democracy like Russia.

If true, the implications of such surveillance are not limited to political, bureaucratic, journalistic, or judicial opponents of the current government. They will affect the economic climate, open-minded academic inquiry, and spirited debates among students and civil society, which are all essential for a thriving democracy.

#### Indian backsliding obliterates transnational containment of disease, pollution, and nukes---extinction

Akshai Vikram 21, Doctoral Candidate in Security Studies at the University of Central Florida, Roger L. Hale Fellow at the Ploughshares Fund, M.A from Johns Hopkins University SAIS and B.A. from Johns Hopkins Baltimore, “Indian Democracy Is On The Ropes. The US Must Act”, Defense One, 6/12/2021, https://www.defenseone.com/ideas/2021/06/indian-democracy-ropes-us-must-act/174679/

Even as the U.K. hosted President Biden on a visit to “rally the world’s democracies,” Britain’s reopening is under threat from a new strain of the COVID-19 virus. This new variant, which originated in India, is directly related to Narendra Modi government’s disappointing and less-than-democratic handling of the pandemic. The new coronavirus strain is just one example of the threat that awaits U.S. interests if India, the world’s largest democracy, should complete its slide into authoritarianism. Thankfully, the U.S. still has a number of options to combat, if not prevent, democratic backsliding in India.

Democratic or not, India’s relevance is assured. Its size alone guarantees this. India’s largest state, Uttar Pradesh, boasts a population of over 200 million people, larger than any individual country in Africa, Europe, or Latin America. This hard fact has led Republicans and Democrats to agree on India’s importance, with both sides emphasizing its potential role as a regional counterweight to China. The Trump administration’s National Defense Strategy stressed the benefits of a “free and open Indo-Pacific region” and promised to “strengthen our alliances and partnerships in the Indo-Pacific…to preserve the free and open international system.” The Biden administration made similar pronouncements in its Interim National Security Guidance, saying it will “reinvigorate and modernize our alliances and partnerships,” partially to “hold countries like China to account.” The Biden administration specifically promised to “deepen our partnership with India” as part of this effort.

This strategic logic presumes the United States will be dealing with a democratic India that prefers a “free and open international system,” rather than an authoritarian India that domestically more closely resembles “countries like China” than it does a full-functioning democracy.

But the pace of Indian democratic backsliding has noticeably quickened. It was an ominous warning when Narendra Modi, who was banned from the United States for turning a blind eye to a virtual pogrom against Muslims while chief minister of Gujarat, was elected Prime Minister in 2014. After seven years in power, Modi and his Hindu nationalist Bharatiya Janata Party, or BJP, have further eroded Indian democracy, leading the nonprofit Freedom House to rank India as “partly free” for the first time in 30 years.

Modi’s authoritarian actions have ranged from the pseudo-scientific and laughable to the egomaniacal and lethal. Most notoriously, the BJP sought in 2019 to openly discriminate against Muslim immigrants. The law passed, and when it drew mass protests across the country, the BJP met them with authoritarian force. Later in the year, India stifled the Internet in Kashmir.

India’s democratic backsliding has also hurt its lackluster COVID-19 response. Modi’s BJP has propagated a number of inane myths about the disease, especially quack cures. Party leaders from Modi on down have set bad examples, appearing at large rallies, without masks, and turning the Hindu Kumbh-Mela festival into a superspreader event because “the faith in God will overcome the fear of Covid-19.”

The Modi government has also moved to stifle dissent, especially investigative journalism on its pandemic response. In April, the chief minister of Uttar Pradesh threatened to seize the property of people propagating “rumors” of oxygen shortages. And just last month, when information on the Indian variant was desperately needed, a top Indian virologist on a government panel to investigate the variant suspiciously resigned, after he had been quoted in the New York Times criticizing the government. All this suggests that continued democracy in India is no sure thing.

A fully authoritarian India could take a number of forms, with disparate effects on its relationship with the United States. Shared concerns about China could lead the U.S.-India relationship to mirror the path of American relations with Vietnam, where the two countries have managed to work constructively despite their tempestuous past and Vietnam’s one-party rule.

Perhaps more likely, India under Modi could present a challenge not dissimilar to that of the Philippines under Duterte, a country too strategically important for the U.S. to ignore in its efforts to counter Chinese influence in the region, but one whose authoritarian streak routinely impedes greater cooperation.

Most detrimentally for the United States, India could even one day seek to follow the path of Russia, prioritizing allegiance to right-wing authoritarian ethno-nationalism rather than its historical and geographic disputes with China. This worst case scenario is not as far-fetched as it once might have seemed: in the last few months alone, Russia and India have taken eerily similar steps to stifle Twitter in response to domestic critics.

No matter how authoritarian the government in New Delhi becomes, the United States will need to engage with it constructively on certain issues, especially transnational threats like climate change and nuclear weapons. Fortunately, the Biden administration has already demonstrated its capability to do just that by cooperating constructively with Russia on nuclear arms control and with both China and Russia on climate change, while at the same time confronting both countries on other issues as necessary.

However, there is no scenario where further democratic backsliding in India would make life easier for the United States. At the very least, an increasingly authoritarian Indian would jeopardize the push for cooperation among ‘like-minded’ democracies, especially when it comes to countering China.

International partnerships, like the recent project of coordinated vaccine production from the emerging ‘Quad’ countries—India, Australia, the U.S., and Japan—could conceivably continue even if India moves further from the democratic camp. Even so, they would surely be less resilient if based solely on common interests rather than common values. Efforts by the European Union to increase ties to India would also likely be undermined.

#### Spyware causes command-and-control failures---nuclear war

Eric Schlosser 16, Investigative Journalist and the Author of Command and Control, “World War III, By Mistake”, The New Yorker, 12/23/2016, https://www.newyorker.com/news/news-desk/world-war-three-by-mistake

The harsh rhetoric on both sides increases the danger of miscalculations and mistakes, as do other factors. Close encounters between the military aircraft of the United States and Russia have become routine, creating the potential for an unintended conflict. Many of the nuclear-weapon systems on both sides are aging and obsolete. The personnel who operate those systems often suffer from poor morale and poor training. None of their senior officers has firsthand experience making decisions during an actual nuclear crisis. And today’s command-and-control systems must contend with threats that barely existed during the Cold War: malware, spyware, worms, bugs, viruses, corrupted firmware, logic bombs, Trojan horses, and all the other modern tools of cyber warfare. The greatest danger is posed not by any technological innovation but by a dilemma that has haunted nuclear strategy since the first detonation of an atomic bomb: How do you prevent a nuclear attack while preserving the ability to launch one?

“The pattern of the use of atomic weapons was set at Hiroshima,” J. Robert Oppenheimer, the scientific director of the Manhattan Project, said in November, 1945, just a few months after the Japanese city’s destruction. “They are weapons of aggression, of surprise, and of terror.” Nuclear weapons made annihilation vastly more efficient. A single bomb could now destroy a target whose elimination had once required thousands of bombs. During an aerial attack, you could shoot down ninety-nine per cent of the enemy’s bombers—and the plane that you missed could obliterate an entire city. A war between two countries with nuclear weapons, like a Wild West shoot-out, might be won by whoever fired first. And a surprise attack might provide the only hope of national survival—especially for the country with an inferior nuclear arsenal.

#### Spyware collapses the free press

Samuel Woodhams 21, Digital Rights Lead at the Internet Research Firm and VPN Review Website, Top10VPN, Digital Rights Researcher and Freelance Journalist, “Spyware: An Unregulated and Escalating Threat to Independent Media”, Center for International Media Assistance, 8/25/2021, https://www.cima.ned.org/publication/spyware-an-unregulated-and-escalating-threat-to-independent-media/

Introduction

The digital surveillance industry is a broad and largely opaque network of companies that produce technology to monitor and track individuals. From tools that surveil citizens’ social media profiles to devices that indiscriminately monitor the activity of nearby mobile phones, the range and sophistication of technologies available has never been greater.

While their delivery methods and capabilities vary, all spyware products are designed to infect a user’s device and monitor their digital activity while remaining undetected. Typically, this means an infiltrator can covertly access a target’s phone calls, text messages, location, internet searches, and stored data. Even more troubling is the fact that most of the products are capable of evading antivirus tools that are specifically designed to detect malicious activity.

The rapid expansion of the digital surveillance industry has enabled governments around the world to acquire new technologies to monitor journalists, silence independent journalism, and control the flow of information. As of April 2021, the Committee to Protect Journalists (CPJ) had identified 38 cases of spyware targeting journalists, commentators, and their associates.1 The University of Toronto’s Citizen Lab suggests the true figure could be over 50.2 There are reports of spyware targeting journalists working with international media outlets, including Al Jazeera and the New York Times,3 as well as reporters and editors working for the US-based Ethiopian diaspora outlet Oromia Media Network, Colombia’s Semana magazine, and Mexico’s Proceso.4

In July 2021, French-based nonprofit Forbidden Stories, Amnesty International, and a consortium of 80 journalists from 17 outlets launched the Pegasus Project, a collaborative international investigative journalism initiative aimed at uncovering the extent to which Israeli spyware company NSO Group’s software is used by governments to target journalists, human rights activists, lawyers, and political dissidents.5 NSO Group’s signature product, Pegasus, named after the mythical winged horse, is one of the most powerful spyware tools ever deployed.6 Investigative journalists with the Pegasus Project revealed that at least 180 journalists were selected as potential targets of surveillance by government clients of NSO Group.7 The number of people who were attacked by the spyware infecting their phones remains unclear. NSO Group has repeatedly denied wrongdoing, claiming it sells software to carefully vetted clients to ensure its technology is used only for law enforcement and anti-terrorism purposes.8

This is not the first time that NSO Group has been accused of abetting human rights violations. In 2019, WhatsApp filed a lawsuit against NSO Group, accusing the company of exploiting a vulnerability in the app and hacking into 1,400 accounts in 20 countries.9 More than 100 of these accounts are thought by WhatsApp to have belonged to journalists and human rights defenders, although the lawsuit did not disclose the identities of the victims. As a result of these allegations, the US Department of Justice reportedly renewed its investigation into the company in March 2021.10

There is no question that spyware is being used by governments to identify, monitor, and ultimately silence journalists. Ronald Deibert, director of Citizen Lab, a research organization using digital forensics to verify the use of spyware against journalists, summarizes the danger this way:

“The reckless and abusive use of commercial spyware to target journalists, their associates, and their families adds to the numerous and growing risks that journalists worldwide now face. Media organizations and investigative journalists are valuable “soft” targets who control important information, including information on sources, that threaten powerful actors. Thanks to companies like NSO Group, unscrupulous dictators and autocrats now have a powerful tool to aid in their sinister aims to stifle dissent and quell controversial reporting.”11

When the devices and digital accounts of journalists and their sources are vulnerable to surveillance, the ability of journalists to carry out their newsgathering function is significantly diminished.12 Journalists who fear they are a target of surveillance may self-censor. Credible sources may be less likely to talk to the press, and media outlets may struggle financially to keep pace with the increasingly sophisticated threats facing their staff.

#### Extinction

Marie Davidsen Buhl 21, Fellow at Effective Altruism, “Towards a Longtermist Framework for Evaluating Democracy-Related Interventions”, Rethink Priorities, 7/28/2021, https://rethinkpriorities.org/publications/towards-a-longtermist-framework-for-evaluating-democracy-related-interventions

1.6 Liberalism

What is this feature?

Definition: There is rule of law and individual rights and freedoms for the decision-making group, which limit the power of the government.

Clarifications:

Liberalism both protects citizens against government despotism and protects minorities from tyranny of the majority. As such, for a society to high high levels of liberalism, it must be the case that liberal rights and freedoms are in place even if the majority of the population are in favour of violating them (for example, even if a majority ethnicity is in favour of removing legal protections for a minority group, the government would not be able to do so).

The liberalism presented here is a relatively thin notion of liberalism, close (though not identical to) the concept of political liberalism. As such, it does not include things such as a liberal market economy or anti-paternalism.

As was the case of competitive democracy, our definition of liberalism has the counterintuitive implication that a society can have a maximal level of liberalism even if it does not grant liberal rights to the majority of the population (e.g., a society with liberal rights for property-owning white men, but there is little legal protection for other groups and a slave economy). However, we do not mean to say that such a society should be classified as a liberal democracy (see Appendix C), or even liberal in the everyday sense of the word.

What low levels of liberalism might look like: Parliamentary sovereignty, tyranny of the majority, authoritarian democracy, totalitarianism.

Components

Rule of law: Transparent laws, equality under the law, de facto law enforcement and access to legal remedy.

Checks and balances: There are institutions in place to restrain the power of governments, e.g., separation of powers.

Constitutional limits on government power to preserve civil rights, including freedom of conscience, religion, speech and assembly, and right to privacy.

Minority rights.

Pluralism: Toleration of many different opinions and ways of life.

Liberal norms amongst the decision-making group (e.g., voters) and the representatives (e.g., support for liberalism).

Illustrative interventions related to this feature

(Note that we are not necessarily endorsing these interventions or organisations):

Preventing or prosecuting government corruption.

Prosecuting human rights violations, e.g., via funding Amnesty International.

Investigative journalism, e.g., the Global Investigative Journalism network (Hillebrandt, 2020).

Protecting freedom of press, e.g., The Reporters Committee for Freedom of the Press (Hillebrandt, 2020).

1.7 Inclusion

What is this feature?

Inclusion has two parts:

(1) Most or all beings who are capable of participating in group decision-making and are affected by policy decisions are allowed to participate in group-decision-making (i.e., most or all beings which are in both the decision-capable group and affected group are also in the decision-making group).

(2) The interests of most or all of the beings who are affected by policy decisions are taken into account during those decisions (i.e., the moral circle includes most or all of the affected group).

Clarifications:

Inclusion can be specified with respect to any of the features, e.g., inclusion with respect to competitive democracy might be high (if there is universal suffrage) in the same society/institution where inclusion with respect to responsiveness is low (if the opinions of one group are systematically ignored when making actual policy decisions)[6:1].

A maximally inclusive society would be one in which the following conditions are met:

The decision-making group (e.g., voters) contains all beings who are both in the moral circle and are capable of decision-making

The moral circle includes everyone in the affected group.

This has the implication that a maximally inclusive society would give voting rights and liberal rights to, for example, people in other countries, under-18s, felons and others who don’t currently have such rights in most liberal democracies.

What low levels of inclusion might look like: Aristocracy, limited franchise, no representation of non-voting beings.

Components

Proportion of the population that has voting rights, liberal rights, etc., and absence of barriers to those rights being upheld in practice.

Representation for the interests of non-voting beings (e.g., through lobbying/interest groups, councils, official positions such as ministers, or just individual voters taking those beings’ interests into account)

Illustrative interventions related to this feature

(Note that we are not necessarily endorsing these interventions or organisations):

Widening the franchise, e.g., to 16-year-olds, felons, or non-citizen residents.

Protecting minority voting rights, e.g., preventing gerrymandering through redistricting (Hillebrandt, 2020).

Institutional reforms to represent future generations (see e.g., John & MacAskill, 2020).

Interventions related to moral circle expansion.

2. Potential intermediate goals for longtermists

This section covers ways in which each of seven potential intermediate goals may:

affect the long-term future

be affected by changes in a society’s level of the features of liberal democracy as discussed above.

A potential intermediate goal for longtermists is a goal we could pursue to potentially increase the value of the far future. Fulfilling a goal is not obviously of positive expected value; indeed, some intermediate goals may be ambiguous or negative for the far future. We cache out the costs and benefits of pursuing each goal into four broad categories: existential risk reduction, trajectory change, speeding up development and meta-longtermism[1:1]..

The potential intermediate goals we identify are:

Reducing great power conflict

Intellectual progress

Moral circle expansion (MCE)

Economic growth

Preventing authoritarianism

Preventing infohazard proliferation

Building effective altruism

We chose these particular intermediate goals because they seemed (a) plausibly substantially affectable by some democracy-related interventions and (b) relatively clearly relevant to the long-term future. But the choice was somewhat arbitrary and partly for illustrative purposes; there are also other goals that meet those two criteria, and these seven are not necessarily the most important for evaluating a given democracy-related intervention. We elaborate on this in Section 4 (Directions for further research). Finally, we focus only on how features of democracy affect potential intermediate end goals. However, in reality there are likely bidirectional relationships and feedback loops, with some intermediate goals impacting particular features of democracy.

2.1 Reducing great power conflict

What is this potential intermediate goal?

Reducing the probability of conflict between major powers - e.g., China and the USA.

What are some ways great power conflict might affect the long-term future?

Existential risk reduction and trajectory change: Great power conflict is often seen as an existential risk factor. That is, it increases the probability of existential catastrophes indirectly rather than directly. This operates through multiple mechanisms - for instance, great power conflict might increase the probability of an AI arms race, make nuclear war more likely, or make global co-operation on various existential risks harder[9]. Thus, reducing the likelihood of great power conflict could reduce existential risk. Additionally, conflict between great powers could alter the global hegemony, changing humanity's long-run trajectory. Whether this is positive or negative depends on the particular trajectory change.

What are some ways democracy might affect great power conflict?

Democracies have historically engaged in war less often than non-democracies. This may be mere correlation (e.g., it may be confounded by GDP). But proponents of democratic peace theory argue that the correlation is in fact causal. Below, we briefly overview some possible, speculative ways in which various features of liberal democracy might indeed reduce the likelihood of war.

Competitive democracy, responsiveness, participation and accuracy: Leaders in countries high in these features must follow the demands of voters more closely, in order to be re-elected. That increases the influence of public opinion on policy decisions, such as in decisions on conflict. Therefore, if voters are more averse to war than leaders are, increasing competitive democracy, responsiveness, participation, and accuracy would, all else equal, make war (including great power conflict) less likely. Conversely, if voters are more inclined towards war than leaders are, increasing these features would, all else being equal, make war more likely. Whilst we tentatively believe that voters are more aversive to war than leaders are, there are likely also other causal mechanisms taking place[10]. Thus, we only weakly suggest that increasing these features is positive for reducing great power conflict.

Liberalism: Democratic peace theory and liberal peace theory are used somewhat interchangeably. Perhaps what really makes democracies less likely to go to war is their liberal nature, rather than anything about voting in particular. Specifically, norms around resolving differences through deliberation, pluralism, and a respect for alternative viewpoints may prevent disagreement escalating to violence. Such norms could ultimately make war and great power conflict less likely.

Inclusion: Countries low in inclusion will likely focus primarily on their own country's citizens (the decision-making group) before others (the wider affected group). This would increase nationalistic sentiment. In contrast, highly inclusive societies are likely to be more conducive to a cosmopolitan mindset. Nationalistic countries would also be more likely to go to war with other countries, compared to cosmopolitan societies. Thus, increasing inclusion will probably decrease the chance of great power conflict.

