# NDT—R7—Kentucky DG v MSU GK

## 1NC

### 1

#### Undisclosed AFFs are a voter – hurts pre-round prep from developing a nuanced strategy and forces us to rely on generics, which create shallow argumentation. Voting issue for deterrence BUT best-case scenario you don’t vote on theory since they’ve shifted the side bias too far.

### 2

AI DA

#### Algorithmic antitrust fails now because of vague standards --- plan enumerates SPECIFIC goals which allows agencies to streamline AI enforcement

Casey & Niblett 21 --- Anthony J. Casey, Donald M. Ephraim Professor of Law and Economics and the Faculty Director of the Center on Law and Finance at the University of Chicago Law School, Anthony Niblett, Associate Professor at the University of Toronto Faculty of Law, the Canada Research Chair in Law, Economics and Innovation, and a faculty affiliate at the Vector Institute of Artificial Intelligence, “Micro-Directives and Computational Merger Review”, 1 Stanford Computational Antitrust 132, 12-15-2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007518>

Automated merger review presents a challenge for antitrust agencies that has, to now, been relatively easy to set aside for a later date: What is it, exactly, that we want merger law to achieve? What is it that we want to maximize? While American scholars and lawyers may simply respond to this question by saying “maximize consumer welfare,” this objective is still riddled with ambiguity.65 Further, this goal is neither reflective of the objectives of antitrust authorities around the world, nor is it reflective of the objective of U.S. antitrust throughout the history of the Sherman Act. The goals of antitrust are fluid. And many scholars, commentators, and lawmakers are seeking to re-define these goals in the current debate about antitrust.66

\*\*Footnote 66 begins\*\*

66 See, e.g., a recent bill put forward by the United States Congress that seeks to strengthen antitrust enforcement. Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, 117th Congress § 2(3) (2021) (“competition fosters small business growth, reduces economic inequality, and spurs innovation and job creation”); see also Aurelien Portuese, Beyond Antitrust Populism: Towards Robust Antitrust, 40 ECON. AFF. 237 (2020) (arguing that “antitrust populism” and the fear of large corporations has been on the rise in the United States, superseding goals of economic efficiency and consumer welfare); Herbert Hovenkamp, Antitrust's Borderline (Univ. of Pa., Inst. for Law & Econ. Research Paper, Paper No. 20-44, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3656702 (discussing the goals that lie within and outside the boundaries of competition law). 67 Lim, supra note 8, at 50.

\*\*Footnote 66 ends\*\*

The use of vague standards in antitrust law permits decision makers the flexibility and discretion to pursue a variety of different and possibly competing objectives, sometimes on an ad hoc basis. In our view, the biggest hurdle to the implementation of computational merger review is the inability of human lawmakers to agree on what the law is designed to do.

Predictive technologies solve specific prediction problems. Supervised machine learning algorithms or reinforcement algorithms are designed to achieve a clear, specific objective or reward specific types of actions. They seek to maximize some objective. Consensus about that objective is therefore necessary for computational merger review. Lawmakers must make an ex ante decision about how society balances and prioritizes certain costs and benefits.

Daryl Lim has suggested that “[t|he beauty of Al is that it can reach outcomes humans alone cannot define as ‘good’ or ‘better’ as the untrained neural network interrogates itself via the process of trial and error.... [W]ith the Al being capable of scouring options to optimize the best rewards.”67 This is no doubt true in certain circumstances. But it has limited application in antitrust if we have not reached a consensus as to which decisions should be rewarded and which should be punished. To put it another way, the process of trial and error only works if we can easily identify what an error is.

If antitrust authorities are not clear about the objectives of antitrust law, computational merger review can only take us so far. In the end, algorithms cannot solve the very human problem of choosing the objective.

A - Antitrust authorities around the world seek different objectives

Antitrust authorities around the world vary greatly in the objectives they pursue. As Edward lacobucci and Michael Trebilcock show in their survey of eight different jurisdictions, maximizing consumer welfare is not the main objective for other competition authorities around the world/\*8

Some jurisdictions seek instead to enhance total welfare or overall efficiency. While the United States and Europe place greater emphasis on the welfare of consumers, Australia and New Zealand tend to emphasize total welfare or overall efficiency.69

Other competition authorities explicitly try to protect or defend smaller firms. In Canada, for example, competition legislation seeks to “ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.”70 The protection of small and medium-sized enterprises is also one of the key objectives of Japanese competition law.7\*

Fairness and equity also play an important role in competition law.72 While these values are sometimes seen as complementary to consumer welfare, there are situations where the conflict arises. For example, a fairness goal might favor small shopkeepers over large supermarkets even when those supermarkets can tap into economies of scale and provide lower prices to consumers.7’

In still other settings, competition laws are used to protect domestic or state-owned businesses or to break up foreign champions. The exception given to export cartels in many countries—including the United States and Canada—reflects these goals.74 Similarly, in China, one of the objectives listed is to protect the state-owned economy, encouraging the expansion of domestic enterprises and scrutinizing foreign takeovers.75

In South Africa, competition law contains an “extensive and ambitious” list of objectives, designed in part to redress the inequities of the country’s history.76 For example, South African competition law seeks to promote “participation of all citizens in the economy” and “the fair distribution of ownership and control of markets among different racial groups,” as well as to “balancje] the interests of workers, owners, and consumers.”77

In the European Union, a key objective has been the promotion of market integration and the freedom of movement of goods, services, capital, and people within the Union.7® And in Germany in the 1920s, the objectives of competition law even included fighting inflation.79

All this is to say that there are many potential objectives for antitrust law. Indeed, many in the United States have argued for a broader conception of what antitrust law is and what it should do. Some of these reform advocates have argued that courts, legislatures, and antitrust authorities should embrace broader objectives such as addressing inequality, increasing employment, increasing wages, and mitigating adverse effects on the environment.®0

B - “Maximizing consumer welfare” is not a clear objective

In the United States, it is commonly assumed that maximization of consumer welfare is the objective—or at least the stated objective—of antitrust law. This was not, however, always the case. In 1890, Senator John Sherman of Ohio stated the following when outlining the purpose of the antitrust act that bears his name: “If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”®'

But even if we assumed that “maximizing consumer welfare” is the objective of the law, questions remain about how that can be translated into a well-defined algorithmic objective. Barak Orbach has noted that the consumer welfare standard in antitrust law is “confused and debated” and scholars “hold various views about the desirable interpretations of the standard, and they selectively use judicial statements to substantiate opposite views.”82 Joseph Brodley noted that efficiency and consumer welfare became dominant terms of antitrust discourse “without any clear consensus as to what they actually mean.”®’

When Robert Bork argued in his highly influential book, The Antitrust Paradox, that the sole normative objective of antitrust was to maximize consumer welfare, he was not actually speaking of consumer surplus in the classic economic sense. Rather, Bork was referring to static efficiency more generally, the maximization of total surplus.\*"’ While maximizing consumer surplus and maximizing total surplus may often be achieved using the same means, that is not always true. To take one extreme example, perfect price discrimination maximizes total surplus but minimizes consumer surplus.

The differences between maximizing consumer welfare and maximizing total welfare have created tensions in the application of merger law in Canada. Under section 96 of the Canadian Competition Act, anticompetitive mergers that are likely to substantially lessen or prevent competition can still proceed if the gains in efficiency brought about by the merger outweigh and offset the likely anticompetitive effects.86 There have been vociferous disagreements between the Canadian Competition Tribunal and federal courts about which objective to apply in assessing the efficiencies defence.8' Ultimately, a “balancing weights” approach has prevailed.88 The Tribunal may elect to put more weight on consumer surplus than producer surplus. The Tribunal then engages in a value judgment as to whether this weighting is reasonable given the income disparity between the consumers of the products and the shareholders of the merging firms. Such a vague standard is not easily translated into an ex ante objective.

Returning to the United States, some have suggested that consumer welfare should simply focus on prices. The lower the price, the greater the consumer welfare. According to this view, the objective should be to minimize prices paid by consumers. But low prices may not align with consumer welfare. Low prices for “bads” or status goods, for example, may be inimical to welfare.89 But even putting aside these conflicts, the goal of lower prices may still be ambiguous for other reasons.

First, which consumers should we be concerned with? Focusing on the prices paid by the ultimate consumers of the products of merging companies could be a poor proxy for the economic harms created by mergers. The merger between Facebook and Instagram is frequently offered as an example of a merger that should have been prevented by the agencies.90 But the nominal dollar price paid by consumers of Facebook and Instagram to this day remains at zero. The prices of digital advertising on these platforms would clearly provide a more accurate picture of the competition harms. But a balancing exercise may be required in two-sided markets when some consumers benefit from a merger and some consumers are harmed.

Second, what specifically does “price” mean? If, as some have argued, the “price” paid by consumers includes aspects of quality, service, and privacy harms, then arriving at a way to maximize consumer welfare becomes trickier. Even assuming privacy harms are measurable, one must still make difficult decisions about balance. If a merger results in lower dollar prices but greater privacy harms, how does one pre-emptively code the balance inherent in this trade-off in order for the automated system to make a call?

Third, one must balance predictions about likely short-term and long-term effects. An objective that seeks to maximize consumer welfare in the short run may have deleterious effects on consumer welfare in the long run. Static efficiency may come at the expense of dynamic efficiency.91 A merger that creates synergies in research and development may generate innovations across a variety of dimensions. The merger may raise prices today while providing the benefits of innovation tomorrow.92 Further, when balancing these effects, one must account for the greater uncertainty of long-term predictions. And so balancing short-term costs against long-term benefits requires agencies to weigh the costs of uncertainty and delay.

The use of micro-directives in merger review will require the agencies to change the way they approach these various these various considerations. In short, the enforcement of vague standards (substantially lessen competition) seeking to achieve vague objectives (maximize consumer welfare) has allowed antitrust agencies to kick the proverbial can down the road. Currently, no one has to state the law’s goals with any specificity. Nor do the agencies have to pursue those goals with any consistency. This will have to change. Creating a computational merger review system will require the agencies and legislatures to be explicit about and commit to the law’s objectives up front.

#### AI use by antitrust agencies is modeled

Massarotto & Ittoo 21 --- Giovanna Massarotto, Adjunct Professor University of Iowa, Center for Technology Innovation and Competition (CTIC), University of Pennsylvania, & Ashwin Ittoo, Associate Professor, University of Liege, “Can AI Replace the FTC?”, Date Posted: 9 Jan 2021, Date written: November 19, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733324#:~:text=It%20shows%20how%20a%20relatively,agencies%2C%20such%20as%20the%20FTC.

Now that we have clarified the FTC role and powers within the U.S. antitrust law enforcement framework under Section 5 of the FTC Act and the main Al techniques relevant for our project, lets explain why we considered interesting the investigation of Al techniques in the enforcement of antitrust law.

As mentioned, today there is a growing interest in the application of ML techniques to the legal domain. However, some previous applications of Al algorithms in the law enforcement did not meet the expected results questioning its validity in the law enforcement. Compas is only a symbolic example of algorithm employed in the U.S. legal system with the aim to make the judicial mechanism more efficient. Compas was trained to assist judges in Florida in defining whether a defendant was likely to re-offend34 and should remain in jail or release while the trial was pending.35

Yet, the algorithm clearly showed bias in the system. According to the study conducted by the independent online newsroom Propublica, “defendants predicted to re-offend who actually did not were disproportionately black.”36 This algorithm exhibits the risks related to the adoption of Al techniques, which can lead to bias at scale if the algorithm is not correctly built and trained. A natural question to ask is whether it is worth to devise algorithm to enforce law, including antitrust law.

Despite an initial skepticism, as previously observed, the FTC antitrust enforcement resembles to a tool of economic regulation. Therefore, antitrust might serve as testing ground for the exploitation of Al techniques in future regulatory interventions based on economic reasoning. In this way government agencies could gain in efficiency and companies have a better understanding of what can consist of an anticompetitive practice.

#### Algorithmic governance replaces civil service --- crushes administrative SOP --- key to internal checks on the Executive

Seipel 20 --- Matthew B. Seipel, Regional Attorney, California Public Employment Relations Board; J.D., UCLA School of Law, “ARTICLE: ROBO-BUREAUCRAT AND THE ADMINISTRATIVE SEPARATION OF POWERS”, 2020 Cardozo L. Rev. De Novo 99, 2020, Lexis

Algorithmic governance could undermine the administrative separation of powers because its use consolidates agency leader control at the expense of the civil service and civil society. Algorithmic governance does this by allowing leaders to: (1) unilaterally advance their agenda; (2) marginalize and erode the civil service; and (3) restrain public participation.

A. Unilateral Advancement of Agency Leaders' Agenda

The first way algorithmic governance creates concentrated agency leader power is by allowing leaders to unilaterally advance their policy agenda. Algorithmic governance, or a "robo-bureaucrat," is programmed to engage in a specified function and abide by certain protocol--all of which are likely to be directly informed by agency leaders. 32In other words, a robo-bureaucrat is more or less programmed to do what the agency leaders want and it must abide by its programming. If a robo-bureaucrat, for some reason, goes rogue 33and pushes back against the agency head, agency leadership can likely replace or reprogram it with little resistance. 34This compliant robot stands in sharp contrast to the independent, professionalized, legally protected, and often rivalrous civil service. 35

B. Marginalization & Erosion of the Civil Service

The second way algorithmic governance consolidates agency leader control is by marginalizing the civil service. It does this in at least three ways. First, government agencies are likely to use algorithmic governance to replace important civil service discretionary duties and work altogether. 36There is little indication that governments will end their foray into algorithmic governance: it is hard to imagine cash-strapped agencies declining automation when automation's advocates promise increased efficiency, productivity, cost-savings, and quality of public services. 37Indeed, one report suggests that AI and machine learning may replace or change 130,000 federal jobs in the next two decades. 38As the ACUS Report observed, "[t]he advent of algorithmic enforcement may . . . supplant expertise within the federal bureaucracy, exacerbating a perceived trend toward politicized federal administration and the hollowing out of the administrative state." 39

Although algorithmic governance has yet to displace the federal civil service in any significant way, as the technology advances in sophistication, government agencies may use AI to shape and replace "discretion at all levels of bureaucracy." 40Indeed, it is not hard to imagine the federal government replacing workers with automated systems that would provide licenses to pilots, close factories violating environmental protection regulations, and find that a proposed merger violates antitrust law. 41

Labor unions representing federal employees appear to lack any power to fight back against AI displacing civil service jobs and duties. To begin with, the Federal Service Labor-Management Relations Act (FSLMR) 42--the act governing labor relations in most of the federal public sector--provides that management has the right "to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted." 43So federal agencies have the unilateral right to control what duties to assign and to whom or what positions job responsibilities will be assigned. 44And in a similar vein, agencies also may unilaterally contract out certain functions. 45It follows that management rights could be construed to cover an agency's decision to replace an employee's job responsibilities with a robo-bureaucrat. As a result, a labor union likely cannot, for example, demand to bargain over the agency's decision to supplant a civil service employee's duties with a machine.

And although the FSLMR provides that agencies and unions may negotiate the technology, methods, and means of performing work, this negotiation may only occur "at the election of the agency." 46So even when an agency deploys AI to merely complement a civil service worker's decision making, the agency's decision is likely only negotiable when the agency decides it is negotiable. Of course, even though a union likely cannot negotiate over the decision to replace duties or federal workers with a robo-bureaucrat, the negotiable effects of the decision may be within the duty to bargain. 47

Several government agencies at the state level have already begun replacing important state worker decisions with those of machines. For example, in 2013, the Michigan Unemployment Insurance Agency implemented MiDAS, an algorithmic decision-making system used to detect unemployment insurance fraud. 48By implementing this system, Michigan sought to save the state money and replace around 400 state workers. 49MiDAS ended up falsely accusing over 34,000 unemployed people of fraud. 50Across other state and local agencies, algorithmic governance is replacing human decision making in areas such as social services and criminal justice. 51

Second, algorithmic governance creates a vulnerable civil service. As discussed, when AI becomes more advanced and widespread in government, it is probable that certain swaths of the civil service will be in danger of being replaced. 52This threat will contribute to public workers' feelings of job insecurity--feelings already exacerbated by nationwide efforts to remove for-cause protection from the civil service. 53

And the advent of what may be characterized as "robo-boss"--an algorithmic system used to manage employees--may leave workers in the civil service even more defenseless. For example, a Texas school district implemented a teacher appraisal algorithmic system to make termination decisions allegedly using data from classroom statistics throughout Texas, performance of the teacher's students, and the teacher's performance record. 54A lawsuit over the school district's use of this system argued, in part, that there was no way teachers could verify the accuracy of the algorithm's scores. 55The court agreed, observing that uncontradicted testimony from the plaintiffs' expert confirmed that the algorithm's teacher scores would "remain a mysterious 'black box,' impervious to challenge." 56So "teachers have no meaningful way to ensure correct calculation of their . . . scores, and as a result are unfairly subject to mistaken deprivation of constitutionally protected property interests in their jobs." 57And thus a robo-boss's inscrutable decision-making processes--like the system in Texas--could prevent public workers from challenging, in any meaningful way, a robo-boss's employment decisions.

Third, algorithmic governance creates a more compliant civil service. With the threat of intelligence automation looming, the bureaucracy is less likely to challenge agency leaders' decisions and policies for fear of being replaced by an automaton. 58For that reason, even though the civil service might still perform certain governmental functions, the robo-bureaucrat threat would create a more compliant and subservient public workforce. 59This result would further an agency leader's pursuit of securing unitary control over the administrative state.

In a similar vein, even when a civil servant uses or oversees an algorithmic governance system, that worker may be subject to "automation bias": "the over-reliance of decision-makers on automated predictions, even when such deference is unreasonable and mistaken." 60For example, "[u]nder the influence of automation bias, workers will likely adopt a computer's suggested eligibility determinations and benefit calculations." 61Or an ALJ may review AI-created content in a mechanical manner, without second-guessing the automated results. 62All of this results in a civil service more likely to comply with--and less likely to question--a robo-bureaucrat's decision or decision-making process.

C. Restraint on Public Participation

The final way algorithmic governance consolidates agency leader power is by restraining public participation. An agency's use of a robo-bureaucrat will likely make it harder for civil society to hold the agency accountable. 63One reason is that "many of the more advanced AI tools are not, by their structure, fully explainable." 64It may be impossible to determine how a robo-bureaucrat made a decision, and therefore, it will be harder for the public to peer inside its decision-making process. 65And public accountability is even more constrained when a third-party AI developer refrains from divulging information about the programs to protect its trade secrets or other confidential information. 66Given this opaqueness, when automated systems effectively constitute changes to agency rules, for example, "[c]itizens cannot see or debate these new rules." 67

This AI "black box" also has profound consequences on legal accountability, in part, because much legal doctrine is built on notions of human behavior, such as the doctrines of intent and causation. 68That is why AI may disrupt doctrines such as Article III standing (which requires causation) 69or the rational basis test (which requires a justification for government action). 70The opacity and complexity of automated systems also works to prevent an agency from providing sufficient individual due process before depriving a person of liberty and property using that system. 71Specifically, these systems often undermine the due process requirements of notice and an opportunity to be heard. 72

In sum, because algorithmic governance appears likely to promote the leadership's agenda, marginalize the civil service, and restrain participation by civil society, algorithmic governance threatens to consolidate agency leader control within the agency. This concentrated power jeopardizes the crucial balancing role the civil service and civil society play in the administrative separation of powers. As a result, the rise in algorithmic governance increases the risk that agency heads will be standing alone among a coterie of obedient robo-bureaucrats to advance their agenda--a result inconsistent with our core constitutional commitments to a constrained and rivalrous government, and in violation of the administrative separation of powers.

#### Extinction

COGLIANESE & LEHR 17 --- CARY COGLIANESE, Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania; Director, Penn Program on Regulation, DAVID LEHR, Research Affiliate, Penn Program on Regulation; Yale Law School, J.D. expected 2020, “ARTICLE: Regulating by Robot: Administrative Decision Making in the Machine-Learning Era”, 105 Geo. L.J. 1147, June, 2017, Lexis

Algorithms are not new. For decades, they have served as integral components of every computer program. 1 But today, advanced machine-learning algorithms are creating a vastly automated society, transforming many facets of life. Many products and services, including email spam filters, 2 medical diagnoses, 3 product marketing, 4 and self-driving cars, 5 now depend on machine-learning algorithms and their ability to deliver astonishing forecasting power and speed. Today's algorithms are digital "robots" 6 that possess effectively autonomous abilities to adapt and learn. 7 As this type of artificial intelligence becomes more intricately woven into the economy, a new kind of information revolution is beginning that may lead to fundamental changes in society. 8 The ability of increasingly intelligent systems to replace human workers, for instance, has prompted widespread concern about the impact of machine learning on employment opportunities across a variety of occupational and professional fields. 9 According to some projections, artificial intelligence threatens to displace workers in "all routinized jobs and skill-based jobs that require the ability to perform diverse kinds of 'cognitive' labor, from physicians to reporters to stockbrokers." 10

Even more ominously, some commentators worry about potentially new forms of human oppression that could stem from greater reliance on artificial intelligence. High-tech entrepreneur Elon Musk, for example, has warned that artificial intelligence presents the "biggest existential threat" to society, likening it to "summoning the demon." 11 Renowned physicist Stephen Hawking has eerily forecasted that "[t]he development of full artificial intelligence could spell the end of the human race." 12 New York Times reporter John Markoff summarizes the views of a growing number of observers who worry that emerging "smart machines" risk constituting a new set of "masters" controlling humanity. 13

These worries about artificial intelligence's impact on human liberty have surfaced over the use of machine learning by private-sector institutions such as banks and media companies, but presumably the prospect of governmental reliance on autonomous, self-learning robots only magnifies any perceived risks of digital oppression. Machine learning uses by defense, homeland security, and criminal law enforcement authorities have understandably begun to trigger alarm and prompt serious ethical consideration. Waging war through robots, for example, presents obviously novel concerns. 14 The use of algorithms to analyze telephone records and other personal information has also sparked extensive public controversy over privacy issues. 15 Similar controversies surround law enforcement agencies' use of machine learning to detect, respond to, and perhaps even predict crime. 16

Notwithstanding the extensive attention given to the use of machine-learning algorithms by national security and criminal law enforcement agencies, the use of such artificial intelligence by other governmental institutions in the day-to-day operation of government has escaped sustained analysis. Granted, commentators have occasionally speculated about a fanciful future in which institutions like the Supreme Court 17 or the presidency 18 might be replaced by artificial intelligence. But such speculations are usually intended as absurdities. Most people believe that core governmental institutions and their decisions must be grounded in judgments made by real human beings: a "government of the people, by the people." 19 Even if machine-learning algorithms come to be widely accepted as substitutes for human control over automobiles or other functions in private life, a deeper, more fundamental suspicion about artificial intelligence will presumably remain about the use of machine learning in the governmental sphere. When it comes to making laws and other governmental decisions, the notion of using algorithms as substitutes for human decisions would appear to create a serious threat to democratic governance, conjuring images of unaccountable, computerized overlords. 20

### 3

#### Core antitrust laws are economy wide

Gerber 20 --- David J Gerber, Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust”, Ch. 1, page 15, 2020, https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198727477.001.0001/oso-9780198727477-chapter-2

C. **A Core Definition**

The Guide uses the **term**s “competition law” and “antitrust law” to refer to **a general domain of law** whose object is to deter **private restraints** on **competitive conduct**. We look more closely at the terms:

1**. “General”—**The laws included are those that are **applicable throughout an economy** and thereby provide a framework for **all market operations** (there are always some exempted sectors). Laws dealing only with **specific markets** (e.g., telecommunication) **do not play that role.**

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### Substantial is across the board

**Holmen 13** (Holmen School District, SECTION 504 OF THE REHABILITATION ACT OF 1973, <https://www.holmen.k12.wi.us/board/policies_and_admin_rules/300/a342-1%20504%20Rehab%20Act%20of%201973%2012-9-13.pdf>)

A substantial limitation is a significant restriction as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, or duration under which the average person in the general population can perform that same major life activity. The Supreme Court in “Toyota v. Williams” noted that to meet the “**substantially limit**” definition, the disability must occur across the board **in multiple environments,** not only in one environment or one setting. The implication for school related 504 eligibility decisions is that the disability in question must be manifested in all facets of the student’s life, not only in school.

#### Vote neg for limits and ground---sectors are boundless and create uniqueness and link unpredictability for topic specific disads

### 4

Substantial PIC

#### Counterplan:

#### The United States federal government should:

#### --increase prohibitions on interstate anticompetitive horizontal shareholding by private institutional investors.

#### --eliminate prohibitions on intrastate anticompetitive horizontal shareholding by private institutional investors.

#### that could substantially effect commerce among the several states by reducing the scope of its antitrust laws, devolving authority to prohibit intrastate anticompetitive horizontal shareholding by private institutional investors. that could substantially effect commerce among the several states to the fifty states and relevant territories,

#### --and establish a domestic competition network to achieve convergence of prohibitions on anticompetitive horizontal shareholding by private institutional investors.

#### Solves the interstate cases their advantages assume – AND drives intergovernmental policy convergence on intrastate cases

Kovacic 13 (William E. Kovacic, Commissioner, U.S. Federal Trade Commission, and Professor, George Washington University Law School, “Distinguished Essay: Good Agency Practice and the Implementation of Competition Law” European Yearbook of International Economic Law 2013. European Yearbook of International Economic Law, vol 4, <https://link.springer.com/chapter/10.1007/978-3-642-33917-2_1>) MULCH

If the answer to all of these queries is to leave the status quo in place, then it is incumbent upon the public agencies with competition or consumer protection duties to spend more effort than they do today to achieve a greater convergence of approaches and to see how collaboration can permit them to achieve results that exceed the grasp of single agencies acting alone. One place to start is to create a domestic competition network and a domestic consumer protection network to engage the public authorities in the kind of discussions and cooperation that U.S. agencies pursue with their foreign counterparts.17 There is no forum in which the U.S. public institutions assemble regularly to discuss what they do and consider, as a group, how the complex framework of federal, state, and local commands might operate more effectively. At best, the U.S. public authorities perform these network building functions in piecemeal fashion at bar association conferences and other professional gatherings. There also are bilateral discussions involving some public bodies.18 These measures are useful, but they are not good substitutes for the establishment of a more comprehensive framework of interagency regulatory cooperation. The U.S. competition agencies spend more time seeking to develop effective mechanisms for cooperation with foreign authorities than they devote to the integration of policymaking across federal and state agencies domestically.

Good examples of how to achieve greater levels of cooperation exist abroad. In the middle of the previous decade, the European Union (EU) created the European Competition Network (ECN) to coordinate the work of the national competition authorities of the EU member states and the European Commission’s Competition Directorate (DG COMP). The ECN meets regularly to discuss matters of common concern and to promote information sharing and other forms of cooperation. The network has achieved considerable success in avoiding conflicts that might have arisen from the EU’s decision to devolve greater levels of responsibility to the member states as part of a modernization of the EU’s competition policy framework.

As suggested above, government agencies in the United States would do well to emulate the European experience and create domestic networks for competition policy and consumer protection, respectively. A domestic competition network could begin with a memorandum of understanding adopted by the public agencies with competition policy duties, including the two federal antitrust agencies, sectoral regulators such as the Federal Communications Commission (FCC) and the antitrust units of the state attorneys general. The agreement might commit the participants to participate in regular discussions about matters such as the coordination of inquiries involving the same transaction or conduct, the development of common analytical standards, information sharing about specific cases, staff exchanges, and the identification of superior investigative techniques. Cooperation could progress toward the pursuit of joint research projects and the preparation of a common strategy to address various commercial phenomena. The network would be a platform for replicating activities that have become core elements of the ECN, such as interagency sharing of practical know-how and sector-specific experience, the development of common training exercises, and benchmarking of procedures across agencies.

#### BUT, reducing plan’s pre-emptive scope is key to intrastate prototyping that calibrates dynamic reforms

Meese 20 (Alan J. Meese, Ball Professor of Law and Co-Director, Center for the Study of Law and Markets, William and Mary Law School, “Antitrust Regulation and the Federal-State Balance: Restoring the Original Design,” American University Law Review, vol.70, 2020)

Abandoning the substantial effects test and retracting the scope of the Sherman Act would reboot competitive federalism in the antitrust field. States would again be free to adopt unique antitrust doctrine applicable to restraints that occur within their borders and produce no external harm. States would reap the benefits of doctrinal innovations, with no prospect that federal courts applying the Sherman Act will undermine state-specific policies.556 The resulting competition between the states acting as “laboratories of democracy”557 would presumably generate a wider variety of possible solutions—both substantive and institutional—to various antitrust problems, as states vie for producers and consumers by offering rival packages of antitrust doctrine and enforcement institutions.558 This decentralized process of articulating antitrust doctrine and policy would generate both experience and data about the impact of various rules and institutions, thereby informing lawmakers and state courts considering possible reforms. Federal courts, too, could learn from these results, drawing upon the “accumulated experience” of various states when fashioning Sherman Act doctrine.559

#### Absent calibrated dynamism, politicization and corporatism turn case

Coniglio 21 (Joseph V. Coniglio, managing associate in the Antitrust/Competition group at Sidley Austin LLP, former paralegal specialist in the Technology and Financial Services Section of the DOJ’s Antitrust Division, former legal intern at the FTC, “Twilight of the Lodestars: Brandeis, Chicago, Schumpeter and the Future of Competition Policy,” Competition Policy International, 6-30-2021, https://www.competitionpolicyinternational.com/twilight-of-the-lodestars-brandeis-chicago-schumpeter-and-the-future-of-competition-policy/)

“All becoming and growing — all that guarantees a future — involves pain.”2 Something like this may be said of U.S. competition policy, which increasingly seems in flux and with much labor before it. While many have highlighted how the consumer welfare policy of decades past is now challenged by a neo-Brandeisian alternative, perhaps only very few dared to think that a dynamic theory of antitrust might itself emerge as a contender to both the Chicagoan and neo-Brandeisian paradigms for the coveted title of “lodestar” in guiding the next generation of competition policy. This article provides a backdrop for the current state of play, and considers whether the current antitrust consensus may find itself disrupted by not just a neo-Brandeisian alternative, but also a neo-Schumpeterian model for competition policy.

As to the former, the possibility of a more progressive direction for antitrust enforcement has suddenly become very real. Following last year’s lengthy Congressional report on antitrust enforcement in digital markets,3 both the Senate — in the form of the Competition and Law Enforcement Reform Act (“CALERA”)4 — and now the House — with five bills constituting an anti-monopoly program known as “A Stronger Online Economy: Opportunity, Innovation, Choice”5 — are considering legislation that would radically transform antitrust enforcement, particularly in digital markets. Taken with the noteworthy appointment of Lina Khan, who will Chair the Federal Trade Commission, one might easily divine from these events that antitrust law is now at an “inflection point.”6

And yet, with the recent launch of the Schumpeter Project at the Information Technology and Innovation Foundation, a prominent think tank, the latter has also come to pass. As it is described, “[t]he Schumpeterian perspective represents a new intellectual framework for practical antitrust reforms that enable the innovation economy [] to advance dynamic competition policy in which innovation is a central concern for antitrust enforcement, not a secondary consideration.”7 In contrast with the Chicagoan or neo-Brandeisian models, the core insight of a Schumpeterian antitrust is said to be that “market power enables investments in the research and development that drives innovation, and that innovation in turn drives competition.”8

Of course, recognition of alternative and more dynamic paradigms that lie beyond both the neoclassical orthodoxy underlying modern antitrust and the institutionalism to which the neo-Brandeisians are successors is not a new development.9 Austrian thinkers, most notably Friedrich von Hayek, without question played a crucial role in the development of the neoliberal polices that would provide the bedrock for the law and economics revolution that began to take hold in the 1970s. Moreover, commentators have already articulated in some detail how more dynamic economic theories could be deployed to craft a new competition policy.10 But is now the time for the creative destruction of antitrust law?

As with any theory of law, to overcome the challenge of legal realism and avoid devolving into a primarily political affair, antitrust law must be sufficiently determinate to constitute a coherent framework for adjudicating disputes. Essential to this end is overcoming problems of both ambiguity and vagueness — that is, not only respectively knowing what antitrust law means, but how to apply it. Whereas common law standards may look backward to tradition, and civil law to more detailed rules, antitrust has managed to avoid the abyss of legal realism as a hybrid “common law statute,” whereby the courts have put forward concrete rules that serve as flesh on the bones of antitrust’s statutory standard — which is, generally speaking, the protection of competition.11

Up until now, antitrust law’s greatest triumph in this respect was the adoption of the consumer welfare standard and neoclassical economics, and specifically price theory, to solve the fundamental problem of determining when business conduct that resulted in increased market concentration—a consequence of both competition on the merits and anticompetitive behavior—was unlawful. Before the consumer welfare standard, antitrust law had no firm answer to this question, and risked becoming an essentially political exercise haphazardly aimed at promoting democracy by preventing even de minimis increases in market concentration, and thus compromising its status as a rule of law, rather than of men.

While there were many figures in the antitrust enlightenment who woke competition policy from its dogmatic slumber, few were more important than Harold Demsetz, a Professor of Economics at UCLA. As Demsetz pointed out, the simple concentration doctrine12 upon which much of antitrust enforcement had been premised, and which presumed that increases in market concentration would almost invariably lead to decreases in market performance, could not be sustained in light of a sober look at the empirical evidence.13 Put simply, while there may be virtues prized by no less an economist than Adam Smith from rivalry amongst many sellers, improved economic performance, understood in neoclassical terms — lower prices, higher quantities — isn’t necessarily one of them.

While Demsetz’s analysis concerning the relation between structure and performance was transformational, much less so were his writings on the nature of competitive conduct and its relation to neoclassical equilibrium. Over a decade and half following his landmark empirical research, Demsetz gave a speech commemorating the 100th anniversary of the Sherman Act and posited that “[w]e do not yet possess an antitrust-relevant understanding of competition.”14 As he pointed out, the forms or “dimensions” of competitive conduct are many, and encompass not just price and other types of rivalry, but also innovation. For Demsetz, the task for competition policy was to properly account for each of them in formulating antitrust rules.

As Demsetz no doubt understood, this presented a related, but far more intractable problem than debunking the simple concentration doctrine: just as there can be tradeoffs between structural forms of rivalry and market performance, so too can there be tradeoffs between market performance — specifically, the dimensionality of price competition that is the focus of price theory and which features prominently in the consumer welfare analysis — and innovation competition, the major driver of long-run economic growth. Indeed, perhaps no one had seen this potential tradeoff more clearly than Schumpeter himself, whose gales of creative destruction and innovation competition were incentivized by market power in static product markets.

So understood, the core problem for competition policy is one of ambiguity: does antitrust law’s raison d’etre of protecting competition mean Smithian rivalry, neoclassical price competition, or creative destruction? Or, if all three, how do we identify the proper “mix” of competitive forms given the tradeoffs between them? For Demsetz, there was no good answer to the latter question: “If we agree that many relevant forms of competition relate inversely to each other and that no plausible method exists for converting intensities of different forms of competition into a common unit of intensity, then, it would seem, we also must agree that the Sherman Antitrust Act is logically impossible to carry out if its goal is interpreted as increasing the overall intensity of competition (or to reducing the overall intensity of monopoly).”15

On this view, a Schumpeterian competition policy should not seek to make creative destruction the new “lodestar” of competition policy to parry the Brandeisian effort to reinstate structuralist rivalry as the “lodestar” (while also being wary of a rear guard action by technocratically-minded neoclassical thinkers to, for example, move from a partial to general equilibrium analysis as their new “lodestar”). Indeed, doing so would not only misjudge the problem, but overlook that protection of innovation has long been a feature of antitrust law, especially when evaluating unilateral conduct. As such, if the real challenge for antitrust involves harmonizing the three major and in some cases inversely-correlated dimensions of competition — Smithian rivalry, neoclassical price competition, and creative destruction — it is thus not clear what benefits a distinctively Schumpeterian competition policy will bring.

In fact, aside from the still contentious relation between market structure and innovation, the tensions with Schumpeter and contemporary antitrust policy are profound. Whereas the thought collective that laid the foundation for the law and economics revolution saw neoliberal corporatism as the best alternative to socialism, Schumpeter saw the former as merely the precursor to the latter, famously quipping not only that socialism could work, but that capitalism could not survive.16 Further still, however, for Schumpeter innovative behavior depended crucially on an ethic of entrepreneurialism — what he called the “psycho-sociological superstructure” of a dynamic capitalist economy, and for which he believed corporatism was a demoralizing force.17

A Schumpeterian competition policy may thus far more resemble the neo-Brandeisian approach than the Chicago School in evaluating business conduct with an eye to “non-economic” criteria well beyond neoclassical analyses. In an attempt to account for Schumpeter’s broader insights, a Schumpeterian antitrust may therefore introduce a new vagueness problem into antitrust by replacing what is currently seen as an empirical methodology focused on positive economics with something more akin to “methodological individualism,” a technique which Schumpeter himself pioneered and is typical of Austrian approaches.18 For this reason, creative destruction of modern antitrust through a Schumpeterian turn may prove to be at best a pyrrhic victory for American political economy that creates more uncertainty at a time when the need for clarity in antitrust rules could not be overstated.

To be sure, there is still no general theory that can properly account for the various dimensions of competition in the sort of systematic way that could ground truly sound and comprehensive antitrust reform.19 In other words, Smithian rivalry, neoclassical equilibrium, and creative destruction remain somewhat incommensurable goods within a broader antitrust rule regime. For this reason, the sensible option for policymakers may be to better calibrate the relation between Smithian rivalry, neoclassical price competition, and creative destruction as comparable modes of competition with an ordering reflected in clear and coherent antitrust rules.20 Indeed, at a very high level, prioritizing Smithian rivalry in merger review, creative destruction when analyzing unilateral conduct,21 and neoclassical price competition in dealing with cartels is a relatively accurate understanding of both antitrust law today, as well as several mergers-focused reform programs.

In his classic Politics, Aristotle saw the wisdom of studying not just the ideal constitution — shall we say again, the “lodestar” — but also that which is second-best and invariably much more practical under the circumstances, and which itself took the form of a “mixture” between yet another trinity: rule by one, rule by the few, and rule by the many.22 In the present antitrust moment, with radical proposals for reform in both houses of Congress and a neo-Brandeisian Chair of the FTC, the competition policy community would do well to follow Aristotle’s example. Rather than crown any one dimensionality of competition as the new lodestar and king, antitrust reform should focus on harmonizing the three major competitive dimensionalities of Smithian rivalry, neoclassical price competition, and Schumpeterian creative destruction within a newly polished but mixed antitrust rule regime that preserves its status as a rule of law and avoids the pitfalls of politicization.

#### It's an independent existential risk and magnifies all others

Ikerd 2K (John E. Ikerd, Professor Emeritus of Agricultural & Applied Economics, University of Missouri Columbia, PhD agricultural economics, University of Missouri, “Economics as if People Mattered; Farming for Quality of Life,” paper presented at 2000 Midwest Small Farm Conference and Trade Show, sponsored by Sustainable Earth, Noblesville, IN, November 17-18, 2000, <http://web.missouri.edu/~ikerdj/papers/EconasifPeopleMatter.htm>)

In times past, more cheap stuff may well have been what humanity needed most. A couple of hundred years ago many people lived lives of drudgery – many starving, freezing to death, or struggling day-to-day with pestilence and disease. But those times are long past – at least for most of the world. The system of competitive capitalism gave people food, clothing, and shelter and helped people lead longer, healthier lives. But, in the process of producing more cheap stuff, it has depleted the resources – people as well as nature – upon which its future productivity must depend. It is destroying itself as it destroys human society and destroys the natural environment. It has evolved from a system of competitive capitalism to a system of industrial corporatism that has become a cannibalistic system for reckless resource exploitation rather than rational resource use. The corporatist economic system of today cannot possibly support another fifty years of human progress. It is destroying the very things that must be restored before humanity can take its next step forward.

We must find a new, shared vision for the future of humanity, and it must be built on a new economic foundation. Our focus on short run, self-interest and our worship of economic materialism is a major contributor to, if not the sole cause of, nearly every major problem we face in today's society. Nearly every incident of environmental degradation and destruction is a consequence of economic rationalization that the earth's resources are ours for the taking. Hunger and disease in the world are not consequences of a lack of food or medicine, but of our acceptance of the economic logic that only those who are willing and able to pay are deserving. Our blind faith in free-markets has caused us to surrender both the private and public sectors of our society to corporate control. Our political campaigns are planned and paid for by the corporations who then have access and influence, if not outright control, of the politicians who are supposed to represent the people. Any positive vision for the future of humanity must be based on a new and different vision of economics – as E.F. Shumacher said, an Economics as if People Mattered.

The economy of the future must focus on people rather than production and profits. To achieve such an economy, we must challenge the economic assumption that people are best served by ever-increasing production and profits. Economists argue that since people invariable prefer more money to less, more money obviously enhances our quality of life. Thus the more we produce, spend, and consume the higher will be our quality of life. Economists argue that any means we might choose to address the ills of society invariably costs money, and more money comes only from increased production. Production creates jobs from which people pay the taxes, and those taxes support various social services. Economists argue that only the affluent can afford to protect the environment. So, we must continually increase production if we are to have the wealth from which we derive the means of caring for the natural environment. To economists, the well being of people is simply some linear transformation of production and profits – the greater the production, the greater the profits, and the higher the level of human well being.

However, the foundation for contemporary economic thinking is based on observations of the world of 200 years ago, not the world of today. Adam Smith's observations in his 1776 book, The Wealth of Nations, are simply not relevant to the society of today. None of the assumptions needed to ensure that the pursuit of short run, self-interest is transformed into long run, societal benefits – as if by an “invisible hand” are present in the world of today. There are no longer large numbers of buyers and sellers, but instead a few giant corporations, which make a mockery of the concept of competitive, capitalistic, free markets. It is not easy to get into enterprises that are profitable or to get out of enterprises that are unprofitable, and thus, to give people more of what they want and less of what they don't want. Patents, specialized equipment, and large capital requirements represent formidable barriers to entry and exit. Consumers do not have accurate information concerning the value they will realize from whatever they buy, but instead are confronted with disinformation by design, in the form of persuasive advertising. Finally, the consumer is no longer king. Consumer sovereignty went by the wayside when advertising agencies began hiring Ph.D. psychologists to warp and bend consumer tastes and preferences to fit the desires of corporate producers.

There is absolutely nothing in existing economic theory to support the proposition that today's economy is performing for the benefit of society as a whole. There is far more support for the proposition that today's economy is functioning solely for the benefit of giant corporations and that any net benefits for people are but a side-effect of the pursuit of corporate profits and growth.

Economists have all sorts of rationalizations for continuing to worship at the altar of “free-market economics” during an era of corporatist reign. But none of them stand up to the ultimate test of common sense. The concept of “workable competition” is not workable in a corporatist economy – there quite simply is no longer an “invisible hand” of impersonal competition to transform greed into good. The simple fact that people have jobs and make money doesn't necessarily mean that they are willing to pay higher taxes – or that higher taxes and more social services necessarily translate into greater societal well being. We need a society in which people recognize their interdependence, understand that they are all part of the same whole, and truly care about each other. More jobs and more money simply don't translate into acceptance of social responsibility. Our social responsibilities will be met through understanding and compassion, not through the pursuit of greed.

Stewardship of the environment is not a luxury of the rich but a responsibility of all people. The poor of the world cannot attain a higher quality of life by exploiting their natural environment or exploiting other people. Whatever they gain in material well-being will be more than offset by the loss of cultural and moral values, the degradation of their society, and the destruction of their natural environment. The rich degrade and destroy far more resources in their pursuit of material wealth than they have ever been willing to give back in terms of protection or restoration. “Ecological economics” is a contradiction of terms, because the economics of selfishness and greed simply can't accommodate the principle of true stewardship. In general, contemporary economics is fundamentally incapable of addressing the social and ecological dimensions of life that are essential in sustaining human progress. We will need a new economics to build a sustainable human society.

Toward an Economics of Sustainability

Sustainability is the foundation upon which the new economics must be built. Sustainability requires that we find ways to meet the needs of the present while leaving equal or better opportunities for those of the future. We need an economy that will sustain human progress on earth – not an economics that exploits the very resources, both human and ecological, upon which the future well being of people depends. We need a new economics of sustainability.

The concept of sustainability is far broader than economics – at least as economics currently is conceived. Daly and Cobb, in their book, For the Common Good, refer to the economics of today as “chrematistics” -- the “manipulation of property and wealth so as to maximize short-term monetary exchange value to the owner.” Sustainability is also broader than ecology or sociology because sustainability includes contemporary economics. However, sustainability is quite consistent with the root-word for economics, “oikonomia” – meaning “management of the household (community, society, humanity & biosphere) so as to increase its value to all members over the long run” (p. 138). Oikonomia includes the management aspects of sociology and ecology as well as economics. Daly and Cobb suggest that we address “oikonomia” through an “economics of community,” which would be accomplished through new government policies. However, it will take more than public policy to implement “okonomia.” First, the people must embrace this new and different concept of economics. They must understand the necessity for managing the whole of human society, the environment, and the economy if we are to sustain human life on earth.

People will embrace the concept of sustainability only if they understand that sustainability is fundamentally about sustaining a desirable quality of life for people. Some find fault with this anthropocentricity or people-centered interpretation of sustainability. They contend that other forms of life may be just as important as human life in the longer run scheme of things. However, if we are not concerned uniquely with sustaining the human species, there is no “economic” issue to be addressed. Economics is about managing resources to meet the needs of humans. If we weren't particularly concerned about humans, we could simply depopulate the earth or otherwise reduce human claims on resources to a point where the sustainability of other species would no longer be in question, or at least not threatened by humans. However, our nature as humans is not unlike the nature of other species, in that we humans have an innate instinct for survival, reproduction, and self-gratification.

We will not reduce our claims on earth's resources for the sole purpose of ensuring the sustainability of other species or of the earth. But, we will protect other species if we perceive it to be in our best interest to do so. The fact that we are concerned uniquely with sustaining the human species does not imply that we are concerned exclusively with sustaining the human species. Contrary to what the economics of “chrematistics” might imply, our best interest is not exclusively individualistic in nature. Our interests as members of society and as members of the human race are linked with the integrity of the rest of the biosphere. Thus, our interests may well be served best through sharing and stewardship, including preservation of other species, rather than through expressing our individualistic human greed. Our interests are best served through “oikonomia” rather than “chermatistics.”

The new sustainable economy must be multidimensional – having social and ecological dimensions, as well as the conventional individualistic dimension. The three dimensions must be considered as interdependent aspects of the same whole, but makes distinctive contributions to a sustainable economy. The new economics must deal with ways of managing the ecological, social, and individual economies to increase their value to all members of society over the long run.

First, conventional economics will continue to play an important role in society – in meeting the needs of individuals. There will continue to be a large and legitimate private sector in a sustainable economy. However, in order for the private economy to function in the “collective” interests of society, economic competition must be restored. This is not an impossible task. The people broke the corporate monopolies of the early 1900s. When the people learned and understood the implications of a corporately dominated economy, they rebelled. They started the Progressive Movement, the “trusts were busted,” and competition was restored. They didn't do the job perfectly, and corporate monopolies have emerged again.

This time we have far larger, multi-national corporations. The job may be more difficult this time, but the consequences of failing to control corporate power may be far more severe. People still have power over corporations – people grant corporate charters and people can take those charters away. Corporations are not people, and it's people, not corporations, that matter. When the people become convinced that competition must be restored to the private sector of the economy, it will be restored. In the process, the people will come to understand the limitations of the private sector in meeting the social and spiritual needs of people, and will come to embrace the social and ecological economies as means of meeting their needs and wants.