#### The plan solves:

#### 1. UPDATING.

#### Prohibiting violations in the infrastructure level establishes a collaborative relationship between blockchain and antitrust that infuses technological principles into legal enforcement.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 247-249

1.2 Enforcement

1.2.1 Not this...

Enforcement is the second pillar of a collaborative approach between law and tech, antitrust and blockchain. I realize that this may seem counterintuitive; enforcement is, by definition, confrontational. In reality, distinct types of enforcement can lead to varying degrees of confrontation: some harm the entire blockchain, while others target the sole perpetrators of illegal practices. One should avoid the former, as it would reduce blockchain’s usefulness and thus deprive policymakers and regulators of an important ally. It is in the interests of both communities to encourage the latter.

I concluded the first part of this book by underlining that making law and tech work toward the same objective implied bearing with some assaults by each on the other. This means that blockchain communities should not only tolerate antitrust sanctions, but also facilitate them, because they ultimately lead to further decentralization. It also means that antitrust agencies and courts should direct their enforcement activities in a specific way. Overall, they should seek to preserve blockchain. This will be challenging, as agencies generally conduct their enforcement activities one case after the other, without such a long-term objective. That being said, agencies could still achieve the overall goal of enabling blockchain technology to flourish while ensuring case-by-case enforcement.

For that, agencies should avoid enforcement activities against practices that directly arise from the intrinsic characteristics of a blockchain. For example, public permissionless blockchains distribute information throughout the marketplace, including the number of transactions implemented by specific users, the fees being paid and so on. This transparency could lead to antitrust concerns, especially when it comes to tacit collusion.14 Nevertheless, because this essential feature makes markets more fluid and mitigates information asymmetry,15 enforcement activities should not be directed at it.

The same goes for the opacity that blockchains create. As we have seen together, the identity of a blockchain’s participants and the content of their transactions are protected by encryption. Yet one should not consider this a relevant element in European competition law for presuming the intention to collude (moral component), for systematically making cartelization on block- chain a restriction “by object” rather than “by effect,” or for easing the burden of proof on antitrust agencies. Doing so would deter legal uses of blockchain.

More generally, it is important to underline that all blockchain participants agree to the same set of rules. That should not be seen as an illegal agreement between them, even though it affects their economic behavior. Agreeing to the same rules is, in fact, necessary for blockchain’s survival, as it creates consistency in the blockchain ledger in the absence of central coordination. It solves the Byzantine Generals Problem, according to which a central power is always needed to coordinate actions and maximize outcomes. That applies to forks, which should only rarely be seen as illegal (as I discussed in Chapter 8), because they create checks and balances within each blockchain. Let me reiterate that without consensus regarding the rules and their modification, the whole system would collapse, as the ledger integrity could not be maintained. All practices engaged by the blockchain nucleus to ensure survival, such as their forks and modifications of the core client, should thus be presumptively legal as far as antitrust enforcement is concerned.

1.2.2 ...but that!

I recommend that antitrust agencies focus their enforcement activities on practices that affect the “real space”, and on practices that defeat blockchain’s purpose.

As I discussed in Chapters 9 and 11, the first type of practice covers the use of blockchains to support firms’ efforts to collude or monopolize markets. These practices have a strong and direct impact on consumers. Detecting this type of behavior will require proactive actions by antitrust agencies. If they engage in such actions, enforcement in the field will increase consumer welfare.

The second category concerns practices that centralize blockchain ecosystems artificially. More specifically, agencies should target practices that centralize the infrastructure level of a blockchain. As I have explained, that level has a critical influence on the decentralization of other levels. Prohibiting artificial forms of centralization at that layer will free most of the ecosystem from coercive forms of power. In doing so, it will make blockchain a more potent ally to antitrust law. Furthermore, this type of enforcement will prove increasingly important over time. If blockchain adoption continues to increase, it could very well become a key infrastructure for the world economy. At that point in time, the artificial centralization of blockchain will become antitrust agencies’ top enforcement priority.

Overall, directing enforcement activities toward these two types of practices would free blockchain, and its economic ramifications, from the most restrictive practices without diminishing its usefulness or creating resentment within blockchain communities. Antitrust would thus become the ally of blockchain ecosystems and would start being perceived as such.

#### 2. LEADERSHIP.

#### Going bold builds FTC’s brand and secures a foothold for future experimentation.

Philip J. Weiser 17, Hatfield Professor of Law and Dean Emeritus at the University of Colorado Law School, Former Senior Advisor for Technology and Innovation to the National Economic Council Director in the White House, “Entrepreneurial Administration”, Boston University Law Review, 97 B.U.L. Rev. 2011, December 2017, Lexis

Introduction

A core failing of today's administrative state and modern administrative law scholarship is the lack of imagination as to how agencies should operate. On the conventional telling, public agencies follow specific grants of regulatory authority, use the traditional tools of notice-and-comment rulemaking and adjudication, and are checked by judicial review. In reality, however, effective administration depends on entrepreneurial leadership that can spearhead policy experimentation and trial-and-error problem-solving, including the development of regulatory programs that use non-traditional tools.

Entrepreneurial administration takes place both at public agencies and private entities, each of which can address regulatory challenges and earn regulatory authority as a result. Consider, for example, that Energy Star, a successful program that has encouraged the manufacture and sale of energy efficient appliances, is developed and overseen by the Environmental Protection Agency ("EPA"). 1 After the EPA established the program, Congress codified it and, eventually, other countries followed suit. 2 By contrast, the successful and complementary program encouraging the construction of energy efficient buildings, the well-respected Leadership in Energy and Environmental Design ("LEED") standard, was developed and is overseen by a private organization. 3 After it was developed, a number of governmental authorities endorsed it and [\*2013] have encouraged LEED-certified construction projects with both carrots 4 and sticks. 5 Significantly, although neither the Energy Star program nor the LEED standard were originally anticipated by any regulatory statute, both have had tremendous impacts.

The Energy Star and LEED case studies exemplify the sort of innovative regulatory strategies taking root in the modern administrative state. 6 Despite the importance of entrepreneurial administration in practice, scholars have failed to examine the role of entrepreneurial leadership in spurring policy innovation and earning regulatory authority for an agency (or private entity). 7 This oversight is most unfortunate in the case of technologically developing fields where experimental regulatory strategies - as opposed to traditional notice-and-comment rulemaking or adjudication - are often essential. 8 In short, administrative law needs an account of agency action that explains why entrepreneurial leadership matters in government and how agencies should operate. 9

[\*2014] This Article: explains that the conventional view of agency behavior - following the specific direction of Congress or the President and using notice-and-comment rulemaking or adjudication processes - does not capture how public agencies and private entities develop innovative regulatory strategies and earn regulatory authority as a result. In particular, this Article: explains how governmental agencies like the EPA and private entities like the United States Green Building Council ("USGBC") (which oversees the LEED standard) depend on entrepreneurial leadership to develop experimental regulatory strategies. It also explains how, in the wake of such experiments, legislative bodies have the opportunity to evaluate regulatory innovations in practice before deciding whether to embrace, revise, reject, or merely tolerate them. To be sure, such experimental strategies are not always preferable to traditional administrative rulemaking and adjudication, but considering experimental strategies and evaluating whether they would be more effective than traditional regulatory approaches is.

Legal scholarship on experimental regulation is well-developed in the context of states serving as laboratories of democracy. 10 Scholars have not, however, discussed the significant role that federal agencies and private bodies can play in experimenting with regulatory strategies in advance of congressional action. 11 Scholars have also failed to examine the role of entrepreneurial leadership in developing successful experiments. This Article: does just that, highlighting the importance of entrepreneurial leadership in government, discussing a number of [\*2015] emerging regulatory experiments, and suggesting how Congress should evaluate such experiments.

This Article: proceeds in four parts. Part I examines the traditional model of regulation and the emerging alternative models of agency action through co-regulation, developing best practices through convening, and encouraging private regulation. In so doing, it underscores that entrepreneurial leadership and a culture of experimentation and trial-and-error learning is essential to developing the best solution. Part II discusses the relevant criteria for evaluating such experiments and examines potential objections to the earned regulatory authority model. Part III discusses four case studies of experimental regulatory strategies: (1) the USGBC's development of the LEED standard; (2) the Federal Trade Commission's ("FTC") oversight of information privacy and data security practices; (3) the National Institute of Standards and Technology's ("NIST") development of a strategy for cybersecurity readiness; and (4) the Department of Health and Human Services' ("HHS") oversight of electronic health records. In all of these cases, the private body or federal agency acted to oversee an emerging technology or issue (often in advance of explicit congressional direction and guidance), allowing Congress to observe the strategy in action and evaluate it after the fact. Part IV examines the concept of policy entrepreneurship, explaining both the barriers and opportunities it faces in the modern administrative state.

I. The Traditional Model and Emerging Realities

The traditional model of regulation relies on notice-and-comment rulemaking and agency adjudication. 12 Under this model, the output - the starting point for traditional administrative law analysis - is generally a form of positive law developed and enforced by a government agency through traditional tools (rulemaking or adjudication). 13 As Professors Charles Sabel and William Simon have observed, this model, "pejoratively called command and control, is identified with rule-bound bureaucracy and deference to ineffable expertise." 14

The traditional model can be depicted neatly as a hierarchy. 15 Congress sets a specific policy direction and empowers an administrative agency to implement that policy. The agency, in turn, uses either its rulemaking or adjudication authority to implement that direction. Finally, owing to the agency's expertise and congressional authorization, courts review the agency's action with deference.

[\*2016] Driven by technological changes and globalization, regulatory agencies increasingly are looking to alternative regulatory strategies, many of which fit under the "New Governance" label. 16 In some cases, innovative regulators experiment with new approaches to address emerging issues and fill gaps in the existing regulatory regime. In other cases, an agency might experiment with a co-regulatory strategy (where the agency integrates its authority with private sector efforts); exercise its authority in creative ways, such as developing best practices through convenings; or rely on private regulation. In that last category, as is the case with Energy Star, the government agency (or private entity, for that matter) can certify compliance with best practices, thereby sharing valuable information with the public and shaping norms of behavior. 17 In each of the above examples, the regulatory agency acts not within a hierarchy, but within a network. 18

[\*2017] The traditional, hierarchical model follows a familiar, step-wise approach to regulation. 19 The first step is establishing a standard of conduct. 20 The second step is implementing that standard of conduct, generally through a monitoring regime. 21 The final step is enforcement, in which parties are sanctioned for any failures to comply with the rules. 22 This model of regulatory action still holds strong in some areas, but it is no longer - and should not be - the exclusive strategy for addressing emerging policy issues.

In the emerging, networked environment, regulatory agencies find themselves with a range of options and tools for developing standards of conduct, monitoring behavior in the marketplace, and enforcing or encouraging compliance. The conversation around such emerging solutions has taken a number of forms, sometimes under the headings of "responsive regulation," "experimentalism," or "New Governance." However framed, there is a pressing need for more adaptable approaches that can operate effectively in technologically changing environments or in fields where the circumstances differ across geographic (or other) contexts. 23 To address emerging challenges, regulatory agencies will increasingly be called upon to experiment with non-traditional regulatory strategies, requiring legislatures to monitor and evaluate the effectiveness of innovative regulatory initiatives after the fact.

A. The Limits of the Traditional Regulatory Approach

The traditional model of regulation is coming under strain in the face of increasing globalization and technological change. 24 Consider, for example, the traditional model of drug and medical device approval used by the Food and Drug Administration ("FDA"). The legacy model of regulation envisioned the FDA reviewing a drug and making an up-or-down decision on whether to approve the marketing of the drug. 25 By putting all of the pressure on the front [\*2018] end (ex ante), the legacy model creates two sets of challenges: (1) the pre-approval process takes a long time, costs a lot of money, and, in some cases, unnecessarily delays access to potentially beneficial drugs; and (2) the lack of a post-approval review process allows drugs to "be marketed despite evidence that they were doing unanticipated harm." 26 Unfortunately, the second type of error - a lack of responsiveness to on-the-ground realities - reinforces the first type of error, creating more pressure on the FDA to withhold approval until it satisfies itself that the relevant drug or device will not cause harm. 27

Congress is well aware of the limits of traditional ex ante regulation. In the food and drug arena, it has worked to update the FDA's model of regulation. In the Food and Drug Administration Amendments of 2007, for example, Congress gave the FDA increased flexibility to approve drugs and require ongoing research as to how the drugs work, called for an improved Adverse Event Report System at the agency, and mandated a framework for monitoring drug efficacy in practice. 28 More recently, the FDA established fast-tracks for approving drugs and medical devices that promise life-saving breakthroughs. 29 As the FDA explained with respect to the medical device review process, "reducing premarket data requirements while increasing postmarket requirements for devices subject to a [Pre-Market Approval], when appropriate, can assist the FDA in making medical devices available to patients sooner than if following the traditional premarket review pathway." 30

[\*2019] This Article: , while sympathetic to the need to reform existing regulatory structures, does not focus on this issue. 31 Rather, it explains how considerable flexibility for a range of alternative options exists within current structures and is already being used by agencies and private entities to great effect. As such, this Article: describes the underappreciated model of earned regulatory authority, calls for a more self-conscious use of this model, and explains how agencies can spearhead and implement this model successfully through entrepreneurial leadership and a culture of trial-and-error problem solving. 32

The role of a more imaginative approach to regulation relates back to the "responsive regulation" movement led by Ayres and Braithwaite. On their account, regulatory strategies can be conceptualized as an "enforcement pyramid," with "persuasion" on the bottom and "license revocation" at the top (as the regulatory equivalent of the death penalty for a regulated firm). 33 In all cases, a responsive regulation approach emphasizes dialogue and engagement around the impact of regulatory efforts in practice. 34 In so doing, it underscores that regulators need not always use their traditional tools (notice-and-comment rulemaking and adjudication). Rather than reflexively adopting traditional approaches, regulatory agencies can (1) embrace and oversee self-regulation (enforced self-regulation or co-regulation), (2) convene stakeholders to develop best practices, or (3) persuade parties to develop private regulatory initiatives. The next three Sections discuss each strategy in turn.

[\*2020]

B. The Promise of Co-Regulation

Even when using its traditional authority, an agency can operate more nimbly and effectively by integrating its efforts with private bodies who have expertise in the field. Where that integration involves the explicit embrace, oversight, and enforcement of actions by private bodies, the model of regulation is aptly described as "co-regulation." 35 For a successful use of co-regulation, consider the FCC's use of frequency coordinators to assign rights to use the wireless spectrum. As I have explained previously:

One notable self-regulatory program that the FCC has overseen is the use of frequency coordinators, which manage voluntary cooperation in the use of point-to-point microwave links and private land mobile radio systems. In that context, the coordinator evaluates requests for new licenses and certifies that such new licenses will not cause undue interference to established users. Consequently, while the FCC is the authority that grants or denies licenses as a formal matter, it routinely relies on and defers to the judgment of the frequency coordinator. This deference to the frequency coordinator facilitates cooperation around the use of the relevant licenses. 36

The importance of this co-regulation model is that the FCC's delegation of authority enables practical problem-solving on the ground by the frequency coordinator. As Dale Hatfield, a former Chief Engineer at the FCC, explained, this system works because it encourages the local engineers to "sit down together, solve these problems, and say let's figure out how to do it," limiting the need for the FCC to use its backstop authority. 37

The FTC's partnership with the Better Business Bureau's National Advertising Division ("NAD") operates in a functionally similar fashion to the FCC's use of frequency coordinators. 38 Notably, the NAD has developed an [\*2021] effective model of dispute resolution around misleading advertising issues, deciding an array of issues and referring cases, where necessary and appropriate, to the FTC. 39 Because the NAD has developed such a trusted program, FTC leaders have praised its work and relied on it to carry the laboring oar in this area, 40 leaving the FTC's residual authority as a backstop. In particular, the NAD refers cases to the FTC where a party refuses to participate in its process or comply with a decision. 41

Learning from the NAD model, the European Union is working with the European Advertising Standards Alliance to develop a similar approach to overseeing false advertising claims. 42 In this case, however, the governmental authority is actively involved in developing and supporting this body rather than integrating its work after the body developed on its own. 43 In short, government can either embrace existing bodies as part of a co-regulation strategy or stimulate and steer the development of new ones.

C. The Role of Best Practices and Agency Convened Efforts

For many regulatory agencies, the opportunity to act as a "convenor," to develop best practices, and to create "soft law" or norms is an important part of their mission. As former FTC Chair Bill Kovacic explained with regard to the FTC, "Congress gave the FTC capacity to serve as a convenor - to engage in a diverse array of activities that facilitate norms development," including "what we now call "soft law' measures (e.g., self-regulatory standards, proposed guidelines)." 44 In particular, Congress specifically authorized the FTC to collect information and develop reports on topics not immediately related to cases or regulatory matters before the Commission. 45 In Kovacic's view, the FTC has used its convening authority effectively, "improving understanding, building consensus, and supplying focal points for norms development" through thoughtful reports that distill key issues. 46

[\*2022] For a range of agencies, the role of developing and championing best practices is on the rise, 47 reflecting a number of trends. First, many agencies find themselves without sufficient authority to promulgate binding rules as new technologies emerge. Second, even where an agency may have formal authority, it might be reluctant to use it in the face of an emerging technology where it needs to act more quickly than formal notice-and-comment rulemaking allows. Third, the agency may lack sufficient confidence that a prescriptive rule is warranted and thus leaves open a range of options, merely narrowing the field of possibilities and pointing entities in the right direction. 48

To develop best practices effectively, an agency must invest significant resources in the enterprise. Stated generally, this effort involves "horizontal modeling rather than hierarchical direction" and is "a method of regulation in which central administrators provide advice and disseminate information, instead of mandating a one-size-fits-all regulatory scheme." 49 In an increasing number of cases, best practices focus not only on U.S. firms, but also those across the world, requiring that the regulatory agency coordinate its international counterparts. 50 Moreover, to develop emerging best practices, it is important that agency staff take the time to learn the details of "the regulated entities first-hand, develop a strong sense of emerging processes, and … [share] knowledge of these processes with staff at other locations." 51

Where an agency (or a private entity) identifies and disseminates a best practice, it acts as a "norm entrepreneur." 52 As discussed in Part III, the FTC has performed this role in the online privacy and data security contexts, articulating and recommending a set of best practices. 53 One virtue of this role - like soft law more generally - is that it may well make the adoption of more formal regulation less necessary. 54 To the extent that the articulation of the relevant [\*2023] norm itself does not overcome the collective action problem and catalyze compliance with a norm, a certification regime (like Energy Star) for those who are compliant (along with naming and shaming) might do so.

One path for catalyzing compliance, which can be labeled as "jawboning" or "threats," involves the use of apparent legal authority - say, opening up an investigation - to achieve a desired result. In a provocative article, Professor Tim Wu defends the use of "threats," calling for norm entrepreneurship by agency leaders and the development of limiting principles for the practice. 55 In criticizing Wu's argument, some commentators have characterized it as condoning lawless conduct. 56 In that spirit, I previously criticized the FCC's use of its merger review authority to secure outcomes in other contexts that were not specifically related to the merger. 57 I also called the FCC's use of "arm twisting" controversial when done without full transparency and a willingness to take formal action. 58 Finally, I noted that the tactic is "dangerous" if the agency is not willing and able to follow through with formal regulation if the called-for behavior does not take place, as the meaningless nature of the threat will become plain and the agency will lose credibility. 59

Any agency that develops best practices should be aware of the potential risks of such an effort. For starters, if an agency's identified best practices are allowed to become stale, some private actors might stick with them and fail to improve their practice. Second, given that there is no judicial oversight of best practices development, 60 it is important that agencies pre-commit to a level of procedural regularity and fairness in how they develop them. Third, without either carrots or sticks related to best practices, an agency may find it difficult to generate attention or catalyze compliance. 61

[\*2024]

D. Private Regulation

As exemplified by the LEED building standard, a private regulatory initiative can drive behavior toward a social goal. Given the need to respond to emerging issues more adaptably than traditional regulatory processes allow, public agencies may be tempted to rely on private bodies. 62 In the internet environment, for example, a range of issues are managed by multi-stakeholder organizations, which use "dialogue to develop voluntary norms and best practices." 63 Similarly, in the environmental field, a range of "private activity generates pressure on environmental behavior without resulting in a statute, regulation, agency enforcement action, or court decision for review by scholars and policymakers." 64

The role of private, multi-stakeholder efforts in internet governance is the U.S. government's official policy. 65 Since the development of the internet's basic technical standards in the 1980s and 1990s by groups like the Internet Engineering Task Force ("IETF") and the World Wide Web Consortium ("W3C"), "these entities have largely established the norms and standards for the global internet, but they are little known to the general public." 66 The U.S. government recently fully embraced this model, recognizing the need for internet policy and governance issues to be developed in an adaptable and global fashion. 67 This embrace includes supporting the Internet Corporation for Assigned Names and Numbers ("ICANN") as an independent, international body to oversee the internet's numbering system. 68

In the internet context, two private regulatory efforts bear notice, as both exist in tandem with legal and regulatory oversight. First, the Copyright Alert System (overseen by the Center for Copyright Information) was a cooperative effort between broadband providers and content providers focused on addressing [\*2025] piracy in peer-to-peer networks. 69 This initiative, which existed for four years, 70 provided some measure of guidance to the broadband industry on what sort of "repeat infringer" policy was reasonable. 71 In light of recent court decisions holding a broadband provider liable for failing to develop an appropriate repeat infringer policy, the guidance from this organization could be considered best practice and protect a provider from liability, 72 although its cessation of operations may limit its impact. Second, the Broadband Internet Technical Advisory Group ("BITAG") is a multi-stakeholder organization that seeks to define best practices and broadband network management ahead of any FCC action under its network neutrality regime. 73 In its most recent regulatory decision on network neutrality, the FCC highlighted its openness to "obtaining objective advice from industry standard-setting bodies or similar organizations," specifically citing BITAG as an example. 74

Both the Center for Copyright Information and BITAG relied on a mix of industry representatives and public interest advocates and operated in an open, transparent, and consensus-based manner. 75 Like frequency coordinators and the [\*2026] NAD, the bodies confronted the challenge of earning their legitimacy and claim to regulatory authority. If such efforts succeeded, the FCC and copyright courts would regard their guidance as meaningful, just as the FTC and courts do with respect to the actions of the NAD. 76

In the environmental realm, the Marine Stewardship Council ("MSC") is an instructive case study on how a multi-stakeholder private regulatory initiative can have a major impact. The MSC, founded by the World Wildlife Fund and Unilever, was launched to address the concern about fisheries operating in a sustainable fashion. 77 As one commentator explained, "the MSC administers standards for sustainable fisheries, updates the standards periodically with input from a stakeholder advisory group, evaluates fisheries, and allows those fisheries that meet certain criteria to label their fish as MSC-certified." 78 The MSC standard focuses on three core concerns: (1) maintaining sustainable fish stocks; (2) minimizing any adverse environmental impact; and (3) managing the fishery effectively, including compliance with relevant legal requirements. 79 Under the MSC-administered regime, independent private auditors must assess compliance with the relevant standards and compliant products can be labeled as such. 80 Indeed, the MSC regime allows any organization with concerns related to certification to make a formal objection during the certification process. 81

[\*2027] The MSC provides a powerful example of how private regulation can work even when not reinforced by public regulation. 82 By 2012, sixty percent of the fish caught in U.S. fisheries for human consumption were MSC-certified and major corporations, such as Wal-Mart and McDonald's, had committed to selling only MSC-certified, wild-caught fish. 83 Moreover, the MSC's private regime drove compliance with the nonbinding Code of Conduct, developed by the United Nations Food and Agriculture Organization, by making it part of its requirements. 84 After surveying this regime and formal regulatory efforts to address the issue, one commentator concluded that the MSC model was more successful than traditional regulatory efforts in this area and that "private regulation is best situated to address the complex problem of fisheries depletion." 85

In short, private regulatory efforts, such as those led by multi-stakeholder organizations, can influence private behavior whether they operate in tandem with public regulatory oversight or in a vacuum created by a lack of regulatory oversight. Whether they operate in the backdrop of public oversight or as a standalone effort, private bodies need to establish their legitimacy to influence behavior on the ground. To do so, they must have sufficient independence from those they oversee, enabling both regulators and consumers to trust their judgments (including determinations of compliance). 86

[\*2028]

E. Hacking the Bureaucracy

In most situations, Congress and agencies think along traditional lines and agency leaders continue on the established path of agency regulation, under-utilizing the alternative models discussed above. 87 There are a number of reasons for this dynamic, including the power of "path dependency and bureaucratic entrenchment." 88 Even more powerfully, the incentives for policymakers are often to avoid Type 1 errors - those visible errors of commission - that arise when trying a new strategy that might fail. By contrast, the hidden Type 2 errors - ones of omission - are permissible and a regular feature of bureaucratic inertia. 89

On one account, the challenge of leading a bureaucracy is captured by the reality that governmental employees, who enjoy civil service protection, can tell their politically-selected leaders, "I was here long before you arrived and will be here long after you are gone." In practice, such explicit defiance is the exception. Regardless of whether bureaucratic inertia is willful or based on an entrenched tradition governmental agencies are built to continue the same course. Consequently, any course corrections require energetic leadership. 90 And governmental employees are generally conditioned "to be quiet, take orders, and do their jobs in a repetitive way." 91 On the positive side, governmental employees tend to have a service orientation and are mission driven, meaning [\*2029] that effective engagement around the mission and purpose of the agenda can catalyze innovation and collaboration. 92

Bureaucratic inertia and autopilot administration not only prevent innovative programs from being developed, but also can lead existing programs to be administered badly. Take, for example, the development of the healthcare.gov website. After Congress passed the Affordable Care Act, a health care economist, David Cutler, encouraged the White House to treat the administration of the law more like "launching a start-up than passing a law." 93 In particular, Cutler made clear that the default strategy - using the existing personnel at the Center for Medicare and Medicaid Services ("CMS") - for administering the law was a recipe for failure. 94 In an assessment ignored by the White House, he explained that CMS "is demoralized, the best people have left, IT services are antiquated, and there are fewer employees than in 1981, despite a much larger burden." 95

Cutler's call for an entrepreneurial approach to implementing the Affordable Care Act was rejected by President Obama. 96 Perhaps fearing the need to manage political warfare with House Republicans or responding to the HHS' interest in protecting its turf, President Obama agreed to, in Cutler's words, pile "new responsibilities onto a broken system." 97 As this episode underscores, even when the current system is flawed, the pressure to use it is powerful. As a result, the healthcare.gov website cost $ 800 million to develop, whereas Twitter, which serves a similar number of users and is of comparable complexity, cost only $ 60 million. 98

The redeeming part of the healthcare.gov story is that it demonstrates that treating a government project like a startup can work. After the failed rollout of healthcare.gov (which only enabled six people to sign up for insurance on its first day), President Obama essentially embraced Cutler's recommendation, [\*2030] authorizing Todd Park, Mikey Dickerson, and a team of entrepreneurs to operate in a new structure that was called "tech surge." 99 This project, like a good startup, approached the challenge of building an effective website from first principles. Rather than ask how the government had done IT projects before, the team innovated (for government) in a number of important ways, including using Amazon Web Services to support the site. 100 In developing the new website, it broke from the traditional bureaucratic process of "waterfall" development (where every step is prescribed and locked-in) and used "agile" development (where the process is iterative and evolves along the way). 101 Finally, the team built a login system for $ 4 million (with annual maintenance costs of $ 1 million) to replace the initial version that did not work well and cost $ 250 million to build (with $ 70 million annual maintenance costs). 102

In an important legacy of this effort, Park and Dickerson continued to work in government after fixing healthcare.gov, developing the new U.S. Digital Service ("USDS"). 103 The goal of the USDS is to lure a range of talented technology professionals to the federal government, including data scientists, product managers, and product designers. 104 The USDS, in turn, provides guidance to government agencies on questions like how they can use Amazon Web Services. 105 In short, the USDS supports entrepreneurial leadership in government; and as Park said, it develops "people who can hack the technology, as well as people who can hack the bureaucracy." 106

The healthcare.gov story now has two parts. The first is the cautionary tale about government's traditional inertial default setting - that is, to do things as they were done before. The second underscores that entrepreneurial leadership [\*2031] in government is both possible and important, and can lead to transformative results. 107

The positive legacy of the healthcare.gov story is that entrepreneurial leaders in government can free their agencies from "the mental grip of conventional structures on the capacity to consider alternatives." 108 In so doing, such leaders can facilitate the development of alternative regulatory strategies. Similarly, governmental agencies face the challenge of overcoming the institutional bias that "experts may myopically focus on issues within their area of expertise and thereby fail to recognize that a decision would benefit from accessing other bodies of knowledge or ways of thinking." 109 In short, an important role of entrepreneurial leadership in government is to examine issues through the lens of first principles. 110

The concept of policy entrepreneurship recognizes that an entrepreneurial mindset and skillset can be applied to governance to foster innovative results. Professor Adam Sheingate, for example, defines the concept as the "skillful manipulation of politics [that] somehow results in the creation of a new policy or a new bureaucratic agency, creates a new institution, or transforms an existing one." 111 This type of leadership can also be seen in the development of, for example, the MSC program, the FTC's oversight of online privacy, and the Energy Star program. In a world where the best solutions may well require new models of regulation, it is critical that agency leaders experiment with new solutions. 112

[\*2032] A significant hurdle for entrepreneurial leadership in government - and a foundation of the inertial default setting - is the lack of acceptance of failure as an outcome. In practice, this means that governmental agencies often reflexively turn to traditional regulatory models and do not consider untested alternatives (often out of fear of failure). 113 This instinct mirrors the old private sector saw that "nobody got fired for buying IBM." 114 Citing the fear of failure and risk aversion, former Massachusetts Governor Deval Patrick explained, "there may be no industry less susceptible to innovation than government." 115 There are, however, exceptions, including the Defense Advanced Research Projects Agency ("DARPA"), which makes a conscious effort to promote a "risk-taking and failure-tolerant culture." 116

In the entrepreneurship environment, failure is a normal state, providing data, an opportunity to iterate, and a spur to refine a product offering. 117 Consequently, entrepreneurs celebrate the need to "fail fast" on new experiments by trying them on a small scale and determining as quickly as possible whether they can work. 118 As two advocates of innovation in government put it, "[a] [\*2033] culture of innovation means continuously exploring and adopting new processes in an ecosystem where risk is incentivized, not precluded." 119 Similarly, entrepreneurial leadership in government authorizes calculated risk-taking and, more importantly, provides cover for trial-and-error learning when the trials do not produce the envisioned results. 120 Unfortunately, leaders who support experimentation and are willing to accept the inevitable failures, are the exception, not the rule. 121

The basic entrepreneurial methodology of experiment-measure-iterate is captured in Eric Ries's classic book, The Lean Startup. 122 A core thesis of the book, widely accepted in the entrepreneurial community (and ignored by most legal scholars), 123 is that companies should develop and market a "minimum viable product," solicit feedback from actual customers, and improve it based on that data. 124 At Facebook, this philosophy was adopted and embodied in its mantra, "done is better than perfect." Citing that mantra, one commentator explained that "had Facebook waited so much as a year to perfect its model, the company might very well be where MySpace is today." 125

The Ries philosophy is famously captured in a feedback loop representing the cycle of innovation. 126 The core idea is to embrace experimentation, gather data [\*2034] (whether it signals success or failure), and iterate. 127 The lean startup model, represented by the following diagram, focuses on taking ideas from prototype to feedback to improvement: 128

This lean startup model echoes the style of software development championed by open source software, which calls for releasing code that can be viewed and improved by a community of users and developers. In what Eric Raymond dubbed "Linus's Law," in honor of the founder and coordinator of Linux, the open source maxim is "given enough eyeballs, all bugs are shallow." 129 This approach has spread far beyond open source, enabling "business webs where focused companies partner others to innovate and create value." 130 Although this [\*2035] approach and a commitment to prototyping and testing solutions is novel in government, it is starting to take root, with promising results. 131

With respect to the fear of failure, government operates quite differently than the entrepreneurial world. In government, the perceived costs of failure are sufficiently high that many governmental leaders decline to introduce a new initiative for fear it will fail or refuse to admit that an existing program is failing, even though that admission is a necessary predicate for improvement. To be sure, there are cases like the initial healthcare.gov rollout where the failure is readily apparent and must be fixed. In other cases, however, governmental leaders stand by programs where the data backing up its effectiveness is either uncertain or doubtful.

For an instructive case of governmental leaders refusing to acknowledge the limitations of a program, consider the case of the EPA's Performance Track program. When created, the program was supposed to highlight those companies with stellar environmental records. 132 In practice, however, it ultimately became, as EPA Administrator Lisa Jackson put it, "just one of those window-dressing programs that has little value." 133 Similarly, the EPA Inspector General criticized the program as ineffective, noting that it did not provide "a new model for achieving" its stated goals and very few companies met their stated goals. 134 Nonetheless, the Bush Administration did not make any real changes to the program before the Obama Administration cancelled it. 135

The Performance Track program story, like the failure to acknowledge the failings of the healthcare.gov website earlier, underscores that the hesitancy to acknowledge failure is a major challenge in governmental administration. If governmental leaders refuse to acknowledge failures, they undermine the ability to learn - and iterate - from mistakes and instead allow failed programs to [\*2036] continue during a period of denial. 136 Or, as Lawrence Summers put it while reflecting on the healthcare.gov debacle, it is crucial to resist the "overwhelming temptation for everyone involved [in a project] to circle the wagons and promise rapid repair so as to hold critics at bay." 137

Another challenging dynamic for governmental leaders to address is the impact of unconscious bias. It is normal for those involved in a project to believe that it is working, following what Nobel Laureate Daniel Kahneman calls "confirmation bias." 138 As one commentator put it, a challenge for those evaluating regulatory experiments is that those "deeply involved in the implementation of a particular regulation are likely to see the benefits of such a project far more clearly than the costs." 139 As commentators have explained, there are a number of strategies for overcoming this bias, including using red team-blue team exercises, appointing a Devil's Advocate, and creating a process for deliberate decisionmaking. 140 Of course, as happened in the Performance Track situation, new leadership is able to bring a fresh perspective. Ideally, however, existing leaders can step back and ask, "if a new leader came in and took a fresh look, what would she do?" 141

[\*2037] The role of entrepreneurial leadership in encouraging candid reflection and criticism is essential. As former FTC Chair Bill Kovacic and David Hyman explain, agencies develop an institutional culture and a reputation (or a brand, as they put it). 142 In some cases, that brand can be one of reliability and commitment to data-driven decisionmaking. An important role of an entrepreneurial leader is to develop and maintain that commitment. In the case of Underwriters Laboratory ("UL"), for example, its early leadership did just that, building up "UL's reputation for reliability by creating organizational structures, administrative routines, and oversight systems designed to prevent mistakes and misconduct." 143 To get past the natural status quo bias, an entrepreneurial leader should welcome diverse ideas, criticism, different options, and experimentation. 144 In Part II, to explain how policy entrepreneurship can earn regulatory authority, I discuss how experimental initiatives need to establish their effectiveness, legitimacy, and accountability to be embraced as lasting regulatory regimes.

#### It also improves overall resource efficiency and investigation accuracy.

Almudena Arcelus 21, Principal at Analysis Group, Mihran Yenikomshian, Vice President at Analysis Group, and Noemi Nocera, Associate at Analysis Group, “Mitigating Antitrust Concerns When Competitors Share Data Using Blockchain Technology”, Harvard Journal of Law and Digital Technology, Harv. J.L. & Tech. Dig. (2021), Spring 2021, Lexis

C. Transparency for regulators

Implementing transparency in the network design can improve regulators' ability to investigate claims of antitrust violations. First, blockchain networks could be designed to provide antitrust investigators with a clear audit trail of the life cycle of an asset as it moves through a firm's supply chain, providing critical information to investigators as they assess when and how a firm's products transformed from raw materials to a finished good. Second, networks can be designed to provide investigators with more accurate, reliable, and comprehensive transaction data across an entire firm, rather than the piecemeal and inconsistent data that regulators often receive. Last, we could imagine the development of a blockchain, potentially accessible only by select parties or regulators, that contains industry-wide transaction data, which could provide an unmatched tool for investigators. Furthermore, the standardized data format in a blockchain may lead to faster resolution of potential antitrust investigations.

Whether or not these particular strategies would be effective in a real-world setting will depend on the industry or business context, the design of the blockchain network at issue, and the effectiveness of governance and regulatory oversight.

V. CONCLUSION

Because of its potential to change the way many governments' and firms' services currently operate, blockchain technology has attracted extensive press coverage. Although antitrust concerns exist in relation to blockchain adoption and data sharing between competitors (including access to information, collusion, abuse of dominance, and enforcement), blockchain serves mainly as a data management tool. How it affects competition will depend on network design and regulatory oversight, among other things. When examining antitrust concerns, industry observers as well as regulators should assess blockchain technology according to its specific implementation and its role in the wider framework within which it is used.

### 1AC---Plan

#### Plan: The United States federal government should increase its prohibitions on anticompetitive practices by nucleus blockchain participants.

### 1AC---Solvency

#### Contention 3 is SOLVENCY.

#### Prohibiting anticompetitive practices by the blockchain nucleus creates a principled basis to apply antitrust to distributed ledgers without overbroadening liability for all users.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 110

2 BLOCKCHAIN’S LEGAL FICTION

In this section, I introduce the theory of granularity and outline how it enables the application of antitrust law to blockchains. Transactional by nature, that theory aims to explain public permissionless blockchains beyond the simple cost reduction framework. It seeks to translate accurately the governing reality of such blockchains, creating for the purpose a new legal fiction that encapsulates blockchain without forcing it into inadequate boxes.

2.1 Dynamics of Blockchain Governance

The theory of granularity, to which one may want to provide a semantic explanation, frames blockchain governance as a new transactional institution. By doing so, it fills the gap created by the impossibility of applying the theory of the firm to public permissionless blockchains.