### 5

#### The United States federal government should:

* **Establish a universal basic income of 1000 a month**
* **Stop escalatory tariffs against China**
* **Provide increased subsidies for professional development and networking to workers disaffected by employment practices of corporations**
* **Establish an increased graduated corporate income tax, wealth tax, and stock micro-transactions tax**
* **Initiate talks with willing global partners to establish effective financial policy and common ownership standards**
* **6**
* Text: The United States federal government should require enforcer-firms to prohibit anticompetitive horizontal shareholding by private institutional investors., establish a private right of action for noncompliance with enforcer-firms contractual requirements, require the enforcer-firm to report violations, and hold delegations unconstitutional if the agency imposes inadequate constraints on the enforcer-firm.
* **Counterplan solves and avoids resource tradeoffs and bizcon while creating a model for environmental regs**
* **Van Loo 20** [Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project. April 2020, The New Gatekeepers: Private Firms as Public Enforcers, 106 Va. L. Rev. 467, Lexis]
* III. Expanding the Public Influence on the Firm
* This Article aims primarily to illuminate the rise of mandated enforcement, both in its form and scope. Once recognized, however, this development implicates prominent conversations and policy debates. By **redrawing** the **lines** between public and private, mandated enforcement **adds a new layer** to some of the most fundamental corporate law questions: how should the firm be conceptualized? And what duties does it owe to society?
* The firm has a decidedly private core, as implicated by its prominent description as a nexus of contracts. 186 Because the firm's contractual foundations are necessarily incomplete, corporate law fills in the gaps to reflect the parties' intents. 187 Some scholars have proposed giving greater weight in corporate governance to a broader set of social issues, including employee rights or a cleaner environment, and have demonstrated how managers have discretion under the business judgment rule to pursue these goals. 188 Nonetheless, most commentators and judges see the primary goal of corporate law as advancing shareholder value. 189
* By some accounts, the depiction of the firm as a contractually-based private entity helped advance the notion that government intervention in those private agreements is "unnatural." 190 That line of reasoning views the firm's "market-oriented nature" as serving "to dismiss the notion that [\*496] the corporation owes anything to the state." 191 Of course, the firm and its directors cannot pursue profit illegally. Under Delaware law, for instance, the firm's articles of incorporation cannot limit a director's personal liability when the director commits a "knowing violation of law." 192 Thus, the firm is private at its core, but public statutes define the limits. The rest of this Part illustrates how mandated governance constitutes a **considerable expansion** of that public side.
* A. Conscripting the Firm as Regulator
* Two of the most fundamental functions of administrative agencies are writing and enforcing rules. Firms now perform each of these functions for the public good. They do not undertake these activities voluntarily in response to laws or market incentives, but by direct public mandate.
* 1. Writing Rules
* Mandated enforcement puts the firm in a rulemaking role by compelling it to write regulatory contractual clauses. 193Link to the text of the noteFirms' written contracts serve as a principal vehicle for implementing third-party governance. For example, in its FTC settlement, Facebook agreed to require "service providers, by contract, to implement and maintain appropriate privacy protections" for any data obtained from Facebook. 194Link to the text of the noteWhen the company later submitted its required compliance report, Facebook explained that it had implemented its third-party oversight through its contracts. 195Link to the text of the noteIn particular, it developed a "Contract Policy" so that agreements with third parties operate through Facebook's "pre-approved standard contract templates." 196Link to the text of the noteFacebook's legal department "reviews contracts that deviate from the pre-approved templates to help ensure that contracts with applicable service providers contain the [\*497] required privacy protections." 197Link to the text of the noteThe case of Facebook embodies a broader theme of regulator-mandated contract clauses. Consumer finance, pharma, and oil regulators also explicitly mention contractual requirements. A CFPB guidance bulletin states that all financial institutions should include "in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities." 198Link to the text of the noteThe FDA expects pharmaceutical companies to detail in their contracts the shape of third-party suppliers' compliance systems, and to reserve the right to audit these systems. 199Link to the text of the noteThe EPA required BP Oil to include certain provisions in any new contract with a drilling rig, including requiring the rig to join an industry safety group. 200Link to the text of the noteThe firm's contracts no longer contain only voluntary second-order regulatory components made in response to regulation, but now also include first-order clauses mandated by law. 201Link to the text of the note These mandated contractual clauses presumably become legally enforceable against the smaller companies agreeing to them. 202Link to the text of the noteEven if the counterparties do not expect the contract to ever reach a courtroom, however, their terms can define the contours of the ongoing relationship. 203Link to the text of the noteBusinesses refer to their contracts for guidance as to their respective rights. 204Link to the text of the noteThrough their inclusion in contracts, third-party enforcement clauses can influence many of the firm's relationships with external parties. 205Link to the text of the note More to the point, these mandates infuse a more significant public obligation into the firm's contracts. Motivated solely by profit and without any legal influence, businesses have long inserted contract clauses that incidentally advance the interests of consumers, the environment, or health. 206Link to the text of the noteEven second-order contractual clauses, inserted [\*498] voluntarily in response to laws, still retain the autonomy of contracting parties and therefore a heavy private component. 207Link to the text of the noteConversely, conscripted enforcement contracts impose more thoroughly public obligations because businesses do not write them voluntarily. Do contractual third-party governance clauses differ from other contractual mandates? Various statutes influence the shape of particular contracts by requiring them to include certain information. For instance, credit card companies must prominently communicate the annual percentage rate under the Truth in Lending Act. 208Link to the text of the noteThe Uniform Commercial Code provides a default warranty of merchantability and imposes a duty to act in good faith. 209Link to the text of the noteLegislative limits on freedom of contract are neither new nor unusual. Conscripted enforcement clauses need not differ from other contractual mandates to mark a significant expansion of public influence on the firm's contracts. However, those traditional mandates do, in fact, differ because their most immediate beneficiary is one of the contracting parties. Arguably, these restraints advance freedom of contract, in that they help one of the parties to come to the agreement they would have wanted if both were economically rational and informed. 210Link to the text of the noteDisclosures, for instance, give information that both parties would want entering into the transaction about the nature of what they are receiving - such as the full cost of a loan, including fees. 211Link to the text of the noteThose laws may ultimately benefit the public by improving welfare through more efficient market transactions, but they remain more clearly internal-to-the-contract in terms of their direct beneficiary - one of the contracting parties. 212Link to the text of the note In contrast, mandated enforcement can benefit parties not involved in the contract. For example, mandates require Facebook, Citibank, and Pfizer to protect consumers by governing service providers and suppliers. 213Link to the text of the noteExxon and BP must ensure that contractors safeguard the environment for the benefit of the public. 214Link to the text of the noteGranted, one or both of the contractual parties also arguably benefit from these requirements, by [\*499] preserving their reputation and strengthening industry standards. 215Link to the text of the noteAlso, consumer-oriented protections benefit a party that will ultimately contract with the enforcer-firm - Facebook's users, or Citibank's customers. 216Link to the text of the noteThe benefits to the contracting parties are less immediate and less definite, however - and they do not motivate the clause. Congress regularly passes laws that require administrative agencies to write rules. Following the financial crisis of 2008, for instance, Congress tasked the CFPB with writing numerous consumer protection rules. 217Link to the text of the noteBy analogy, in the case of third-party governance, regulators arguably delegate some of the rulemaking authority they receive from Congress to firms. Regulators could write the specific third-party governance clauses that they want firms to include in their contracts, but they do not. This non-directive approach reflects regulators' broader strategy of delegating complex decisions to private parties due to limited information and resources. 218Link to the text of the note Instead, regulators provide general guidance regarding what the firm should include, such as instructing Google to require "service providers by contract to implement and maintain appropriate privacy protections." 219Link to the text of the noteAlthough companies do not normally release the text of their contracts, Facebook's terms state to app developers, "We or an independent auditor acting on our behalf may audit your app, systems, and records to ensure your use of Platform and data you receive from us is safe." 220Link to the text of the noteRegulators thus, to varying degrees, let the firm determine how best to write that clause. In short, by writing contract clauses governing other private parties, businesses play a rulemaking role analogous to what Congress expects of administrative agencies.
* 2. Enforcing Law
* Mandated third-party governance also compels large firms to enforce the law. In his testimony in front of the Senate, Mark Zuckerberg was [\*500] asked by one senator why the company had not more closely monitored app developers and held them accountable for violating Facebook's privacy policies. Zuckerberg responded, "Before, we'd thought that when developers told us that they weren't going to sell data, [that was] a good representation. But one of the big lessons that we've learned here is that clearly, we cannot just take developers' word for it. We need to go and enforce them." 221Link to the text of the note As mentioned above, federal regulators use ongoing monitoring as their main enforcement tool, rather than simply bringing formal lawsuits. 222Link to the text of the noteThe FDA and EPA conduct routine on-site inspections of laboratories and manufacturing facilities, for instance, and the CFPB visits banks to examine their records. 223Link to the text of the noteWhen the federal monitors - typically called inspectors or examiners - detect wrongdoing, they often handle the problem directly without involving lawyers. 224Link to the text of the note Mandated enforcement also emphasizes monitoring. As part of its consent order, Facebook now informs developers it may "audit" their app to ensure compliance. 225Link to the text of the noteCapital One must conduct "periodic onsite audit reviews" of service providers. 226Link to the text of the noteA pharmaceutical company is expected to reserve the right "to audit its contractor's facilities for compliance." 227Link to the text of the noteExxon is required by court order to review subcontractor monitoring data. 228Link to the text of the noteThus, by public mandate, firms must undertake one of the core functions of the modern public regulator. In implementing regulatory monitoring, private firms face similar challenges as public regulators long have. For instance, Volkswagen fooled regulators for years into thinking its cars met emissions standards through software that recognized when an emissions test was occurring and hid actual emissions levels. 229Link to the text of the noteSimilarly, Citibank had an oversight [\*501] regime that included reviewing call centers' phone conversations, but call center employees figured out which calls would be audited and only veered from the mandated script on unmonitored calls. 230Link to the text of the noteBusinesses now have incentives to evade the enforcer-firm's detection as they long have had for public regulatory policing. In monitoring third parties, large firms also look for similar things as do public regulators. A "critical component" of modern regulation is to move beyond the identification of specific violations to ensure that companies have "a robust and effective compliance management system." 231Link to the text of the noteThis means scrutinizing a company's procedures to ensure a meaningful compliance system. 232Link to the text of the noteThe enforcer-firm must also look for more than violations. As one example, when Facebook monitors app developers for privacy, it examines developers' data security procedures. 233Link to the text of the note Enforcement must come with some kind of sanction. One pervasive regulatory sanction is the ability to block access to the market, often through the revocation of a permit or license. 234Link to the text of the noteThis gives regulators a potentially ruinous enforcement sanction, even if they rarely use it. Big businesses are expected to enforce using a similar gatekeeper function by blocking access to markets. In one consent decree, the Comptroller of Currency and other governmental entities required HSBC to "perform appropriate due diligence" of "Third-Party Provider qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability." 235Link to the text of the noteThese factors reflect what bank regulators consider in extending bank charters. 236Link to the text of the noteMore broadly, regulators may require firms to screen third-party qualifications at the outset, and then to reserve the right [\*502] to end the contract in the event of misconduct. 237Link to the text of the noteLike public regulators, large private firms wield powerful blocking sanctions. 238Link to the text of the note Despite their private foundations, corporations increasingly must play a role similar to the public regulator - both by writing rules for the benefit of the public into their contracts with third parties and by actively monitoring and enforcing those rules. This new role not only changes the descriptive account of the firm, but promises to reshape corporate governance, liability, and structure.
* B. Shaping Corporate Governance
* Much of corporate law addresses the duties owed by officers and directors. 239Link to the text of the noteIn public corporations, the shareholders do not exert day-to-day control, but rely instead on the board of directors and the officers of the corporation to run the business. 240Link to the text of the noteFiduciary law is one of the main ways that shareholders can hold officers and directors liable if they manage the corporation in a way contrary to shareholders' interests. 241Link to the text of the noteOther civil lawsuits may also be brought against business leaders. This Section looks at the implications of third-party mandates for personal liability and the corporate governance principles that such liability seeks to promote. In In re Caremark International Inc. Derivative Litigation, the Delaware Chancery Court observed that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may ... render a director liable for losses." 242Link to the text of the noteSubsequent rulings have reinforced directors' fiduciary duty to ensure the corporation has reporting systems and controls that [\*503] enable them to monitor risks. 243Link to the text of the noteBut the bar is high for such liability. 244Link to the text of the noteDirectors do not violate their fiduciary duty simply by overseeing a company with objectively poor compliance systems, unless plaintiffs show that the directors' oversight of those systems was subjectively reckless or grossly negligent. 245Link to the text of the note How does third-party mandated governance alter board members' duties to shareholders? Shareholders tested that issue through a suit against Capital One. 246Link to the text of the notePointing to the CFPB's aforementioned enforcement action, shareholders first alleged that the board inadequately monitored the call centers. 247Link to the text of the noteThe court noted that, under Delaware law, to establish a breach of fiduciary duty in monitoring third parties, plaintiffs must show that the board operated in bad faith. 248Link to the text of the noteBecause Capital One had controls in place for call centers, the court found that the plaintiffs did not plead sufficient facts to show "a "sustained or systematic failure of [the] board to exercise oversight' or that the board "utterly failed to implement any reporting or information system or controls.'" 249Link to the text of the noteThe court ultimately dismissed the suit on summary judgment because the plaintiffs did not put forth facts showing that the directors "consciously chose not to remedy the misconduct." 250Link to the text of the noteState law may eventually catch up, but the Capital One shareholder suit demonstrates how state corporate law imposes lower duties than regulators do upon the board with regard to third parties. 251Link to the text of the note Despite the lack of a strong influence on directors' state law liability, mandated third-party regulation could still alter corporate governance. By specifying actions the board must take in the wake of settlements, administrative agencies are dictating concrete board duties. In its settlement with Citibank, for instance, the CFPB required the board to form a sub-committee focused on compliance and for that sub-committee [\*504] to meet monthly, take minutes, and submit quarterly reports to the CFPB's regional director on the bank's progress overseeing third parties. 252Link to the text of the noteRegulators' detailed instructions put responsibility at the top of the corporation for the ongoing oversight of third parties, leaving little room for the board to claim ignorance. 253Link to the text of the note Although regulators are unlikely to prosecute officers and directors for third-party mandates, and insurance would normally shield many from paying anyway, 254Link to the text of the notethe mandates move business leaders toward personal liability for the acts of third parties under various statutes. For example, the Federal Trade Commission Act holds individuals liable for a corporation's deceptive acts if the individual possessed authority to control the acts and knew or should have known about them. 255Link to the text of the noteSince many settlement agreements and guidance documents require the board of directors or officers to oversee third-party compliance and to receive reports, 256Link to the text of the noteregulators are essentially ordering them to have control and knowledge. Some regulators, including the CFPB and FTC, have pursued actions against individuals for failed supervision of third parties. 257Link to the text of the noteIndividuals within the firm may thus in the future face greater personal liability for the acts of third parties as a result of current mandates to monitor and influence those third parties. 258Link to the text of the note More broadly, the mandates may still influence board members' conduct even if personal sanctions are unlikely. Enforcement actions against firms drove the explosion in many large corporations' compliance departments, which now often rival legal departments in size and influence. 259Link to the text of the noteThose large compliance departments often retain some formal relationship with the board. 260Link to the text of the noteThe emergence of specific [\*505] requirements for third-party oversight could similarly shape industry norms for the board's oversight of other external companies. 261Link to the text of the note Put differently, regulators are moving the bar set by corporate law's compliance duties imposed on boards for third-party oversight. By requiring the firm to oversee third parties for legal compliance, regulators inevitably implicate those ultimately responsible for running the firm, including owners, board members, and managers. Regulators' specific requirements for board conduct, reaching details such as minutes and compliance plan approval, mean that even boards that have yet to be subject to enforcement actions operate in reference to them in managing their compliance programs. Mandated enforcement may overcome the formidable shield from liability that state law, business judgment rule, and other waivers 262Link to the text of the notehave provided to the board of directors. C. Altering Entity Liability and Structure Legal liability plays a prominent role in corporate law. By some leading accounts, the limitation of liability is the defining characteristic of the corporation and has driven its structural evolution. 263Link to the text of the noteRegulators' approach to third-party regulation has increased the firm's liability for the acts of other businesses. 264Link to the text of the noteThat shift in liability implicates the firm's entity-level liability, which could alter the corporate structure in ways that policymakers did not intend. Mandated third-party governance could change large companies' organizational structures. In recent decades, many businesses have outsourced activities previously conducted in-house. 265Link to the text of the noteDiverse considerations drive the decision to outsource, including cost savings and an enhanced ability to monitor remote parties, 266Link to the text of the notebut some scholars have [\*506] concluded that one goal is lessening the risks of legal liability. 267Link to the text of the noteRegardless of the motivation for the original outsourcing, the third-party service provider typically contractually shields the outsourcing firm from lawsuits. 268Link to the text of the noteFor instance, a debt collector indemnified cell phone carrier Sprint from "all claims, damages, losses, liabilities, costs, expenses and reasonable attorney's fees" related to its collection services. 269Link to the text of the note Third-party mandates could make outsourcing less attractive if they remove some of these legal protections. As discussed above, this governance shift already prevents many of the largest companies from delegating away liability for public prosecution. 270Link to the text of the noteThat fact alone presumably makes outsourcing less attractive in terms of shielding from third-party liability. Outsourcing would become even less attractive if it stopped insulating the firm from private lawsuits. Agency law provides a primary avenue for private parties holding firms liable for the acts of third parties. The more a business controls the acts of another, the more likely courts will find the business to be the principal liable for an agent's acts. 271Link to the text of the noteVarious other statutes also provide a private right of action against companies for acts by third parties they control, such as for unfair and deceptive acts committed against consumers. 272Link to the text of the noteThe more Verizon controls the acts of the telemarketer, for instance, the easier it is for a customer harmed by the telemarketer to sue Verizon, rather than the telemarketer. Outsourcing [\*507] may provide less protection from liability in private lawsuits if third-party mandates closely map those factors considered by courts in determining control. In analyzing whether a third party, such as a telemarketer, is an agent, courts cite activities such as monitoring and editing the script used by telemarketers as demonstrating control. 273Link to the text of the noteYet regulators often mandate third-party monitoring and explicitly require the implementation of "controls" over third parties. 274Link to the text of the noteIt follows that conscripted enforcement may move the firm into a position of control sufficient for courts to hold the firm liable for the acts of third parties. In other words, the new gatekeepers may prompt a resurgence of respondeat superior liability. 275Link to the text of the note The additional risk of liability possibly imposed by third-party mandates might change the outsourcing calculus. Purchasing the service provider would not necessarily impose more liability. In United States v. Bestfoods, the EPA sued a parent company under common law liability for the cleanup costs of hazardous waste disposed of by a subsidiary. 276Link to the text of the noteThe Supreme Court reasoned that something more than ownership control was needed to hold the parent liable under the common law. 277Link to the text of the noteDirect involvement by the parent company in the wrongdoing is needed. 278Link to the text of the note Although purchasing a subsidiary thus would not necessarily increase liability for the wrongdoing of the subsidiary, it could facilitate monitoring. As an independent company, the service provider would be reluctant to share private information with its client. Companies generally guard private information closely, and, if the client later used a different service provider, oversharing information could reduce the original service provider's competitive advantage. When the service provider is a subsidiary, however, the need for secrecy diminishes. Thus, mandated third-party governance may cause businesses to either purchase the third-party service provider or develop a new service provider as a subsidiary to facilitate more effective monitoring. This assumes that the firm believes more effective monitoring would decrease the likelihood that the service provider will engage in wrongdoing. If so, [\*508] pervasive mandated enforcement could thereby influence firms' organizational structures.
* D. Strengthening the Public Duty
* Conscripted enforcement informs debates about what duties businesses owe to society. Firms must refrain from violating laws, but they usually do not need to take any particular action to benefit the public. 279Link to the text of the noteA strong norm discourages "unwarranted "social' obligations on private enterprise." 280Link to the text of the note Industry-specific exceptions do exist, however. Utilities and common carriers must offer cable, internet, electricity, and gas services at comparable prices even to unprofitable customers, such as inhabitants of rural communities. 281Link to the text of the noteUnder the Community Reinvestment Act, banks must extend credit in underserved neighborhoods. 282Link to the text of the noteDisparate state and federal laws obligate hospitals not to exclude patients. 283Link to the text of the note Unlike banks' and utilities' requirements to help some sector of the public, third-party mandated governance is not limited to companies offering essential services or serving as common carriers. 284Link to the text of the noteIt thus reaches a broader swath of the economy. 285Link to the text of the noteAdditionally, those essential service providers can fulfill the mandated public act by offering their core product - even for compensation. 286Link to the text of the noteIn contrast, conscripted enforcement requires a public action other than offering the firm's core product, and without compensation, thus bringing the firm further outside its sphere of private enterprise. Third-party mandates differ from the drastic growth in mandated internal compliance. Compliance departments have until now largely [\*509] been seen as internally focused. 287Link to the text of the noteConversely, third-party mandates are externally focused. That distinction matters because mandating internally focused compliance departments can be seen as merely a new mechanism for requiring the firm to do what it was always expected to do - regulate itself. Although different in fundamental ways, conscripted enforcement is part of a broader shift that includes compliance departments, community reinvestment requirements, and the SEC's expanded substantive corporate law authority through the Sarbanes-Oxley Act. 288Link to the text of the noteThese and related developments have over time marked greater federal intervention into corporate governance and operations. 289Link to the text of the note Conscripted governance adds a substantial new layer by allowing a large number of federal agencies beyond the SEC to shape the firm's relationships, contracts, board activities, and liability. In debates about what duties the firm owes to society, appeals to the private nature of the firm are less persuasive in light of this extensive public influence. Other arguments against government overstepping, such as the efficiency implications of regulatory burdens, retain their force and underscore the importance of weighing broader economic tradeoffs in designing corporate governance interventions. 290Link to the text of the noteHowever, as a descriptive matter, policymakers are proceeding as though the firm has a duty to act affirmatively in the public good. IV. Expanding the Private Branch of the Regulatory State The central preoccupation of administrative law is the accountability of unelected bureaucrats. 291Link to the text of the noteThe effectiveness of administrative decisions [\*510] is also crucial to administrative law. 292Link to the text of the noteScholars have already extended those projects to the growth in private governance. 293Link to the text of the noteThis Part begins to map the normative path forward for integrating the enforcer-firm into the regulatory state.
* A. Effectiveness of the Enforcer-Firm
* A central question in business regulation is what set of incentives would **optimally deter** wrongdoing. The law can influence deterrence chiefly by adjusting the severity of the penalty or the likelihood of detection. 294Studies of optimal deterrence have produced inconclusive results. 295That indeterminacy will undermine any efforts to draw strong conclusions about the attractiveness of the enforcer-firm. Nonetheless, since the enforcer-firm is a tool for deterrence, it is necessary to consider when to deploy it.
* One straightforward reason for use of the enforcer-firm is **inadequate** regulatory **resources**. The firm's compliance department plays a major role in enforcement. 296In many public corporations today, the compliance group has grown to rival the legal department in **size and influence**. 297At Goldman Sachs, the number of people in compliance more than tripled between 2004 and 2016, to about 950. 298But the CFPB has only 416 personnel in its monitoring group to conduct examinations of Goldman Sachs, Citibank, and many other large banks. 299As another example, Facebook recently hired thousands of new compliance reviewers, while [\*511] its main regulator, the **FTC**, has only 1,100 employees total. 300By conscripting even a fraction of large companies' compliance departments to enforce, policymakers can **dramatically expand** the administrative state's regulatory workforce. In deciding whether that expansion is beneficial, observers will come to differing conclusions depending, in part, on whether they view current public regulatory resource levels as adequate.
* Putting the question of adequate resources aside, there remain other tradeoffs in determining when it would be ideal to regulate directly rather than through the enforcer-firm. A sensible signal for when the enforcer-firm might prove more effective at regulating than a government entity is the presence of **superior information** or essential sophistication. A major concern about regulation is that bureaucrats have insufficient skills or information to keep up with the private sector. 301Observers mention regulators' predicted inability to understand complex algorithms, for instance, as a counterpoint to calls for public regulation of Amazon, Facebook, and other tech giants. 302Additionally, since traditional gatekeepers do not produce the product subject to regulation, they are less familiar with the intricacies of fast-moving, technical industries.
* Most enforcer-firms already **have greater access to information** about their counterparties through the regular course of business than would regulators or traditional gatekeepers. This informational criterion also suggests that the enforcer-firm is best suited to regulate the types of activities already related to its interactions with the third party, or that "touch and concern" it. 303
* To be clear, the firm is not necessarily an expert in all that the service provider does - indeed, a lack of expertise sometimes motivates a firm to outsource. 304For instance, banks have found the task of monitoring third-party vendors extremely difficult, particularly fintechs and others providing complex artificially intelligent services, such as chatbots, credit [\*512] monitoring, and fraud detection. 305Nonetheless, regulatory understanding exists along a spectrum. Given large firms' resources, talent, information access, and expertise, they will in many contexts deliver a monitor better situated to keep pace.
* The informational advantages speak not only to the ability to detect wrongdoing, but also the cost of doing so. A chief criticism of regulation is that it increases transaction costs. 306In highly fragmented industries, the regulator faces greater difficulty monitoring all entities than in a concentrated industry with a small number of large businesses. 307It requires **expenditures** to establish communications, travel to the site of so many businesses, and understand institutional idiosyncrasies. Unlike administrative agencies and third-party inspectors, the enforcer-firm **already is in contact** with its counterparties and already has a high baseline level of **expertise**, meaning that it can spend less to collect information and develop monitoring sophistication. 308The regulated third party also then **spends less** on transferring and explaining information. The enforcer-firm can thereby **lower the cost of regulation**.
* Regulatory informational savings are only part of the efficiency analysis. Efficiency would be improved if new gatekeeper governance caused the enforcer-firm to better internalize the full costs of its business activities. But if enforcer-firms responded by bringing external services in-house, it could either increase or decrease efficiency. If cost savings or other business advantages would otherwise drive the firm to rely on external service providers in the first place, then those losses from insourcing would need to be compared to the gains from increased compliance and regulatory informational savings. If instead the avoidance of liability is the sole reason for the firm to use some specific external [\*513] services, then insourcing in response to new gatekeeper governance would not necessarily prove inefficient. 309
* A further efficiency complication arises because some of the compliance information needed may be competitively sensitive. Amazon is notorious for hiring outside businesses - whether cloud computing providers, small clothing manufacturers, or shipping companies - and then ultimately deciding to take those products or services in-house after having had the chance to study them closely. 310By forcing the sharing of sensitive information, gatekeeper governance could facilitate anticompetitive displacement or takeover of service providers, and even encourage enforcer-firms to become inefficiently large.
* In the alternative, the sensitivity of information may cause service providers to avoid sharing crucial monitoring information with the enforcer-firm. If the monitor is instead an administrative agency or private inspection firm, the risks to the service provider are lower because the monitor would not be a potential competitor. 311Information is the "lifeblood" of effective governance. 312When competitively sensitive information is necessary for monitoring compliance, a public option or third-party monitor may prove more effective, or at least necessary as a complement to the enforcer-firm.
* Another risk is that dispersed regulators create problems with overlapping jurisdiction. There is evidence that administrative agencies with overlapping jurisdiction are less likely to act, partly because each feels less pressure. 313By analogy, the public regulator, the firm, and the service provider have overlapping jurisdiction. As a result, each may assume someone else is paying adequate attention. Strategic shirking is also possible, since the multiple businesses working with any given service provider may realize they can benefit from other businesses' [\*514] monitoring of that same service provider without incurring the costs of rigorous monitoring. 314
* The possibility of shirking reflects a broader concern that the enforcer-firm's monitoring may serve merely a "cosmetic" function - allowing the firm to show regulators that it is doing something, and thereby defend itself from regulatory liability, without actually exerting considerable influence. 315One FTC lawsuit uncovered email evidence that a health care industry company's written reprimands of third-party telemarketer misconduct may have been all about appearances. 316The company's representative assured the telemarketer after sending compliance emails, "I just have to cover all bases so nobody can say that I never told them lol." 317
* This concern about shirking indicates that the regulatory cost savings and sophistication advantages in using the enforcer-firm should be adjusted for any public resources needed to oversee the enforcer-firm. Still, administrative agency oversight represents another area in which the enforcer-firm has inherent advantages over traditional gatekeepers. With private inspectors, accountants, self-regulatory organizations, or auditors, agency oversight of the private enforcer would require interacting with additional entities. Those interactions would necessitate devoting agency resources to communicating with, understanding, and prosecuting new institutions. In contrast, the agency already oversees the enforcer-firm, and could merely add gatekeeper-related oversight. Public accountability of the enforcer-firm is thus lower-cost and more likely to occur than for many traditional gatekeepers. 318
* A final drawback is that the enforcer-firm's sanctions are more limited than that of an administrative agency. The enforcer-firm's main sanction is exit: if the third party is in violation, the firm can stop doing business with the service provider. That punishment is far narrower than those available to the public regulator, and still allows the third party to do business with other firms. Over time, the typical enforcer-firm may wield [\*515] more substantial sanction power as industries become more concentrated. 319But when the service provider serves a large number of clients, as many do, exit becomes less harmful. 320
* This limitation on the enforcer-firm raises questions about its potential use in peer-to-peer settings. Often two large companies work closely together and surely have informational advantages - thus providing the possibility of cost savings by relying on them to police one another. Facebook, for instance, allows Amazon, Netflix, and Microsoft to access user data, including the ability to read private messages. 321The expansion of the enforcer-firm to oversee peers could, in theory, decrease the resource and information gap between regulator and regulated entity even further. 322Peer-to-peer gatekeepers may still have a regulatory role to play, but such relationships depend on gatekeepers with less relative power. Overall, regulators may need to be more involved as the enforcer-firm's market power diminishes with respect to the counterparty. 323
* Part of the problem with assessing these diverse costs and benefits is that the largest firms remain untested as external regulators. In contrast, research demonstrates that public regulators' monitoring promotes compliance. In one study, increasing the frequency of EPA inspections lowered pollution from factories by about three percent. 324Policymakers would benefit from similar research on the enforcer-firm's benefits and which of the diverse institutional design models, outlined above, are most effective. But there are sufficient examples of public regulators, private third-party monitors, and self-regulation failing. 325A crucial variable in any such analysis is the potentially substantial costs imposed on the enforcer-firm and its counterparties.
* [\*516] In short, the question of whether the enforcer-firm is better than other regulators will hinge on factors that include information access, the sensitivity of the regulatory information needed, the power that the enforcer-firm has over its counterparty, the organizational efficiency of outsourcing, and the societal gains from increased compliance. In theory, in the absence of direct empirical study, large firms' greater information and sophistication should make them more cost-effective than a public regulator or new class of private third-party regulators performing the same function.
* Difficult design questions remain about which party should be incentivized to what degree - the enforcer-firm or its counterparties. Another fundamental choice is whether explicit governance mandates for the enforcer-firm are needed beyond leveraging indirect liability, vicarious liability, and strict liability. Also, legal reforms could address some of the enforcer-firm's downsides. To increase sanctions, the law could give it a **private right** of action against the third party for noncompliance. Or the law might require the enforcer-firm to **report violations**. 326Greater antitrust attention to the enforcer-firm would help ensure it did not abuse its position and any access to sensitive information.
* In assessing the enforcer-firm, it is important to be realistic about the alternatives. The practical choice may not be between public monitors and the enforcer-firm, or between the enforcer-firm and the old gatekeepers. Industry lobbying may block congressional allocation of adequate public resources to oversee a large universe of smaller third-party firms. 327Given these **resource constraints**, the real-world question may simply be whether the enforcer-firm, despite its imperfections, is better than no direct oversight of dispersed third parties. Assuming that greater compliance with those laws is desirable, the enforcer-firm offers a promising avenue for **more effective** regulation.
* **That solves inevitable regulatory failures of the CWA**
* **McAllister 12** (Lesley K. McAllister, Professor of Environmental Law, University of San Diego School of Law, and Associate Adjunct Professor, School of International Relations and Pacific Studies, University of California San Diego, JD Stanford Law School, PhD University of California Berkeley, “Regulation by Third-Party Verification,” Boston College Law Review, 53(1), 2012, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3182&context=bclr)
* Abstract: This Article proposes greater governmental reliance on **private auditors** to **enhance** the achievement of **regulatory objectives**. **Regulatory failure** is a **growing problem** as governmental **agencies lack resources** to adequately monitor and **detect noncompliance**. **Third-party verification** partially privatizes the regulatory function by **requiring regulated entities to hire independent third parties to verify compliance data** and make compliance determinations. As a type of privatization, third-party verification presents both opportunities and potential problems. The key issue, as in other forms of public-private governance, is ensuring that accountability and other public values are protected when private actors perform functions that are fundamentally public. This Article argues that, as third-party verification is incorporated into regulatory frameworks, it must be carefully regulated itself. Regulatory **agencies** must assume the role of “**auditing the auditors**” through making and enforcing rules that govern who can serve as a verifier, how regulated entities select verifiers, and how verifications are performed. With **well-designed rules** and **strong governmental oversight**, **third-party verification** has the potential to cost-effectively **improve** the **implementation** of social regulation.
* Introduction
* Regulatory failure makes headlines. Outbreaks of food borne illness show that regulators have failed to act on information they have or should have had about poor food safety practices.1 Investigative reporting on **water pollution enforcement** reveals that, although **more than half** of polluters are significantly **out of compliance**, **fewer than three percent** of violations result in fines or other **sanctions**.2 From the nation’s largest oil spill, we have learned that the agency responsible for regulating offshore drilling **failed to inspect** as frequently as legally required.3
* The explanation is often the same: **regulatory agencies** **lack** the **capacity** to adequately **implement** and **enforce** the law.4 Most basically, there are not enough inspectors or resources to perform the basic task of detecting violations. For example, of the 9.1 million food shipments imported into the United States in 2006, the Food and Drug Administration (FDA) inspected only 115,000 shipments and sent only 20,000 samples for laboratory analysis.5 Facilities regulated under the **C**lean **W**ater **A**ct might only be inspected once every few years, and **evidence** suggests that **noncompliance is the norm** rather than the exception.6 Continuing and growing shortfalls in federal and state budgets make change to this status quo unlikely.
* **Third-party verification**, the regulatory approach described and analyzed in this Article, seems appropriate for an era of **growing regulatory demands** and **diminishing governmental resources**. As used herein, the term **“third party”** refers to an **external private auditor** or consultant who is paid by the regulated entity.7 “Third-party verification,” in turn, denotes a system in which **governmental agencies rely on these third parties to verify regulatory compliance**.8 With third-party verification, regulated entities are required to contract with a “verifier” or “verification body” to make a regulatory compliance determination.9 The verifiers are generally private entities that have been approved, or “accredited,” to perform this task by the government or by a government-approved “accreditation body.” Third-party verification may **substitute** for direct compliance monitoring by the **governmental agency**.
* **Extinction**
* **McCrory 20** [Martin A. Mccrory, Associate Professor in the Kelley School of Business, Indiana Universit, and Anjanette H. Raymond, Director, Ostrom Workshop, Program on Data Management and Information Governance; Associate Professor, Kelley School of Business, Indiana University; Adjunct Associate Professor of Law, Maurer School of Law, Indiana University, [Vol. 29:2 2020], https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume29/summer2020/1-3-martin-anjanette.pdf
* The freshwater resources in the United States are immense and varied; they contain over two million miles of rivers and streams.4 However, about 59 percent of those waters are properly characterized as “intermittent or ephemeral.'"’ That water does not flow all year long; instead, its flow is dependent on rainfall, season, or drought.
* In addition to streams and rivers, there is a vast array of large bodies of standing water. In fact, there are approximately forty million acres of lakes, ponds, and reservoirs across the country.6 The Great Lakes alone contain over 20 percent of the world’s freshwater7 and 84 percent of North America’s surface fresh water.8
* Even more amazing is the fact that there are over one-hundred million acres of wetlands within the United States.9 In this context, the legal term “wetlands" is defined as zones of water-saturated soil supporting or capable of supporting vegetation and wildlife ecologically adapted to these particular environmental conditions; it includes areas such as swamps, marshes, or bogs.10 These numbers begin to illustrate the remarkable amount fresh water located within the borders of this country.
* For example, the amount of surface water (the water located on the surface of the ground) that needs protecting from anthropogenic contamination is almost overwhelming. Our surface waters provide the source for 60 percent of the water supplied to American homes.11 Additionally, an estimated 117 million Americans depend upon water supplies that draw at least in part from intermittent, ephemeral, or headwater streams (tributary stream of a river).12 That means that nearly one-third of all Americans rely on seasonal waters, small streams, and tributaries for their daily drinking water.13 Certainly, surface water quality is significant for recreation, **wildlife**, and sheer aesthetic pleasure, but it is also **critically important** for drinking, food supply, infrastructure, and power; i.e., **for our life.**
* In addition, U.S. ground water (water below the surface of the Earth)14 makes up approximately 33 percent of the water that municipal and county departments use every day to supply homes and businesses.15 Perhaps more important is the fact that almost 100 percent of those who provide their own water obtain it from groundwater sources.16 The EPA estimates that over thirteen million people rely on their own private wells, which obtain water from groundwater sources.17 These numbers are astounding and underscore the fact that conservation and protection of our water resources are a massive but **imperative** undertaking. However, our recent water pollution assessments belie concern for this vital resource.
* The Natural Resources Defense Council’s (“NRDC”) 2017 report on water conditions states that 70.5 percent of all assessed lakes, reservoirs, and ponds had “impaired water quality.”18 Similarly, the EPA’s 2017 report found that nearly half of the country’s ponds, half of reservoirs, and a third of lakes are so polluted that they are unfit for drinking, swimming, or fishing.19 The report also found that over 13 million acres of the assessed lakes, ponds, and reservoirs were impaired.20
* Incredibly, this number excludes any impairments to the Great Lakes;21 the Great Lakes numbers were so dismal, they would have drastically skewed the statistics at large. The EPA’s 2017 assessment found that 98 percent of the Great Lakes’ waters were impaired for one or more designated uses.22 The leading sources of contamination were three extremely hazardous substances: polychlorinated biphenyls (“PCBs”), dioxins, and mercury.2’
* Rivers and streams fared relatively better, but over half of the rivers tested violated the scientifically established requirements necessary to keep these waters healthy for our use.24 In fact, over 55 percent of all assessed rivers and streams were in violation of their own state’s water quality standards.25 In addition, over 600.000 miles of rivers and streams failed to meet water quality requirements—that is over twice the distance to the moon.26 These facts indicate that water pollution is **an** immediate **existential threat** to our citizens.

### 7

#### The United States federal government should not expand the scope of its core antitrust laws and maintain all current antitrust enforcement policies.

**8**

**The United States federal government should establish that prohibit anticompetitive horizontal shareholding by private institutional investors is an unfair method of competition under the Federal Trade Commission Act.**

**The counterplan solves---the FTC can establish prohibitions, avoids rollback.**

**Khan ’21** et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

**Section 5** of the **F**ederal **T**rade **C**ommission **A**ct **prohibits** “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s **congressionally mandated duty** to use its expertise to identify and combat **unfair methods of competition** **even if** they **do not violate** a **separate antitrust statute**. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the **F**ederal **T**rade **C**ommission **A**ct to reach beyond the Sherman Act and to provide an alternative institutional framework for **enforcing** the **antitrust** laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 **These concerns spurred the passage of the FTC A**ct, which created an administrative body that could police unlawful business practices with **greater expertise** and **democratic accountability** than courts provided.15

**At the heart of the statute was Section 5,** which declares “unfair methods of competition” **unlawful**.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides **no private right of action**, shielding violators from **private lawsuits** and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to **shape doctrine** and **reach conduct** not otherwise **prohibited** by the **Sherman Act**, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to **leave it to the Commission** to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the **various unlawful practices**, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under **the antitrust law**.”20

The Supreme Court has repeatedly affirmed this view of the **agency’s Section 5 authority**, holding that **the statute**, **by its plain text**, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

**It competes---the FTCA is NOT a core antitrust law. Voter for precision and NEG ground because FTC rulemaking wrecks link uniqueness.**

**McLaughlin 64** --- Gerald McLaughlin, Federal Judge, 3rd Circuit Court of Appeals, “New Jersey Wood Finishing Company, Plaintiff-appellee, v. Minnesota Mining and Manufacturing Company, Defendant-appellant, and Essex Wire Corp., Defendant, 332 F.2d 346 (3d Cir. 1964)”, US Court of Appeals for the Third Circuit, May 20th 1964, https://law.justia.com/cases/federal/appellate-courts/F2/332/346/326983/

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the **antitrust laws**" shall be entitled to threefold damages. 15 U.S.C. § 15 (1958) "**Antitrust laws"** as that term is employed in Section 4 **has a restricted meaning**. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.3 15 U.S.C. § 12 (1958); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 78 S. Ct. 352, 2 L. Ed. 2d 340 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, **are "antitrust laws"** within the meaning of Section 4. Other acts **are not,** including for our purposes, the **Federal Trade Commission Act**. See Samson Crane Co. v. Union National Sales, 87 F. Supp. 218 (D.C.Mass.1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged **both public and private actions**. United States v. Borden Co., 347 U.S. 514, 519, 74 S. Ct. 703, 98 L. Ed. 903 (1954); United States v. Cooper Corp., 312 U.S. 600, 608, 610, 61 S. Ct. 741, 85 L. Ed. 1071 (1941); United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833, 834 (E.D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.4

This broad plan of private and public actions is further detailed. The Sherman Act5 contemplates civil (Section 4) and criminal (Section 3) actions by the Justice Department, **and treble damage suits** by private parties (Section 7). 15 U.S.C. §§ 3, 4, 15 note (1958); but cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948). Under the Clayton Act,6 private actions may be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U.S.C. §§ 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U.S.C. § 21 (1958).

To be **distinguished** is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair \* \* practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. v. Federal Trade Commission, 289 F. 985, 992-998 (6 Cir. 1923); Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 647, 51 S. Ct. 587, 75 L. Ed. 1324 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394, 73 S. Ct. 361, 97 L. Ed. 426 (1953); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 1324 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission v. Beech Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922); Standard Oil Co. v. Federal Trade Commission, 282 F. 81, 86-87 (3 Cir. 1922) affirmed 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746 (1923).