2.1.1 Semantic explanation

In “The Nature of the Firm”, Ronald Coase distinguished between organizations and organisms.3 While firms are organizations, blockchains are clusters of organisms that, by nature, are spontaneous. Their functioning must be analyzed and understood this way so that antitrust and competition law can be properly applied when necessary.

The present chapter introduces the theory of granularity for the purpose. Generally, the notion of granularity defines the size of the smallest element in a system - that is, an organism. Thus, this theory aims to analyze the role played by each component of a blockchain. Unlike the firm, where vertical control is exercised over its components, blockchains are made up of horizontal governance mechanisms. This reinforces the importance of each organism, as one cannot merely assume that they will follow one coordinated direction.4 One must then study blockchain’s smallest organisms, the role they play and their dynamism.5 It is only by analyzing the granularity level that blockchain governance can be properly understood.6

2.1.2 Understanding blockchain governance

Blockchain is a space in which different forms of power are being exercised. However, unlike the firm, in which one exercises a power of command and control, I have explained that no single actor can entirely control a public permissionless blockchain.7 As a result, multiple interests can compete within the same blockchain; they may even be opposed. Blockchain “contribute[s] to the realization of a number of individual objectives which no one knows in their totality”8 For that reason, one must study the different types of power that are generally found within public permissionless blockchains to understand which interests may eventually prevail over others. In doing so, we should keep in mind that “people who think the purpose of blockchains is to completely expunge soft mushy human intuitions and feelings in favor of completely algorithmic governance (emphasis on ‘completely’) are absolutely crazy.”9

I study blockchain power games by analyzing what I have described as the fifth blockchain level in Chapter 4: the governance layer. That level sits on top of more technical ones, and it appears to be central in defining the activities at the levels above. Furthermore, different constraints come into play in blockchain governance - namely, economic, political, logical, sociological, architectural and legal ones. Understanding how these constraints interact is a challenge; but it is essential in order to get a grip on who holds control over blockchain layer 1 and how that power is exercised over other participants.

A distinction between all three categories of public permissionless blockchain participants is helpful in this regard - namely, between founders or core developers (I will often present them together for the sake of simplicity), users and miners. I show that although each blockchain has its specificities, the above-mentioned groups will use the same mechanisms to express their preferences,10 and will encounter the same limits if they act on their own. Eventually, their powers may suffer from four constraints that Lawrence Lessig described with his “pathetic dot theory”: law, markets, social norms and architecture.11

As for private blockchains, I have explained that they mimic that structure to different degrees, depending on their original design. The closer they are to public permissionless blockchains, the less the theory of the firm will be transposable to them. The following developments then become relevant for public permissionless as well as private blockchains.

2.1.2.1 The power of founders and core developers'2

Blockchain founders and core developers are those who implement the original rules of a blockchain.13 They design the code software and determine which consensus protocol will be used.14

Although core developers work on the fourth level of blockchain - its infra- structure - they interact with other blockchain participants at the fifth level. Indeed, one may stress that the blockchain architecture limits their power, as they lose any form of direct control over other participants once they put the blockchain online.15 For most blockchains (but not all!),16 founders and core developers cannot unilaterally impose any changes17 or control who may propose protocol updates.18 For instance, any Bitcoin Improvement Proposals must be voted upon, according to miners’ computing power, before they get implemented.19 Indeed,“[t]he nature of Bitcoin is such that once version 0.1 was released, the core design was set in stone for the rest of its lifetime,”20 unless the majority agrees to change it.

The more participants are included in those voting procedures, the more decentralized that blockchain layer is.21 The opposite is also true. For instance, Decred22 and Tezos23 are cryptocurrencies with more centralized governance systems. One of Tezos’ principal characteristics is the ability to amend its consensus when necessary.24 The presence of off-chain and side-chain governance mechanisms, usually controlled by developers, should also be closely studied.25

It remains that core developers do not control who can use the blockchain at the platform layer26 or who can build applications on top of it.27 That is because blockchain founders and core developers cannot impose changes on the blockchain code, interface, application, data or benefice.28 Their main role is thus close to that of “advisors,”29 but their influence is limited by blockchain participants’ desire to maximize their own benefit, which may lead them, should they disagree with core developers, to refuse the implementation of new rules, to move to a rival ecosystem or to fork the blockchain.30 Social norms further limit them because they may fear not being influential enough to prevent hard forks.

Hard forks result in backward-incompatible software updates. When they do not obtain a sufficiently broad consensus among miners,31 hard forks cause the chain to split in two, permanently. Indeed, miners who do not follow the new block validation requirements will be unable to add their blocks to the latest version of the blockchain, as the core client will automatically reject them as non-compliant. Instead, a new chain of blocks will form, creating a split: two chains following different rules. These forks limit the core developers’ willingness to act against the interests of other participants.32 And core developers may also fear soft forks, although to a lesser degree. Soft forks happen when new rules are implemented, but when the blocks following the original rules are not rejected from the chain. These modifications are backward-compatible, accommodating miners who implement the change and those who do not. Nevertheless, one should underline that these limits on core developers’ power are linked to the decentralized nature of blockchain governance, which is not a necessary feature, but needs to be enacted.33 New blockchains may appear in which greater power is given to the founders and core developers.34

However, such blockchains will suffer from two inherent limits. First, the extent to which a (re)centralized blockchain could thrive remains to be seen.35 Such blockchains could deplete trust by confining power in the hands of a few, thus disincentivizing users from joining them. Second, a (re)centralized block- chain could function less efficiently than a truly decentralized one, because all its participants would no longer be in a position to improve it. This lack of efficiency, even if it only concerned certain types of transactions, could hinder these blockchains - which probably explains why, to this day, they have not prospered.

2.1.2.2 The power of users36

On permissionless public blockchains, users propose new transactions. Anyone can become a user.37 Users exercise substantial power over the blockchain, since their decision to use it (or not) is central to the blockchain’s economic and social value.38 Their influence extends from influencing transaction fees39 to providing additional value by developing and using applications running on top of the platform layer.40 They can also force hard forks on the blockchain.41 However, their power is limited by the fact they cannot (easily) exercise coordinated control, as their actions are highly decentralized and spontaneous.42 This creates an architectural limit and makes their behavior primarily dependent on prices.43

2.1.2.3 The power of miners44

On permissionless public blockchains, miners validate transactions assembled into blocks. Any participant can become a miner.45 Miners follow the rules encoded in the fourth blockchain level (e.g., the Bitcoin Core client).46 They can comply with a different set of rules, but they will then waste computing power by producing an orphaned block, thus losing potential rewards. Following the main client’s rules is miners’ dominant strategy.47 If they coordinate their behavior, miners can influence a blockchain by realizing a 51 percent attack,48 thus forcing a soft fork.49 The risk is higher when miners are grouped into mining pools.50 In such a scenario, the blockchain protocol is changed to loosen the rule-set enforced by full nodes.51 Such a change occurs when enough hashing power, or energy expended to mine a cryptocurrency, is devoted to it.52 The power of miners to start soft forks is nonetheless limited by both the blockchain’s architecture53 and social norms - they must convince blockchain participants operating as nodes to run the new version of the software.54 Miners also suffer from market constraints, as initiating a soft fork may decrease the value of the tokens they own.55 The price mechanism also guides their actions, creating a strong market-related constraint. Finally, even if a fork were created, the new community would have the strenuous task of convincing other users to join it.56 For example, Bitcoin had been forked over 100 times at the time of writing. Over 30 of them are considered failures, while another 29 projects are no longer capable of transacting. Among the remaining forks Just a few are considered valuable.57

2.1.3 The blockchain power game

This overall balance of power, common to all public permissionless block- chains, is the general analytical framework (as illustrated in Figure 7.1) within which to analyze whether one of these groups, on a case-by-case basis, has sufficient influence to qualify as control under antitrust or competition law.

On top of all that, core developers, users and miners may also store a copy of the blockchain ledger. When doing so, their computers are labeled as light nodes if they store only a subset of the blockchain ledger and full nodes if they store a copy of the entire blockchain.58

Although these nodes are passive and cannot be designated as actors in the blockchain, they ensure its integrity. This role carries power. First, blockchain participants who are nodes may alter their copy of the blockchain.59 Second, they may also (threaten to) validate blocks in which there is double spending.60 Their job is indeed to prevent users from spending the same token twice by allowing miners to verify the proposed transaction against a list of previous unspent transaction outputs. They protect blockchains value. However, their power is mainly limited by the fact that they cannot either control or influence transactions.61

This is the blockchain power game. It is well balanced, and technical solutions (called “layer 2” solutions) are constantly provided to maintain that balance. But these solutions are insufficient to maintain balance when different groups of blockchain participants come together to escape these constraints to the detriment of the broader ecosystem. When this occurs, they are exercising control over the blockchain.

2.2 The Blockchain Nucleus

Thus far, the theory of granularity has allowed me to determine the different forms of power enjoyed by blockchain participants. I must now detail how to identify a legal fiction controlling the blockchain.62 To this end, I explain what a blockchain nucleus is and then analyze its influence over other blockchain participants. 1 then describe how to define such a nucleus.

2.2.1 Usefulness and challenges

2.2.1.1 The nucleus

None of the three types of blockchain participants - core developers, users and miners - can impose their power on other groups to the point of taking complete control over the blockchain. Blockchains are indeed decentralized. They prevent the exercise of vertical power, and this differentiates them from firms in which a group, or sometimes even an individual, can control the other participants and “force them to collaborate,” so to speak.

That being said, even with horizontal and decentralized governance, a group of participants may achieve a form of control over the blockchain by collaborating, by circumventing (some of) the constraints imposed on them,63 and by changing them in the long run.64

I contend that such a coalition exists for each blockchain (at least, for the surviving ones),65 and I call it the nucleus. The nucleus includes all the participants who have a personal interest (albeit transiently) to collaborate toward the same long-term goal: ensuring the blockchain’s survival.66 Its members do not compete as they are, together, trying to maintain and expand their blockchain. Their short-term interests may diverge from time to time67 - for example, when two miners are racing to mine new blocks.68 Still, they seek to ensure blockchain integrity and systematically promote the same blockchain instead of other ones.

2.2.1.2 Usefulness

Assessing which participants have joined forces and are thus part of the nucleus is essential to determine who ultimately controls the blockchain. Put differently, it leads to identifying the participants that can be held liable for a breach of antitrust law when it is shown that they have anticompetitively exerted their influence.69 Identifying the nucleus amounts to creating a legal fiction to which the law can be applied, but also to which rights can be granted (see Figure 7.2).

The nucleus should indeed become a legal fiction that can be liable for anticompetitive practices, but also able to claim damages. In that regard, determining the nucleus size will prove central. It will prove useful in cases of anticompetitive practices directed at a blockchain nucleus. When a legal entity - whether a blockchain nucleus or a firm - infringes antitrust law and causes damages to another nucleus, the latter must have the means to introduce a legal action, stand by its rights and claim damages. Assigning liability and granting rights to blockchain ecosystems are thus two sides of the same coin.

3 DEFINING THE NUCLEUS SIZE

Courts and antitrust agencies will face the task of determining the nucleus size. The further away a participant will be from the nucleus’s center, the more difficult it will become to genuinely include her or him in the nucleus. With distance, it will prove harder to show that she or he could have influenced other participants’ behavior. Only a case-by-case analysis can elucidate this question. This analysis should nevertheless be based on concrete and quantifiable frameworks to ensure legal certainty, limit legal errors and reduce regulatory costs. To this end, agencies should focus their investigation on economic agents’ ability to exert a horizontal power of command and control. They should also consider their capacity to interfere with the blockchain’s economic value and influence norms.70

Let me be more specific. The first element that should be factored in to determine which participants are part of the nucleus is the technical ability to exert a horizontal quasi-power of command and control. One must assess each blockchain’s architectural characteristics to determine whether a few users may impose such decisions on others. The more a group of users can control others, the more they can single-handedly contribute to the block- chain’s survival, and therefore be considered part of the nucleus. In fact, the original design of a blockchain can give one of the three groups of users more or less power. It can put them in charge of implementing the execution of transactions, designate them as miners or even enable them to change the design a blockchain’s design unilaterally. Some blockchains might also use several mechanisms based on the platform layer to create governance (whether off-chain or side-chain).71

The second element is the ability of each participant to interfere with the blockchain’s economic value.72 When some users govern the pricing structures, the blockchain’s attractiveness or economic incentives, they have indirect control over the blockchain. This ability can be assessed by looking at technical elements. For instance, the capacity to change the size of each block, which may alter the number and types of transactions, is a sign of control. The same goes for the power to propose modifications to the core code to attract new participants. Finally, the more a participant has invested in the blockchain, the more he has an incentive to control its economic value.73 For that reason, previous investments in a blockchain can show agencies where to look for the nucleus.

The third element is the ability to influence a blockchain’s norms.74 Here, “norms” are defined as the “constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other”75 - that is, the unwritten rules that one often feels compelled to follow.76 The more a participant can incentivize others to behave in a certain way - on pain of rejection from the community - the more they exercise control over the blockchain’s general direction.77 For example, when core developers can influence other participants into accepting all of the modifications they would like to apply to the core (e.g., by arguing about the necessity for technical upgrades, security failures, bugs...), they effectively pilot part of the blockchain.

4 THE THEORY OF GRANULARITY IN ACTION

The theory of granularity would enable agencies to identify a blockchain’s nucleus. It would thus permit the creation of a legal fiction to which antitrust can be applied. In turn, this would impose new obligations upon blockchain participants while simultaneously giving them new means to challenge anti- competitive behavior. This theory would make it possible to analyze relevant markets and market power in antitrust proceedings. The theory of granularity would also make it possible to impute anticompetitive practices to a given set of blockchain participants.

#### Antitrust is limited by application only to the ‘firm’, defined by vertical control---modifying this with targeted prohibitions prevents blockchain centralization.

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 79-94

The second part of this book is dedicated to artificial centralization - namely, anticompetitive behaviors that take place on blockchains or are facilitated by them. 1 contend that studying these practices is essential to make blockchain and antitrust law function as allies; indeed, no sustainable cooperation is possible without addressing (and preparing for) the situations in which mutual aggressions will occur.

To this end, I first analyze the extent to which antitrust laws are currently applicable to blockchains. I show that the theory of the firm is central to modern antitrust (Chapter 6) and that it cannot be transposed to all blockchains. For that reason, I propose a new approach - dubbed “the theory of granularity”- which allows for the creation of a legal fiction, placing blockchain’s activities (back) under the rule of law (Chapter 7). I explain that implementing that approach would benefit all the players in the blockchain ecosystem. This would clear the way for law enforcers to apply the rule of law and, in turn, would help eliminate the most harmful practices and encourage investments. Once the question of applicability has been cleared up, I turn to how antitrust law could be applied to anticompetitive practices. To this end, I begin by looking at collusive practices, whether they concern the blockchain itself (Chapter 8) or make use of the blockchain to affect the “real space” (Chapter 9). 1 explain that these practices tend to centralize decision making power and thus contribute to the “artificial” centralization of different levels of block- chain ecosystems and the economy.

Part 2 closes by examining abuses of market power. I first show that the analysis of market power on blockchain raises several difficulties, and I offer suggestions to overcome them (Chapter 10). I then analyze the practices that may result from such power and show that they are heterogeneous (Chapter 11). I draw a risk map. Finally, I conclude by studying different forms of blockchain concentration (Chapter 12). I draw a distinction between hostile and mutually agreed concentrations and explain how these may recentralize blockchain.

6. The theory of the firm

1 LEGAL FICTIONS

The concept of “legal fiction” is central to all legal systems, although regulation and court decisions refer to it only infrequently. I first explain its meaning by taking a brief detour through... trees and forests. I then show why it is useful for the present study.

1.1 Trees as a Legal Fiction

Christopher D. Stone is a law professor in the United States. In 1965, after a stint at the University of Chicago,1 he joined the University of Southern California Law School, where he taught several subjects, including public international law and property law. One day in the fall of 1971, as he was nearing the end of a class, he asked his students the following question: “What would a radically different law-driven consciousness look like?” As he walked out of the classroom, down the corridor to his office, he wondered why he had asked such a strange thing. “How could a tree have rights,” after all? Days went by, and still he continued to wonder. He soon became convinced that the answer to his question should be positive and decided to make it known.

In October that same year, he got in touch with the Southern California Law Review's editor in chief. The Supreme Court had taken up a case, Sierra Club v. Morton, that touched upon his question. Although Stone did not think he would be able to publish his article before the case went to trial, he hoped that Justice William O. Douglas - who had agreed to write the preface to a symposium issue of the Review - would at least see the draft of his article. His strategy paid off. Although the Supreme Court decision did not follow his thesis, Justice Douglas wrote a dissent in which he held that: “Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Should Trees Have Standing?”2 In 1974, Stone published a book in which he developed his theory further.

1.2 The Concept of Legal Fiction

Christopher Stone’s book is a pillar of modern thinking on the subject. Of course, the argument concerning what is a legal person - or a legal object to which rights are attributed - did not originate in the 1970s. Since medieval times, scholars have considered what rights should be attributed to corpo- rations3 - a debate they centered on the question of legal fictions. A “legal fiction” is presumably defined as a fact created by courts or legislation to help legal ruling.4 Stone poses three conditions for the creation of a new one:

They are, first, that the thing can institute legal actions at its behest, second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it.5

A company meets these criteria. Legal systems have recognized them as a legal fiction for hundreds of years.6 Corporations are, in the words of John Sherman, “artificial person[s] without fear of death, without a soul to save or body to punish;”7 and yet they are at the center of our modern economies. Not only has the law “been able to exploit to its advantage and to maximize for its needs” the fact that corporations are persons; but also, they can file legal actions, suffer from damages and benefit from relief. One can find traces of that recognition in the Rolls of British Parliament in 1444: “they [the Master and Brethren of the Hospital] by that same name mowe be persones able to purchase Londez and Tenementz of all manere persones.” Here, the Hospital was recognized as a legal fiction.

As for the process of establishing legal fictions - once the criteria are known to be met - three methods have been used,8 whether by the courts (in common law) or by the legislature (in civil law). The first is by assertion, where one thing is declared to be true. For instance, one may say that corporations are persons. The second is by assumption - more specifically, by an irrefutable presumption that may morph into a legal fiction. For instance, one may say that corporations are presumed to be persons. The third is by deeming. Here, X is deemed to be Y, which creates a disconnect between the reality before deeming the fact, and after.

1.3 Legal Fiction and Blockchain

If legal fictions are so convenient, why not create a multitude of them? The first objection is the necessity to agree on the desirability of the objective they ought to achieve. When courts use legal fictions to deny minorities their fundamental rights, the objective is achieved, but society does not come out better.9 The second objection relates to the balance of power. Bentham called legal fictions “the stealing of legislative power” when courts create them. The third objection relates to the difficulty of creating a coherent legal system. Companies are legal persons, and although they can be charged with criminal activity, these crimes are committed by physical entities (persons). One must therefore put in place adequate measures to ensure that any illegal activity by a firm can be put to an end (that its perpetrators cease to act). The fourth and final objection concerns the systematization of the law. The creation of legal fictions leads to the elimination of case-by-case analysis, at least partially. For instance, a firm will always be a legal person. That may create difficulties because it entails giving the firm all the fundamental rights given to us, humans.

On the other hand, creating legal fictions significantly improves legal certainty. First, this applies to the entities directly concerned, which as legal fictions may bring actions under their own name and can thus be compensated for any damage they might unjustly suffer. It also creates legal certainty for all those who interact with these legal fictions, as trading partners can indeed bring legal actions against them. It helps when legal fictions rather than individuals benefit from illegal practices and cases where several individuals are responsible for a behavior. In short, although the creation of legal fictions is an exercise that requires precision, it unlocks a range of potential interactions that can greatly benefit society.

I intend to explain that creating a new legal fiction for blockchains is essential to their decentralization. I have argued that decentralization is the capacity of subjects to determine their competence. That requires recognizing their legal existence before transferring such capacity. Doing so will also allow them to introduce proper legal actions and prevent illegal behaviors being turned against them.

2 THE FIRM IN ANTITRUST

Antitrust’s most common legal fiction is the firm. That legal fiction has developed little since the 1930s and Ronald Coase’s work. For that reason, one may wish to understand its premises to get a grasp of modem antitrust law.

2.1 The Theory of the Firm

The economic literature regarding the emergence of firms emphasizes the importance of transaction costs and the ability to reduce them thanks to top-down control. To this day, that theory has provided the bedrock for modem microeconomic analysis.

2.1.1 Highlights of Ronald Coase’s article

In 1937, when he was 21 years old, Ronald Coase published “The Nature of the Firm.”10 It contains no mathematics and is just 20 pages long, but it remains one of the most-cited publications in economic theory today." One can hardly overstate its impact.12

In it, Coase sought to answer the following question: if markets are efficient, why do firms emerge? Coase responded simply and elegantly, stressing that firms make it easier to organize certain exchanges. Coase introduced the concept of transaction costs without naming it - referring to all the expenses the parties must incur to complete a transaction - and explained that firms exist to minimize these costs.13 Indeed, a transaction involves different costs - the costs of finding economic agents on the market, negotiating, drafting a contract and so on. By internalizing these various externalities, firms reduce the cost of economic transactions. Firms were thus seen as an institutional device for the first time.14 Coase opened the firm “black box.”15

He then explained why firms reduce these costs. His explanations came down to the power of command and control.16 Firms are hierarchically organized: orders and directions are given from the top and trickle down the hierarchy. This reduces the scope for costly opportunistic behavior that might otherwise make transaction unprofitable. Put differently, the reduction of these costs is often achieved by collaboration between employees, while market participants outside the firm are compelled to compete.

In Coase’s words, “in place of the complicated market structure with exchange transactions is substituted the entrepreneur-coordinator, who directs production.”17 Reductions of costs follow, as “by forming an organisation and allowing some authority (an ‘entrepreneur’) to direct the resources, certain marketing costs are saved.”18 Coase thus defines the “firm” as “the system of relationships which comes into existence when the direction of resources is dependent on an entrepreneur.”19 On the contrary, this kind of efficiency is not found in the market, where free economic agents compete under emergent orders. One can thus define the boundary between the firm and the market: where control stops, the firm’s perimeter stops.

Coase particularly emphasized the firm’s ability to deal with contingencies during the performance of a contract. While firms manage long-term relationships, the market mainly permits short-term contracts based on the price mechanism.20 Thus, Coase argued, “it seems improbable that a firm would emerge without the existence of uncertainty”21 in the market. This assumption is based on the theory of incomplete contracts, according to which the contracting parties cannot anticipate all the situations that may arise during their contract’s performance.22 The firm helps in creating a way to settle disputes, which as a result reduces all the upfront costs related to the management of potential conflicts. Here again, Coase put the firm’s ability to exercise control at the center of his demonstration. He was awarded the 1991 Nobel Prize in Economics for “his discovery and clarification of the significance of trans- action costs and property rights for the economy’s institutional structure and functioning.”23

2.1.2 Coase’s impact

Coase’s article put transaction costs at the center of modem economics, making them “the ultimate unit of microeconomic analysis.”24 Although Coase complained in 1988 that the concept was “largely absent from current economic theory,”25 it has transformed the perception of the firm from a pro- duction function into a governance structure.26

This transformation of economic thinking heavily influenced Oliver Williamson, among many others.27 He researched the optimal design of firms28 and helped to open the firm “black box” even further, putting the firm’s “control instruments”29 and the “means by which to infuse order”30 at the center of his analysis. Williamson was awarded the Nobel Prize in Economics in 2009.

Alternative theories to those of Coase have also developed. For instance, incentive theory portrays the firm as an incentive system that uses various instruments combining authority, ownership and compensation to ensure that all employees contribute their best to the firm’s interests.31 The theory holds that firms must adopt institutional arrangements that ensure survival by aligning these incentives. They are thus a nexus of written and unwritten contracts between different economic actors in which each contractual relationship is an agency relationship, whose optimal configuration must be discovered. According to the proponents of this theory, there is no difference in nature between firms and the market. Both are said to depend on contractual relationships that do not imply any exercise of authority or control. As I will explain, none of these alternative theories is currently being used in antitrust and competition law.32

2.2 A Pillar of Modern Antitrust

Although Coase’s theory was developed in the 1930s, modem antitrust is still constructed on the basis of this theory and has not adapted to changes in the nature of firms. Why is that? One may find a satisfying explanation in the fact that the nature of economic hierarchies has changed little to this day. Even the apparition of online platforms and aggregators has not changed the structure consisting of minimizing transaction costs thanks to vertical power. In a nutshell, Coase’s theory is here to stay. As a matter of fact, and as we are about to see, all modem antitrust case laws and regulations are based on the above-mentioned article, whether in the United States or Europe. More specifically, Coase’s theory helps point out where control is being exercised and, therefore, where the firm’s boundaries are. Antitrust and competition law applies to all entities defined accordingly.

2.2.1 The firm’s boundaries in antitrust and competition law

The Sherman Act in the United States and the TFEU in Europe are both the subject of extensive case law. The vast majority of the jurisprudence is not concerned with the question of the firm - that is, the person that is the subject of antitrust and competition law. The firm’s structure has transformed very little since the introduction of these two texts; it has become more complex, but has not changed in nature.33 For that reason, litigation generally involves other issues subject to further disagreement. Nevertheless, blockchain’s emergence forces us to reassess the definition of a “firm,” to analyze whether decentralized groups can be captured by antitrust law as currently conceived or if blockchains should be captured through another theory. In the United States, antitrust provisions apply to all “persons”34 affecting trade and commerce by unlawful restraints and monopolies.35 According to Section 7 of the Sherman Act:

the word ‘person,’ or ‘persons,’ wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.36

The text does not further define the term “person”; it simply establishes exemption regimes for which antitrust is not applicable - mainly concerning federal government agencies and instrumentalities.37

The case law is more informative. In *Copperweld*,38 the Supreme Court stressed that although “[n]othing in the literal meaning of [the Sherman Act] excludes coordinated conduct among officers or employees of the same company,”39 there is “general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.” On that basis, the Court held that “there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor,” therefore exempting these operations from Section 1 of the Sherman Act.

The Supreme Court was dealing with possible intra-group collusion for the first time with this decision.40 One can only guess what would have been its reasoning before Coase’s article (1937). The fact remains that *Copperweld* follows a Coasian logic:41 the firm uses vertical control to save transaction costs; antitrust law must recognize the fact and exempt from Section 1 of the Sherman Act all agreements between two legal entities bound by such a control relationship42 In the words of the Supreme Court:

The intra-enterprise conspiracy doctrine looks to the form of an enterprise’s structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly-owned subsidiary. A corporation has complete power to maintain a wholly-owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise’s conduct seriously threatens competition.

In the end, “courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes” “when making a single-entity determination.”43 Only when “general corporate actions are guided or determined” by “separate corporate consciousnesses” can two entities be seen as two separate firms in antitrust law.44 One must make no mistake about it: only control makes the firm and defines its scope.45

In Europe, the theory of the firm as defined by Coase is also the basis of modern competition law.46 Article 1 of Protocol 22 to the European Economic Area Agreement defines the “firm” as “any entity carrying out activities of a commercial or economic nature,” but the concept is not properly delimited in the black letter of EU law. However, the case law defines “undertakings” as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”47 The legal form of the entity offering the economic activity does not matter.48 In fact, as the CJEU made clear in Shell, “undertakings” are economic units rather than legal units.49 Here again, the concept of undertaking takes Coase’s path-breaking article as a starting point.50

That definition of the “firm” is still incomplete, as it does not define its boundaries. For instance, in Imperial Chemical Industries, the CJEU ruled that the degree to which it carried out “the instructions given” by a company was essential in analyzing the independence of a subsidiary; and that “where a subsidiary does not enjoy real autonomy in determining its course of action in the market,” the prohibitions set out in Article 101 of the TFEU were inapplicable.51 The CJEU further held in Akzo Nobel that “the actual exercise of decisive influence”52 defines firm limits in competition law; and that “it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary.”53 In the end, a firm encompasses all the elements over which control is exercised, as in the United States.54 For instance, in Hydrotherm, the CJEU found that a natural person, a limited partnership and another undertaking made up a single economic unit when they were all controlled by the same natural person.55 That logic derives from Coase’s “The Nature of the Firm.”56

2.2.2 The firm as a pillar of antitrust and competition law

The definition of the firm’s boundaries helps in three fundamental steps of antitrust and competition law: (1) determining whether the law should apply; (2) assessing practices; and (3) and assigning liability. First, establishing the firm’s boundaries helps determine the extent to which antitrust and competition law applies. U.S. antitrust law provides several exemptions to different types of entities, which require both the identification of the firm and an understanding of its activities. European competition law applies only to undertakings that carry out an economic activity. Once again, it is then necessary to identify the firm’s boundaries to determine the activities carried out.

Second, establishing the firm’s boundaries is essential when agencies assess the legality of business practices.57 In terms of collusion, U.S. and European courts have recognized that two legal entities that are part of the same eco- nomic unit - that is, the same firm - cannot be held guilty of collusion, as one cannot agree with oneself.58 Antitrust prohibits several forms of cooperation outside the firm, while it always permits cooperation within the firm. The logic is similar in terms of monopolization and abuse of a dominant position. As a company cannot abuse its market power against itself, abuses of power are illegal only when they affect other firms. Above all, defining the boundaries of firms is essential to analyze market power (and thus whether Section 2 of the Sherman Act or Article 102 of the TFEU is applicable to a given case) and the ability to engage in anticompetitive practices. Control indeed confers the firm with the power to implement practices - including the ability to raise prices, which is often central in antitrust cases.

Finally, identifying the boundaries of firms is essential to assign liability.59 Liability for anticompetitive practices rests with the parent company that ultimately controls other entities if such control has been exercised.60 This logic stems from the classic distinction between ownership and control.61

It is safe to assume that antitrust law will capture the activities of blockchain participants at their individual level.62 For example, one could imagine that a miner is considered a company on his own; after all, miners are operating an economic activity. Nevertheless, analyzing whether the entire blockchain layer 1 could be deemed a firm for the purpose of antitrust law is essential if agencies are to understand and apprehend anticompetitive practices that are carried out beyond the simple framework of the individual. For example, suppose a blockchain is implementing practices to exclude another blockchain from the market. In that case, one will want to punish these practices rather than each individual action leading to the entire scheme. I will return to these practices in the coming chapters.

In other words, defining the firm’s boundaries is a necessary step in understanding competitive dynamics, in analyzing practices and eventually, in assigning antitrust liability to the blockchain when, as an entity, it seeks to achieve survival through anticompetitive ways. It is thus essential to carefully consider the elements that are taken into account when defining “firms” under antitrust law. I showed that in the United States, as in Europe, only one element matters: control. This reasoning is problematic when it comes to blockchain.

# 2AC

## Blockchain ADV

### AT: No Enforcement

#### Violators can be identified and prosecuted

Samuel N. Weinstein 21, Associate Professor of Law at the Benjamin N. Cardozo School of Law, “Blockchain Neutrality”, Georgia Law Review, 55 Ga. L. Rev. 499, Winter 21, Lexis

Blockchain technology does present certain non-antitrust-specific challenges to the legal system that antitrust enforcers and plaintiffs may have to contend with. Blockchain users sometimes protect their identities using pseudonyms, which may make identifying them for purposes of legal sanctions difficult. So far, this issue is more theoretical than practical, as researchers have demonstrated that most blockchain users' identities can be uncovered, 174 and prosecutors have successfully linked individual defendants to blockchain transactions. A high-profile example of law enforcement's ability to pierce blockchain pseudonymity took place in the trial of Ross Ulbricht, who was accused of controlling Silk Road, an online bazaar offering drugs and various illegal services. 175 Prosecutors produced evidence of transactions between bitcoin addresses in Silk Road's digital wallet and Ross Ulbricht's digital wallet, which the FBI found on his seized laptop. 176 Ulbricht was convicted and sentenced to life in prison for operating Silk Road. 177 Further, in what appears to be among the earliest antitrust cases filed in the blockchain space, a plaintiff was able to identify the defendants, who are individuals and business entities. 178 Undoubtedly, blockchain designers will continue to strive toward [\*542] true anonymity for users, but to date this threat appears overblown. 179

## FTC ADV

## OFF

### T Scope Exemptions---2AC

#### Blockchain is exempted---antitrust is not applicable

Dr. Thibault Schrepel 21, PhD in Antitrust Law from Université Paris-Saclay, LLM in International Law and Legal Studies from the Brooklyn Law School, Associate Professor of Law at VU Amsterdam University, Faculty Affiliate and Creator and Director of the Computational Antitrust Project at the Stanford University CodeX Center, Blockchain + Antitrust: The Decentralization Formula, p. 107-108

4 CHAPTER SUMMARY AND BEYOND

I have explained that legal fictions achieve specific objectives by granting rights to subjects and entities. Their creation is a strenuous exercise, and for this reason courts and legislatures are reluctant to design new ones. Antitrust law, for instance, has been based on the same legal fiction as was theorized the 1930s. Ronald Coase’s early work defines the “firm” as a zone in which vertical control is exercised to reduce transaction costs.

Over the last several decades, the theory of the firm as developed by Coase has become a crucial part of antitrust analysis. It is used to define entities to which antitrust laws apply and to characterize and assess anticompetitive practices. The creation of an “inside” and “outside” the firm thus guides both collusion and monopolization cases.

But one cannot transpose the theory of the firm to blockchain layer 1, as it does not feature the same vertical control. The absence of vertical control averts antitrust law, meaning that most of the behavior within that layer cannot be sanctioned. This is problematic for blockchain communities, as applying antitrust could benefit them by eliminating illegal practices. It is thus necessary to create a new legal fiction around that layer - Chapter 7 makes a proposal along those lines.

#### ‘Expanding the scope’ increases the general range to which antitrust applies. Their distinction is totally arbitrary.

Christopher L. Sagers 21, James A. Thomas Distinguished Professor, Cleveland State University. Law & Faculty Director, Cleveland-Marshall Solo Practice Incubator, "Sagers Email," JDi Debate, December 2021, https://jdidebate.blogspot.com/. brackets inserted for readability.

Jordan Di <jordandi505@gmail.com>

Fri, Dec 3, 11:17 AM

to C.SAGERS

Hi Jordan!

It's very nice hearing from you, and I'm sorry I'm just getting back to you. Your question was stimulating for me to think about, and I'm glad you've had a chance to review and think about that old book I edited.

So, I wound up writing a really long answer that I am afraid will be counter-productive. It seems very possible that you are asking a much simpler question than I thought, and I just misunderstood it. I'm sorry if that's the case, but the following is what I've got to share.

It turns out I've heard about this competition and its reliance on that book, but only because another participant also asked me for clarification. I wasn't involved in setting up the competition or designing the resolution, and questions from participants were the first that I heard anything about it. I also should say that I've never participated in debate and don't know anything about it, so I don't know how useful the following feedback will be.

But I will confess that I don't think the resolution was a very good idea, at least not as it is written.

A. What I Really Think

To me, the problem is that this idea of the "scope" of antitrust has no established legal meaning and very little practical significance. It isn't used in actual practice and it would have no real, legal significance in any actual antitrust case. It was a convenient shorthand that I came up with for organizing the materials in that book, and it also had one theoretical value to me, but that's it. Most antitrust lawyers I've worked with understand it what I meant by it, but it doesn't have any precise meaning or doctrinal significance. I don't think the term was even really used before that book. I almost literally made it up.

So, it sounds like participants in this competition are getting hung up on whether particular exclusions from antitrust liability are issues of "scope" or issues of something else, but I don't believe there is any good reason to worry about it. It almost literally doesn't matter, except maybe in the one theoretical sense that I mentioned. (I'll say something about that in a second.) For example, you mentioned the "investment" exception from the Clayton Act, and you ask whether it should be thought of as a "limit" on the "scope" of antitrust. But I find myself asking . . . so what? What difference would it make if that is a matter of "scope" or it is something else?

Moreover, what even is a "scope" issue? If antitrust is held not to apply in a given case, is it because that conduct was beyond the "scope" of antitrust, or was it because, even though antitrust applied to the challenged conduct, the conduct just wasn't illegal? For example, say that a manufacturer enters into an exclusive distribution agreement for 6 months with a distributor, prohibiting the distributor from carrying the products of a competitor. Contracts like that are so plainly not illegal--because it is for such a short period of time--that some lawyers say they are "per se legal." So, are 6-month exclusive distribution contracts outside the scope of antitrust, or are they subject to antitrust but legal? We could ask the same question about investment purchases under the Clayton Act. They are automatically legal so far as [Section 7] s. 7 is concerned. But does antitrust not apply at all, or does antitrust apply and just hold those purchases legal?

(I can answer these questions for myself, because I have a working definition of my own of what "scope" means. In my mind, the manufacturer and its sales are subject to antitrust, because it is exchanging a thing of value for money, but not all of its conduct is illegal. Likewise, I think of purchases of stock as always being subject to the Clayton Act, but sometimes legal under it. But my working definition in itself has no legal or policy significance, really.)

Like I said, I did have one theoretical purpose for thinking about antitrust "scope" as one, unified doctrine, and encouraging other lawyers to think of all the various doctrines that govern antitrust applicability as one doctrine, that should be made theoretically coherent. But the purpose I had in mind was different than what participants in the competition seem to be thinking about.

I thought that thinking of a "scope" of antitrust could force judges and lawyers to think more coherently or holistically about the several different doctrines that can be used in particular cases to exclude conduct from antitrust applicability. It would make them think about the fact that the different doctrines often clash with one another theoretically--they generate different results on similar facts for no good reason. As one example, the McCarran-Ferguson Act mostly exempts insurance from federal antitrust so long as a given insurance company's conduct is subject to some state legal requirements in a given case. Courts typically don't require active state oversight of the company in order for MFA immunity to apply. The question is just whether there is some regulation. But in non-insurance cases, the mere fact that a defendant is subject to some state law is definitely not enough to exempt it from antitrust. Usually, in those cases, the so-called "state action immunity" requires that a state statute explicitly authorizes the challenged conduct and​ a state actor actively oversees it. So very similar cases could come out with opposite results for no better reason than that one case involves insurance and the other does not.