Within this area of "unfair methods of competition", the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that its specific prohibitions particularly Section 2 and Section 3 (15 U.S.C. §§ 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed judgment respecting them.7 These "unfair methods of competition (later amended to include "unfair \* \* \* practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (**the FTC Act was not an antitrust law** within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 **did**, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which **might** also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694-695, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); United States v. Borden Company, 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954). 51 Cong.Rec. 16274-16275 (1914). The question here presented concerns in part the "cumulative remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor of potential private suitors during the pendency of certain government antitrust suits. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

### 9

Bedoya DA

#### Bedoya’s confirmation is likely, BUT opposition to the antitrust agenda threatens indefinite deadlock

Fung 3-30 (Brian Fung, technology reporter covering business and policy at CNN, graduate of Middlebury College and the London School of Economics, “Senate votes to advance Alvaro Bedoya’s FTC confirmation,” CNN Business, 3-30-2022, https://www.cnn.com/2022/03/30/tech/ftc-bedoya-advance/index.html)

One of President Joe Biden’s key administrative nominees is a step closer to confirmation after Alvaro Bedoya, Biden’s pick for Federal Trade Commissioner, narrowly cleared a key procedural vote in the Senate on Wednesday.

The decision paves the way for a final floor vote on Bedoya’s nomination, to be held at a later time. But what was supposed to be a 15-minute process on Wednesday stretched on for over two hours, culminating in Vice President Kamala Harris traveling to Capitol Hill to break a 50-50 tie.

The close Senate vote reflects a partisan rift over Bedoya, a visiting professor at Georgetown University’s law school and founding director of its center on privacy.

Bedoya’s nomination is considered critical as the Federal Trade Commission ramps up enforcement on algorithms, cybersecurity, privacy, and a slew of antitrust issues surrounding Big Tech.

If Bedoya is confirmed, it would give Democrats a voting majority at the FTC and break a months-long 2-2 partisan deadlock at the antitrust and consumer protection agency.

Senate Republicans have opposed Bedoya’s nomination. Sen. Roger Wicker, the Senate Commerce Committee’s top Republican, reiterated his disapproval Tuesday, citing what he said were Bedoya’s “divisive social media statements” on immigration issues.

Bedoya’s past research has focused on the potential for artificial intelligence and facial recognition technology to discriminate against minorities.

“Mr. Bedoya’s record shows that he would drive the FTC, an agency with a tradition of bipartisanship, further down the hyper-partisan path it has taken under Chair Lina Khan,” Wicker said in a statement.

Senate Democrats have called for Bedoya to be confirmed so that the FTC can continue to do its work.

“The FTC is the security guard for America’s consumers,” Senate Commerce Committee Chair Maria Cantwell said in a Tuesday floor speech. “The FTC needs to be able to protect all Americans, and to accomplish that we need to have a commission that is not deadlocked, but has somebody like Mr. Bedoya who can help us move ahead on these issues.”

Lawmakers’ divide over Bedoya resulted in a 14-14 tie vote earlier this year on whether to advance his nomination out of the Senate Commerce Committee. That prompted Wednesday’s procedural move to discharge Bedoya’s nomination from the committee and to allow for a full Senate vote.

#### It’s NOT about Bedoya – it’s a referendum on the scope of the current agenda – deadlock is the point

Murphy 21 (Kathleen Murphy, Senior Reporter at FTC Watch, former Section Research Manager, Specialist at Congressional Research Service, former Managing Editor at CQ Roll Call and Bill Analysis Editor at Congressional Quarterly, “Bedoya’s confirmation hearing draws closer,” FTC Watch, Issue 1016, 11-1-2021, <https://www.mlexwatch.com/articles/13940/print?section=ftcwatch>)

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

#### Plan expands opposition, derailing confirmation

Kovacic 20 (William E. Kovacic, former FTC Chair, Global Competition Professor of Law and Policy, George Washington University Law School, JD Columbia University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy,” U. of Pennsylvania Journal of Business Law, 23(1), 2020, https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/)

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 In 1980, bitter opposition to elements of the FTC’s competition and consumer protection programs led Congress to allow the FTC’s funding to lapse, forcing the agency to temporarily cease operations. 119 Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency’s funding. In January 1981, David Stockman, Ronald Reagan’s first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC’s competition policy program.120

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency’s choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.121 Many legislators complained that the agency had disregarded the legislature’s preferences and used its powers in ways that Congress never contemplated to fall within the FTC’s remit.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.123

The Commission, Frenzel concluded, was “a rogue agency gone insane.”124

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less-flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency’s unauthorized adventurism. Senator Howard Cannon explained: “The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.”125

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency’s competition mission. Stockman said, “ . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”126

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC’s power to order divestiture or other forms ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.129 Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC’s power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.130

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient (“rogue”) but crazy (“insane”), as well.131 Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.” 132 David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”133

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency’s appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency’s elastic powers innovatively. Congress’s admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.136 During hearings in 1970 to confirm Caspar Weinberger to be the Commission’s new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to “maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well.”137 In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about “expanding” its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform “tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.”138

Weinberger’s successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission’s powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks.139 In his appearances as FTC chair before congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick’s first appearance before the Commission’s Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing. I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . . 140

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had “responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States.” 141 Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency’s back: “[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require.”142 McGee closed the proceedings with militant instructions:

“Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing.”143

Kirkpatrick served as the FTC’s chair for just over twenty-nine months. The Commission’s new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman’s confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric. 144

With evident approval, Moss recounted how the FTC had “stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise.” 145 The members of the Senate Commerce Committee, Moss concluded, “consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal.” 146 Member after member of the Commerce Committee echoed Moss’s message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, “I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned.”147

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying “to make the most of that other resource given to us by Congress – our statutory powers.” 148 Weinberger said the Commission had “encouraged the staff to make recommendations to us which will probe the frontiers of our statutes,” had made progress in “[p]robling the outer limits” and “exploring the frontiers” of the agency’s authority, and had shown it “is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices.”149 In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was “moving into ‘high gear’ in the task of preserving and promoting competition in the American economy.”150 He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”151

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal152 and petroleum refining industries.153 With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies.154 The Joint Committee’s chairman, Senator William Proxmire, told Engman “the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.”155 Perhaps astonished to hear that cases to break up the nation’s leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, “The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition.”156

Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. 157 Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.158 The Commission’s decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands.159 In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry.160 Here, also, the agency’s decision to prosecute the shared monopolization case against the country’s leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems.161 In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.162

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC’s activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC should do and how it should do it. As described below in Section IV.D., 163 that change in legislative temperament and the response by Congress to industry backlash against the FTC’s program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.164

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was “insane.” Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel.165 As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases).166 The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.167 In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

Another focal point for attention in assessing the FTC’s performance in the 1970s was the quality of its substantive agenda. Was the FTC’s substantive program in the 1970s “insane”? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures.168 Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC’sflaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency’s improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC’s knowledge in the 1970s of the positive record of its past enforcement experience.169

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration – a period characterized by what one journalist described as an “almost total abandonment of antitrust policy.” 170 In 1987, in discussing Reagan-era federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.” 171 Professor Milton Handler remarked that in the Reagan era “a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free.” 172 Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”173

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party’s nomination for the presidency, Barack Obama said the George W. Bush administration “has what may be the weakest record of antitrust enforcement of any administration in the last half-century.” 174 The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.175

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.176 After noting that for most of the 20th century “antitrust enforcement waxed or waned depending on the administration in office,” Professor Robert Reich recently wrote that “after 1980 it all but disappeared.”177 He added that Presidents Bill Clinton and Barack Obama “allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated.” 178

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s.179 A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.180

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC.181 The Reagan administration is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. 182 Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.183

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. 184 The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action.185 The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School’s concern that private rights of action over-deter legitimate business conduct by dominant firms.186 This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.187

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots.188 More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC’s stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.189

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC’s relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

#### Key to restore a bipartisan FTC process

Cantwell 3-29 (Maria Cantwell, U.S. Senator (D-WA), former U.S. House Representative (D-WA), former vice president of marketing for RealNetworks, BA public administration, Miami University in Oxford, Ohio, “CONGRESSIONAL RECORD — SENATE,” 3-29-2022, p.S1840, https://www.congress.gov/117/crec/2022/03/29/168/55/CREC-2022-03-29-pt1-PgS1840-2.pdf)

Ms. CANTWELL. Madam President, I thank the majority leader for that concise documentation of what really the FTC is about. It is about getting somebody on there who is going to fight to protect consumers on issues.

We know that we need the FTC now more than ever. We needed their muscle during the COVID pandemic, as opportunistic scammers stole $5.9 billion out of the pockets of Americans, and that is just the reported amount. That doesn’t include people who never knew that they were scammed or were too embarrassed to report what happened.

So Congress, on a bipartisan basis, pumped up the FTC’s power, and at the end of 2020, we passed the COVID–19 Consumer Protection Act to help root out promoters of dangerous, fake treatments and cures.

Second, we gave the FTC $30 million in the American Rescue Plan to promote and protect Americans against scams that targeted their COVID stimulus payments.

Last year, we confirmed the FTC Chair, Lina Khan, with support from 21 Republicans in this body, and today we are talking about the next important step in protecting consumers, and that is moving to confirm Mr. Bedoya to fill the last seat on the Federal Trade Commission.

Mr. Bedoya has the right experience we need to tackle the problems that we are facing right now—some of the most complicated and pressing issues regarding how to protect our privacy and protect children’s online privacy. I say that because I heard comments from my colleague about Mr. Bedoya and the fact that he issued various tweets about this or that in his time in the private sector.

I guarantee you that if we voted for people based on what their tweets are, there would be a lot of people who wouldn’t be approved at all, including some of the people who have been through this process.

Mr. Bedoya served as the chief counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology, and Law. So I would say that as it relates to the FTC’s ability to do something about reining in some of the bad practices that we see online, I think he is a very qualified person and individual.

Mr. Bedoya graduated summa cum laude from Harvard and holds a law degree from Yale, where he served on the Yale Law Journal and received the Paul and Daisy Soros Fellowship for New Americans.

So I think that Mr. Bedoya is a person who has dug in on a variety of issues and has the experience and leadership in one of the most critical areas—technology—that the FTC is dealing with today.

So I encourage my colleagues to support him. That is why he is supported by the current Republican FTC Commissioners. They also support his nomination. They say they recognize his willingness and expertise and ability to reach across the aisle and find common ground on solutions that work for people.

It is that skill set that we are looking for at the FTC to help hard-working Americans get a fair shake in the marketplace, whether that is at the pharmacy, the gas pump, or online.

And I know that as a proud immigrant, Mr. Bedoya will also use his role to expand the FTC’s work in underserved communities.

The FTC needs to be able to protect all Americans, and to accomplish that, we need to have a Commission that is not deadlocked now but has somebody like Mr. Bedoya, who can help us move ahead on these issues.

#### Failure politicizes enforcement

Bryant 3-30 (Jennifer Bryant, staff writer for The International Association of Privacy Professionals’ Daily Dashboard, Europe Data Protection Digest, Canada Dashboard Digest, Asia-Pacific Dashboard Digest and U.S. Privacy Digest, formerly worked as a journalist and editor for more than 12 years, covering the Seacoast of New Hampshire and Maine for Seacoast Media Group; **internally quoting Janis Kestenbaum, former senior legal advisor to former FTC chairwoman Edith Ramirez, current Partner at Perkins Coie**; “FTC Chair Lina Khan anticipated to share privacy vision,” The Privacy Advisor, 3-30-2022, https://iapp.org/news/a/ftc-chair-lina-khan-anticipated-to-share-privacy-vision/)

Kestenbaum said it’s “apparent” and “commendable” that Khan “doesn’t want to do things simply because they’re what the FTC has done before,” but she pointed to what she’s seen as “diminished bipartisanship” at the FTC as “concerning.”

“Bipartisanship has been a hallmark of the FTC and it has real value. To illustrate, in the last decade, we saw many goals and approaches shared by President Trump’s and President Obama’s FTC chairs. There are not many federal agencies that had the degree of continuity from the Obama to Trump administrations that the FTC enjoyed,” she said. “If bipartisanship is lost, we may start to see big ideological swings with each change in presidential administrations.”

It will also be interesting, Brookman said, whether Khan mentions another hot topic among the privacy community, consideration of a rulemaking process on privacy and artificial intelligence filed by the FTC in December. In the filing, the FTC said it intends to “curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination.”

“The FTC is overdue to change its decades-old culture of caution about use of its unfairness authority and tackling Magnuson-Moss rulemaking, and there is strong bipartisan support on the commission when it comes to privacy issues even though there is sometimes disagreement on process,” Kerry said. “Chair Khan has recognized a need for ‘substantive limits’ on collection and use and to explore creative use of remedies and enforcement of consent orders. But there is only so far the FTC can push the envelope within the confines of its existing authority and fixing information ecosystems that extend far beyond big platforms.”

Kestenbaum, too, wants to see Khan address the FTC’s anticipated rulemaking, saying “it’s being viewed by some as a stopgap measure while we await federal privacy legislation.”

“Questions therefore abound about how Chair Khan wants to approach the rulemaking, including what kinds of practices she potentially wants to address and how,” she said.

Kerry said he’s hoping to “see a more forceful clarion call than we have seen so far for federal legislation that sets boundaries for collection, use, and sharing of personal information and gives the FTC greater authority and resources to enforce them — including fines in the first instance.”

#### That turns case AND locks in corporatism

Baker 20 (Jonathan B. Baker, former chief economist at the FTC and the FCC, Research Professor of Law, American University Washington College of Law, “Why the Political Misuse of Antitrust Must be Prevented,” Promarket, 7-20-2020, https://promarket.org/2020/07/20/why-the-political-misuse-of-antitrust-must-be-prevented/)

These concerns reinforce the importance of insulating antitrust from politics, which holds no matter who is in power.

Antitrust law and enforcement should be apolitical, but they necessarily operate in a political context. Antitrust law once explicitly pursued social and political goals in addition to the economic goals that are central today. Moreover, progressives have grown more concerned about market power precisely because of its adverse political consequences. These critics seek to use antitrust systematically to attack corporate concentration in order to redistribute political power away from concentrated centers of wealth and thereby, progressives hope, increase economic opportunity. Today’s antitrust institutions face many political threats, not least of which is the stealth rejection of antitrust in favor of laissez-faire.

Yet, even though concerns about the politicization of antitrust are justified, as the Elias testimony illustrated, a political mobilization to take on growing market power could strengthen our informal political bargain to rely on competition implemented through antitrust enforcement—not laissez-faire or direct governmental supervision—as the primary approach to regulating large firms. This mobilization ought not promote the formula of midcentury antitrust, which explicitly, albeit secondarily, pursued political ends. These methods were of limited success, and pressing for their return would divert effort away from more promising reforms.

A movement focused on attacking market power would strengthen the political bargain, first and foremost, because market power has become a serious problem. And second, antitrust enforcement, as currently practiced, discourages the sort of political shenanigans exemplified by the Johnson and Nixon cases. These are rare exceptions in the modern era. For the most part, antitrust is successfully divorced from abuse by special interests and crony capitalists, and undermining market power would make such abuse even less likely.

Many obstacles, including the norm against direct political influence and rules that limit judicial discretion, stand in the way of political abuse. Yet, even as antitrust shuns politics, it retains a connection to the popular will. This reflects an important distinction between politics and ideology. Enforcement is, properly, responsive to ideological shifts, and enforcement would be stronger if the public were to mobilize against market power. But that doesn’t mean antitrust enforcement should be subject as well to the sort of abuse that undermines trust in the fairness of the legal process.

Special-Interest Protectionism and Crony Capitalism

Special-interest protectionism and crony capitalism are related ways of manipulating the political system to exercise market power.

Special-interest protectionism refers to the ability of firms or other narrow interest groups to establish or entrench protected positions through government action. A particular firm or industry may influence the government to act in its favor, without regard to the public interest, in order to create or protect market power. Congress and the courts have created exemptions from the antitrust laws over time to benefit particular industries, perhaps for this reason. Special-interest protectionism was a prominent concern of nineteenth-century constitutional interpretation and twentieth-century public-choice scholars. It is closely related to regulatory capture: the manipulation of a regulatory agency by a firm it supervises.

The incentive underlying manipulation is obvious. Profit-maximizing firms, individually or along with their major rivals, can gain market power by investing in lobbying. Compliant government officials, elected or otherwise, may create entry barriers or foreclose fringe competitors’ access to customers or low-cost inputs.

Even Chicago School–oriented antitrust commentators, who question antitrust’s concern with exclusionary marketplace conduct, acknowledge that predation through use of governmental processes could be a serious problem.

While special-interest protectionism is transactional and episodic, “crony capitalism” is systemic and entrenched. Firms secure lasting political power through their individual or collective size and lobbying influence and use that power to obtain and protect market power. They may create entry barriers or, more corruptly, obtain other forms of enrichment for themselves or their political allies (that is, their cronies). Crony capitalism becomes ingrained when firms with market power invest some of the resulting rents to secure the political power that helps protect or extend it. This erodes antitrust constraints still further, creating more market power, and so forth, in a vicious cycle.

Crony capitalism differs from oligarchy, though they can be related. An oligarchy is a political system in which a small number of political actors control vast resources, which they deploy to enhance or defend their personal wealth and social position.

In the US political system, the threat of oligarchy comes from the ability of the wealthy to capture political institutions, change those institutions to lock in their political positions, and use their control of institutions to, among other things, lower their taxes. Lock in might be facilitated by restricting the franchise, eviscerating constraints on corporate political contributions, or undermining institutions such as unions that could supply political opposition to large firms.

This threat is not merely speculative: the disproportionate influence of the wealthiest on public policy is well-documented, and successful political coalitions may attempt to change the rules to protect their positions.

This combination is equally dangerous for political and economic competition. To the extent that large firms are owned by wealthy families, the political system could tend toward crony capitalism and oligarchy simultaneously. Political institutions could then both protect large firms from competition and systematically enrich the wealthy.

Trump’s election has made concerns about special-interest protectionism, crony capitalism, and oligarchy more salient. The norm against direct political influence is endangered by the combination of Trump’s campaign statements threatening antitrust challenges for political ends, his post-election meetings with executives from firms pursuing acquisitions under review at the enforcement agencies, his agreements with certain firms to keep jobs from moving abroad, his frequent criticism of law enforcement decisions with which he disagrees, and his extensive personal and familial financial interests. These encourage firms to lobby the president directly in order to influence enforcement actions. They also raise the possibility that the president would base decisions on his political or financial interests.

Trump’s signals have been recognized by the business community: the chief executive officer (CEO) of AT&T said he was flabbergasted by the administration’s decision to challenge his firm’s proposed acquisition of Time Warner, in part because he has been one of Trump’s “biggest defenders on public policy.”

Even where Trump’s goals plausibly relate to public interests, they may not be acceptable under antitrust law. For example, boosting domestic employment is not cognizable under the Clayton Act as currently interpreted. Beyond flouting a norm or violating the Clayton Act, presidential involvement in antitrust enforcement decisions could contravene the Constitution.

If a president instructs the Justice Department on the resolution of merger reviews or other antitrust investigations—particularly without hearing from agency staff and other interested parties and without reviewing the detailed factual record developed by an agency investigation—it is hard to be confident that agency enforcement decisions appropriately apply the law to the facts, uninfluenced by the political or financial interests of the president. That scenario would call into question whether the president has met his constitutional obligation to “take care that the laws be faithfully executed.”

Even if agency decisions are free from direct presidential influence, the concern that they might not be undermines confidence that enforcement actions serve the public interest and undercuts political support for antitrust institutions and norms. It also harms enforcement by diminishing the credibility of agency officials with courts and firms.

#### It's an independent existential risk and magnifies all others

Ikerd 2K (John E. Ikerd, Professor Emeritus of Agricultural & Applied Economics, University of Missouri Columbia, PhD agricultural economics, University of Missouri, “Economics as if People Mattered; Farming for Quality of Life,” paper presented at 2000 Midwest Small Farm Conference and Trade Show, sponsored by Sustainable Earth, Noblesville, IN, November 17-18, 2000, <http://web.missouri.edu/~ikerdj/papers/EconasifPeopleMatter.htm>)

In times past, more cheap stuff may well have been what humanity needed most. A couple of hundred years ago many people lived lives of drudgery – many starving, freezing to death, or struggling day-to-day with pestilence and disease. But those times are long past – at least for most of the world. The system of competitive capitalism gave people food, clothing, and shelter and helped people lead longer, healthier lives. But, in the process of producing more cheap stuff, it has depleted the resources – people as well as nature – upon which its future productivity must depend. It is destroying itself as it destroys human society and destroys the natural environment. It has evolved from a system of competitive capitalism to a system of industrial corporatism that has become a cannibalistic system for reckless resource exploitation rather than rational resource use. The corporatist economic system of today cannot possibly support another fifty years of human progress. It is destroying the very things that must be restored before humanity can take its next step forward.

We must find a new, shared vision for the future of humanity, and it must be built on a new economic foundation. Our focus on short run, self-interest and our worship of economic materialism is a major contributor to, if not the sole cause of, nearly every major problem we face in today's society. Nearly every incident of environmental degradation and destruction is a consequence of economic rationalization that the earth's resources are ours for the taking. Hunger and disease in the world are not consequences of a lack of food or medicine, but of our acceptance of the economic logic that only those who are willing and able to pay are deserving. Our blind faith in free-markets has caused us to surrender both the private and public sectors of our society to corporate control. Our political campaigns are planned and paid for by the corporations who then have access and influence, if not outright control, of the politicians who are supposed to represent the people. Any positive vision for the future of humanity must be based on a new and different vision of economics – as E.F. Shumacher said, an Economics as if People Mattered.

The economy of the future must focus on people rather than production and profits. To achieve such an economy, we must challenge the economic assumption that people are best served by ever-increasing production and profits. Economists argue that since people invariable prefer more money to less, more money obviously enhances our quality of life. Thus the more we produce, spend, and consume the higher will be our quality of life. Economists argue that any means we might choose to address the ills of society invariably costs money, and more money comes only from increased production. Production creates jobs from which people pay the taxes, and those taxes support various social services. Economists argue that only the affluent can afford to protect the environment. So, we must continually increase production if we are to have the wealth from which we derive the means of caring for the natural environment. To economists, the well being of people is simply some linear transformation of production and profits – the greater the production, the greater the profits, and the higher the level of human well being.

However, the foundation for contemporary economic thinking is based on observations of the world of 200 years ago, not the world of today. Adam Smith's observations in his 1776 book, The Wealth of Nations, are simply not relevant to the society of today. None of the assumptions needed to ensure that the pursuit of short run, self-interest is transformed into long run, societal benefits – as if by an “invisible hand” are present in the world of today. There are no longer large numbers of buyers and sellers, but instead a few giant corporations, which make a mockery of the concept of competitive, capitalistic, free markets. It is not easy to get into enterprises that are profitable or to get out of enterprises that are unprofitable, and thus, to give people more of what they want and less of what they don't want. Patents, specialized equipment, and large capital requirements represent formidable barriers to entry and exit. Consumers do not have accurate information concerning the value they will realize from whatever they buy, but instead are confronted with disinformation by design, in the form of persuasive advertising. Finally, the consumer is no longer king. Consumer sovereignty went by the wayside when advertising agencies began hiring Ph.D. psychologists to warp and bend consumer tastes and preferences to fit the desires of corporate producers.

There is absolutely nothing in existing economic theory to support the proposition that today's economy is performing for the benefit of society as a whole. There is far more support for the proposition that today's economy is functioning solely for the benefit of giant corporations and that any net benefits for people are but a side-effect of the pursuit of corporate profits and growth.

Economists have all sorts of rationalizations for continuing to worship at the altar of “free-market economics” during an era of corporatist reign. But none of them stand up to the ultimate test of common sense. The concept of “workable competition” is not workable in a corporatist economy – there quite simply is no longer an “invisible hand” of impersonal competition to transform greed into good. The simple fact that people have jobs and make money doesn't necessarily mean that they are willing to pay higher taxes – or that higher taxes and more social services necessarily translate into greater societal well being. We need a society in which people recognize their interdependence, understand that they are all part of the same whole, and truly care about each other. More jobs and more money simply don't translate into acceptance of social responsibility. Our social responsibilities will be met through understanding and compassion, not through the pursuit of greed.

Stewardship of the environment is not a luxury of the rich but a responsibility of all people. The poor of the world cannot attain a higher quality of life by exploiting their natural environment or exploiting other people. Whatever they gain in material well-being will be more than offset by the loss of cultural and moral values, the degradation of their society, and the destruction of their natural environment. The rich degrade and destroy far more resources in their pursuit of material wealth than they have ever been willing to give back in terms of protection or restoration. “Ecological economics” is a contradiction of terms, because the economics of selfishness and greed simply can't accommodate the principle of true stewardship. In general, contemporary economics is fundamentally incapable of addressing the social and ecological dimensions of life that are essential in sustaining human progress. We will need a new economics to build a sustainable human society.

Toward an Economics of Sustainability

Sustainability is the foundation upon which the new economics must be built. Sustainability requires that we find ways to meet the needs of the present while leaving equal or better opportunities for those of the future. We need an economy that will sustain human progress on earth – not an economics that exploits the very resources, both human and ecological, upon which the future well being of people depends. We need a new economics of sustainability.

The concept of sustainability is far broader than economics – at least as economics currently is conceived. Daly and Cobb, in their book, For the Common Good, refer to the economics of today as “chrematistics” -- the “manipulation of property and wealth so as to maximize short-term monetary exchange value to the owner.” Sustainability is also broader than ecology or sociology because sustainability includes contemporary economics. However, sustainability is quite consistent with the root-word for economics, “oikonomia” – meaning “management of the household (community, society, humanity & biosphere) so as to increase its value to all members over the long run” (p. 138). Oikonomia includes the management aspects of sociology and ecology as well as economics. Daly and Cobb suggest that we address “oikonomia” through an “economics of community,” which would be accomplished through new government policies. However, it will take more than public policy to implement “okonomia.” First, the people must embrace this new and different concept of economics. They must understand the necessity for managing the whole of human society, the environment, and the economy if we are to sustain human life on earth.

People will embrace the concept of sustainability only if they understand that sustainability is fundamentally about sustaining a desirable quality of life for people. Some find fault with this anthropocentricity or people-centered interpretation of sustainability. They contend that other forms of life may be just as important as human life in the longer run scheme of things. However, if we are not concerned uniquely with sustaining the human species, there is no “economic” issue to be addressed. Economics is about managing resources to meet the needs of humans. If we weren't particularly concerned about humans, we could simply depopulate the earth or otherwise reduce human claims on resources to a point where the sustainability of other species would no longer be in question, or at least not threatened by humans. However, our nature as humans is not unlike the nature of other species, in that we humans have an innate instinct for survival, reproduction, and self-gratification.

We will not reduce our claims on earth's resources for the sole purpose of ensuring the sustainability of other species or of the earth. But, we will protect other species if we perceive it to be in our best interest to do so. The fact that we are concerned uniquely with sustaining the human species does not imply that we are concerned exclusively with sustaining the human species. Contrary to what the economics of “chrematistics” might imply, our best interest is not exclusively individualistic in nature. Our interests as members of society and as members of the human race are linked with the integrity of the rest of the biosphere. Thus, our interests may well be served best through sharing and stewardship, including preservation of other species, rather than through expressing our individualistic human greed. Our interests are best served through “oikonomia” rather than “chermatistics.”

The new sustainable economy must be multidimensional – having social and ecological dimensions, as well as the conventional individualistic dimension. The three dimensions must be considered as interdependent aspects of the same whole, but makes distinctive contributions to a sustainable economy. The new economics must deal with ways of managing the ecological, social, and individual economies to increase their value to all members of society over the long run.

First, conventional economics will continue to play an important role in society – in meeting the needs of individuals. There will continue to be a large and legitimate private sector in a sustainable economy. However, in order for the private economy to function in the “collective” interests of society, economic competition must be restored. This is not an impossible task. The people broke the corporate monopolies of the early 1900s. When the people learned and understood the implications of a corporately dominated economy, they rebelled. They started the Progressive Movement, the “trusts were busted,” and competition was restored. They didn't do the job perfectly, and corporate monopolies have emerged again.

This time we have far larger, multi-national corporations. The job may be more difficult this time, but the consequences of failing to control corporate power may be far more severe. People still have power over corporations – people grant corporate charters and people can take those charters away. Corporations are not people, and it's people, not corporations, that matter. When the people become convinced that competition must be restored to the private sector of the economy, it will be restored. In the process, the people will come to understand the limitations of the private sector in meeting the social and spiritual needs of people, and will come to embrace the social and ecological economies as means of meeting their needs and wants.

### Solvency

**Deterrence theory wrong --- assumes agents are rational actors calculating risks --- Motivations are borne from a corrupted corporate culture**

**MARKHAM 13** --- JESSE W. MARKHAM, JR, Marshall P. Madison Professor of Law at the University of San Francisco School of Law, “THE FAILURE OF CORPORATE GOVERNANCE STANDARDS AND ANTITRUST COMPLIANCE”, SOUTH DAKOTA UW REVIEW [Vol.58 2013], https://heinonline.org/HOL/LandingPage?handle=hein.journals/sdlr58&div=28&id=&page=

Secondly, the **underlying but unexamined assumption** in much of the literature is that there is some way for a potential antitrust violator to carry out the deterrence calculation, at least in rough arithmetic terms. That is, ~~he or she~~ [someone] can at least estimate numerically the projected benefits from cartel activity, the percentage likelihood of detection, and the amount of the likely fine. **Where are these numbers supposed to come from**? Each of the elements of this calculation is **buried in obscurity** in the real world. The projected benefits from cartel activity are **not determinable ex ante**. Indeed, scholars have been unable with much confidence to calculate the economic rewards from a cartel even after it has operated, let alone in advance. **There is no way of knowing** beforehand, for example, how long a cartel will endure, how successful it will be at imposing prices above competitive levels, or (at least sometimes) even what the competitive or cartel prices would be. The percentage likelihood of detection and successful prosecution also is **not a number** that is ready to hand to the sales person who is invited into a cartel. Again, **the literature is rife with confessions** that one **simply cannot know how many cartels go undetected**, so the percentage of all cartels represented by those that get detected is equally unknowable. Furthermore, fines arc meted out in the United States at least by applying a densely complex set of sentencing guidelines. Even if a corporate agent could assess in advance such things as culpability scores, the decision to violate the law frequently will implicate not just U.S. antitrust law but also the laws of other nations. It is the total, not just the U.S. component, of costs that would affect the decision to join or abstain. Additionally, the cost to the agent may include incarceration. While economists might feel confident in equating a year of incarceration with a dollar figure, an actual person deciding how to act might find this absurd or at least lack much confidence in any particular number. The agent deciding how to act needs all three of the elements of the deterrence calculus but is unlikely even to have one of them. One imagines a sales person at his or her desk with a calculator, multiplying a 0.2786% risk of conviction times the likely fine (**payable by someone else**, of course), plus economic cost of incarceration, subtracted from the dollar amount of economic benefit to him or her of participating in a cartel. There is **no reason to believe** that calculation or **anything like it** has ever been made **by a single human being** (let alone a corporation). Deterrence calculus is theoretically of some value but **should not be misunderstood as affecting or describing human behavior.**

A third problem with the calculus of antitrust deterrence is that it distracts from what may in fact **be the central factor**: **corrupted corporate culture**. It is also well-understood that cartel activity is to some extent motivated by **cultural forces** and **not simply by economic calculus**. **Even if** the calculations imagined in the literature could actually be performed in advance of the violation, the **actor’s motivation may not be so simple**. In the account of the lysine cartel, Mark Whitaker explained why he had participated in price fixing: “They said that if I’m going to grow with ADM, **I gotta be part of the business**,” he said. ‘‘**I knew what they wanted me to do was illegal**, and that weighed on me. When they told me to lie, I had to lie.”32 Nowhere in any account of the lysine cartel was there any mention of an ex ante analysis of economic reward calculated against potential cost. Instead, the cartel seemed to move forward with the actions of people like Whitaker, **motivated by pleasing those around** (or more precisely, **above) them**. Apparently, Whitaker’s cartel participation was also influenced by his worries about being caught having embezzled substantial sums from his employer, which he sought to avoid exposing by making no waves in his company. The story told in The Informant also **reveals a general arrogance**— a tendency to discount the risks of apprehension. The picture of a **corrupt corporate culture** painted in Eichenwald’s account, while not necessarily accurate as to all of its dialogue and details, **is unremarkable**: cartels are incubated in corporate cultures. Deterrence theory, however, **largely ignores this impetus to violate laws.**

**Treble damage crushes market value**

**Gaughan 05** --- Patrick A. Gaughan, President of Economatrix Research Associates, Inc., an economic and financial consulting firm, “THE ECONOMICS OF PUNITIVE DAMAGES: POST STATE FARM V. CAMPBELL”, Contemporary Studies in Economic and Financial Analysis, Volume 87, 217–266 , 2005, https://www.emerald.com/insight/content/doi/10.1016/S1569-3759(05)87009-3/full/pdf

Litigation costs will **lower corporate profitability** and **reduce the pool of monies available for dividends** and, thereby, **impede capital gains**. This is true for any cost, and litigated-related costs are no different. For this reason, the exposure to **potentially large** and unpredictable litigation payments can have **an adverse effect on stock prices**. Research studies have **confirmed the impact** that litigation can have on stock prices (Bizjak & Coles, 1995). **This impact can be very significant**. A good example of this was the **42% decline in the stock price** of the Halliburton Company in response to a $30 million verdict in December 2001 in favor of five plaintiffs (Banerjee, 2001). This was one of many asbestos cases that were brought against the company.1 Over the prior quarter century, the company had settled almost 200,000 asbestos claims although many of them were settled for relatively modest amounts. The market reacted to the large verdict and what it implied about the **potential litigation exposure** that would occur **if the other cases had a similar result**. Another was the declines of Bayer AG’s stock price in response to the first Baycol trials beginning in Texas in 2001 (see Fig. 1). The company’s stock price fell from $43.36 at the end of January 2001 to $20.02 by September 10, 2001, and declined even further to $17.96 by the end of October of that year. Later in 2003, when Bayer AG received a favorable verdict, the stock rebounded. Towards the end of 2004, Pfizer’s market capitalization lost approximately $30 billion over a couple of trading days as a result of concerns that were being expressed about a possible relationship between heart problems and some of its anti-inflammatory drugs. The market fell even though no firm relationship between ailments and those drugs was known at that time and not a single lawsuit had been filed.

For companies with large litigation exposure, such as tobacco and asbestos defendants, the adverse shareholder wealth effects can be **quite significant**. Securities analysts have attempted to measure the magnitude of the large tobacco liabilities of Philip Morris Companies, Inc., which is now called Altria. Table 3 shows that over the past three years, Philip Morris USA, the tobacco subsidiary of Altria, as well as other divisions of the food/ tobacco company, were the object of many lawsuits, including class actions and multiple plaintiff cases (Altria Annual Report, 2003).

In February 2001, Goldman Sachs issued a report that featured a ‘‘sum of the parts’’ analysis which computed total enterprise value and the value of each of the company’s corporate divisions that composed the total enterprise value. The various parts or business segments were valued using comparable multiples that were relevant to the four industry segments that made up the parent firm – Philip Morris Companies, Inc.2 This comparable multiples analysis is an accepted method of valuing businesses (Gaughan, 2004). The Goldman Sachs analysis measured what has been termed the ‘‘litigation overhang’’ and found it to be equal to $91.5 billion (Goldman Sachs Analyst Report, 2001)! Without the litigation exposure, their analysis showed that the value of the equity of Philip Morris Companies, Inc. would have equaled approximately $200 billion, compared to the market value of the equity as of that time which was $108.7 billion. Goldman Sachs attributed this large difference to the market’s allowance for the uncertain tobacco liabilities.

Litigation-related liabilities are but one form of relevant information that markets consider when determining equity values. Increases in such liabilities due to **punitive damages** may cause **stock prices to decline, adversely affecting shareholders**. Markets tend to be somewhat **efficient** (with exceptions) **in processing relevant information**.3 Some might argue that the company should reduce dividend payments to shareholders and allocate those monies to litigation payments, thereby making shareholders pay punitive and other damages in this manner. Unfortunately, this method also **has farreaching spillover effects that will hurt shareholders** in other ways. Announcements of dividend reductions and/or elimination usually cause the announcing company’s stock price to fall. For example, Cigna announced in February 2004 that it was undergoing a major restructuring and would cut its dividend from $.33 per share to $.025. As can be seen from Fig. 2, the market reacted in the expected manner with a sharp falloff in the stock price and market capitalization. Such dividend-cut-related stock collapses **can have even more far-reaching effects,** as a company can then become a target for a takeover, which, if completed, **effectively ends the existence of the company in its prior form**. These are spillover effects that need to be considered when contemplating actions that affect dividends and share values.

**disproportionally impacts rural economies**

**Gaughan 05** --- Patrick A. Gaughan, President of Economatrix Research Associates, Inc., an economic and financial consulting firm, “THE ECONOMICS OF PUNITIVE DAMAGES: POST STATE FARM V. CAMPBELL”, Contemporary Studies in Economic and Financial Analysis, Volume 87, 217–266 , 2005, https://www.emerald.com/insight/content/doi/10.1016/S1569-3759(05)87009-3/full/pdf

Other corporate stakeholders may include communities where the defendant corporations **do substantial business.** These communities may be recipients of tax receipts and charitable contributions. **For smaller communities** with a **less diversified economic or industrial base**, changes in the level of these expenditures can have a **significant impact on regional economies**. In such communities plant closures can have **dramatic adverse effects** that might be reflected in **rising unemployment and declining regional output.** Increases in costs caused by **large litigation liabilities** may cause companies to **shrink the size of their work force**. Displaced workers may be **forced to try to replace higher paid manufacturing jobs with lower paying ones** (Patch, 1995). These effects may be **more pronounced** during weak economic times when there are fewer opportunities for workers to mitigate their damages due to a soft employment market. If unionized manufacturing jobs are lost, they may be replaced by lower paying service positions (Ehrenberg & Smith, 2000). One well-known example of such concentrated regional economic effects occurred in communities such as **Allentown and Bethlehem,** Pennsylvania, when the steel industry contracted in the 1980s and companies were forced to lay off workers and close plants (Strohmeyer, 1994).

If the costs of litigation cause a defendant corporation to downsize or limit expenditures that it would have devoted to other stakeholders, such as communities (an example would be corporate charitable contributions), we may incur **still other litigation-related spillover effects**. We know from macroeconomic theory that such cutbacks in expenditures will have **total adverse effects that are a multiple of the original reduction**. These effects are well known and are explained in major principles of economic textbooks in the context of Keynesian expenditure multipliers (see Samuelson & Nordhaus, 1998). Insofar as the affected corporations may have a concentrated presence within a given region, these adverse effects may be **even more pronounced**. Regional expenditure multipliers that attempt to measure the aggregate impact of expenditures may be used to quantitatively measure the total adverse impact that a cutback in corporate expenditures might have. These multipliers measure how many dollars of expenditures are ultimately generated when a given dollar is spent. Economic models exist, which attempt to measure the magnitude of such multipliers (Rickman & Schwer, 1995). Such multipliers may be one tool that can be employed when trying to measure the adverse impact of a reduction in expenditures caused by punitive awards or other litigation-related costs.

**That’s the root cause of US populism**

**Rodriguez-Posea 21**—(Professors of Economic Geography at the London School of Economics). Andrés Rodríguez-Posea, Neil Lee, & Cornelius Lipp. August 11, 2021. “Golfing with Trump. Social capital, decline, inequality, and the rise of populism in the US”. Cambridge Journal of Regions, Economy and Society. Accessed 10/2/21.

We hypothesise that low social capital alone is unlikely to have triggered the swing of voters to Donald Trump and that interpersonal inequality at the local level is unrelated to increases in Trump’s vote share. We propose that it is precisely the **long-term economic and demographic decline** of the places that still rely on a relatively **strong social capital** that is behind the rise of **populism in the US**. Strong, but **declining communities** in parts of the **American Rustbelt**, the **Great Plains**, and elsewhere, reacted at the ballot box to being ignored, neglected and being left-behind.

The results of the analysis show that increases in populist vote in the US are fundamentally driven by the economic and demographic decline of strongly cohesive **midtown and rural America**. These places still have greater levels of social capital than more **dynamic and unequal areas** of the US. This social capital has played a role in the swing of votes within communities driven by a growing feeling of frustration, increasingly known as the rising geography of discontent (McCann, 2020) or the politics of resentment (Cramer, 2016). In **small cities and rural areas** of the US, scattered predominantly across the Rustbelt and the Great Plains, the rise in populist vote represents a reaction of strong communities in which individual losses are identified with collective losses. These so-called ‘**places that don’t matter**’ (RodríguezPose, 2018) have **had enough** of seeing their **people leave** and their **jobs go** and have used the **ballot box** to **exact revenge** on a system they consider offers little to them. By contrast, the more dynamic, mainly urban, areas of the US, where society is often less cohesive, where there is less social capital and where interpersonal inequalities are significantly higher, have, for the moment, shunned the calls of populism.

We argue that our results have implications beyond the United States. In particular, work across Europe, including studies considering Brexit (e.g., Carreras et al., 2019; Lee et al., 2018) and Euroscepticism more generally (Dijkstra et al., 2020), have highlighted the importance of long-term decline in explaining the growth in populism. Yet the focus has tended to be on income and industrial decline, rather than employment and population decline, as a cause. The decline of previously tight-knit communities has been underplayed in this literature, but our results provide an important justification to investigate whether they can be generalised outside the United States.

The paper is structured as follows. The next section studies the rise of Trumpism in the US. This is followed by a section looking at explanations for the growth of the Trump vote, focusing, in particular, on social capital, interpersonal inequality, and long-term economic and demographic decline. The methods and data used in the analysis are presented in the ensuing section, which is followed by the econometric analysis. The main conclusions of the study are put forward in the final section.

The rise of populism in the US

On 8 November 2016, Donald Trump was elected president of the US. Trump, a businessman with limited previous political experience, managed against the odds first to secure the Republican Party nomination and then the presidency on a political platform with strong nationalist and authoritarian populist tendencies (Norris and Inglehart, 2019).

Trump’s election was achieved on the wings of winning the electoral votes of crucial swing states, such as Pennsylvania, Ohio, Michigan and Wisconsin. In these states, like very much everywhere else in the US, the votes for the Democratic candidate, Hillary Clinton, were geographically concentrated in the larger cities. Clinton triumphed in cities like Philadelphia, Pittsburgh, Columbus, Cincinnati, Cleveland, Detroit, Milwaukee and Madison, and took some university towns in Ohio and Pennsylvania. The suburbs, towns and rural areas, by contrast, provided fundamental support for Donald Trump (Rodden, 2019).

Figure 1 shows the Trump margin, the swing in the share of votes towards the Republican Party between the 2012 presidential election, when Mitt Romney was the Republican presidential candidate, and the 2016 election. The Trump margin is highest in most of the mid-Atlantic, Midwest, and Great Plains states. The greatest swing took place in an arch surrounding the Great Lakes, drawing a semicircle expanding from northern Maine in the East to north-eastern Minnesota in the West (Figure 1).

The geography of the Trump margin changed relatively little in the 2020 election (Figure 2). Despite losing the election to Joe Biden, Donald Trump increased his margin relative to the votes obtained by Mitt Romney in 2012 across many rural and small-town counties where he had already prevailed four years earlier. He also managed to make forays into territories traditionally relatively hostile to the Republican Party, such as southern Texas and parts of New Mexico (Figure 1). However, the main geographical traits of the 2016 election remained untouched in November 2020. The Trump margin was, once again, highest in rural and small-town communities around the Great Lakes, the Midwest and the Great Plains.

In contrast, Donald Trump attracted less votes along both coasts and in large urban agglomerations everywhere in the US (Figure 1).

Possible explanations for the rise of Populism

Why did Donald Trump get elected in 2016? Why did he almost get re-elected in 2020? What are the reasons behind the rise of authoritarian populism in the US?

The rise of Trumpism in the US has coincided with that of forms of authoritarian populism in other western democracies. Especially in the second half of the 2010s, researchers have tried to investigate the causes of populism from different perspectives. The main divide in the studies of populism has been between those focusing on cultural parameters versus those emphasising economic explanations.

Those examining culture and values have centred their explanations around the role of values (Norris and Inglehart, 2019). Citizens embracing populism are those that feel ill at ease with what they increasingly regard as a different society from the one they grew up in or with the image of society transmitted to them by their parents and family. These citizens generally regard globalisation, migration and multiculturalism as key factors behind the rise of economic (but also cultural and identity) insecurities (Norris and Inglehart, 2019; Salmela and von Scheve, 2017). The change in cultural values threatens their identity and undermines family and religious traditions, transforming the environment they live in into one they no longer feel comfortable with (Norris and Inglehart, 2019). Gradually, this insecurity has morphed into anger and resentment towards a system that, in their view, no longer values them (Salmela and von Scheve, 2017).

Economic explanations revolve around the economic insecurity brewed by deregulation and globalisation (Guiso et al., 2017). Factors such as the openness to trade and the exposure to Chinese goods (Autor et al., 2013, 2016; Colantone and Stanig, 2018) rank high in this strand of research. Recent economic transformations are exploited by populists, invoking protectionism while stoking economic nationalism, such as in Donald Trump’s ‘Make America great again’ 2016 campaign slogan. Post-financial crisis austerity has also been considered a driver of discontent (Gray and Barford, 2018).

Cultural and economic transformations are causing rising resentment with a system, which is increasingly reflected in the electoral ballot. Voters supporting populist options are both swayed by their individual characteristics, such as age, race, education, exposure to new technologies, health, work status or welfare dependency, as well as by the conditions of the places where they live (Alabrese et al., 2019).

At the intersection between culture and economics, two factors were signalled by Putnam as the main risks for American democracy. Social capital, as ‘the performance of […] democratic institutions depends in measurable ways upon social capital’ (Putnam, 2000: 349), and interpersonal inequality and the increasing polarisation of American society.

Putnam argued these trends went hand in hand and reinforced one another (Putnam, 2000: 359): ‘the last third of the twentieth century was a time of growing inequality and eroding social capital. By the end of the twentieth century, the gap between rich and poor in the United States had been increasing for nearly three decades, the longest sustained increase in inequality in at least a century, coupled with the first sustained decline in social capital’.

In the next subsections, we look at the potential role of both factors in the rise of populism, as well as that of long-term economic and demographic decline as a possible alternative.

Social capital as a driver of populism

Social capital has become one of the dominant concepts in the social sciences. The concept draws on a longstanding body of research, which suggests that social networks matter for all sorts of social and economic outcomes. Coleman (1988) defined social capital as a resource considering (a) obligations and expectations, (b) information channels and (c) social norms. These three aspects of social relationships reduce the coordination costs of shared action and improve outcomes, moving away from a static view of social relations and economic activity as being about individualised actors, towards a view that economic activities are relational rather than simply transactional (Rodríguez-Pose and Storper, 2006). Putnam took on this concept and defined it as ‘the features of social life— networks, norms and trust—that enable participants to act together more effectively to pursue shared objectives’ (Putnam, 1995: 664).

Most views of social capital consider it a force for good. In his work on the strength of weak ties, Granovetter (1973) showed the importance of social relations in enhancing economic outcomes, while Putnam (2000: 394) indicated that social capital ‘strengthens our better, more expansive selves’.

Hence, the long-term decline of social capital in the US posed a serious threat to American society and its democracy, as it pushes citizens to free-ride ‘by neglecting the myriad civic duties that allow […] democracy to work’ (Putnam, 2000: 349).

However, there are also longstanding concerns that it can have negative consequences. Olson (1965) viewed associational behaviour as lapsing into special interest groups. Overall, closed networks may enable the development of social capital, but they can also allow the development of group-think and incentives to engage in factional behaviour rather than in the general interest (Rodríguez-Pose and Storper, 2006) and prevent the progress of new ideas and social change (Coleman, 1988). In short, a tight-knit community can entrench the ‘forces of tradition’ and restrict social change (Farole et al., 2011: 68).

In terms of how social capital can affect voting behaviour, social capital is often seen as a pillar of a functioning democracy, something which goes back to Alexander de Tocqueville and his argument that civic association underpinned the US democratic model. Similarly, Putnam (1993) argues that the lack of adequate social capital in southern Italy undermined democracy and legitimate political representation. His arguments for the US are that declining social capital not only depresses civic engagement and political participation but that it also destroys connectedness and trust. The increasingly empty public forums that became the norm in the last third of the 20th century represented a threat to American democracy (Putnam, 2000: 412).

In this respect, social capital can be considered as a form of protection against populism or demagoguery. Pre-dating the post-crisis resurgence of populism, Fieschi and Haywood (2004) indicated that a lack of trust in political institutions could fuel populism. Both Putnam (1993; 2000) and Fieschi and Haywood (2004) viewed social capital as essential for a healthy democracy and having a purely negative impact on populism (i.e., where there is greater trust, political relationships are healthier and more mutually respectful, and so populists are less able to blame elites).

But this positive view of social capital has, more recently, also been challenged. Satyanath et al. (2017), for example, showed that German states with higher levels of social capital, proxied by associational behaviour, facilitated a rapid expansion of Nazi ideas and, in turn, Hitler’s accession to the Chancellery through higher shares of votes for the Nazi party. The presence of large and dense networks involving high levels of trust expedited a swift flow of information and a more rapid exposure to Nazi party propaganda.

Interpersonal inequality and populism

Putnam (2000) saw rising interpersonal inequality as the other main risk for American democracy. For him, the increase in interpersonal inequality and the decline of social capital were two sides of the same coin. On the one hand, the rise in inequality of the last third of the 20th century (Katz and Murphy, 1992) disrupted participation and reduced civic engagement. On the other, the decline in social capital accelerated the disintegration of American communities and eased the implementation of policies and the passing of legislation that fermented greater inequality. This process also had a geographical component as ‘the American states with the highest levels of social capital are precisely the states most characterised by economic and civic equality’ (Putnam, 2000: 359). This view of interpersonal inequality as a threat to democracy and, therefore, a driver of populism has been shared by many economists who have examined the roots of the recent rise of authoritarian populism in developed countries. The rise in wealth polarisation in American society, as well as elsewhere in the developed world, is a fundamental factor for the increasing support of extreme antisystem options at the ballot box. Economic transformations in recent decades, and, above all, globalisation and automation, have driven ‘multiple, partially overlapping wedges in society’ (Rodrik, 2018: 23). One of these wedges concerns income and wages. The economic system has been leaving increasing shares of the population behind, in conditions that are financially insecure (Eichengreen, 2018; Guiso et al., 2017). The concentration of wealth in a dwindling number of hands (Milanovic, 2016; Piketty and Saez, 2014)—the top 1% (Dorling, 2019)—and the parallel rise in the people at risk of poverty in developed countries (O’Connor, 2017; Rodrik, 2018) is considered tainted with a stigma of unfairness (Rodrik, 2018: 23). Citizens have come to believe that the growing wealth of the elites has been earned unfairly and, consequently, the tolerance towards inequality has decreased (Pastor and Veronesi, 2018). Hence, interpersonal inequality, often confounded with economic unfairness (Starmans et al., 2017), is, from this perspective, pushing voters towards illiberal and anti-system parties at the ballot box. Inequality is perceived to drive a reaction against the status quo, resulting in an erosion of democratic institutions and leading to nativism and plutocracy (Milanovic, 2016).

For Putnam (2000: 359) ‘there is every reason to think that the twin master trends of our time—less equality, less engagement—reinforce one another’. Thus, fighting the decline of social capital is also a way to prevent the rise of inequality and vice versa. It is also the best way to combat the challenges besieging American democracy.

**The role of long-term economic decline**

Putnam’s work is about all sorts of decline. From that in civic engagement or in political participation to declines in bowling or card playing. All these declines are meticulously documented in Bowling alone. Yet, there is one type of decline that is conspicuously absent from Putnam’s (2000) analysis: that of **smalltown and rural America**. Similarly, the growth of territorial inequalities and the rising geographical polarisation in the US does not feature prominently in Putnam’s work.

However, the demographic and economic decline of small-town and rural America has been documented for quite some time (e.g., Fuguitt et al., 1989; Johnson, 2006). Small towns and large swaths of **rural areas** have been losing population and jobs **throughout the second half of the 20th and the beginning of the 21st century**. The decline of these areas has been matched by the evolution of many large cities, such as Detroit, Cleveland, Buffalo, Milwaukee or Toledo, once among the most dynamic industrial hubs in the US (Hartt, 2018). Many of these cities articulated, and still articulate, large hinterlands in ‘Rustbelt’ states.

Such decline has had important implications for social capital. According to Putnam (2000: 207), ‘the decline in social connectedness over the last third of the twentieth century might be attributable to the continuing eclipse of smalltown America’. This is because **small-town and rural America** have for long been the **centres of civic engagement**. In these areas, people have been and remain community-oriented (Wuthnow, 2019: 4). During most of America’s history this feeling of community, widespread across the whole of the US, was regarded as a force for good. ‘Residents of small towns and rural areas are more altruistic, honest and trusting than other Americans’, noted Putnam (2000: 205). They are viewed as deeply proud, caring about their communities and wanting the best for them (Wuthnow, 2019). Communities with a better endowment of social capital have been perceived as better able to cope with all sorts of economic and social challenges (Rupasingha et al., 2006).

However, when these communities suffer long-term population and economic decline and when the way of life that created and sustained the feeling of community ebbs away (Rodríguez-Pose, 2018; Wuthnow, 2019),2 the very social capital behind the cohesiveness and former dynamism of these areas can also channel the growing anger and resentment felt by those being left behind. When the **feeling of neglect** becomes widespread, when there is **growing resentment** about the rising economic gulf between large cities and small communities (Cramer, 2016: 83), social capital at a **local scale** can become the mechanism to **diffuse that anger** and outrage at a system they feel **no longer represents and serves them**. Areas with a strong social capital develop a consciousness that helps shape their **political views** (Cramer, 2016) and this consciousness is inherently related to place. Locals concerned about the many problems afflicting their communities, from **population loss**, **brain drain** and **ageing** to **social disintegration** and **increasing drug addiction**, feel that their plights are **ignored by the federal government** (Wuthnow, 2019) and can **react collectively at the ballot box**. In this respect ‘place matters because it functions as a lens through which people interpret politics’ (Cramer, 2016: 12). This consciousness is both rooted in place and class, but also ‘infused with a sense of distributive injustice’ (Cramer, 2016: 12). And it may also be the mechanism that feeds the increasing call for attention of places that have seen far better times, have been devastated by economic processes such as globalisation or automation and where people are becoming effectively stuck because of lack of capacity and/or opportunities for mobility (Rodríguez-Pose, 2018: 202). These processes have contributed to render their economies redundant and, often, undermine the self-esteem and sense of purpose of many local dwellers. Such consciousness is contributing to spread out a geography of discontent (Dijkstra et al., 2020; McCann, 2020) and a politics of resentment (Cramer, 2016) to areas that have had a rough ride linked to both economic and cultural transformations and have seen their friends and neighbours leave, their jobs dwindle, and their services gradually disappear (Collantes and Pinilla, 2019; Guilluy, 2019). Social capital can, in this respect, provide the vehicle for this anger to come out into the open at the ballot box (Rodríguez-Pose, 2018) or, increasingly, through rebellion and revolt (Guilluy, 2019).

Bringing together social capital, inequality, and demographic and economic decline

What can be expected from the combination of dwindling social capital, rising inequality, and the demographic and economic decline of many cities, small towns, and rural areas in the US? Depending on the perspective adopted, two potential outcomes can emerge.

On the one hand, as posited by Putnam (2000), the threats posed by populist tendencies to American democracy could be addressed by redressing the decline of social capital and the increase in inequality. Anger at the system would, therefore, be more prevalent in those places where there is a combination of high inequality and low social capital. That is, predominantly, in large American cities. In these places ‘efforts to strengthen social capital should go hand in hand with efforts to increase equality’ (Putnam, 2000: 359).

On the other, remnants of strong social capital that foster a pervasive consciousness within declining cities, especially in small towns and rural areas across the US, could have served as a means to channel the growing anger of long-term decline to the ballot box in numbers and ways that would be impossible in places with lower social capital stock.

The evidence of the 2016 and 2020 presidential elections points to the latter explanation. The demographically and economically more dynamic, mainly urban areas in the US, where society is less cohesive, but where interpersonal inequalities are significantly higher, shunned the calls of populism and voted in large numbers for the Democratic candidates. By contrast, many long-term declining communities with strong social capital embraced Donald Trump in far greater numbers than they had supported Mitt Romney, a far more mainstream Republican presidential candidate, in 2012.

Hence, in this paper, we will argue that the rise of populism in the US, as proxied by the swing to Donald Trump, is not related, as feared by Putnam (2000), to low levels of social capital, high interpersonal inequality, or their combination, but mainly to long-term economic and demographic decline. We will also argue that strong social capital, civic engagement and cohesiveness may have contributed to the revenge at the ballot box of places left behind (Wuthnow, 2019) that have felt neglected and snubbed for a considerable amount of time (Cramer, 2016; McCann, 2020). Their strong social identity and local consciousness—in other words, their social capital—may have expedited the rise of Trumpism in ways that would have been impossible in the most dynamic US cities and towns. This form of American populism will thus be mainly driven by the long-term economic and demographic decline of the strong communities that built America, while the rise of interpersonal inequality, something that could generate future conflict, is, for the moment, not associated with populism.

**Model and data**

Model

In order to demonstrate that:

(a) **Economic and demographic decline** are fundamental factors in the rise of the **Trump** vote and that this process has become exacerbated in the tightly-knit communities with strong social capital that have witnessed an erosion of their relevance;

(b) This process is not limited to the aftermath of the crisis, but **goes back a long way**, with roots that can be traced to, at least, the 1970s; and

(c) Trumpism is more connected with long-term decline than with local interpersonal inequality, which tends to be far higher outside those tightly-knit communities;

we will analyse the **swing of votes** to the Republican Party between the **2012**, on the one hand, and the **2016** and **2020** presidential elections—the Trump margin—on the other and **regress it** on the three factors that might have driven the surge in vote for Trump: **social capital**, **interpersonal inequality**, and **economic and demographic decline**. In view of the theoretical framework developed above, we will also look at the interactions between those factors, as the Trump vote could have increased in a) those places having suffered a long-term decline that are more unequal; in b) places with high social capital that are more unequal; and c) in places having suffered a long-term decline, with a strong level of social capital.

The model adopts the following form:

TMc,20xx−2012 = α + β1 Income pcc,2016 + β2 Inequalityc,2016

+β3 Social Capitalc,2016 + β4 Economic

& Demographic Changec,2016−t + γ1X¯c,t + νs + εc

where,

TMc, 20xx−2012 represents the Trump margin, that is the change in the share of the vote between Donald Trump in 2016 or 2020 and Mitt Romney in 2012;

Income pcc,2016 denotes the income per capita in a county in 2016;

Inequalityc,2016 is a measure of income inequality within a county in 2016;

Social Capitalc,2016 depicts the level of social capital in a county in 2016;

Economic & Demographic Changec,2016−t indicates changes in employment, population, average earnings, and average wages in a given county between 2016 and any year marking the start of a decade, going back to 1970;

X¯c,t is a vector of other variables that could have affected a shift in the vote for Donald Trump. These include variables that have been identified in the scholarly literature as factors behind the rise in Trump and/or populist vote, including population density, levels of unemployment, education, the racial composition, the sex ratio, the age structure, the share of married adults, or the local impact of imports from China at the county level;

finally,

νsis a state − level f ixed − ef fect, while εc

denotes the error term.

Data

Geographical units

The analysis is conducted at **county level**. This approach allows us to investigate **very long-term impacts** on local areas in a consistent way. However, one critique of using counties as our unit of analysis is the ecological fallacy, as we are generalising from the individual to the county level. This is unlikely to be a major problem here, however, as studies show that local context is an **important determinant of individual attitudes** (e.g., Reeves and Gimpel, 2012).3 As the data are drawn from multiple sources and cover the last five decades, there was a need for some matching to reflect changes in county boundaries over the period of analysis. The data have, therefore, been levelled at the county geographical division used by the Bureau of Economic Analysis (BEA) in 2017. As county boundaries underwent extensive changes, particularly in the state of Virginia, some modifications have been included. In the case of Virginia 51 counties in the state have been assembled into 23 ‘county compounds’, or county-equivalents. Alaska, which also underwent considerable modification in local boundaries, is excluded from the analysis. In the rest of the US, county adjustments are either inexistent or very minor. 3067 of the 3143 county or county-equivalents across the US are included in the analysis.4

Dependent variable and independent variables of interest

The dependent variable in our model is the ‘Trump Margin’ (Figure 1), which represents the difference in the share of voter support for Donald Trump in the 2016 or 2020 presidential election relative to that of the previous Republican candidate, Mitt Romney, in 2012. It uses data drawn from the MIT Election Data and Science Lab for 2012 and 2016 and from McGovern et al (2020) for 2020. Following Goetz et al. (2019) and Agnew and Shin (2019), we use the difference in share instead of Trump’s overall share of votes, as we deem that this margin better signifies the increase in populist vote between both elections.5

The three main independent variables of interest depict (following the theoretical discussion above) social capital, interpersonal inequality and economic and demographic decline.