But a problem, as you might see from this example, is that thinking through the differences in different scope doctrines gets extremely​ complex. Just that one example requires you both to really understand the McCarran-Ferguson Act and its caselaw and​ the law of state action immunity, and​ have a reasonable understanding of substantive antitrust in general, before you can even reasonably think about whether and how the doctrines should be revised for greater coherence. Because I think most practicing antitrust lawyers would find that a challenge, I can't imagine how non-lawyer undergraduate debate competitors are supposed to do it.

OKAY, so, all of that said, I would like to add one other sense in which it does actually kind of matter in real cases whether a legal rule goes to the applicability of antitrust or merely goes to the legality of the underlying conduct. As I'm sure you know, lawsuits can be dismissed before they go to trial. If a defendant moves to dismiss and persuades a court that antitrust doesn't even apply to the defendant's conduct, then the case can be dismissed at a very early stage in the litigation. If the court believes that antitrust applies to the defendant's conduct, but there is some substantial reason to believe that the conduct doesn't violate antitrust, then getting pre-trial dismissal will probably take longer and be more difficult. Real-world parties care about this kind of thing a lot​, because getting early dismissal is much cheaper for defendants and leaves plaintiffs with much less hope of securing any sort of settlement. But I can't believe that procedural niceties like that are actually of interest in your competition.

So, with my apologies, I think it would have been a lot better if the organizers of the competition wrote the resolution in a way that is much more specific. It should have asked something like, "should federal antitrust prohibit XYZ conduct by online commerce platforms" or something like that. Just asking whether the "scope" should change is hardly asking any question at all, because the word has so little clear meaning or significance.

B. What Is Probably More Useful

All of that was probably not hugely useful to you, since it's my background navel-gazing.

I hope the following might be more practical advice, though again I was never involved in debate, so you'll have to be the judge of whether it's useful or not.

If I were to talk about the resolution you quoted, I would begin by saying what I mean by the "scope" of antitrust. To me, it means the general range of conduct to which the Sherman, Clayton, and FTC Acts apply, which roughly means exchanges of things of value within the domestic United States and imports. That is very broad, but then I would point out that that scope is and always has been riddled with specific exceptions. And then I would say that I do (or do not) favor reining in those exceptions. That is, I wouldn't argue about "scope" in some abstract sense, and instead would say that we should read all of the existing exemptions as narrowly as possible. You wouldn't necessarily have to argue about individual exemptions, although discussing particular examples might be helpful. Anyway, to argue that I favor narrowing the existing exemptions, I would point out that when antitrust applies to particular conduct, it effectively requires that conduct to be regulated by the ordinary market forces of capitalism. It requires leaving that conduct to the whims of supply and demand, without interference from private agreements, exclusionary conduct, or anticompetitive consolidations. I would argue that that is generally a good thing--markets do a pretty good job of allocating resources, and ordinarily work better than either government or private intrusions. If you were going to make that kind of argument, you would say that we should generally narrow and limit all those dozens of statutory and caselaw rules that say that antitrust should not apply to particular cases. We should make it really hard, in all cases, for defendants to argue that their conduct should be exempt from antitrust. (Btw, that is nominally what the courts say. Though they now honor it only in the breach, the courts still constantly repeat rote platitudes that markets are great, Congress wants markets to regulate conduct without the interference of private parties, and for those reasons that all exemptions and immunities are narrowly applied.)

If I were required to argue that I disfavor it, I would say that in fact the forces of supply and demand are often ill-suited to regulate particular kinds of conduct. I don't personally believe that, but it's an easy enough argument to make. You say that markets are clumsy, that they have negative and unanticipated consequences in all kinds of ways, and so we have to apply antitrust carefully. You would argue that we should make it relatively easy for a defendant to say that in a particular case it should enjoy protection under some statutory exemption or the statute action immunity or the labor exemption or whatever, because imposing antitrust and the full force of unbridled price competition often harms other values that we care about.

================

So, I have a bad feeling that this is too long, too beside the point, and to confusing, and I'm afraid I may have done more harm than good. I hope that some of it was helpful to you, and if I can be of any more help, I will try.

Best of luck to you, and thanks for reaching out.

Chris

### K---2AC

#### Pluralism is preferable to ideological dogmatism.

Clive L. Spash & Adrien O.T. Guisan 21, Chair, Public Policy and Governance, Vienna University of Economics and Business; PhD, Vienna University of Economics and Business, "A Future Social-Ecological Economics," Real World Economics Review, No. 6, 09/07/2021, pg. 203-204.

Economies are the socially structured institutional process involving the interaction of humans with the natural world. Social reproduction is achieved only within the bounds of the given structure and mechanisms of biophysical reality. The form and scale of economic processes depends upon a set of spatially and temporally contextual social institutions. That is economics concerns the form and function of social provisioning process which can take various forms and are far from limited to price-making market or capitalist institutions. Starting from processes of social provisioning, economics becomes the study of plural historical, actual and potential economies with their underlying institutional arrangements and biophysical basis rather than a singular abstract idealised “economy”. This broadens analysis not only to what institutions, norms and values shape the economic process and agents’ behaviours, but also to what are socially desirable and ecologically sustainable systems of social provisioning. Economics is neither value free nor ethically neutral but its stance on both should be made explicit. It must also be realist about how economies are reproduced via social and ecological mechanisms. That means linking to both power relations and ethical and just means of provisioning, but also material and energy throughput that respects others (human and non-human). The aspirations of economists to provide for the well-being of humanity, if taken seriously, mean a revolutionary change in economics is long overdue.

The philosophical basis of the approach is argued to be closest to critical realism. Core aspects of correspondence here are depth ontology raising the profile of both structure and mechanisms as opposed to a sole focus on empirical facts. Structure as a metaphysical reality with multiple causal mechanisms operating in open systems then poses challenges for how economics conducts itself as a science. While following critical realism in its epistemic pluralism there is also a recognised need for structuring interdisciplinary research and uniting diverse fields via common ontological understanding leading to a structured methodological pluralism (not the eclecticism of constructionism and conventionalism). Potential methods for research are selected on the basis of the qualities of an object of study and research question and as such remain open and diverse (quantitative/qualitative, intensive/extensive, see Sayer, 2010). Economic science is then neither deductivist, empiricist nor reducible to a set of idealised methods.

#### Economic tools are necessary for institutional design. Market failure analysis is valuable.

Suresh Naidu et al 19, teaches economics, political economy and development at Columbia University, “Economics After Neoliberalism,” Boston Review, 2/27/19, https://bostonreview.net/forum/suresh-naidu-dani-rodrik-gabriel-zucman-economics-after-neoliberalism/

We live in an age of astonishing inequality. Income and wealth disparities in the United States have risen to heights not seen since the Gilded Age and are among the highest in the developed world. Median wages for U.S. workers have stagnated for nearly fifty years. Fewer and fewer younger Americans can expect to do better than their parents. Racial disparities in wealth and well-being remain stubbornly persistent. In 2017, life expectancy in the United States declined for the third year in a row, and the allocation of healthcare looks both inefficient and unfair. Advances in automation and digitization threaten even greater labor market disruptions in the years ahead. Climate change–fueled disasters increasingly disrupt everyday life.

We believe that these are solvable problems—at the very least, that we can make serious headway on them. But addressing them will require a broad public discussion of new policy ideas. Social scientists have a responsibility to be part of this discussion. And economists have an indispensable role to play. Indeed, they have already started to play it. Economics is in a state of creative ferment that is often invisible to outsiders. While the sociology of the profession—career incentives, norms, socialization patterns—often militates against engagement with the policy world, a sense of public responsibility is bringing people into the fray.

The tools of economics are critical to developing a policy framework for what we call “inclusive prosperity.” While prosperity is the traditional concern of economists, the modifier “inclusive” demands both that we consider the whole distribution of outcomes, not simply the average (the “middle class”), and that we consider human prosperity broadly, including nonpecuniary sources of well-being, from health to climate change to political rights. To improve the quality of public discussion around inclusive prosperity, we have organized a group of economists—the Economics for Inclusive Prosperity (EfIP) network—to make policy recommendations across a range of topics, including labor markets, international trade, and finance. The purpose of this nascent effort is not simply to offer a list of prescriptions for different policy domains, but to provide an overall vision for economic policy that stands as an alternative to the market fundamentalism that is often—and wrongly— identified with economics.

We personally saw the power of this identification in early 2018, when the three of us attended a workshop on “new thinking beyond neoliberalism.” The participants—historians, political scientists, sociologists, legal scholars, and economists—agreed that the prevailing neoliberal policy framework had failed society, resulting in monumental and growing inequality. All of us were horrified by the illiberal, nativist turn in our politics, fueled in part by these chasms. There was consensus around the need for a genuine alternative—a set of policies that were both effective and inclusive, responding to legitimate grievances without sowing deeper societal divisions.

Although we fully embraced these aims, we found ourselves on the defensive. In the eyes of many, the turn toward neoliberalism is closely associated with economic ideas. Leading economists such as Friedrich Hayek and Milton Friedman were among the founders of the Mont Pelerin Society, the influential group of intellectuals whose advocacy of markets and hostility to government intervention proved highly effective in reshaping the policy landscape after 1980. Deregulation, financialization, dismantling of the welfare state, deinstitutionalization of labor markets, reduction in corporate and progressive taxation, and the pursuit of hyper-globalization—the culprits behind rising inequalities—all seem to be rooted in conventional economic doctrines. The discipline’s focus on markets and incentives, methodological individualism, and mathematical formalism stand in the way of meaningful, large-scale reform. In short, neoliberalism appears to be just another name for economics.

Consequently, many people view the discipline with outright hostility. They believe the teaching and practice of economics has to be fundamentally reformed for the discipline to become a constructive force. There are, indeed, legitimate reasons for discontent with the way economics is often practiced and taught. Conservative foundations and think tanks have monopolized the banner of economics in policy circles, pushing the view that there is a steep efficiency–equality trade-off and assigning priority to economic growth. Students often leave their introductory economics courses thinking that “markets always work.” Conservatives tend to deploy “economics” as a justification for preferred policies, while liberals are seen as insensitive to the requirements for prosperity.

Our response is fundamentally different. Many of the dominant policy ideas of the last few decades are supported neither by sound economics nor by good evidence. Neoliberalism—or market fundamentalism, market fetishism, etc.—is not the consistent application of modern economics, but its primitive, simplistic perversion. And contemporary economics is rife with new ideas for creating a more inclusive society. But it is up to economists to convince our audience about the merits of these claims, which is why we have embarked on this project. Below, we have outlined a set of policy briefs (full versions are available here) that we hope will stimulate and accelerate economists’ engagement with creative ideas for inclusive prosperity.

Before we get to policy proposals, however, we must first address the issue of how to persuade non-economists that economics is part of the solution. To be sure, many economists’ habits, especially when it comes to how they engage in public debates, are to blame for the misunderstanding of what economics is and what economists do.

Economists study markets (among other things), and we naturally feel a certain pride in explaining the way markets operate. When markets work well, they do a good job of aggregating information and allocating scarce resources. The principle of comparative advantage, which lies behind the case for free trade, is one of the profession’s crown jewels—both because it explains important aspects of the international economy and because it is, on its face, so counterintuitive. Similarly, economists believe in the power of incentives; we have evidence that people respond to incentives, and we have seen too many well-meaning programs fail because they did not pay adequate attention to the creative ways in which people behave to realize their own goals.

Yet too many economists believe their quantitative tools and theoretical lenses are the only ones that count as “scientific,” leading them to dismiss disciplines that rely more on qualitative analysis and verbal theorizing. Many economists feel they need to take the side of markets because no-one else will and because doing otherwise might “provide ammunition to barbarians” (aka, self-interested pressure groups and rent-seekers). And even when some economists recognize market failures, they worry government action will make things worse and sweep many of the discipline’s caveats under the rug. Economists thus get labeled as cheerleaders for free markets and hyper-globalization.

Economists also often get overly enamored with models that focus on a narrow set of issues and identify first-best solutions in the circumscribed domain, at the expense of potential complications and adverse implications elsewhere. A growth economist, for example, will analyze policies that enhance technology and innovation without worrying about labor market consequences. A trade economist will recommend reducing tariffs and assume that devising compensatory mechanisms for people who lose their jobs is somebody else’s responsibility. And a finance economist will design regulations to make banks safe, without considering how these may interact with macro-economic cycles. Many policy failures—the excesses of deregulation, hyper-globalization, tax cuts, fiscal austerity—reflect such first-best reasoning. To be useful, economists have to evaluate policies in the totality of the context in which they will be implemented and consider the robustness of policies to many possible institutional configurations and political contingencies.

But these bad habits aside, contemporary economics is hardly a paean to markets and selfishness. The typical course in microeconomics spends more time on market failures and how to fix them than on the magic of competitive markets. The typical macroeconomics course focuses on how governments can solve problems of unemployment, inflation, and instability rather than on the “classical” model where the economy is self-adjusting. The typical finance course revolves around financial crises, excessive risk-taking, and other malfunctions of financial systems. In fact, the “competitive equilibrium model” in which free markets are maximally efficient—even if they are not good for fair distribution—is the dominant framework only in introductory economics courses. Thoughtful economists (of which there are many) quickly move away from it.

Economics is still somewhat insular within the social sciences because of its methodological individualism, model-based abstraction, and mathematical and statistical formalism. But in recent decades, economists have reached out to other disciplines, incorporating many of their insights. Economic history is experiencing a revival, behavioral economics has put homo economicus on the defensive, and the study of culture has become mainstream. At the center of the discipline, distributional considerations are making a comeback. And economists have been playing an important role in studying the growing concentration of wealth, the costs of climate change, the concentration of important markets, the stagnation of income for the working class, and the changing patterns in social mobility.

Economists still have a strong bias toward market-based policy solutions, and their policy prescriptions tend to be narrowly focused on addressing precise market failures. For example, to address global warming, economists are likely to support putting a steep price on carbon. But the science of economics has never produced predetermined policy conclusions. In fact, all predictions and conclusions in economics are contingent: if x and y conditions hold, then z outcomes follow. The answer to almost any question in economics is “it depends,” followed by an exegesis on what it depends on and why. Back in 1975, economist Carlos F. Diaz-Alejandro wrote, “by now any bright graduate student, by choosing his assumptions . . . carefully, can produce a consistent model yielding just about any policy recommendation he favored at the start.” Economics has become even richer in the intervening four decades. We might say, only slightly facetiously, that today the graduate student need not even be that bright!

Moreover, economics research has become significantly more applied and empirical since the 1990s. The share of academic publications that use data and carry out empirical analysis has increased substantially in all subfields and currently exceeds 60 percent in labor economics, development economics, international economics, public finance, and macroeconomics. This is important because systematic empirical evidence is a disciplining device against ideological policy prescriptions. The recent empirical bent makes it more difficult to idolize markets because it makes it more difficult to ignore inconvenient facts. Recent empirical findings, for example, show that international trade produces large adverse effects on some local communities; minimum wages do not reduce employment; and financial liberalization produces crises rather than faster economic growth.

Economics does have its universals, of course, such as market-based incentives, clear property rights, contract enforcement, macroeconomic stability, and prudential regulation. These higher-order principles are generally presumed to be conducive to superior economic performance. But these principles are compatible with an almost infinite variety of institutional arrangements with each arrangement producing a different distributional outcome and a different contribution to overall prosperity. The recipe thus calls for comparative institutional analysis of economic performance—not glib “markets work” slogans. The abstraction with which economists perceive complex bundles of institutions also gives practitioners tools to help design large-scale alternatives—from precision tweaks to the tax code to full-blown visions of post-capitalist societies.

Consider even the simplest economic setting of a perfectly competitive market economy. When an economist draws a supply-and-demand diagram on the black board, she may not list all the institutional prerequisites that lie behind the two curves. Firms have property rights over their assets and can enforce their contracts with suppliers. They have access to credit, can rely on public infrastructure such as transportation and power, and are protected from thieves and bandits. Their employees accept the terms of employment and show up at work each day. Consumers have all the information they need to make reasonable choices. They are reasonably confident that firms do not cheat them. There is a stable unit of value and means of exchange for buying and selling goods.

Clearly markets rely on a wide range of institutions; they are “embedded” in institutions, as Karl Polanyi would say. But how should those institutions be designed? Take property rights as an example. The Coase theorem suggests it does not matter for efficiency how property rights are allocated as long as transaction costs are zero. But the caveat does a lot of work here: transaction costs matter greatly. So, we must make choices. Should a job belong to a company, a worker, or a combination? Perhaps the company itself should be owned by a third party—a local government entity, say—and simply ensure incentive compatibility for managers and workers. That might sound crazy to most Americans, but China has eked unprecedented rates of economic growth out of such a property-rights regime. Perhaps employers should have property rights (for a fixed period) only over new assets they create, with existing assets distributed among other claimants. That too sounds crazy, unless we realize that is exactly what the patent system does, giving innovators temporary ownership over new “intellectual property.” Perhaps the government, on behalf of the general public, should retain part ownership of new technologies since so much of innovation relies on public infrastructure (public R&D and subsidies, higher education, the legal regime, etc.). The choices that need to be made must consider distributional concerns and depend both on our ultimate objectives and the potential fit with local context.

As we grapple with new realities created by digitization, demographics, and their impacts on labor markets, such questions about the allocation of property rights among different claimants become crucial. Economics does not necessarily have definite answers here. Nor does it provide the appropriate distributional weights (how to weigh the returns to workers, employers, and the government, and what procedural and deontological constraints should be respected). But it does supply the tools needed to lay out the trade-offs, thus contributing to a more informed democratic debate.

#### Reject a totalizing conception of competition.

Sanjukta Paul 22, Assistant Professor, Law, Wayne State University, "A Democratic Vision for Antitrust," Dissent, Vol. 69, No. 1, Winter 2022, Project Muse.

Last spring, prominent Big Tech critic Lina Khan became the new chair of the Federal Trade Commission (FTC)—;an appointment widely seen as a coup for progressive reform. In her confirmation hearing, she characterized the agency's overarching goal in terms of "fair competition." This choice of emphasis is significant for understanding the antitrust reform project of which Khan is a leader. At its core, the project is a policy paradigm aimed at creating fair markets—;markets characterized by socially beneficial competition, fair prices, and decent wages.

While both proponents and detractors of this reform project sometimes conflate competition policy with the goal of maximizing economic competition for its own sake, in reality, competition law has always assessed economic rivalry and coordination in relation to broader social ends. For a long time, that assessment has been obscured—;not to mention insufficiently tethered to the original goals of federal antitrust law. The reform project aims to reorient the use of antitrust in expressly egalitarian and democratic directions.