The measure for social capital is based on an update by researchers at Penn State for the year 2014 of Rupasingha’s et al. (2006) index. Rupasingha et al. (2006) created—inspired by Putnam’s (1993, 2000) concept of civic engagement and using principal component analysis—a social capital index at county level for the US including four key components. These were: a) the **number of non-profit organisations** in a county, excluding those with an international approach; b) the **census response rates** in 2010; c) **voter turnout** in the 2012 presidential election and d) a **number of associational indicators**, including **bowling centres**, **business**, **civic and social associations**, **golf courses** and **country clubs**, labour, professional, religious and political organisations, fitness and recreational sports centres and sports teams and clubs, with all these factors aggregated and divided by population. The four factors included in the index were standardised. The first principal component is considered as the index of social capital.

Mapping this index at county level provides a very uneven geography of social capital across the US. The highest levels of social capital were concentrated around the Midwest and, especially, the Great Plains states. Both Dakotas, Iowa, Kansas, Minnesota, Montana, Nebraska and Wyoming boasted the highest level of social capital. Social capital was also high in the northwest (Oregon and Washington state) as well as in some areas around the Great Lakes, such as Wisconsin, rural Illinois, Ohio, eastern Pennsylvania and parts of New England. Social capital was, by contrast, significantly weaker in the South, particularly in Kentucky and Tennessee, and in some Mountain states, such as Arizona, Nevada and Utah (Figure 3).

The second independent variable of interest, Interpersonal inequality, is based on data drawn from the 2013–2017 5-year American Community Survey (ACS). At the core of the analysis is the 2016 county-level Gini index of incomes in a county. Two alternative measures are considered for robustness. These are the share of the population in the county in the top income quintile and that in the top 5% of income.

Income inequality in the US is highest in the Deep South, particularly in states such as Alabama, Arkansas, Louisiana, Mississippi, South Carolina and eastern Kentucky, as well as in the largest urban agglomerations, such as New York City, Los Angeles, Chicago, Houston, Miami, Detroit and the Bay Area (Figure 4). The lowest differences in income inequality are found in Midwestern states, and mainly in small-town and rural communities in Illinois, Indiana, Iowa, Missouri, Ohio and Wisconsin, as well as in some parts of the Mountain states such as Nevada, Utah or Wyoming (Figure 4).

The third and final independent variable of interest is Economic and demographic decline. In the econometric analysis, we use four different proxies: three for economic change (employment change, change in average earnings per job, and change in average wages and salary) and population change as a proxy for demographic change. The benchmark measure of change at the county level is employment change between 1980 and 2016. However, in successive parts of the analysis all four economic and demographic change indicators are considered, covering, by decade, the period between 1970 and 2016. The data for 2016 are drawn from the 2013–2017 5-year ACS. For earlier years, we resort to Bureau of Economic Analysis data. To ensure a normal distribution of residuals, all change variables are transformed logarithmically.

Figure 5 provides an indication of economic change across counties in the US. It represents changes in employment between 1980 and 2016. As expected, the biggest growth in employment over that period of 36 years took place along the Pacific coast, in the north-east urban corridor, and in southern Florida. The lowest levels of employment growth occurred in the Great Plains states, along a strip running from East Texas in the south to North Dakota in the north (Figure 4). Many areas south of the Great Lakes and in the South have also performed relatively badly in employment terms. However, all is not gloom around the Great Lakes, as the area between Chicago and Milwaukee witnessed considerable growth in employment, as did most of the counties on the shores of Lake Erie.

Control variables

In addition, several control variables, representative of factors that have been associated with the rise of populism in the US and elsewhere, are included in the analysis. First, we consider income per capita in 2016, as variations in the territorial levels of wealth have been related to populist vote. Population density has been highlighted by certain authors (e.g., Rodden, 2019) as a driver of populism. Traditional parties, and mainly those of the left, are increasingly struggling in suburbs and rural areas of the US (Rodden, 2019). Population density at the county level is represented by its value in 2016. Unemployment is frequently regarded as another determinant linked to the rise of discontent and populism (Algan et al., 2017; Guriev, 2018). We control for the unemployment rate at the county level in 2016. Education is also a prominent factor behind the rise in antisystem voting. Low levels of education have been seen to be crucial for Brexit, the election of Donald Trump and the rise of populist alternatives elsewhere (e.g., Essletzbichler et al., 2018; Goodwin and Heath, 2016; Sides et al., 2017). We, therefore, use an indicator of the percentage of adults with higher education in each county in 2016. The racial dimension has been recurrent in the analysis of the outcome of the 2016 US presidential elections, with some accounts highlighting that the role of race and racial attitudes may be more important than economic factors (e.g., Morgan and Lee, 2018; Reny et al., 2019; Sides et al., 2017). We control for the share of black population in 2016 in US counties and, in alternative specifications, for the share of whites in that year. Demographic variables have also featured prominently (e.g., Goodwin and Heath, 2016). We include three such variables: the sex ratio of the population, the young-age dependency ratio and the share of married adults. Finally, the ‘China shock’ is often signalled as a trigger of discontent at the ballot box (Autor et al., 2016). We, therefore, include a measure of imports from China at county level.

A list of the variables in the analysis, together with their definitions and sources, is included in Supplementary Table A1 in the Supplementary Appendix.

Descriptive analysis

What is the connection between the dependent variable (the Trump margin) and the independent variables of interest? Plotting the correlation between the Trump margin in the 2016 and 2020 US presidential elections and the three independent variables of interest reveals that the correlation between social capital, inequality and employment change since 1980, on the one hand, and the Trump margin, on the other, is, at best, tenuous. The strongest correlation is between employment change and the swing in votes towards Donald Trump. Counties with a greater decline in employment over the period of analysis supported Donald Trump in far greater shares than they supported Mitt Romney in 2012. The link between interpersonal inequality and the increase in the Republican vote is inexistent, while places with a higher social capital 2014 showed marginally higher shifts in votes towards Donald Trump (Figure 6).

The correlations among the independent variables of interest are similarly weak. There is no link between inequality and changes in employment, while counties with higher levels of social capital have, on average, slightly lower interpersonal inequality and witness marginally lower employment growth since 1980 (Figure 7). The link between county size and any of the correlations is highly imperfect, although larger counties are somewhat more unequal, have lower social capital, and experience, with notable exceptions, greater employment growth (Figure 7).

Econometric analysis

Basic model

The question is whether these relationships stand when all these factors are included together with additional controls in a regression analysis. The results of regressing model (1), using simple ordinary least squares (OLS) and including state fixed-effects, are presented in Table 1. Regressions 1 through 5 report the estimation for the 2016 election, while Regression 6 does it for the 2020 election. We run both elections separately as the conditions of both elections were very different: in 2016 Trump voters were electing an outsider with a limited track record in politics, while in 2020 they were voting for an incumbent president.

The results highlight that, once the income per capita of the different counties in the US and the conditions of their state are controlled for, interpersonal inequality, long-term employment change and differences in social capital across US counties are connected to a swing towards Donald Trump in the 2016 presidential election (Table 1, Regression 4).

However, this connection is not always in the direction expected by Putnam (2000) in Bowling alone. The combination of social capital and lower inequality as a protector of American democracy is not discernible. While richer counties shifted towards Trump’s populist positions in lower numbers than poorer counties both in 2016 and 2020, more unequal areas of the country were less swayed by Trump’s brand of populism. By contrast, places with greater civic engagement and a stronger social capital opted in larger numbers for the more extreme option in 2016, although the connection is not significant in the 2020 election, once other control variables are included. Counties that have witnessed considerable destruction of employment since 1980 were also convinced to a greater extent by Trump’s discourse than areas that experienced greater job creation (Table 1). These results are robust to including the three independent variables of interest together in the regression (Table 1, Regression 4) and additional controls expected, according to the literature, to affect populist vote (Table 1, Regressions 5 and 6). They are also robust to clustering the standard errors at county level (Supplementary Table A2). The coefficient for inequality, which is significant and negative when all the controls regressed together in the 2016 election (Regression 5), becomes insignificant in the 2020 election (Regression 6). In 2016 citizens living in the more unequal counties of the US were far less inclined to swing towards Donald Trump, but this relationship became weaker four years later.6

The coefficients for the control variables are generally in line with expectations. More densely populated counties, counties with a higher share of university graduates, those with a higher share of black population, those less affected by imports from China, and those with a younger population swung less to Trump (Table 1). The unemployment rate yields insignificant coefficients in both elections, while the increase of support for Donald Trump is higher in places with a lower share of married adults.7

These results are robust to changing the share of black population in a county by that of whites (Supplementary Table A5), with counties with a greater share of white population swinging towards Donald Trump, and to changes in the measurement of inequality at the county level. Counties with a greater percentage of people in the top income quintile (Supplementary Table A6) and those with a higher proportion of individuals in the top 5% of the income distribution (Supplementary Table A6) had a lower Trump margin in 2016, but not in the 2020 elections.

The introduction of interactions between the independent variables of interest barely alters the results emanating from the basic model. Changes in employment since 1980 and all the control variables, including income per capita at the county level, yield the same sign in the coefficients and similar levels of significance. Once again, counties that have seen a greater employment decline put more trust in Donald Trump than they did in Mitt Romney (Table 2). Social capital remains positive and significant, apart from Regression 2, where it becomes insignificant for the 2016 election, and insignificant in 2020. While inequality displays a negative coefficient that is significant for the 2016 election and in 2020, when the interaction between employment change and inequality is considered (Table 2).

The significant interactions are those between employment change and interpersonal inequality in 2016 and 2020 and between employment change and social capital in 2020. In the case of the former, both coefficients are positive and significant, meaning that the swing to Donald Trump was more pronounced not only in poorer counties, in those with lower interpersonal inequalities, and those that had suffered a long-term employment decline, but also in counties where high levels of employment growth were matched by a high degree of interpersonal inequality (Table 2, Regressions 1 and 4). In the case of the latter, citizens living in counties with higher levels of social capital voted less for Trump in 2020, if employment had grown more than elsewhere in the previous 40 years (Table 2, Regression 6).

Different types and time horizons of decline

So far, we have concentrated just on one side of economic and demographic change: employment change since 1980. What happens if we consider different types of decline? In Table 3 we take into consideration, not just employment change, but also population change (Regressions 2 and 6), change in average earnings per job (Regressions 3 and 7), and in average wages and salaries (Regressions 4 and 8).

The results indicate that long-term employment and population decline over a period of almost 40 years has been strongly connected with a swing to Donald Trump at the ballot box in both 2016 and 2020 (Table 3, Regressions 1, 2, 5 and 6). Declines in average earnings and in wages and salaries are, in contrast, disconnected from the Trump margin in 2016. By contrast, counties that increase their average earnings per job and average wages and salaries, once other factors are controlled for, swung more towards Trump in 2020. In these counties presence of strong social capital was also linked to a higher Trump margin (Table 3, Regressions 7 and 8).

These results chime well with the literature highlighting that the rise of populism in the US has more to do with racial issues than individual economic factors (Norris and Inglehart, 2019; Reny et al., 2019) and with a sense of alienation of the white working classes (Cramer, 2016; Morgan and Lee, 2018; Walley, 2017), what Kimmel (2017) calls ‘angry white men’. However, they also powerfully relate to the literature that has focused on geographical dimensions and, in particular, with long-term economic decline, mostly in Europe (e.g., Guilluy, 2019; Rodríguez-Pose, 2018) but, increasingly, in the US (e.g., Wuthnow, 2019). However, in contrast to the findings for Europe, where the rise of anti-system voting at the ballot box has been linked to economic and industrial decline, but not to employment and demographic decay (Dijkstra et al., 2020), in the US it is the slow demise of still strong communities that have been losing employment and population for some time that triggers the reaction at the ballot box to a far greater extent than declines in earnings and salaries. Once we have established that long-term unemployment and demographic decline have a powerful connection to Trump’s vote margin, the question is whether this association waxes or wanes with time. Table 4 looks at the change in these relationships over time, including the link with changes in average earnings and wages and salaries, since 1970 in ten-year intervals. This implies that the regressions are the same as in Table 3, only substituting the time covered in each of the economic and demographic decline variables. Only the coefficients for these variables are reported, as there are no significant changes in the other coefficients.

The coefficients displayed in Table 4 show that the link between employment and population decline at the county level and Trump’s vote margin is not a recent phenomenon. The coefficients for employment and population change are always negative and highly significant, regardless of the period and election considered. Counties that have been shedding employment and losing population since the 1970s have been more inclined to support Donald Trump than they did Mitt Romney in 2012. Having said that, the dimension of the negative coefficients is generally larger for the more recent periods than for longer time spans. The 2008 Great Recession has provided a springboard for the rise of populist discourse and a populist candidate, but the seed of discontent was planted, as indicated by Cramer (2016), quite some time earlier.

Table 4 once again points to the fact that this reaction at the ballot box is more about the long-term decline of communities shedding jobs and people than about the loss of earnings, wages, and salaries. The coefficients for the change in average earnings per job are mostly insignificant. However, it is often the case that counties witnessing a higher increase in wages and salaries swung more towards Donald Trump, particularly in the 2020 election. Hence, ‘it is not the very poor that are threatening the political system but the large numbers of still relatively well-off people—often seen as the threatened middle classes—still living relatively comfortable lives but in declining places’ (Rodríguez-Pose, 2020: 1–2).

Conclusions

Two decades ago, Putnam (2000) warned that American democracy was at risk from the twin challenges of the decline in civic engagement and social capital on the one hand, and the rise in interpersonal inequality on the other. More Americans bowling alone and engaging to a far lesser extent than before in local communities and an increasingly divided society from an economic perspective represented a twin threat to the democratic institutions that had been built since independence.

Sixteen years later his forecast materialised with the **election of Donald Trump**, an outsider and political novice with strong **populist tendencies**, who first stunned the Republican Party elite by securing its presidential nomination, and then went on to beat the Democratic party candidate, Hillary Clinton, in the November 2016 election.

Yet, the election of a candidate that, by shaking the system, has stretched American democracy to the limit, may have had little to do with **declining social capital** and **rising interpersonal inequality** and much more with the **long-term employment and population decline** of many formerly prosperous American communities. These communities are precisely those where social capital—the very form of capital that, according to Putnam (2000), was supposed to provide the glue for America’s democratic institutions—has held stronger than elsewhere.

This is what this paper has shown. By combining social capital with interpersonal inequality and long-term economic and demographic decline at county level in the US and linking it to the swing to Donald Trump at the ballot box in the 2016 and 2020 presidential elections, it has revealed that the rise in discontent identified by some scholars (e.g., Cramer, 2016; Kimmel, 2017; Wuthnow, 2019) is at the root of the Trump electoral tsunami. However, this analysis has **provide**d evidence for the **deep geographical roots** of this phenomenon. It is **not** just simply the **white working class** that is rebelling against the system. There are plenty of white working-class voters on the West Coast, along the eastern megalopolis or in American large cities, as well as in medium-sized cities, towns and rural areas that did not swing and/ or did not vote for Donald Trump. It is middleand working-class individuals, who live in communities that have seen better times and have for long experienced a slow, but relentless employment and population decline, and where social capital has remained relatively strong, that cast the decisive votes to put Donald Trump in office in 2016. The link between social capital and the Trump margin became weaker in the 2020 election when considering population and employment decline, but not when taking into account changes in earnings per job and in wages and salaries. Hence, social capital and local civic engagement may not have acted as the positive forces envisaged by Granovetter (1973) or Putnam (2000), but, in most cases, more in the negative way suggested by Satyanath et al. (2017), through mechanisms possibly linked to local consciousness and identity (Cramer, 2016).

The long-term **economic and demographic decline** of many **tightly-knit American communities** has driven the rise of Trumpism. A decline that can be traced back to **the last quarter of the 20th century** and that has created a malaise that goes well beyond the crisis and that is increasingly **manifesting itself at the ballot box**. Declining, but still rather cohesive communities with strong social capital are the drivers of this process. In mostly small-town and rural areas of the US, the rise in the populist vote is a consequence of a reaction of communities in which individual losses are strongly identified with collective losses. And social capital may act as one of the transmission mechanisms. Individuals living in these communities know that a loss for one is a loss for all. Therefore, the rise of populism in the US is fundamentally linked to the geography of decline; to places that, despite remaining **relatively homogeneous** in terms of interpersonal inequality, have witnessed **considerable employment and demographic decay** over the long term. The Great Recession of 2008 may have ignited the fuse that resulted in the election of Donald Trump as president, but the discontent has roots that are far deeper.

**It's an independent existential risk and magnifies all others**

Andrew **Leigh 21**, Australian member of Parliament, former professor of economics at the Australian National University, 2021, What's the Worst That Could Happen?: Existential Risk and Extreme Politics, unpaginated ebook version

How likely is it that humanity could end? Experts working on catastrophic risk have estimated the chances of disaster for a wide range of the hazards that our species faces. Adding up the threats, philosopher Toby Ord estimates the odds that humanity could **become extinct** over the next century at one in six, with an out-of-control superintelligence, **bioterror**ism, and **totalitarianism** among the largest risks. He argues that most of the risks have arisen because technology has advanced more rapidly than safeguards to keep it in check. To encapsulate the situation facing humanity, Ord titled his book The Precipice.

A one in six chance of going the way of dodos and dinosaurs effectively means we are playing a game of Russian roulette with humanity’s future. Six chambers. One bullet. Even the most foolhardy soldier usually finds an excuse not to play Russian roulette. And that’s when just their own life is at stake. In considering extinction risk, we’re contemplating not one fatality but the death of billions or possibly trillions of people—not to mention countless animals.

It can seem impossible to imagine our species becoming extinct due to a **catastrophe** such as **nuclear war**, **asteroids**, or a **pandemic**. But in reality, the danger surpasses plenty of perils we already worry about. One way to put catastrophic risk into perspective is to compare it with more familiar risks. If extinction risk poses a one in six risk to our species over the next century, then it means that it is far more hazardous than many everyday risks. Specifically, it suggests that the typical US resident is fifteen times more likely to die from a catastrophic risk—such as nuclear war or bioterrorism—than in car crash.2

Extinction risk outstrips other dangers too. Ask people about their greatest fears, and you’ll get answers like “street violence,” “snakes,” “heights,” and “terrorism."4 But in reality, these are much less hazardous than catastrophic risks. People in the United States are 31 times more likely to die from a catastrophic risk than from homicide. Catastrophic risk is 3,519 times likelier to kill than falls from a height, and 6,194 times more likely to kill than venomous plants and animals. If you have ever worried about any of these threats, you should be more fearful about cata- strophic risk. Extinction risks aren’t just more dangerous than any of them; they are more hazardous than all of them put together. Catastrophic risk poses a greater danger to the life of the typical US resident than car accidents, murder, drowning, high falls, electrocution, and rattlesnakes put together.

A one in six risk is just the danger in a single century. Suppose that the risk of extinction remains at one in six for each century. That means there’s a five in six chance humanity makes it to the end of the twenty-first century, but less than an even chance we survive to the end of the twenty-fourth century. The odds that we survive all the way to the year 3000 are just one in six. In other words, if we continue playing Russian roulette once a century, it’s probable that we blow our brains out before the millennium is halfway through, and there’s only a small chance that we make it to the end of the millennium.

Part of the reason humans undervalue the future is that it’s hard to get our heads around the idea that our genetic code could live on for millions of years. At present, the best estimates are that our species, Homo sapiens, evolved around three hundred thousand years ago.1 That means we have existed for about ten thousand generations. But we have another one billion years before the increasing heat of our sun brings most plant life to an end.1 That’s plenty of time to figure out how to become an interstellar species and move to a more suitable solar system. Humans could live to enjoy another thirty million generations on earth.

Thinking about the mind-boggling scale of these numbers, I’m reminded of the Total Perspective Vortex machine, created by Douglas Adams in The Restaurant at the End of the Universe. Anyone brave enough to enter sees a scale model of the entire universe, with an arrow indicating their current position. As a result, their brain explodes. As Adams reflects, the machine proves that “if life is going to exist in a universe of this size, then the one thing it cannot afford to have is a sense of proportion.”

Still, let’s try. Imagine your ancestors a hundred generations ago. They are your great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-grandparents. These people lived around 1000 BCE, at the start of the Iron Age. They might have been part of Homeric Greece, ancient Egypt, Vedic age India, the preclassic Maya, or Zhou Dynasty China.

Contemplate for a moment about what the hundred genera- tions between our Iron Age ancestors and today have achieved. They built the Taj Mahal and Sistine Chapel, the Angkor Wat and Empire State Building. Thanks to them, we can relish the poetry of Maya Angelou, novels of Leo Tolstoy, and music of Ludwig van Beethoven. An abundance of inventions has delivered us deli- cious food, homes that are comfortable year-round, and technol- ogy that provides online access to a bottomless well of entertain- ment. If time machines existed, we might pop in to visit our great100 grandparents, but few would volunteer to stay in the Iron Age.

Yet humanity is really just getting started. If things go well, it’s ten thousand generations down, thirty million to go. Imagine what those future generations could do, and how much time they have to enjoy. Here’s one way to think about what it means to have thirty million generations ahead. Suppose humanity’s potential time on the planet was shrunk down to a single eighty- year life span. In that event, we would now be a newborn baby— just nine days old. Homo sapiens is a mere 0.03 percent through all we could experience on earth.

We won’t meet most of those who follow us on the planet, but we should cherish future generations all the same. If you value humanity’s past achievements—the Aztec and Roman civiliza- tions, art of the Renaissance, and breakthroughs of the Industrial Revolution—then the generations to come are just as worthy. This is what political philosopher Edmund Burke meant when he described society as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.’- To appreciate the past is akin to admiring the achievements of distant places. Like geography, his- tory helps us better understand the way of the world.

Politicians like me like to speak fondly about looking after "our children and our grandchildren.” But it usually stops after a generation or two. Policy pays little heed to the many generations that will follow. For my own part, it took a coronavirus-induced shutdown to have the time to spend reflecting deeply about the long term. This book had been rattling around in my head for years, but it was only when all my meetings, events, and travel were canceled that I had the time to write it. Pandemics are one of the threats to humanity that I’ll discuss in this book, but in this instance, it provided a chance to reflect on the long term. It’s tempting to ignore the distant future. It’s easier to love the grandchildren whom we hug than the great-great-great-grand- children whom we’ll never get to smile on. But that doesn’t make those far-flung generations any less important. Via my wife, our children can trace their lineage to Benjamin Franklin, but I’m more excited about the potential achievements of the generations yet to be born.

For companies and governments, a major impediment to long- term thinking is the idea of discounting the future. When investing money, this is a reasonable approach. A dollar in a decade’s time is less valuable than a dollar today for the simple reason that a dollar today could be invested and earn a real return. Share markets have good and bad years, but based on returns from the past 120 years, someone who put $1,000 into the US stock market for an average year could expect it to be worth $1,065 after twelve months (accounting for dividends and inflation).2 Approximating these returns, when governments contemplate making investments, they often apply a discount rate of around 5 percent, while companies use rates that are higher still.2

When it comes to growing your greenbacks, this makes perfect sense. If Kanesha offered you $ 1,000 today, and Jane offered you $ 1,000 in a year’s time, most of us would think that Kanesha was making the more generous offer. Kanesha’s cash can be put to productive use and would be worth more than Jane’s when the year is out.

But what if we’re talking about Kanesha and Jane themselves? Suppose Kanesha is alive today, and Jane is yet to be born. When discounting is applied to lives, it suggests that Kanesha’s life to- day is worth twice as much as Jane’s life in fifteen years’ time. It implies that Kanesha today is worth 132 times as much as Jane in a century’s time. So if we’re spending money to keep them safe, a 5 percent discount rate indicates that we should spend more than a hundred times as much to protect Kanesha today than to pro- tect Jane in a century’s time.

The further we stretch the time period, the more ridiculous the results become. Discounting at a rate of 5 percent implies that Christopher Columbus is worth more than all eight billion people on the planet today.— Naturally, it also implies that your life is worth more than eight billion lives in five hundred years’ time. Even if you value the hug of a loved one over the unseen successes of next century’s generations, is it fair to ruthlessly dis- miss the distant future? Discounting is the enemy of the long term.

As philosopher Will MacAskill points out, there is something morally repugnant about concluding that the happiness of those who will be alive in the 2100s is inconsequential simply because they live in the future. MacAskill coined the term “presentism” to refer to prejudice against people who are yet unborn.” Just like racism, sexism, or other forms of bigotry, he argues that mis- treating those who live a long way in the future is unfair. To dis- criminate in favor of Kanesha against unborn Jane is a form of presentism. If you traveled back in time to the 1500s and met someone who claimed that they were worth more than everyone alive in the 2000s, you’d rightly regard them as an egomaniac. Isn’t it equally narcissistic to ignore the happiness of people in the 2500s?

Some have contended that we should favor the living over the unborn for the same reason that philanthropy favors the down- trodden over the wealthy. If incomes rise over time, the argument goes, then asking today’s citizens to help those in the future is like taking from the poor to give to the rich.— But this reasoning ignores the fact that we are talking about the survival of future generations. Theoretical riches won’t do them any good if they are practically dead—or if planetary apocalypse snuffs out their chance to be born. Similarly, it misses the possibility that future pandemics, wars, or climate disasters could make coming genera- tions significantly poorer.—

Insights from behavioral science help explain why humans aren’t good at understanding extinction risk.— Our thinking about dangers is skewed by an “availability bias”: a tendency to focus on **familiar risks**. Like the traders who failed to forecast the collapse of the securitized housing debt market, we are lousy at judging the probability of rare but catastrophic events. Most important, our instincts fail us as the magnitudes grow larger. In research titled "The More Who Die, the Less We Care,” psychologists Paul Slovic and Daniel Vastfjall argue that we become numb to suffering as the body count grows.— Humans’ compassionate instincts are aroused by stories, not statistics. Indeed, one study found that people were more likely to donate to help a single victim than they were to assist eight victims. This may help explain why the international community has been so slow to respond to genocide, including recent incidents in Rwanda, Darfur, and Myanmar. As artificial intelligence researcher Eliezer Yudkowsky notes, human neurotransmitters are unable to feel sorrow that is thousands of times stronger than a single funeral.— The problem is starker still when it comes to extinction risk. Our emotional brains cannot multiply by billions.

Add to this a media cycle that has become a media cyclone, in which stories explode in a matter of minutes, and “outrage porn” seems to drive the news choices of many outlets. In the 2016 US election, researchers found that for every piece of professional news shared on Twitter, there was one piece of “junk news.’’— Conflict fueled by social media keeps us in a primal state of rage and retaliation. And this isn’t the only force that makes politics myopic. Campaign contributions tend to come from donors who have an immediate interest in a “today” issue rather than from people aiming to solve long-term problems. This kind of “instant noodle” politics prioritizes quick results and sidelines fundamental challenges.

In this environment, a **special style of politics has thrived: populism**. The term “populist" gets thrown around a lot—typically as an insult—so it’s worth taking a moment to define it precisely.— Populists see politics as a conflict between **crooked elites and the pure mass of people**. Many candidates trying to defeat an incumbent will criticize “insiders,” but populists make a stronger attack on elites, claiming that they are dishonest or corrupt. Populists then claim that they—and only they—represent the “real people.” Populists combine a fierce critique of elites and personal appeal to the “silent majority.”

The political strategy of populists involves **critiquing intellectuals, institutions, and internationalism**. The political style of populists tends to be fierce. They do not strive for unity and calm consensus. Populists share with revolutionaries a desire for sudden and dramatic change. They have little respect for experts and the systems of government. Populists’ priorities tend to be immediate issues such as crime, migration, jobs, and taxes. Consequently, the electoral success of populists has served to **sideline work on long-term dangers such as climate change and nuclear war**.

Donald Trump may have **lost** his presidential reelection bid, **but** he has **transformed the Republican Party**, which has jettisoned its longstanding commitment to free trade, immigration, and global alliances. Many moderate Republicans, who might have served comfortably under Ronald Reagan or George H. W. Bush, have quit the party or been defeated by Trump-supporting populists. The Republican Party, which holds nearly half the seats in Congress and controls a majority of state legislatures, has embraced populism to a degree that was unimaginable when it was led by George W. Bush, John McCain, or Mitt Romney. After four years under President Trump, the Republican Party is now more cynical and isolationist, focused on immediate grievances rather than long-term challenges.

Yet while the strength of populism threatened to sideline issues of catastrophic risk, coronavirus did the opposite. The worst pandemic in a century led to the most severe economic crisis since the Great Depression. Churches and concert halls fell silent. International travel collapsed. The Summer Olympics were postponed. Stocks plunged, and for a brief moment, the price of a barrel of oil went negative. Globally, millions lost their jobs, and millions more faced famine.

COVID-19 never threatened to extinguish humanity, but it highlighted our vulnerability to infectious diseases. More than at any time in living memory, people focused on the dangers of pandemics. The popularity of Geraldine Brooks’s Year of Wonders, Stephen King’s The Stand, Emily St. John Mandel’s Station Eleven, and Albert Camus’s The Plague vividly illustrates the way in which fear of pandemics has become more acute.

We know that disasters can remake society. The black death helped usher in the Renaissance.— The Great Depression made a generation of investors more risk averse.— World War II spawned the United Nations and formed the modern welfare state. In autocracies, droughts and floods can topple dictators.—

Coronavirus is reshaping the world in numerous ways.— Handwashing is in. Cheek kissing is out. The rise of big cities is slowing as people consider the downsides of density. Firms that automated their production systems to deal with physical dis- tancing requirements and stay-at-home orders are discovering that they can get by permanently with fewer staff. More tele- working and less business travel is leading to a drop in demand for receptionists, bus drivers, office cleaners, and security guards. When it comes to our use of technology, coronavirus suddenly accelerated the world to 2030. When it comes to globalization, the pandemic took us back to 2010.

But it’s still an open question as to how COVID-19 will affect humanity’s ability to think about the long term. Most of the examples I’ve listed are instances in which crises affected societies organically: the shock came, and it changed our behavior. But accentuating the long term requires taking risk more seriously and placing greater emphasis on **saving our species**. Linebackers are swift to respond when an offensive player suddenly takes a step to the right. But it takes longer to recognize that a team’s offensive plays are skewed to the right and modify the defensive formation accordingly.

Like a football team that adapts its tactics, this book argues that we should lengthen our thinking. At minimal cost, society can massively reduce the odds of catastrophe. By ensuring that the big threats get the attention and resources they need, we can safeguard the future of our species. As insurance policies go, this one is a bargain.

In the chapters that follow, I’ll outline the **biggest risks facing humanity**. I’ll begin in chapter 2 with pandemics, such as the possibility that the **next virus** might combine the infectiousness of COVID-19 with the deadliness of Ebola. What can we do to shut down exotic animal markets, speed up vaccine develop- ment, and create surge capacity in hospitals? I’ll then delve into **bioterrorism**, and the danger of extremists developing their own versions of smallpox or the bubonic plague. How difficult is it for them to create these devilish diseases, and what can we do to prevent it?

In chapter 3, I’ll then explore **climate change**—perhaps the in- tergenerational issue that has received the most public attention in recent years. While much of the modeling looks at how global warming could be bad, my focus is on the chances that it’s **catastrophic**. This isn’t about climate change shortening the ski season; it’s about the possibility of temperatures rising by 18°F (10°C), rendering large sections of the planet uninhabitable. What does the risk of cataclysmic climate change mean for energy policy?

Next, I’ll turn to nukes. As a child in the 1980s, I vividly re- member watching The Day After. My classmates and I agreed that a nuclear war was inevitable. When the Cold War ended, the world seemed safer, but in the three decades since, the threat from **new nuclear powers** has made the problem less predictable. As I discuss in chapter 4, what we used to call an arms race now looks more like a bar fight, with hazards coming from **unexpected directions**, including **terrorist groups**. Yet just as there are practical ways to avoid pub brawls (don’t drink past midnight, avoid the stairs, look out for the glass), so too are there sensible strategies that can **reduce the odds of nuclear catastrophe** (adopt a “no first use" policy, reduce the stockpiles, control loose nukes).

A **superintelligence** has been dubbed the “last invention” we’ll ever make. An **a**rtificial **i**ntelligence machine whose abilities exceed our own could turbocharge productivity and living stan- dards. But it could also **spell disaster**. If we program our artificial intelligence to maximize human happiness, it could fulfill our wishes literally by immobilizing everyone and attaching electrodes to the pleasure centers of our brains. As chapter 5 notes, what makes artificial intelligence different from every other risky technology is its runaway potential. Once a superintelligence can improve itself, it is **unstoppable**. So we need to build the guardrails before the highway.

What are the odds? In chapter 6,1 complete the discussion of catastrophic danger by examining less risky risks, including asteroids and supervolcanoes. I also consider the prospect of “**unknown unknowns**.” For example, prior to the first atomic bomb test, some scientists thought there was a chance it could set the atmosphere on fire, destroying the planet. When the Large Hadron Collider was being built, critics warned that the particle collisions inside it could create micro black holes. Although neither situation eventuated, they raise the question of what **other doomsday scenarios** could be **lurking around the corner**. How should the prospect of these unexpected risks change our approach to cutting-edge science? Drawing together these dangers with the major hazards, I report the likely probability of each, benchmarking existential risks such as nuclear war and pandemics against individual risks such as being struck by lightning or dying on the battlefield.

Ultimately, tackling **ex**istential risks is a **political problem**. Private citizens can achieve many things, but preventing nuclear war, averting bioterrorism, and curbing greenhouse emissions are fundamentally problems of government. Governments control the military, levy taxes, and provide public goods. So the **values** of those who run the country will determine how much of a priority the nation places on averting catastrophe.

That’s why the **rise of populists is crucial to humanity’s long- term survival**. In chapter 7,1 discuss the factors that have led to the electoral success of populists during recent decades, and why populists tend to be **uninterested in dealing with long-term threats**. Populists’ focus on the short term means that—like a driver distracted by a back seat squabble—we’re in danger of **missing the threats that could kill us**. I’ll explore why populists around the world struggled to respond to COVID-19, and what this says about the dangers that populism poses to our species. Most critics of populism have concentrated on the present day. They’re missing the bigger picture. Populists are primarily **endangering the unborn**.

Bad politics **doesn’t just exacerbate other dangers**; it represents a **risk factor in itself** through the possibility of a totalitarian turn —in which democracy is replaced by an enduring autocracy. The road to democracy is not a one-way street. Over the centuries, dozens of countries have backslid from democracy into autocracy —abandoning the institutions of fair elections, protection for minorities, and free expression. Such an outcome could be deadly for dissenters and miserable for the multitudes. Chapter 8 explores why democracy dies and identifies the signs that institutions are being undermined. Chapter 9 suggests how we might strengthen democracies to allow citizens to have a greater say, and lower the chances of the few taking over from the many. Chapter 10 concludes the book.

When COVID-19 hit, many rushed out to buy life insurance.— In our personal lives, we know that spending a small amount on insurance can guard against financial ruin. Societies can take a similar approach: implementing modest measures today to safe- guard the immense future of our species. For each of the existential risks we face, there are sensible approaches that could curtail the dangers. For all the risks we face, a better politics will lead to a safer world.

Because of its focus on the urgent over the important, populist politics should perhaps bear the label, “Warning: populism can harm your children." But what is the alternative? In the conclusion, I argue that the answer lies in the ancient philosophy of stoicism. A stoic approach to politics isn’t about favoring one side of the ideological fence over another. Instead, it’s about the temperament of good political leadership. Stoicism emphasizes that character matters and holds that virtue is the only good. **Decisions are based on empirical evidence**, not emotion. Anger has no place in effective leadership. Strength comes from civility, courage, and endurance. Stoics make a sharp distinction between the things they can change and those they cannot.

### adv1

### error rates

#### Expanding antitrust to new business practices increases the risk of false positives---wrecks economic growth.

Manne 20 (Geoffrey A. Manne, distinguished fellow at Northwestern University Center on Law, Business, and Economics, President and founder of the International Center for Law and Economics, JD and AB degrees from the University of Chicago, Former law professor at Lewis & Clark Law School, Former lecturer in law at the University of Chicago Law School and the University of Virginia School of Law, Worked for FTC, member of the American Law and Economics Association, the Canadian Law and Economics Association, and the Society for Institutional & Organizational Economics; “Error Costs in Digital Markets;” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733662>, TM) [typo modified]

The arguments in favor of the normative error-cost framework are even stronger in the context of the digital economy. The concern with error costs is especially high in dynamic markets in which it is difficult to discern the real competitive effects of a firm’s conduct from observation alone. And for several reasons, antitrust decision-making in the context of innovation tends much more readily toward distrust of novel behavior, thus exacerbating the risk and cost of over-enforcement.

As noted, there is an “uneven history of courts and enforcement officials in enhancing welfare through antitrust,” suggesting reason to be skeptical.163 In the face of innovative business conduct, the concern is compounded by the problematic incentives of antitrust economists. As Manne and Wright note:

Innovation creates a special opportunity for antitrust error in two important ways. The first is that innovation by definition generally involves new business practices or products. Novel business practices or innovative products have historically not been treated kindly by antitrust authorities. From an error-cost perspective, the fundamental problem is that economists have had a longstanding tendency to ascribe anticompetitive explanations to new forms of conduct that are not well understood.164

The two problems are related. Novel practices generally result in monopoly explanations from the economics profession, followed by hostility from the courts. Often a subsequent, more-nuanced economic understanding of the business practice emerges, recognizing its procompetitive virtues, but this also may come too late to influence courts and enforcers in any reasonable amount of time—and it may never tip the balance sufficiently to appreciably alter established case law. Where economists’ career incentives skew in favor of generating models that demonstrate inefficiencies and debunk the Chicago School status quo, this dynamic is not unexpected.

At the same time, however, defendants engaged in innovative business practices that have evolved over time through trial and error regularly have a difficult time articulating a justification that fits either an economist’s limited model or a court’s expectations. Easterbrook ably described the problem:

[E]ntrepreneurs often flounder from one practice to another trying to find one that works. When they do, they may not know why it works, whether because of efficiency or exclusion. They know only that it works. If they know why it works, they may be unable to articulate the reason to their lawyers-because they are not skilled in the legal and economic jargon in which such "business justifications" must be presented in court. . . .

. . . It takes economists years, sometimes decades, to understand why certain business practices work, to determine whether they work because of increased efficiency or exclusion. To award victory to the plaintiff because the defendant has failed to justify the conduct properly is to turn ignorance, of which we have regrettably much, into prohibition. That is a hard transmutation to justify.165

Imposing a burden of proof on entrepreneurs—often to prove a negative in the face of enforcers’ pessimistic assumptions—when that burden can’t plausibly be met can serve only to impede innovation.166

Even economists know very little about the optimal conditions for innovation. As Herbert Simon noted in 1959,

Innovation, [technological] change, and economic development are examples of areas to which a good empirically tested theory of the processes of human adaptation and problem solving could make a major contribution. For instance, we know very little at present about how the rate of innovation depends on the amounts of resources allocated to various kinds of research and development activity. Nor do we understand very well the nature of “know how,” the costs of transferring technology from one firm or economy to another, or the effects of various kinds and amounts of education upon national product. These are difficult questions to answer from aggregative data and gross observation, with the result that our views have been formed more by arm-chair theorizing than by testing hypotheses with solid facts.167

Our understanding has not progressed very far since 1959, at least not insofar as it is applied to antitrust.168 Simon astutely infers that innovation would be a function of “human adaptation and problem solving”; “the amounts of resources allocated to various kinds of research and development activity”; the nature of ‘know how’”; “the costs of transferring technology”; and “the effects of various kinds and amounts of education.” But economists today tend to focus primarily on how market structure affects innovation.

As Teece notes, however:

A less important context for innovation, although one which has received an inordinate amount of attention by economists over the years, is market structure, particularly the degree of market concentration. Indeed, it is not uncommon to find debate about innovation policy among economists collapsing into a rather narrow discussion of the relative virtues of competition and monopoly. . . .

. . . [Yet] reviews of the extensive literature on innovation and market structure generally find that the relationship is weak or holds only when controlling for particular circumstances. The emerging consensus is that market concentration and innovation activity most probably either coevolve or are simultaneously determined.169

Even to the extent that economic science has developed some better theories of innovation and its relationship with market structure and antitrust, the literature has still failed to develop clear and concrete theories or empirics that are readily implementable by courts or enforcers in the face of complex economic conditions.170 Particularly to the extent that contemporary monopolization theorems purport to address novel, often-innovative business practices, they are problematic for antitrust law and policy aiming to maximize welfare (minimize errors), for several reasons.

First, they engender circumstances that increase the likelihood of antitrust complaints, investigations, and enforcement actions.171 In the face of limited evidence, untestable implications, and possibility theorems regarding the consequences of novel, innovative conduct, a proper application of error-cost principles would likely be expected to deter intervention. Yet it is precisely in these situations that intervention may be more likely.

On the one hand, this may be because in the absence of information disproving a presumption of anticompetitive effect, there is an easier case to be made against the conduct—this despite putative burden-shifting rules that would place the onus on the complainant. On the other hand, successful innovations are also more likely to arouse the ire of competitors and/or customers, and thus both their existence and their negative characterization are more likely brought to the attention of courts or enforcers—abetted in private litigation by the lure of treble damages.

Antitrust is skeptical of, and triggered by, various changes in status quo conduct and relationships. This applies not only to economists (as discussed above),172 but also to competitors (who are likely to raise challenges to innovative, even if perfectly procompetitive, conduct that makes competition harder), enforcers (who are inherently on the look-out for cutting-edge cases because clearly infringing conduct is rare and opportunities to expand their authority attractive), and judges (who may be particularly swayed by economists’ possibility theorems to believe that they can make upholdable new law).

Business process and organizational innovations are also more relevant to the sorts of conduct with which antitrust concerns itself. New technological advance is rarely an inherent problem for antitrust; rather, its presence increases the potential cost of over-deterrence, but not necessarily its likelihood.173 But novel technologies are frequently accompanied by novel business arrangements—and these are of particular concern to antitrust.

The problem stemming from both of these is that, to a first approximation (and especially in the digital economy), change (including by incumbents) is the hallmark of competition itself. In these markets competition means innovation and innovation means change. Since Jorde and Teece began writing about antitrust, and especially market definition, in high-tech industries in the late 1980s, we’ve been on notice that traditional, static, price-based antitrust analysis doesn’t work well for understanding these markets. For these industries, performance, not price, is paramount and competition generally unfolds sequentially rather than contemporaneously—which means innovation is key.174

[[BEGIN FOOTNOTE 174]]

174 See, e.g., Thomas M. Jorde & David J. Teece, Competing Through Innovation: Implications for Market Definition, 64 CHI.-KENT L.REV. 741, 742 (1988) (“Moreover, in markets characterized by rapid technological progress, competition often takes place on the basis of performance features and not price.”). See also David S. Evans & Richard Schmalensee, Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries, in 2 INNOVATION POLICY AND THE ECONOMY 1, 3 (Adam B. Jaffe, et al., eds., 2002) (“The defining feature of new-economy industries is a competitive process dominated by efforts to create intellectual property through R&D, which often results in rapid and disruptive technological change.”).

[[END FOOTNOTE 174]]

Second, over-deterring business model and contractual innovations may be even more damaging to dynamic welfare and economic growth than is reducing incentives to engage in technological innovation.175

[[BEGIN FOOTNOTE 175]]

175 See Manne & Wright, Innovation, supra note 1, at 185 (“These innovations are also extremely valuable, in particular because they may be directly extendable to a much wider range of the economy than product innovations, and like product innovations, business innovations can have wide-ranging, dynamic follow-on effects throughout the economy.”).

[[END FOOTNOTE 175]]

#### Decline cascades---nuclear war.

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Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals. Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset INTRODUCTION The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA). But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998). The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020). An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity. COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach. METHODOLOGY An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020): • Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006); • Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012); • Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and • Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources. ECONOMY According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity. The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak. The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020). As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007). Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit. According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019): “You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author). President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period. A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016). In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade. ENVIRONMENTAL What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation: The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs. Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated. Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity. Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021). Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications. On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008). The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section. Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade. GEOPOLITICAL The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic. Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### Inflation turn

**increase from the plan cause interest rate spikes --- turns the aff**

**Smialek 21** --- Jeanna Smialek writes about the Federal Reserve and the economy for The New York Times. She previously covered economics at Bloomberg News, “Wages are rising, but can they keep up with inflation?”, Nov 5th 2021, https://www.nytimes.com/2021/11/05/business/economy/wages-inflation.html

It is **not yet clear** which side of that equation — higher pay or higher prices — **is going to win out**, but the answer could matter **enormously** for the Federal Reserve and the White House.

There are a few ways this moment could evolve. Wage growth could remain strong, **driven by a tight labor market**, and overall inflation could simmer down as supply chain snarls unravel and a surge in demand for goods eases. That would benefit workers.

But **troubling outcomes are also possible**, and high on the list of worries is what economists call a “**wage-price spiral.**” Employees could begin to demand higher pay because they need to keep up with a rising cost of living, and companies may pass those labor costs on to their customers, **kicking off a vicious cycle**. That could make **today’s quick inflation last longer than policymakers expect.**

**The stakes are high**. What happens with wages will matter to families, businesses and central bankers — and the path ahead is far from certain.

“**It’s the** several-**trillion-dollar question**,” said Nick Bunker, director of research for the hiring site Indeed.

For now, wage growth is rapid — just not fast enough to keep up with prices. One way to measure the dynamic is through the Employment Cost Index, which is reported by the Labor Department every quarter. In the year through September, the index’s measure of wages and salaries jumped by 4.2 percent. But an inflation gauge that tracks consumer prices rose by 5.4 percent over the same period.

A different measure of pay, an index that tracks hourly earnings, did rise faster than inflation in August and September after lagging it for much of the year.

And an update to that gauge on Friday showed that wages climbed 0.4 percent in October, which is roughly in line with recent monthly price increases. Over the past year, that measure is up by 4.9 percent. But the data on hourly earnings have been distorted by the pandemic, because low-wage workers who left the job market early in 2020 are now trickling back in, jerking the average around.

The upshot is that the tug of war between price increases and pay increases **has yet to decisively swing** in workers’ favor.

Whether wage gains eventually eclipse inflation — and why — **will be crucial** for economic policymakers. Central bankers celebrate rising wages when they come from productivity increases and strong labor markets, **but would worry if wages and inflation seemed to be egging each other upward.**

The Federal Reserve is “**watching carefully**,” for a troubling increase in wages, its chair, Jerome H. Powell, said on Wednesday, though he noted that the central bank did not see such a trend shaping up.

Recruiters do report some early signs that inflation is factoring into pay decisions. Bill Kasko, president of Frontline Source Group, a job placement and staffing firm in Dallas, said that as gas prices in particular rise, employees are demanding either higher pay or work-from-home options to offset their increased commuting costs.

“It becomes a topic of discussion in negotiations for salary,” Mr. Kasko said.

But for the most part, today’s wage gains are tied to a different economic trend: red-hot demand for workers. Job openings are high, but many would-be employees remain on the labor market’s sidelines, either because they have chosen to retire early or because child care issues, virus concerns or other considerations have dissuaded them from working.

Grocery store managers in Dallas are earning as much as $175,000 in base pay compared to $125,000 before the pandemic, Mr. Kasko and his colleagues said, and employees are being nabbed away from firms like his for six-figure-salary recruiting jobs at corporations.

Emily Longsworth Nixon, 27 and from Dallas, is one of Mr. Kasko’s employees. She herself is fielding five or six messages each day on LinkedIn trying to lure her away, she said, and the tight labor market has upended how she does her job.

She tried to recruit a woman to an executive assistant position at a technology company that would have given her a $30,000 raise — and saw the candidate walk away for a counter offer of no additional pay but three work-from-home days each week.

“After that, I had my tail between my legs for a couple of days; I had never thought to ask that,” she said, adding that employers need to know their candidates like never before as workers flex their power, taking home raises and other perks. “Before Covid, it was an employer-driven market.”

Those in-demand workers could end up being better off in the long run, should their pay continue to chug higher even as supply chains heal and prices for used cars and couches moderate, allowing them to afford more.

Pay gains might also become more sustainable for employers as virus concerns fade and employees trickle back from the labor market’s sidelines.

And even if rapid wage increases persist, it is not absolutely the case that employers will be forced to drastically raise prices. Businesses could stomach a hit to their profits instead, or they could invest in technology that improves worker productivity.

If fewer waitresses can sell the same number of dinners because customers are ordering from QR codes, for instance, employers will have leeway to pay more without taking a hit to their bottom line.

Investment in automation has already moved up sharply by one metric, with orders of robots in the second quarter of 2021 up 67 percent from a year earlier, with demand spanning pharmaceutical industries, cars and electronics, according to the Association for Advancing Automation.

“Companies can’t find people, I don’t care what the industry is,” said Jeff Burnstein, president of the association.

**But a happy outcome is not guaranteed**. If today’s high prices do drive tomorrow’s wage negotiations and set off an upward spiral, the result could be a **longer period of high inflation** that **prods the Fed to raise interest rates** to tamp down demand and cool off prices, slowing the economy and possibly even sending it back into a recession.

A scenario like that hasn’t taken place since the 1970s and 1980s. But a situation like the pandemic lockdowns and subsequent reopening has never happened at all.

“We haven’t seen a wage-price spiral for decades, but we haven’t seen inflation like this for decades, either,” said Jason Furman, a Harvard University economist and former economic adviser in the Obama administration, calling the possibility of a wage-driven spiral **“an open question.”**

**No food wars**

**Rosegrant 13 –** M ark W., Director of the Environment and Production Technology Division at the International Food Policy Research Institute, et al., 2013, “The Future of the Global Food Economy: Scenarios for Supply, Demand, and Prices,” in Food Security and Sociopolitical Stability, p. 39-40

The food price spikes in the late 2000s caught the world’s attention, particularly when sharp increases in food and fuel prices in 2008 coincided with **street demonstrations and riots** in many countries. For 2008 and the two preceding years, researchers identified a significant number of countries (totaling 54) with protests during what was called the global food crisis (Benson et al. 2008). Violent protests occurred in 21 countries, and nonviolent protests occurred in 44 countries. Both types of protest took place in 11 countries. In a separate analysis, developing countries with low government effectiveness experienced more food price protests between 2007 and 2008 than countries with high government effectiveness (World Bank 201la). Although the incidence of violent protests was much higher in countries with less capable governance, **many factors** could be causing or contributing to these protests, such as government response tactics, **rather than the initial food price spike**.

Data on food riots and food prices have tracked together in recent years. Agricultural commodity prices started strengthening in international markets in 2006. In the latter half of 2007, as prices continued to rise, two or fewer food price riots per month were recorded (based on World Food Programme data, as reported in Brinkman and Hendrix 2011). As prices peaked and remained high during mid-2008, the number of riots increased dramatically, with a cumulative total of 84 by August 2008. Subsequently, both prices and the monthly number of protests declined.

Several researchers have studied the connection between food price shocks and conflict, finding at least some relationship between food prices and conflict. According to Dell et al. (2008), higher food prices lead to income declines and an increase in political instability, but **only for poor countries**. Researchers also found a positive and significant relationship between weather shocks (affecting food availability, prices, and real income) and the probability of suffering government repression or a civil war (Besley and Persson 2009). Arezki and Bruckner (2011) evaluated a constructed food price index and political variables, including data on riots and anti-government demonstrations and measures of civil unrest. Using data from 61 countries over the period 1970 to 2007, they found a direct connection between food price shocks and an increased likelihood of civil conflict, including riots and demonstrations.

Other researchers have broadened the analysis by **considering government responses** or underlying policies that affect local prices, and consequently influence outcomes and the linkage between food price shocks and conflict. Carter and Bates (2012) evaluated data from 30 developing countries for the time period 1961 to 2001, concluding that when governments mitigate the impact of food price shocks on urban consumers, the **apparent relationship between food price shocks and civil war disappears**. Moreover, when the urban consumers can expect a favorable response, the protests only serve as a **motivation for a policy response** rather than as a prelude to something more serious, such as **violent demonstrations or** even **civil war**.

Many in the international development community see war and conflict as a development issue, with a war or conflict severely damaging the local economy, which in turn leads to forced migration and dislocation, and ultimately acute food insecurity. Brinkman and Hendrix (2011) ask if it could be the other way around, with food insecurity causing conflict. Their answer, based on a review of the literature, is "a **highly qualified yes**," **especially** for intrastate conflict. The primary reason is that insecurity itself heightens the risk of democratic breakdown and civil conflict. The linkage connecting food insecurity to conflict is contingent on levels of economic development (a stronger linkage for poorer countries), existing political institutions, and other factors. The researchers say **establishing causation directly is elusive**, considering a **lack of evidence** for explaining individual behavior. The debate over cause and effect is ongoing.

#### They can’t solve inequality – tons of alt causes and it’s inevitable

**No empirical or statistical evidence that antitrust decreases inequality**

Jonathan **Klick** **et al. 19**—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

On the whole, the relationship between the enforcement metrics and consumption is **comparable** for the households in both the **first and fifth income quintiles**. There is not much **empirical evidence** to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence **significant enough** to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new(-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades – Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about 3 percent, and because they have detailed longitudinal data on household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are **substantial** and they are most pronounced for those at the lower end of the socio-economic spectrum.158 In addition to this price effect, David Matsa shows that Wal-Mart’s entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.159 Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe **consumption** is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of **income** and wealth. Using Census data,160 in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

As with consumption measures, there is generally **no statistically significant effect** (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the **income** shares of those at the **bottom or the top** of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the **opposite effect**. Further, many of the investigation coefficients are **positive for the fifth quintile** income share as well. If we examine **combined ratios of the shares** as we did with the consumption data, we still find **no support** for the assumption that an increase in antitrust enforcement has **any systematic effect on inequality**.16

### ineq

#### They can’t solve inequality – tons of alt causes and it’s inevitable

**No empirical or statistical evidence that antitrust decreases inequality**

Jonathan **Klick** **et al. 19**—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

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### Adv 2

No way to solve French pharma

**No nuke terror---no motive, capacity, or ability to hide it.**

**Mueller 20** (John Mueller, Adjunct Professor of Political Science, Senior Fellow @ the Cato Institute, Senior research scientist with the Mershon Center for International Security Studies @ Ohio State University, “Nuclear Alarmism: Proliferation and Terrorism,” 06/24/20, Cato Institute, <https://www.cato.org/publications/publications/nuclear-alarmism-proliferation-terrorism>, TM)