For decades, competition law and policy have been dominated by the neoclassical law and economics paradigm, which claims that visible market design and coordination interfere with competitive dynamics that would otherwise lead to an efficient allocation of social resources, and thus to the maximization of social welfare. While recent shifts in mainstream economic thinking have led to more discussion of imperfect competition, particularly in labor markets, the "market failures" and power imbalances that justify interventions are on this view still essentially special cases. Moreover, this idealized picture of markets still obscures certain forms of background coordination—;especially the often hierarchical and extractive coordination that happens within business firms—;while treating other coordination mechanisms as exceptional, with the potential to distort ideal market outcomes.

Conventionally organized business firms are just one of the many means we have to coordinate economic activity; others include labor [End Page 57] unions, producers' cooperatives, and public price boards, to take just a few examples. Because competition law makes ground-up decisions about many forms of economic coordination, and influences the regulatory stance toward others, antitrust reforms hold the potential to affect a broad set of economic policies.

We should not act as if putatively neutral, technocratic appeals to idealized competition can replace moral and political choices about economic life. Nor, however, should we treat actual competition as inherently tainted by its association with neoclassical theory. Channeled appropriately, competition is healthy rivalry: it encourages technological and operational innovations that can have broad social benefits, and it represents an important check on arbitrary bureaucratic power by preserving outside options for workers, consumers, and businesses. Channeled inappropriately, competition can lead to the destructive undermining of rivals (in contrast to constructive outperformance), overwhelm socially valuable independent enterprises, and destroy existing market settlements characterized by fair prices and decent wages. There is no universal logic of competition for policymakers to apply, either dark or redemptive: it is legal, social, and political choices (almost) all the way down.

#### You cannot challenge absent the AFF.

Paul Mason 16, Visiting Professor at the University of Wolverhampton, BA in Politics from the University of Sheffield, Postgraduate Degree from the Second Viennese School at the University of Sheffield, PostCapitalism: A Guide to Our Future, Kindle Edition, p. 6-17

What started in 2008 as an economic crisis morphed into a social crisis, leading to mass unrest; and now, as revolutions turn into civil wars, creating military tension between nuclear superpowers, it has become a crisis of the global order.

There are, on the face of it, only two ways it can end. In the first scenario, the global elite clings on, imposing the cost of crisis on to workers, pensioners and the poor over the next ten or twenty years. The global order – as enforced by the IMF, World Bank and World Trade Organisation – survives, but in a weakened form. The cost of saving globalization is borne by the ordinary people of the developed world. But growth stagnates.

In the second scenario, the consensus breaks. Parties of the hard right and left come to power as ordinary people refuse to pay the price of austerity. Instead, states then try to impose the costs of the crisis on each other. Globalization falls apart, the global institutions become powerless and in the process the conflicts that have burned these past twenty years – drug wars, post-Soviet nationalism, jihadism, uncontrolled migration and resistance to it – light a fire at the centre of the system. In this scenario, lip-service to international law evaporates; torture, censorship, arbitrary detention and mass surveillance become the regular tools of statecraft. This is a variant of what happened in the 1930s and there is no guarantee it cannot happen again.

In both scenarios, the serious impacts of climate change, demographic ageing and population growth kick in around the year 2050. If we can’t create a sustainable global order and restore economic dynamism, the decades after 2050 will be chaos.

So I want to propose an alternative: first, we save globalization by ditching neoliberalism; then we save the planet – and rescue ourselves from turmoil and inequality – by moving beyond capitalism itself.

Ditching neoliberalism is the easy part. There’s a growing consensus among protest movements, radical economists and radical political parties in Europe as protest movements, radical economists and radical political parties in Europe as to how you do it: suppress high finance, reverse austerity, invest in green energy and promote high-waged work.

But then what?

As the Greek experience demonstrates, any government that defies austerity will instantly clash with the global institutions that protect the 1 per cent. After the radical left party Syriza won the election in January 2015, the European Central Bank, whose job was to promote the stability of Greek banks, pulled the plug on those banks, triggering a €20 billion run on deposits. That forced the left-wing government to choose between bankruptcy and submission. You will find no minutes, no voting records, no explanation for what the ECB did. It was left to the right-wing German newspaper Stern to explain: they had ‘smashed’ Greece.3 It was done, symbolically, to reinforce the central message of neoliberalism that there is no alternative; that all routes away from capitalism end in the kind of disaster that befell the Soviet Union; and that a revolt against capitalism is a revolt against a natural and timeless order.

The current crisis not only spells the end of the neoliberal model, it is a symptom of the longer-term mismatch between market systems and an economy based on information. The aim of this book is to explain why replacing capitalism is no longer a utopian dream, how the basic forms of a postcapitalist economy can be found within the current system, and how they could be expanded rapidly.

Neoliberalism is the doctrine of uncontrolled markets: it says that the best route to prosperity is individuals pursuing their own self-interest, and the market is the only way to express that self-interest. It says the state should be small (except for its riot squad and secret police); that financial speculation is good; that inequality is good; that the natural state of humankind is to be a bunch of ruthless individuals, competing with each other.

Its prestige rests on tangible achievements: in the past twenty-five years, neoliberalism has triggered the biggest surge in development the world has ever seen, and it unleashed an exponential improvement in core information technologies. But in the process, it has revived inequality to a state close to that of 100 years ago and has now triggered a survival-level event.

The civil war in Ukraine, which brought Russian special forces to the banks of the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in Europe; the paralysis of NATO as its populations withhold consent for military intervention – these are not problems separate from the economic crisis. They are signs that the neoliberal order has failed.

Over the past two decades, millions of people have resisted neoliberalism but in general the resistance failed. Beyond all the tactical mistakes, and the repression, the reason is simple: free-market capitalism is a clear and powerful idea, while the forces opposing it looked like they were defending something old, worse and incoherent.

Among the 1 per cent, neoliberalism has the power of a religion: the more you practise it, the better you feel – and the richer you become. Even among the poor, once the system was in full swing, to act in any other way but according to neoliberal strictures became irrational: you borrow, you duck and dive around the edges of the tax system, you stick to the pointless rules imposed at work.

And for decades the opponents of capitalism have revelled in their own incoherence. From the anti-globalization movement of the 1990s through to Occupy and beyond, the movement for social justice has rejected the idea of a coherent programme in favour of ‘One No, Many Yes-es’. The incoherence is logical, if you think the only alternative is what the twentieth century left called ‘socialism’. Why fight for a big change if it’s only a regression – towards state control and economic nationalism, to economies that work only if everyone behaves the same way or submits to a brutal hierarchy? In turn, the absence of a clear alternative explains why most protest movements never win: in their hearts they don’t want to. There’s even a term for it in the protest movement: ‘refusal to win’.4

To replace neoliberalism we need something just as powerful and effective; not just a bright idea about how the world could work but a new, holistic model that can run itself and tangibly deliver a better outcome. It has to be based on micro-mechanisms, not diktats or policies; it has to work spontaneously. In this book, I make the case that there is a clear alternative, that it can be global, and that it can deliver a future substantially better than the one capitalism will be offering by the mid-twenty-first century.

It’s called postcapitalism.

Capitalism is more than just an economic structure or a set of laws and institutions. It is the whole system – social, economic, demographic, cultural, ideological – needed to make a developed society function through markets and private ownership. That includes companies, markets and states. But it also includes criminal gangs, secret power networks, miracle preachers in a Lagos slum, rogue analysts on Wall Street. Capitalism is the Primark factory that collapsed in Bangladesh and it is the rioting teenage girls at the opening of the Primark store in London, overexcited at the prospect of bargain clothes.

By studying capitalism as a whole system, we can identify a number of its fundamental features. Capitalism is an organism: it has a lifecycle – a beginning, a middle and an end. It is a complex system, operating beyond the control of individuals, governments and even superpowers. It creates outcomes that are often contrary to people’s intentions, even when they are acting rationally. Capitalism is also a learning organism: it adapts constantly, and not just in small increments. At major turning points, it morphs and mutates in response to danger, creating patterns and structures barely recognizable to the generation that came before. And its most basic survival instinct is to drive technological change. If we consider not just info-tech but food production, birth control or global health, the past twenty-five years have probably seen the greatest upsurge in human capability ever. But the technologies we’ve created are not compatible with capitalism – not in its present form and maybe not in any form. Once capitalism can no longer adapt to technological change, postcapitalism becomes necessary. When behaviours and organizations adapted to exploiting technological change appear spontaneously, postcapitalism becomes possible.

That, in short, is the argument of this book: that capitalism is a complex, adaptive system which has reached the limits of its capacity to adapt.

This, of course, stands miles apart from mainstream economics. In the boom years, economists started to believe the system that had emerged after 1989 was permanent – the perfect expression of human rationality, with all its problems solvable by politicians and central bankers tweaking control dials marked ‘fiscal and monetary policy’.

When they considered the possibility that the new technology and the old forms of society were mismatched, economists assumed society would simply remould itself around technology. Their optimism was justified because such adaptations have happened in the past. But today the adaptation process is adaptations have happened in the past. But today the adaptation process is stalled.

Information is different from every previous technology. As I will show, its spontaneous tendency is to dissolve markets, destroy ownership and break down the relationship between work and wages. And that is the deep background to the crisis we are living through.

If I am right we have to admit that for most of the past century the left has misunderstood what the end of capitalism would look like. The old left’s aim was the forced destruction of market mechanisms. The force would be applied by the working class, either at the ballot box or on the barricades. The lever would be the state. The opportunity would come through frequent episodes of economic collapse. Instead, over the past twenty-five years, it is the left’s project that has collapsed. The market destroyed the plan; individualism replaced collectivism and solidarity; the massively expanded workforce of the world looks like a ‘proletariat’, but no longer thinks or behaves purely as one.

If you lived through all this, and hated capitalism, it was traumatic. But in the process, technology has created a new route out, which the remnants of the old left – and all other forces influenced by it – have either to embrace or die.

Capitalism, it turns out, will not be abolished by forced-march techniques. It will be abolished by creating something more dynamic that exists, at first, almost unseen within the old system, but which breaks through, reshaping the economy around new values, behaviours and norms. As with feudalism 500 years ago, capitalism’s demise will be accelerated by external shocks and shaped by the emergence of a new kind of human being. And it has started.

Postcapitalism is possible because of three impacts of the new technology in the past twenty-five years.

First, information technology has reduced the need for work, blurred the edges between work and free time and loosened the relationship between work and wages.

Second, information goods are corroding the market’s ability to form prices correctly. That is because markets are based on scarcity while information is abundant. The system’s defence mechanism is to form monopolies on a scale not seen in the past 200 years – yet these cannot last.

Third, we’re seeing the spontaneous rise of collaborative production: goods, services and organizations are appearing that no longer respond to the dictates of services and organizations are appearing that no longer respond to the dictates of the market and the managerial hierarchy. The biggest information product in the world – Wikipedia – is made by 27,000 volunteers, for free, abolishing the encyclopaedia business and depriving the advertising industry of an estimated $3 billion a year in revenue.

Almost unnoticed, in the niches and hollows of the market system, whole swathes of economic life are beginning to move to a different rhythm. Parallel currencies, time banks, cooperatives and self-managed spaces have proliferated, barely noticed by the economics profession, and often as a direct result of the shattering of old structures after the 2008 crisis.

New forms of ownership, new forms of lending, new legal contracts: a whole business subculture has emerged over the past ten years, which the media has dubbed the ‘sharing economy’. Buzzterms such as the ‘commons’ and ‘peer- production’ are thrown around, but few have bothered to ask what this means for capitalism itself.

I believe it offers an escape route – but only if these micro-level projects are nurtured, promoted and protected by a massive change in what governments do. This must in turn be driven by a change in our thinking about technology, ownership and work itself. When we create the elements of the new system we should be able to say to ourselves and others: this is no longer my survival mechanism, my bolt-hole from the neoliberal world, this is a new way of living in the process of formation.

In the old socialist project, the state takes over the market, runs it in favour of the poor instead of the rich, then moves key areas of production out of the market and into a planned economy. The one time it was tried, in Russia after 1917, it didn’t work. Whether it could have worked is a good question, but a dead one.

Today the terrain of capitalism has changed: it is global, fragmentary, geared to small-scale choices, temporary work and multiple skill-sets. Consumption has become a form of self-expression – and millions of people have a stake in the finance system that they did not have before.

With the new terrain, the old path is lost. But a different path has opened up. Collaborative production, using network technology to produce goods and services that work only when they are free, or shared, defines the route beyond the market system. It will need the state to create the framework, and the postcapitalist sector might coexist with the market sector for decades. But it is postcapitalist sector might coexist with the market sector for decades. But it is happening.

Networks restore ‘granularity’ to the postcapitalist project; that is, they can be the basis of a non-market system that replicates itself, which does not need to be created afresh every morning on the computer screen of a commissar.

#### Young votes for the perm.

David Schlosberg & John Dryzek 02, Poli Sci @ Northern Arizona; Social and Political Theory @ Australian Nat’l, Political Strategies of American Environmentalism: Inclusion and Beyond” Society and Natural Resources 15 p. 796-798

Dual Strategies: Inclusion and Opposition Environmental activism in an oppositional public sphere, which has grown in large measure as a result of disillusion with the results of inclusion, demonstrates that the life of environmentalism can go on beyond the state. Among political theorists who have contemplated the question of inclusion versus opposition, most conclude that social movements should operate both inside and outside the state. Referring to the exemplary case of the women’s movement, Cohen and Arato believed that ``The dual logic of feminist politics . . . involves a communicative, discursive politics of identity and influence that targets civil and political society and an organized, strategically rational politics of inclusion and reform that is aimed at political and economic institutions’’ (Cohen and Arato 1992, 550). For Cohen and Arato, the justi®cation of the dual strategy is largely the well-being of civil society: Groups or their supporters influential within the state would help build a constitutional, legal, and policy context for the movement outside. Hilary Wainwright (1994) reached the same conclusion from a more instrumental perspective. Action within the state is needed to supply collective decisions with ``binding national and international authority’’ (p. 195), but without the movement outside, such policy action is unlikely (p. 197). Iris Young, arguing against those who pin their hopes on civil society rather than the state, concluded that ``social movements seeking greater justice and well-being should work on both these fronts, and aim to multiply the links between civil society and states’’ (Young 2000, 156). A number of movement activists also advocate a dual strategy. David Brower, the leading American environmentalist of the 20th century, was fond of saying that he was glad someone like Dave Foreman (founder of Earth First!) came along, because it made Brower’s position seem more reasonable. Brower’s own then-radical presence was once praised in identical terms by moderate environmentalist Russell Train. Mark Dowie (telephone conversation with the author, 26 August 1999) argued that such a recognition is becoming more widespread in the U.S. movement: ``I think wise people at both levels, grass roots and national, value the work of the other side and see ways of partnering and working together on some of these issues. . . . I think there is a certain maturity coming now in the movement that has accepted the work of the different styles and different tactics of different people with the same objective.’’ It is easy enough to conclude in the abstract that a dual strategy emphasizing both state and public sphere is desirable for any social movement. As Dryzek (1996a, 119), argued, the ``happiest conceivable outcome may be a clear separation between two environmental movements: one within the state to take advantage of every bit of flexibility in the liberal democratic system, another outside, more democratic and vital.’’ But this is too easy a conclusion to reach; not all situations feature a mix of compatibility and contradiction in the relationship between movement interest and state imperative of the sort that makes a dual strategy compelling. Let us consider the times when a dual strategy may not be appropriate. First and most obviously, a movement will not be able to follow a dual strategy if it confronts a truly exclusive state; oppositional civil society may be the only option. This situation is rare in the United States. While the Reagan administration in its early years tried to expel environmentalists from the state, the effort failed because of the variety of access channels (notably to Congress) that the administration did not control. Second, if a movement’s resources are scarce, it may not have enough to devote adequately to both the long march through the institutions and activism in the public sphere, both of which can be both demanding and frustrating. Third, if a movement’s de®ning interest can be attached to an established or emerging state imperative, then thoroughgoing entry into the state may be a good bargain. So while we endorse an engagement with dual strategies, we argue for a more re¯ective, situational understanding of such engagement. We are not arguing that everything can be accomplished in civil society, nor are we arguing that all movements should adopt a dual strategy.4 We are simply noting that movements with limited resources should examine situations in order to identify where those resources are best spent, on which issues, and at which time. A blanket exhortation to engage in a dual strategy does not fit all situations equally. If some but not all of a movement’s defining interest can be attached to an established or emerging state imperative, while other aspects of that interest challenge an imperative, a dual strategy is clearly desirable.5 The content of these imperatives matters a great deal when it comes to movement strategy and movement prospects. We next argue that both economic and legitimation imperatives can be bent in a direction that allows a closer connection between movement interests and state imperatives than has been seen in the United States since the early 1970s. Interest in pollution control and conservation of material resources can be attached to the economic imperative via the idea of ecological modernization. Interest in public participation and public health can be linked to the legitimation imperative through emerging notions of environmental risks and their consequences. However, we also show why such attachments are currently blocked in the United States in comparison with some Western European countries which helps to explain why the United States is now something of an environmental policy laggard.

#### Our impact outweighs and the ALT fails.

Heidi Hudson 15, Professor of International Relations and Director of the Centre for Africa Studies at the University of the Free State, Bloemfontein, South Africa, “(Re)framing the Relationship between Discourse and Materiality in Feminist Security Studies and Feminist IPE,” pg 413-419, Politics & Gender; Cambridge Vol. 11, Iss. 2, June 2015

Critical Perspectives on Gender and Politics¶ While feminists usually try to ground the meanings that they study, theorizing the mundane or the everyday may very well represent a detour--or even a dead end--if bread-and-butter issues related to the security and economic well-being of ordinary women and men [people] are ignored. What value does feminist theorizing (even if it draws from women's lived experiences) have in war-affected contexts where meeting immediate needs is paramount? At what point does the theorizing of the body under such circumstances become a means to satisfying intellectual fetishes? Theorizing the everyday is messy because it has to contend with the immediate social setting in which popular culture is inseparable from the economic materiality of the conditions of oppression.¶ In response to this dilemma, my aim is to argue for a productive rather than a reductive relationship between Feminist Security Studies (FSS) and Feminist (International) Political Economy (FPE), achieved through a reframed relationship between discursive subjectivity and a structure-centred materiality. I argue for a more systematic feminist analysis that reunites FPE and cultural FSS critiques. This analytical synthesis is based on an understanding of the co-constituted agency of discourse and materiality underpinned by a postcolonial-feminist attention to the politics of space.¶ After the Cold War, security became a catch-all concept for critical variants of IR, but instead of working against disciplinary fragmentation, "security has settled into each new camp in particularistic ways" (Sylvester 2013, 618). For FSS the main concern is to underscore the conceptual necessity of gender to understanding security. Although scholars have also emphasized the theoretical and methodological diversity of FSS, I contend that there is an implicit hierarchy of sorts when it comes to which critical tradition matters more theoretically or epistemologically--with a subtle but distinct privileging of the discursive as evidenced by the influential contributions of, among others, Judith Butler (1993), Karin Fierke (2013a), Lene Hansen (2006), and Laura Shepherd (2008). FSS thus tends to focus on the gendered, discursive construction of forms of violence with less attention paid to materialities of economic insecurity. In contrast, FPE tends to avoid the security frame and its discursive implications and concentrates more on gender as a social relation of inequality and the gendered effects of capitalism or economic globalization.¶ Poststructuralist scholarship in FSS insists that the discursive is not privileged over the material and that objects in the material world and human subjects both take their forms and agencies relationally, as they are embedded within particular locations. Similarly, gendered and embodied security is theorized to be the outcome of relational processes--performed in, by, and through those relations. Theory thus makes practice (Foucault 1972). Yet, thinking about our bodies as cultural constructs, produced as objects in security discourse, has a high level of abstraction. Before we can analyze discourse about bodies, shouldn't we first make the bodies from "other worlds," rooted in everyday struggles of human insecurity, feature in IR? How is attention to contextualized discourses of individuals or groups without considering their basic needs different from what liberal feminists are doing, namely treating those whose security is at stake as abstract, silent, rights-bearing individuals with no culture? Moreover, for all this talk about interactions between language and matter (as if they were equal), "language" remains the star of the show, as evidenced in Karin Fierke's claim that "embodied security is ... fundamentally bound up in the interaction between humans and their material environment, both of which are constituted in and through language" (Fierke 2013b, 16). Theoretically, materiality should gain agency through the fact that it cannot ontologically be separated from discursive forces but in practice discourses treat material practices (bodies) as effects (objects) rather than causes (subjects), and consequently maintain agency (Wilcox 2012). A subtle hierarchy is therefore imposed. Reversing the starting point of the inquiry may succeed in troubling dualistic thinking but does not transcend it. We may have thrown the baby out with the bathwater when we privileged the effects of cultural constructions of gender difference at the expense of the material effects of bodies, economic justice, and security (see Fraser 2013).¶ There are clearly limits to discursive analysis, especially when it comes to connecting physical insecurity and the materiality of insecurity linked to structures. We must therefore look to the so-called "new materialisms" on posthumanist agency (Connolly 2013), material feminisms (Hughes 2013), and Feminist IPE. Feminist IPE as a diverse body of scholarship studies structures, social practices, and the meanings of the global political economy (Griffin 2010; Peterson 2007). The emphasis falls on specifically gendered bodies while also foregrounding differences that are based upon material and structural inequalities as well as intersectional relations of disadvantage (e.g., gender, institutionalized racism, or ethnicity). In this regard, FPE may find itself closer than FSS to a radical definition of human security as everyday life experiences embedded in global structures of inclusion and exclusion and can keep FSS honest by guiding it back to a concern with everyday (economic) insecurities.¶ While FPE reminds us to consider the global picture of inequality, a systematic feminist political economy theory of security/conflict/violence is yet to emerge. That said, revisiting the material conditions that influence the socioeconomic production of gender as a relation of inequality is a potentially agency-inducing factor that could complement (together with attention to new materialisms) the discursive analytics of FSS, as will be shown in the discussion that follows on sexual and gender-based violence (SGBV) in the Democratic Republic of Congo (DRC).¶ FSS research has highlighted the harmful discursive misrepresentations that characterize international attention on rape as a tool of war in the DRC (e.g., Baaz and Stern 2013). However, feminist poststructuralism on its own is not a suitable lens to understand the hybridity of how women in the DRC adapt SGBV discourses to fit in with local cultural practices and to fulfil particular sociomaterial needs within their specific context. One needs a postcolonial feminism for that. To keep the international community interested and maintain the status that funding brings, women's organizations in the eastern DRC tend to emphasize the brutal and extensive nature of SGBV. The outcome is not straightforward--women's victimhood is reinforced--but at the same time, it could mean that so-called "victims" fight back, negotiating the "global patriarchal bargain" from below, simultaneously engaging with discourse and the material aspects of socioeconomic justice and empowerment (Jean-Bouchard 2013).¶ This case also underlines the necessity to consider a broad range of materialities (i.e., not only those that are discursively produced, but also "conventional" political economy materialities during and after war). During war, rape as a form of gendered accumulation by dispossession was used in Mozambique and Rwanda to strip women of their productive and reproductive labor power, as well as their possessions and access to land and livestock. Postwar, Baaz and Stern (2013) found that Congolese men rape due to a complex mix of cultural and political economy perceptions about masculinity, women as property, and a sense of entitlement to sex as compensation for their loss of status as providers. Borrowing Claudia Card's (2003) term "social death" to describe the cultural shame as a consequence of rape, I argue that the loss of social vitality is not just a loss of identity and meaning for one's existence, but also a deeply material loss of political, economic, and social relations. Both FSS and Feminist IPE should therefore pay more attention to the political economy of social relations and inequalities of the everyday.

#### Ontological theorizations should be verified by praxeological inquiries like the AFF to avoid naturalizing lived oppression and building in reifying assumptions.

Lois **McNay 17**. University of Oxford. 11/2017. “Ontology and critique,” part of the critical exchange section of Contemporary Political Theory on “Democracy, Critique and the Ontological Turn.” Contemporary Political Theory, vol. 16, no. 4, pp. 501–531.

It is commonplace to observe that political theorising of all kinds necessarily rests on ontological presuppositions in so far as to say anything of normative significance about the world, the theorist cannot avoid making certain simplifying assumptions about its basic nature and the constitutive features of social being. For the most part, these animating assumptions form the unarticulated backdrop to any given political paradigm but, in moments of theoretical challenge, they may become objects of intense scrutiny. In the hands of radical democrats, for instance, ontological thinking has been an especially effective tool for challenging dominant views of the world in so far as it exposes the partially theorised or latent foundational assumptions that naturalise a given mode of social being. Feminist and critical race theorists for example have repeatedly used an intellectual counter-strategy akin to what Sandra Bartky (1977) calls ‘ontological shock’, to contest the complacencies of liberal thought that flow from its uncritical reliance on a disembodied, disembedded conception of the subject. Likewise, the interest of contemporary radical democrats in ontology pursues a similar counterhegemonic agenda. Here the aim is to reinvigorate the democratic imagination by thinking about the political realm in isolation from other areas of social life in order to identify its quintessential logic. These political ontologies differ from experientially grounded forms of critique in that, rather than expanding accounts of embodied social being, they speculate instead on suppressed, primordial dynamics of indeterminacy (lack or abundance) that form the condition of possibility of social existence itself. The postulation of a foundational ‘undecidability’ exposes the constructed, incomplete character of entrenched social objectivity. Through this subversive denaturalisation – things could be otherwise – a space is cleared for alternative visions of emancipatory political practice (e.g. Mouffe 2013; Glynos and Howarth, 2007). Ontologies of radical contingency are felt, in short, to be an especially effective way of opening up accounts of democracy to the ever-present possibility of progressive social transformation beyond the confines of the neo-liberal imaginary. In this light, then, it is clear that the contemporary preoccupation with political ontology is not an idiosyncratic feature of our current epoch but stands in an established tradition of radical democratic reasoning. This endeavor to define a generative ontological logic has obvious intellectual precedents in the work of thinkers such as Carl Schmitt, Hannah Arendt and Sheldon Wolin, who in different ways sought to rescue political action from what they regarded as a defunct liberalism that had reduced politics to a depoliticized administration of social affairs. The ontological perspective is used by them to reaffirm the status of political action as the paramount site of human freedom and creativity. Today’s ontological thinking picks up many of these concerns but develops them, this time around, in relation to resisting the pathologies of neo-liberal governance. If anything, however, these contemporary formulations are potentially more radical in their entailments for democratic praxis because unlike, say, Arendt, they don’t insist on a rigid separation of properly political concerns from private or social ones. All social relations are, in principle, open to becoming sites of radical contestation and change. But despite its radical inheritance, there is a sense in which the political promise of current thought on ontology has been somewhat thwarted, and, in my view, this is to do with its tendency to lapse into a socially weightless mode of theorising that forecloses a developed account of social power (see McNay, 2014). This social weightlessness manifests itself in a variety of ways – for example, the widespread tendency to model politics on ‘thin’ notions of discourse for example – but is most apparent in the insufficient attention paid by ontological theorists to the patterns and particularities of the lived reality of oppression. In the ‘ontology-first’ approach, the space of experience is invariably interpreted as a symptom of a prior radical contingency and, in being reduced to a secondary phenomenon, is implicitly denied existential depth, complexity and independent significance. The characteristic trope of this ontological reduction upwards is an exaggerated emphasis on the mutable, fluid, agonist elements of embodied social experience and a corresponding underestimation of its entrenched, routinized, negative aspects. This is not to deny that, in some of its dimensions, social being is certainly characterised by a degree of openness but a one-sided emphasis on contingency as a political good in itself is fast becoming what Paipais (2017) terms an ‘ontological orthodoxy’. Put differently, it is important to grasp oppression not simply as a matter of external, material constraint but also as internal psychological constraint; objective structures of inequality are taken into the bodies of individuals and lived as seemingly natural, subjective dispositions. As Bourdieu famously puts it ‘the most personal is the most impersonal… many of the most intimate dramas, the deepest malaises, the most singular suffering that men and women can experience find their roots in the objective contradictions, constraints and double binds inscribed in the structures of the labour and housing markets’. (Bourdieu, 1992, p. 201) What the Bourdieusian formulation makes clear is that attentiveness to the lived reality of oppression does not mean some simple-minded immersion in a supposed phenomenal immediacy, what Norval terms an ‘unmediated’ recourse to ‘experiences of suffering’. Rather, experience is always mediated through power and this requires careful analysis of the generative dynamic between embodied reality and the material and symbolic relations that constitute it: what Bourdieu calls a phenomenology of social space. Moreover, it is precisely the dismissal of thought about the embodied experience of oppression as ‘essentialist’ or ‘miserabilist’ that is problematic in so far as it engenders an unwarranted presumption of agency, that is, that individuals are somehow ready-made, fully willing political actors. What is left out in abstract invocations of agency, qua ontological indeterminacy, is systematic reflection on the social conditions that need to be in place for individuals to become effective political actors in the first place. Unaccompanied by attentiveness to these incarnate, social dynamics, the assertion of radical contingency is ultimately too thin to be politically enlightening. As Ian Shapiro puts it: ‘although everything might in some ultimate sense be contingent … this may be a quite trivial truth. That no building will endure for ever tells us nothing about the relative merits of different kinds of construction…questions about this latter order, in the realm of the relatively enduring, should occupy us’ (Shapiro 1992, p. 14). The bracketing of sociality does not just mean that political ontologies rely on tendentious accounts of agency, but also that they tend to embody a peculiarly self-enclosed and irreflexive mode of theorising. Reflexivity, or the capacity for on-going critical self-scrutiny, is widely held to be an indispensable feature of radical democratic critique if it is to maintain its emancipatory relevance to those oppressed groups who are the principal object of its inquiry. A theory’s ability to scrutinise its own limitations ~~and blind-spots~~ is essential in guarding against the intellectual reification that produces doxastic and potentially exclusionary ways of viewing the world. It necessarily entails therefore building into theory some kind of practical responsiveness to the particularities and changing dynamics of social life. After all, reflexivity involves not merely formal recognition of the ‘other’ but the concerted effort to respond as fully as possible to the destabilising implications that this ‘cross-grained, opaque, unassimilated material’ may have for the inquirer’s previously settled view of the world (Adorno, 1974; see also Bohman, 2008). The problem with ontologically grounded theory is that this important capacity for critical self-reflection is curtailed by its neglect of the dynamics of embodied being. Its suspension of sociality serves to insulate it from precisely the kind of external standpoint that potentially delivers an epistemic ‘shock’ to its frictionless theoretical world-view. Consequently, its arguments are propelled more by the internal, purportedly ‘necessary’ logic of speculative ontology rather than by receptivity to social context. As Prozorov puts it here, political ontology ends up ‘studying its own message’. This epistemological closure blocks crucial questions about the politics of their own mode of inquiry. How do certain theoretical and conceptual schema blunt sensitivity to the lived aspects of oppression? In what ways does a particular scholastic withdrawal from the practical world influence the kind of thinking that is made possible? What kind of methodological self-scrutiny would help to guard against theoretical reification? In short, political ontologies often fail to enact in their own theoretical practice the historicising entailments that flow from their galvanising premise of radical contingency. The premise seems to necessarily imply the adoption of a practical, open-ended and dialogical approach to theoretical reasoning, what might be called praxeological inquiry. Instead, however, ontologically grounded theories too often remain closed, self-perpetuating paradigms or what Wolin (2000) terms ‘theoretic theory’, whose relation to the practical logic and concerns of social life is questionable. For radical democrats then what are the alternatives to political ontology? It seems to me that a power-first rather than ontology-first approach to political theorising continues to be of importance in a world of increasing precariousness, where entrenched structural inequalities are deepening and new vulnerabilities are emerging on a hitherto unthinkable scale. Another way of putting this is that the intellectual agendas of experientially grounded and other types of disclosing critique – feminism, post-colonialism, critical race theory – are still as important as they ever have been. There is no denying, however, that the current political moment appears to be alarmingly bleak and regressive; but it is important for the democratic theorist not to give up hope and succumb to slightly petulant denunciations of the current era as one of anti-politics or post-democracy, as one without progressive political alternatives. Here Foucault’s words are salutary because, confounding a common view of him as a political nihilist, he did not entertain fatalism as a viable theoretical stance. As he put it ‘the task of [political] philosophy is to describe the nature of the present … with the proviso that we do not allow ourselves the facile, rather theatrical declaration that this moment in which we exist is one of total perdition, in the abyss of darkness … it is a time like any other, or rather, a time which is never quite like any other’ (Foucault, 1988, p. 36). It is important not to give up on the present moment as one of political potentiality because, in Foucault’s view, this is one of the enduring lessons of Enlightenment thought for our own era, namely that critique should endeavour to preserve a ‘disposition’ or commitment to uncovering possibilities for progressive change that cannot be forgotten (Foucault, 1988, p. 94). Foucault describes this disposition as ‘practical critique’, one that takes the form of a ‘possible crossing-over’. In places, as we know, he also called it an ontology, a ‘historical ontology’, an ‘ontology of the actual’ that poses the questions ‘What is our present? What is the present field of possible experiences’ (1984, pp. 49–50). But, it is an ontology that seeks to answer such questions, not by identifying the constitutive dynamics of political being, but by scrutinizing settled forms of social existence so as to dislodge their appearance as natural, given and inevitable and reveal their contingency by uncovering the submerged traces of power that accompanied their historical emergence. Put schematically, Foucault ends up in the same place as radical democrats in that he reveals a radical contingency underlying social existence, but he achieves this insight through a directly contrary method, that is, through an interrogation of the logic of sociality rather than its suspension. Foucault’s power-first approach inspires a view of critique as problem – rather than paradigm – driven, attentive to the complex dynamics of social experience and rooted in social theoretical, rather than ontological or philosophical, abstractions. Critique on this view is ‘theorising with practical intent’, praxeological inquiry that operates across different perspectives and has the aim of expanding interpretative and epistemic horizons, thereby opening up new possibilities for thought and action (see Young, 1997, p. 5). This account of critique problematizes the rather grandiose idea that seems to prevail in academia at the moment that the goal of theory should be the formulation of definitive, all-encompassing models of the political, whether they be ontologically, normatively or procedurally framed. It rests instead on an idea of the theorist as participant observer, as engaged social critic whose work, in tandem with activist concerns, chips away at certain problems to produce an account of society that has the practical aim of unmasking domination and contributing to the gradual actualisation of other ways of being. As Foucault puts it,’we must think that what exists is far from filling all possible spaces’ (Foucault, 1989, p. 206). The actualisation of other ways of being, of other types of democratic practice, requires, amongst many other things, the development of new forms of political imagination. At the moment, the imaginative rationale that governs much mainstream democratic theory is constricted in so far as it is dominated by debates on justification and the public use of reason. In the justification paradigm, it seems that most political issues are dealt with as potential claims to justice whose validity is confirmed through rational reconstruction according to criteria that supposedly engender universal acceptable outcomes. The exchange of reasons is an undeniably important part of democratic practice, but the reduction of the political imagination to justification alone is a deadening way of treating the vast diversity of political concerns. There is an urgent need for theorists to think seriously about different types of democratic interaction and other sources of political normativity that operate not through the force of the better argument but through the galvanisation of emotion, inspiration and political hope. Indeed, recently, there has been a discernible ‘aesthetic turn’ amongst theorists some of whom have drawn on the logic of the exemplary work of art to think about politics in a more creative way, as the disclosure of the new, of as-yet unrealised ways of being (Ferrara, 2008; Kompridis, 2014). There is an associated, growing body of work that uses Arendt’s thought on reflective judgement to revivify accounts of democratic reasoning and practice (e.g. Pia Lara, 2007; Zerilli, 2016). But the sources for reimagining the political are not to be found in scholarly texts alone but in activism too, in particular, in those popular movements whose interventions embody a prefigurative dynamic that oscillates between imagination and actualisation, continually testing and retesting the limits of possibility. Extrapolating from these concrete exemplars, some theorists have sought to reimagine politics around ideas of visibility, embodiment, performativity, precarity and vulnerability. Butler’s (2015) recent work on the dynamics of popular assembly is an example: she identifies a performatively enacted right to appear as the catalyst for innovative modes of democratic mobilisation. But despite these influential new strands of theorising, there is continued need to break the strangle-hold that ideas of public reason, justification and other uni-foundational political paradigms have on the mainstream democratic imagination. Not least because these speculative models often seem to be out of touch with the actuality of popular political behaviour in both its counter-hegemonic (e.g., the Occupy movement or Black Lives Matter) and authoritarian (e.g. Brexit, Trump) manifestations.

#### Alt can’t spill out or effectuate change.

Jennifer Sterling-Folker 15, University of Connecticut, “All Hail to the Chief: Liberal IR Theory in the New World Order”, International Studies Perspectives, Vol. 16, 2015, pg. 40-49

Alternatively, we could become even more radical in our diversities and challenges, by rejecting participation in all forms of disciplinary practice and/or staging a full-frontal assault on the liberal analytical edifice. Doing so remains true to alternative normative and epistemological commitments, but prior frontal assaults (by IR postmodernists and feminists, for example) do not instill much hope in successfully shaking the foundations. As Taliaferro bluntly observes, “by waging war on positivism, rationality, and realism, postmodernist scholars have marginalized themselves” so that “instead of engaging” with postmodernists, “most scholars (even their fellow constructivists) are quite content to ignore them” (2001:260). This outcome is as much about the epistemological and normative commitments of the discipline as it is about postmodernism and, in any case, it is a pattern of all post-Cold War IR theorizing, not just postmodernism. As Sylvester notes, “debate, once thought of as a disciplinary sport, is now mostly confined to within-camp issues” and “collaboration across camps is not the norm” (2013:615). The result, as she observes, is that, “ironic as it might be, the professional IR camp scene today can seem conservative even as it is liberating: there is a whiff of neoliberal privatization and self-aggrandizement in its smoky air.” Hence, radical assaults are defused by becoming disciplining camps themselves, inwardly focused and thereby ensuring their own marginalization within the larger disciplinary context dominated by liberalism.