Nuclear Terrorism Alarm about the possibility that small groups could set off nuclear weapons has been repeatedly raised at least since 1946, when atomic bomb maker J. Robert Oppenheimer contended that if three or four men could smuggle in units for an atomic bomb, they could “destroy New York.” Thirty years later, nuclear physicist Theodore Taylor explained “how comparatively easy it would be to steal nuclear material and step by step make it into a bomb.” At the time, he thought it variously already too late to “prevent the making of a few bombs, here and there, now and then,” or “in another ten or fifteen years, it will be too late.“31 Four decades after Taylor, we continue to wait for terrorists to carry out their “easy” task. In the wake of 9/11, concern about the atomic terrorist surged even though the attacks of that day used no special weapons. By 2003, United Nations Ambassador John Negroponte judged there to be “a high probability” that within two years al Qaeda would attempt an attack using a nuclear or other weapon of mass destruction. And it was in that spirit that in 2004, Graham Allison published a book relaying his “considered judgment” that “on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not.” He had presumably relied on the same inspirational mechanism in 1995 to predict that “in the absence of a determined program of action, we have every reason to anticipate acts of nuclear terrorism against American targets before this decade is out.“32 Allison has quite a bit of company in his perpetually alarming conclusions. According to Robert Gates, former secretary of defense, every senior government leader is kept awake at night by “the thought of a terrorist ending up with a weapon of mass destruction, especially nuclear.” And on April 11, 2010, President Barack Obama held the atomic terrorist to be “the single biggest threat to U.S. security.“33 However, thus far, **terrorist groups** seem to have exhibited **only limited desire** and **even less progress** in **going atomic**. That lack of action may be because, after a brief exploration of the possible routes, they — unlike generations of alarmists — have discovered that the **tremendous effort required** is **scarcely likely** to be **successful**.34 Obtaining a Finished Bomb: Assistance by a State One route a would‐​be atomic terrorist might take would be to receive or buy a bomb from a generous like‐​minded nuclear state for delivery abroad. That route is highly improbable, however, because there would be **too much risk** — even for a country led by extremists — that the **ultimate source** of the weapon **would be discovered**. As one prominent analyst, Matthew Bunn, puts it, “A dictator or oligarch bent on maintaining power is highly unlikely to take the immense risk of transferring such a devastating capability to terrorists they cannot control, given the ever‐​present possibility that the material would be traced back to its origin.” Important in this last consideration are **deterrent safeguards** **afforded** by “**nuclear forensics**,” which is the rapidly developing science (and art) of connecting nuclear materials to their sources even after a bomb has been exploded.35 Moreover, there is a very **considerable danger** to the **donor** that the **bomb** (and its source) would be **discovered before delivery** or that it would be exploded in a manner and on a target the donor would not approve of — including on the donor itself. Another concern would be that the terrorist group might be **infiltrated** by foreign intelligence.36 In addition, almost no one would trust al Qaeda. As one observer has pointed out, the terrorist group’s explicit enemies list includes not only Christians and Jews but also all Middle Eastern regimes; Muslims who don’t share its views; most Western countries; the governments of Afghanistan, India, Pakistan, and Russia; most news organizations; the United Nations; and international nongovernmental organizations.37 Most of the time, it didn’t get along all that well even with its host in Afghanistan, the Taliban government.38 Stealing or Illicitly Purchasing a Bomb: Loose Nukes There has also been great worry about “loose nukes,” especially in postcommunist Russia — weapons, “suitcase bombs” in particular, that can be stolen or bought illicitly. A careful assessment conducted by the Center for Nonproliferation Studies has concluded that it is unlikely that any of those devices have been lost and that, regardless, their effectiveness would be very low or even nonexistent because they (like all nuclear weapons) require continual maintenance.39 Even some of those people most alarmed by the prospect of atomic terrorism have concluded, “It is probably true that there are no ‘loose nukes,’ transportable nuclear weapons missing from their proper storage locations and available for purchase in some way.“40 It might be added that Russia has an intense interest in controlling any weapons on its territory because it is likely to be a prime target of any illicit use by terrorist groups, particularly Chechen ones of course, with whom it has been waging a vicious on‐and‐off war for two decades. The government of Pakistan, which has been repeatedly threatened by terrorists, has a similar interest in controlling its nuclear weapons and material — and scientists. As noted by Stephen Younger, former head of nuclear weapons research and development at Los Alamos National Laboratory, “Regardless of what is reported in the news, all nuclear nations take the security of their weapons very seriously.“41 Even if a finished bomb were somehow lifted somewhere, the loss would soon be noted and a worldwide pursuit launched. Moreover, finished bombs are outfitted with devices designed to trigger a nonnuclear explosion that would destroy the bomb if it were tampered with. And there are other security techniques: bombs can be kept disassembled with the components stored in separate high‐security vaults, and security can be organized so that two people and multiple codes are required not only to use the bomb but also to store, maintain, and deploy it. If the terrorists seek to enlist (or force) the services of someone who already knows how to set off the bomb, they would find, as Younger stresses, that “only few people in the world have the knowledge to cause an unauthorized detonation of a nuclear weapon.” Weapons designers know how a weapon works, he explains, but not the multiple types of signals necessary to set it off, and maintenance personnel are trained in only a limited set of functions.42 There could be dangers in the chaos that would emerge if a nuclear state were to fail, collapsing in full disarray — Pakistan is frequently brought up in this context and sometimes North Korea as well. However, even under those conditions, nuclear weapons would likely remain under heavy guard by people who know that a purloined bomb would most likely end up going off in their own territory; would still have locks (and in the case of Pakistan would be disassembled); and could probably be followed, located, and hunted down by an alarmed international community. The worst‐case scenario in that instance requires not only a failed state but also a considerable series of additional permissive conditions, including consistent (and perfect) insider complicity and a sequence of hasty, opportunistic decisions or developments that click flawlessly in a manner far more familiar to Hollywood scriptwriters than to people experienced with reality.43 Building a Bomb of One’s Own Because they are unlikely to be able to buy or steal a usable bomb and because they are further unlikely to have one handed off to them by an established nuclear state, the most plausible route for terrorists would be to manufacture the device themselves from purloined materials. That is the course identified by a majority of leading experts as the one most likely to lead to nuclear terrorism.44 The simplest design is a “gun” type of device in which masses of highly enriched uranium are hurled at each other within a tube. Such a device would be, as Allison acknowledges, “large, cumbersome, unsafe, unreliable, unpredictable, and inefficient.“45 The process of making such a weapon is daunting even in this minimal case. In particular, the task requires that a considerable series of difficult hurdles be conquered and in sequence. To begin with, now and likely for the foreseeable future, stateless groups are incapable of manufacturing the requisite weapons‐​grade uranium themselves because the process requires an effort on an industrial scale. Moreover, they are unlikely to be supplied with the material by a state for the same reasons a state is unlikely to give them a workable bomb.46 Thus, they would need to steal or illicitly purchase the crucial material. A **successful armed theft** is exceedingly **unlikely**, not only because of the **resistance of guards** but also because **chase would be immediate**. A more plausible route would be to corrupt insiders to smuggle out the necessary fissile material. However, that approach requires the terrorists to pay off a host of greedy confederates, including brokers and money transmitters, any one of whom could turn on them or — either out of guile or incompetence — furnish them with stuff that is useless.47 Moreover, because of **improved safeguards** and **accounting practices**, it is **decreasingly likely** that the **theft** would **remain undetected**.48 That development is important because if any missing uranium is noticed, the authorities would investigate the few people who might have been able to assist the thieves, and one who seems suddenly to have become prosperous is likely to arrest their attention right from the start. Even one initially tempted by, seduced by, or sympathetic to, the blandishments of the smooth‐​talking foreign terrorists might soon develop sobering second thoughts and go to the authorities. Insiders tempted to assist terrorists might also come to ruminate over the fact that, once the heist was accomplished, the terrorists would, as analyst Brian Jenkins puts it none too delicately, “have every incentive to cover their trail, beginning with eliminating their confederates.“49 It is also relevant to note that over the years, known thefts of highly enriched uranium have totaled fewer than 16 pounds. That amount is far less than that required for an atomic explosion: for a crude bomb, more than 100 pounds are necessary to produce a likely yield of one kiloton. Moreover, none of those thieves was connected to al Qaeda, and, most arrestingly, none had buyers lined up — nearly all were caught while trying to peddle their wares. Indeed, concludes analyst Robin Frost, “There appears to be no true demand, except where the buyers were government agents running a sting.” Because there appears to be no commercial market for fissile material, each sale would be a one‐​time affair, not a continuing source of profit such as drugs, and there is no evidence of established underworld commercial trade in this illicit commodity.50 If terrorists were somehow successful in obtaining a sufficient mass of relevant material, they would then have to **transport it** **out of the country** over **unfamiliar terrain**, probably while being pursued by security forces. Then, they would need to set up a **large** and **well‐​equipped machine** shop to manufacture a bomb and populate it with a **select team** of **highly skilled scientists**, **technicians**, and **machinists**. The process would also require good managers and organizers. The group would have to be assembled and retained for the monumental task without generating consequential suspicions among friends, family, and police about their curious and sudden absence from normal pursuits back home. Pakistan, for example, maintains a strict watch on many of its nuclear scientists even after retirement.51 Some observers have insisted that it would be “easy” for terrorists to assemble a crude bomb if they could get enough fissile material.52 However, Christoph Wirz and Emmanuel Egger, two senior physicists in charge of nuclear issues at Switzerland’s Spiez Laboratory, conclude that the task “could hardly be accomplished by a subnational group.” They point out that precise blueprints are **required**, not just sketches and general ideas, and that even with a good blueprint, the terrorist group “would most certainly be forced to redesign.” They also stress that the work, far from being “easy,” is difficult, dangerous, and extremely exacting and that the technical requirements “in several fields verge on the unfeasible.“53 Los Alamos research director Younger makes a similar argument, expressing his amazement at “self‐​declared ‘nuclear weapons experts,’ many of whom have never seen a real nuclear weapon,” who “hold forth on how easy it is to make a functioning nuclear explosive.” Information is available for getting the general idea behind a rudimentary nuclear explosive, but none is detailed enough for “the confident assembly of a real nuclear explosive.” Younger concludes, “To think that a terrorist group, working in isolation with an unreliable supply of electricity and little access to tools and supplies” could fabricate a bomb “is far‐​fetched at best.“54 Under the best of circumstances, the process could take months or even a year or more, and it would all, of course, **have to be carried out in utter secret** even while local and international security police are likely to be on the intense prowl. In addition, people, or criminal gangs, in the area may observe with increasing curiosity and puzzlement the constant comings and goings of technicians unlikely to be locals. The process of fabricating a nuclear device requires, then, the effective recruitment of **people** who at once have **great technical skills** and will remain **completely devoted to the cause**. In addition, a host of **corrupted coconspirators**, many of them foreign, must remain **utterly reliable**; **international** and **local security services** must be kept **perpetually in the dark**; and **no curious outsider** must get wind of the project over the months, or even years, it takes to pull off. The finished product could weigh a ton or more. Encased in lead shielding to mask radioactive emissions, it would then have to be transported to, as well as smuggled into, the relevant target country. Then, the enormous package would have to be received within the target country by a group of collaborators who are at once totally dedicated and technically proficient at handling, maintaining, and perhaps assembling the weapon. Then, they would have to detonate it somewhere under the fervent hope that the machine shop work has been proficient, that no significant shakeups occurred in the treacherous process of transportation, and that the thing — after all that effort — doesn’t prove to be a dud. The financial costs of the extended operation in its cumulating entirety could become monumental. There would be expensive equipment to buy, smuggle, and set up, as well as people to pay — or pay off. Some operatives might work for free out of dedication, but the vast conspiracy also requires the subversion of an array of criminals and opportunists, each of whom has every incentive to push the price for cooperation as high as possible. Any criminals who are competent and capable enough to be an effective ally in the project are likely to be both smart enough to see opportunities for extortion and psychologically equipped by their profession to be willing to exploit them.

**2-Status quo solves EU-US convergence.**

Daniel **Michaels** and Brent **Kendall** 7-15-**21**. Michaels is a Brussels Bureau Chief for The Wall Street Journal. Previously German Business Editor, also overseeing coverage of the European Central Bank. Journal’s Aerospace & Aviation Editor for Europe, covering airlines, aviation and aerospace industries in Europe, Africa and the Middle East. Legal affairs reporter in the Washington bureau of The Wall Street Journal, where he covers the Justice Department, the Federal Trade Commission and the federal courts, including the Supreme Court. "WSJ News Exclusive," WSJ, https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844

The European Union’s top antitrust regulator **foresees greater alignment with the U.S.** on competition enforcement, **particularly in the tech sector**, amid a broader policy reorientation under the Biden administration. EU Executive Vice President Margrethe Vestager, the bloc’s competition commissioner, said she expects “much more intense work when it comes to technology and the digitized market” between her team and Washington. President Biden’s policy statements and appointments, plus legislative proposals from Congress, indicate the **U.S. is moving closer to positions long held in the EU** regarding internet giants, pharmaceutical firms and other industries with diminishing competition. As the world’s two most powerful antitrust regulators, the U.S. and the EU can shape global competition discourse and rein in many of the world’s largest companies, so greater cooperation could have significant impact. For supporters of aggressive enforcement, “it will certainly be a marriage made in heaven,” said Jeffrey Jacobovitz, a Washington-based antitrust lawyer with Arnall Golden Gregory LLP. “I think they’ll work hand in hand. Increased coordination makes enforcement stronger.” That alignment will make it even more incumbent on companies in the crosshairs to develop broad, cross-Atlantic strategies on how to respond to that scrutiny, Mr. Jacobovitz said. While tech companies say similar policies in multiple jurisdictions can simplify operations, some worry about the U.S. adopting some of Europe’s more aggressive positions. “The U.S. should be wary of copying EU-style experimental regulation,” said Christian Borggreen, vice president and head of the Brussels office at the Computer & Communications Industry Association, which represents companies including [Amazon.com](https://www.wsj.com/market-data/quotes/AMZN) Inc., [Facebook](https://www.wsj.com/market-data/quotes/FB) Inc. and Google. “As a leader in tech innovation, the U.S. would have much more to lose if they get it wrong.” Mr. Biden’s appointments of high-profile U.S. progressives who have criticized tech giants—[Lina Khan](https://www.wsj.com/articles/facebook-seeks-recusal-of-ftc-chairwoman-in-antitrust-case-11626267605?mod=article_inline) to run the Federal Trade Commission, and [Tim Wu](https://www.wsj.com/articles/the-man-behind-bidens-push-to-promote-business-competition-11625851555?mod=article_inline) to the White House Economic Council—have been **widely seen as indicating that Mr. Biden plans to turn up the heat on internet conglomerates.** Companies such as [Microsoft](https://www.wsj.com/market-data/quotes/MSFT) Corp. , [Apple](https://www.wsj.com/market-data/quotes/AAPL) Inc. and Google parent [Alphabet](https://www.wsj.com/market-data/quotes/GOOG) Inc. previously felt little pressure from Democrats, including former President Barack Obama, who criticized past EU efforts to restrain U.S. tech companies. Ms. Vestager held an initial meeting with Ms. Khan by videoconference on July 2. Mr. Biden has yet to appoint someone to lead antitrust enforcement at the Justice Department. That nomination could provide further clues to his administration’s approach. In parallel, House Democrats recently introduced a package of bills with bipartisan support that target big tech companies’ practices considered by critics as anticompetitive. The [proposed legislation](https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248/?mod=article_inline) could go as far as breaking up, or at least shrinking, Amazon and other top tech companies. New York state could go a step further with [proposed antitrust legislation](https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225?mod=article_inline) that would forbid companies from abusing a dominant market position—a prohibition central to EU competition regulation that is much stricter than U.S. federal antitrust rules. Mr. Biden last week [issued an executive order](https://www.wsj.com/articles/biden-takes-aim-at-corporate-consolidation-big-business-tactics-11625832017?mod=article_inline) seeking to curb the power of companies across the U.S. economy that dominate their markets. The jockeying for new policy approaches comes as officials on both continents have faced enforcement challenges in limiting digital giants’ activities. Ms. Vestager has imposed billions of dollars in penalties on U.S. tech companies but [had little impact](https://www.wsj.com/articles/europes-antitrust-push-against-google-hasnt-dented-its-heft-can-the-u-s-11603293443?mod=article_inline) on their ability to control markets, according to critics including consumer advocates and some smaller competitors. In the U.S., a federal judge last month [dismissed cases](https://www.wsj.com/articles/federal-judge-dismisses-government-antitrust-lawsuits-against-facebook-11624907747?mod=article_inline) brought by the FTC and most U.S. states against Facebook, though the FTC is expected to try again with an amended lawsuit. “I believe there is a greater consensus that competition enforcement has not always delivered on its promise,” said University of Oxford law professor Ariel Ezrachi, who is director of Oxford’s Centre for Competition Law and Policy. **He said the new U.S. approach is “a real tectonic shift.”** In a sign of the new alignment, the U.S. and EU during Mr. Biden’s trip to Brussels last month announced the **creation of a Joint Technology Competition Policy Dialog** alongside their [new EU-U.S. Trade and Technology Council](https://www.wsj.com/articles/u-s-eu-forge-closer-ties-on-emerging-technologies-to-counter-russia-and-china-11623922201?mod=article_inline). Coordinated enforcement plans **extend beyond tech**. The FTC in March announced the formation of an international working group to share best practices on pharmaceutical mergers that will include competition enforcers from the EU, U.K., Canada and several U.S. states. Ms. Vestager, who has voiced concerns about deals in the sector, welcomed the FTC’s initiative, which came before Ms. Khan took office. The FTC also recently **cited an EU antitrust review of life-sciences company** [Illumina](https://www.wsj.com/market-data/quotes/ILMN) Inc.’s planned acquisition of Grail Inc. in persuading a judge to [reject the companies’ bid](https://www.wsj.com/articles/illumina-battles-u-s-european-antitrust-enforcers-on-grail-deal-11622206801?mod=article_inline) for a quick U.S. court hearing. U.S. and European enforcers **won’t always align**, given their different markets and different laws. The proposed merger of insurance brokers Aon PLC and [Willis Towers Watson](https://www.wsj.com/market-data/quotes/WLTW) PLC, for example, last week won EU approval, even as it faces [a U.S. lawsuit](https://www.wsj.com/articles/aon-dealt-a-blow-in-bid-for-quick-trial-on-u-s-challenge-to-willis-towers-merger-11625607068?mod=article_inline) from the Justice Department. EU and European national competition regulators **already work closely** with the Justice Department, FTC and U.S. states, say officials on both sides of the Atlantic. Cooperation has **deepened over recent years**—**even amid broader U.S.-EU friction** under former President [Donald Trump](https://www.wsj.com/topics/person/donald-trump) —as U.S. authorities began suing the EU’s longtime targets such as Google and Facebook. Trans-Atlantic cooperation “becomes obviously even more intense when both the DOJ and the FTC have their own tech cases,” Ms. Vestager said in an interview. Some cases require targeted companies to grant waivers for authorities to cooperate. With waivers, case teams discuss their work in seminars or weekly calls, getting “really specific and concrete,” Ms. Vestager said. EU Competition Commission Director-General Olivier Guersent, the most senior antitrust regulator under Ms. Vestager, said their team advised U.S. state and federal counterparts on the cases they opened last year. “When DOJ decided to move, we explained the traps we fell into and the problems we had, so they would benefit from our learning curve and gain time,” Mr. Guersent said. The **narrowing gap in approaches** is transcending “some deeply embedded differences of philosophy,” said Mr. Guersent. The U.S., he said, has traditionally relied more on the power of markets—such as the rise of upstarts—to rein in companies that developed disproportionate competitive strength. “We’re less confident [so] we tend to be more interventionist,” he said, ascribing the difference to culture. “The question is how long you are prepared to suffer a loss of welfare to consumers due to excessive market power.” Mr. Guersent said, “In a way, the risk has become too big by American standards as well, and that’s why we’re converging, in my view.”

**Harmonizing competition policy fails – cultural and social costs**

Cenuk **Sayekti, 20**. Lecturer in law at Universitas Lancang Kuning, Riau. Her bachelor's and master's degrees are in law from the Universitas Islam Indonesia. "COMPETITION LAW HARMONIZATION: WHAT ASEAN CAN LEARN FROM OTHERS?" Refleksi Hukum: Jurnal Ilmu Hukum 4, no. 2 (2020): 195-216.

CONCLUSION

There is a reason why some regional economic communities delay or avoid the process of harmonization stem from the perception of different treatment to market behavior. Another obstacle is the problem of legal culture and the effect of the history of a nation on its competition policy and law. The central point regarding this obstacle is that ASEAN member states legal differences often stem from different cultures and social preferences. Specific rules are often suited to local traditions and customs, and even if harmonization enhances foreign trade opportunities among the member states, it may impose quite substantial short-run adaptation costs. Accordingly, the chance to harmonize different competition policies and laws in the ASEAN member states cannot be ultimately seen as an uncontroversial positive effort or one that is free of conflict. The increased integration of trade and national laws also creates fault-lines of cultural dissonance.

### 1NC---Circumvention

**The plan gets circumvented**

1. **Courts**

**Crane 21** – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that. Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus for potential reform legislation.7 As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.8 We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

#### Multiple standards

LOPEZ-GALDOS 17 --- MARIANELA LOPEZ-GALDOS, Global Competition Counsel at the Computer & Communications Industry Association (CCIA), where she represents and advises the association on competition policy issues as well as domestic and international regulatory policy matters, “Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?”, NOVEMBER 17, 2017, https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

In 2003 the OECD recognized that the inclusion of conflicting objectives, including public interest considerations beyond consumer welfare, would undermine the public good. It stated that rooting antitrust in multiple competing policy rationales:

“increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and in a relatively minor way, compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency.”

In the United States, the increasing uncertainty created by antitrust enforcement actions and decisions empowered the voices in favor of limiting and eventually eliminating the political dimension to the enforcement of antitrust norms. In fact, some argue that the exclusion of political factors from antitrust enforcement restored intellectual coherence to the antitrust framework.

## BLOCK

### Enforcers CP

#### It solves better than the aff by avoiding inherent resource gaps

Van Loo 20 [Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project. April 2020, The New Gatekeepers: Private Firms as Public Enforcers, 106 Va. L. Rev. 467, Lexis]

Conclusion The public role of the firm and the private reach of the administrative state expand farther than is commonly understood. With large companies' immense resources at their disposal, administrative agencies now direct a large shadow regulatory workforce. That development offers some promise of filling in the regulatory policing gap left by resource-deprived and technologically less sophisticated administrative agencies. Conscripted enforcement marks one of the federal government's boldest encroachments into the firm by shaping its contracts, relationships, structure, and governance. Moreover, as a descriptive matter, the world's largest firms now have affirmative duties to act for the public benefit. Policymakers may have thereby strengthened the case of those calling on firms to do more for society, at least in the sense of providing a breathtaking precedent for the state enlisting businesses into its service. Shareholders remain the greatest beneficiary of the firm, and administrative agencies are still the most important regulators. However, any account of either the firm or regulation is incomplete without recognizing that the frontier of enforcement is policed by large businesses serving as gatekeepers for some of society's most important laws.

#### The ‘core laws’ of antitrust are the big 3

Kendall Kuntz 21, J.D. Candidate at The University of Maryland Francis King Carey School of Law, “Can the Courts and New Antitrust Laws Break Up Big Tech?,” 2/23/21, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

There are three core antitrust laws in effect today: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. These three antitrust laws attempt to protect market competition for the benefit of consumers. The Sherman Act outlaws monopolies and contracts that unreasonably restrain trade. The Clayton Act prohibits mergers and acquisitions that substantially lessen competition or create a monopoly. Lastly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

#### Scope is when the law applies

Dernbach 21 --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute applies. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action is not addressed in the statute, the statute is not applicable. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

#### ‘Of’ means deriving from them

M. Margaret McKeown 11, Judge on the US Court of Appeals for the 9th Circuit, “Simonoff v. Expedia, Inc,” 643 F.3d 1202, Lexis

Our recent decision in Doe 1 is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that [\*\*5] provided for "exclusive jurisdiction for any claim or dispute . . . in the courts of Virginia." Id. at 1080. We concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Id. at 1082 (quoting Black's Law Dictionary 1080 (6th ed. 1990)). Thus, the phrase "the courts of" a state refers to courts that derive their power from the state—i.e., only state courts—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts. Id. at 1081-82.

#### Severs prohibitions – prohibitions forbid by law but governing standards are distinct

Chanell 90 --- William Chanell, Associate Justice, California Court of Appeals, “CITY OF REDWOOD CITY v. DALTON CONSTRUCTION COMPANY”, Dec 1990, https://caselaw.findlaw.com/ca-court-of-appeal/1769184.html

We agree with the trial court's conclusion. By its plain language, section 35704 exempts certain contractors from the application of an ordinance [221 Cal. App. 3d 1573] adopted pursuant to section 35701. Section 35701 permits cities to prohibit the use of city streets by heavy trucks. (See § 35701, subd. (a).) However, the portion of the city's hauling ordinance at issue in this case does not prohibit street use; it regulates users by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].)

To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. [2] The distinction between a regulation and a prohibition is well understood in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o forbid by law; to prevent;-not synonymous with 'regulate.' " (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject something to governing principles of law. It does not include a power to suppress or prohibit [citation]." (In re McCoy (1909) 10 Cal. App. 116, 137 [101 P. 419].) [1b] Therefore, we are satisfied that section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

#### Generic regs fail deficits don’t apply---enforcer firms solve compliance.

Van Loo 20 [Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project. April 2020, The New Gatekeepers: Private Firms as Public Enforcers, 106 Va. L. Rev. 467, Lexis]

D. What Is Missing

Despite widespread recognition of the pervasiveness and heterogeneity of private enforcement, missing from these discussions is an examination of mandates that explicitly direct regulated entities to serve as enforcers. Instead, the focus has been on encouraging or mandating that other private parties help enforce the law against regulated entities. In the rare instances when scholars mention mandated third-party governance by the largest [\*481] firms, it is in passing or in narrower contexts, such as criminal statutory requirements that banks identify money laundering transactions. 81

As a result, although a rich literature on third-party enforcement spans corporate and administrative law, scholars have yet to connect the firm's growing regulatory role to theories of the firm and debates about its proper place in society. Monitoring in corporate law usually refers to internal contexts, such as the board of directors ensuring that officers exercise their duties or that the corporation obeys the law. 82Corporate law scholars have nonetheless contributed valuable foundations, particularly by illuminating the centrality of gatekeepers to corporate regulation. 83

Administrative law scholarship also provides valuable foundations by showing the evolution and growth of public-private collaboration. 84The expansion of private enforcement from second-order to first-order firms not only raises the accountability stakes identified in that literature but also creates new dynamics. With more formal external oversight roles, the world's most valuable companies have the potential to profoundly shape governance, markets, and norms.

#### Empirical studies prove it’s net better for compliance – companies share more data, get better expertise in legal and technical compliance assistance, and are more likely to change behavior instead of mounting legal challenges – considered “best practice”

McAllister 12 (Lesley K. McAllister, Professor of Environmental Law, University of San Diego School of Law, and Associate Adjunct Professor, School of International Relations and Pacific Studies, University of California San Diego, JD Stanford Law School, PhD University of California Berkeley, “Regulation by Third-Party Verification,” Boston College Law Review, 53(1), 2012, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3182&context=bclr)

Although concerns abound about the privatization of public functions, Freeman usefully observes that public-private partnerships may also lead to the “publicization” of relevant private activity.91 In other words, private actors can be induced to commit themselves to traditionally public goals and behave according to traditional norms of public action such as accountability, due process, and rationality.92 Freeman argues that an enhanced private role in governance need not imply a weak state. Rather, “public/private engagement may enhance state power while simultaneously augmenting private power.”93 Whether privatization leads to publicization and the continued strength of the state depends on how the public-private partnerships are structured.

Third-party verification can easily be viewed as one of the many ways in which public and private entities can work together to achieve public goals. Notably, in the regulatory role of monitoring to detect noncompliance, third-party verifiers may have an advantage over agency inspectors. As private parties that lack the sanctioning power of a governmental regulator, third-party verifiers are likely to approach the regulated entity in a cooperative, peer-to-peer manner that may induce greater information sharing.94 This may be particularly appropriate in the enforcement of new types of regulation such as greenhouse gas reporting requirements.95 Moreover, the process of third-party verification is generally structured to promote communication and correction when instances of noncompliance are found.96 In contrast to a traditional inspection by an agency official, the interaction with third-party verifiers may be perceived by regulated entities less as a judgment day and more as an opportunity to learn and improve.97

B. Harnessing Auditing Industry Expertise

Another advantage of third-party verification is that a great deal of expertise to inspect and make compliance determinations exists in the private sector. A large private inspection industry has developed through voluntary auditing practices as well as voluntary certification schemes.98 In these initiatives, private entities are often hired to monitor and assess compliance with a wide array of standards set by either the government or private organizations.99 This large and growing corps of private inspectors has been aptly termed the “third-party assurance industry.”100

Many companies voluntarily commission third parties to conduct audits for internal operational purposes.101 For example, in the environmental arena, companies may seek a general compliance audit102 to determine their overall compliance status wiThenvironmental laws, or a narrower compliance audit regarding a specific aspect of their operations such as land contamination, equipment performance, or monitoring system design.103 Companies are motivated to conduct voluntary compliance audits to reduce their risk of enforcement liability.104 Companies may also commission a “management audit” to assess an environmental management system.105

#### That solves

Van Loo 20 [Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project. April 2020, The New Gatekeepers: Private Firms as Public Enforcers, 106 Va. L. Rev. 467, Lexis]

C. Mandated Enforcement

The law can require private enforcers rather than merely encouraging them. "Corporate governance is often about gatekeeping," 64which Reiner Kraakman defines as situations in which a corporation must obtain the support of attorneys, accountants, and others before taking certain actions. 65Instead of allowing an oil company to decide whether to hire a [\*479] third-party inspection service, for instance, the regulator may instead write a rule requiring certification from an accredited third-party inspector. 66Thereafter, oil companies would no longer have the option of lowering costs by refusing to hire a third party. Statutes and court orders compel businesses in diverse industries to hire third-party monitors. 67Scholars believe that more of this "regulation by third-party verification" could help to solve the problem of under-resourced public regulators. 68

#### It solves their antitrust key args by maintaining a role for the FTC in monitoring compliance and sanctioning but avoids the massive resource investments of the plan.

Van Loo 20 [Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project. April 2020, The New Gatekeepers: Private Firms as Public Enforcers, 106 Va. L. Rev. 467, Lexis]

Over time, policy makers have enlisted a large array of private actors in their quest for optimal regulatory design. 4 Scholarship on the private role in public governance has focused on third-party enforcers whose main function is to provide a support service. Those enforcers include self-regulatory organizations formed by industry and independent auditors mandated by regulators. 5 The corporate law strand of this enforcement literature emphasizes a network of "gatekeepers," such as lawyers, accountants, and certifiers who guard against compliance and governance failures. 6 For instance, before releasing annual reports, a [\*470] publicly traded company must obtain the signoff of a certified accountant. 7 In these more familiar private enforcement contexts, the private "cops on the beat" 8 are ancillary actors rather than core market participants. 9

This Article demonstrates how policymakers have enlisted a new class of more powerful third-party enforcers: the businesses at the heart of the economy. The ten largest American companies by valuation operate in information technology, finance, oil, and pharmaceuticals. 10A regulator has put leading firms in each of these industries on notice about their responsibilities for third-party oversight. 11In addition to the FTC, the Environmental Protection Agency (EPA) - along with the Department of Justice (DOJ) - requires BP Oil and other energy companies to audit [\*471] offshore oil platform operators for environmental compliance. 12The Food and Drug Administration (FDA) expects Pfizer and other drug companies to ensure suppliers and third-party labs follow the agency's health and safety guidelines. 13The Consumer Financial Protection Bureau (CFPB) orders financial institutions, such as American Express, to monitor independent debt collectors and call centers for deceptive practices. 14

The widespread conscription of businesses as enforcers - also called "enforcer-firms" below - shares characteristics with, but differs meaningfully from, prior iterations of third-party regulation. For instance, the FTC's original administrative order required Facebook to hire a third-party auditor - an example of the old gatekeeper model - to certify Facebook's compliance. 15In that arrangement, refusing to sign off on Facebook's biennial reports to the FTC constituted the auditor's main sanction. 16Facebook could, however, respond to that sanction by bringing its business elsewhere. 17That ability to retaliate weakens traditional gatekeepers' power and independence. 18

In contrast, the enforcer-firm is usually the client - or at least a crucial business partner - of the third parties it regulates. Its main sanction is to cease doing business with those third parties, which can prove devastating. 19The client relationship that weakens traditional gatekeepers thus strengthens the enforcer-firm. In short, policymakers have begun relying on third-party enforcement by the real gatekeepers of the economy: the firms who control access to core product markets. 20

[\*472] In highlighting an overlooked enforcement model, this Article builds on the literature scrutinizing the increasingly narrow divide between private businesses and the administrative state. 21Although that scholarship has yet to examine the enforcer-firm in any sustained manner, 22

[Footnote 22] To the extent scholars have discussed mandated third-party governance it has been in passing or in narrower contexts such as in criminal or international law. See, e.g., Larry Cata Backer, Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley, 2004 Mich. St. L. Rev. 327, 433-34 (2004) (referencing how the Bank Secrecy Act causes a larger number of businesses to become "part of the network of the state's eyes and ears"); John Braithwaite, Responsive Regulation and Developing Economies, 34 World Dev. 884, 889-90 (2006) (exploring how domestic firms can serve as a means of reaching foreign actors); Stavros Gadinis & Colby Mangels, Collaborative Gatekeepers, 73 Wash. & Lee L. Rev. 797, 910-11 (2016) (focusing on money laundering); Itai Grinberg, The Battle over Taxing Offshore Accounts, 60 UCLA L. Rev. 304, 304 (2012) (referencing a "growing consensus that financial institutions should act as cross-border tax intermediaries"). For other ways that scholars have recognized that businesses regulate other firms, see infra Part I.

mandated third-party governance raises some similar accountability issues as previous generations of third-party enforcement. In particular, as a new area of quasi-regulatory activity unlikely to be overturned by judicial review, conscripted enforcement lacks transparency and traditional measures of public involvement, such as notice and comment rulemaking. 23

However, if designed well, the enforcer-firm offers some hope for improving upon prior regulatory models' accountability. Because enforcer-firms often sell directly to consumers, they may prove more responsive to public concerns when compared to traditional gatekeepers, which interact most closely with regulated entities. 24And because the enforcer-firm is itself a prime target of public regulation, it would be easier for an administrative agency to oversee it than to add a whole new category of firms as required for oversight of traditional gatekeepers. 25 [\*473] The conscription of businesses proved crucial in other administrative contexts, including the implementation of a personal income tax. 26The enforcer-firm could, by analogy, enable the regulatory state to bring dispersed business actors into compliance.

### Adv CP

#### UBI solves inequality.

Santens 17 – Scott, founding member of the Economic Security Project at the World Economic Forum, BS in psychology from the University of Washington, “Why we should all have a basic income”, World Economic Forum, 1-15, https://www.weforum.org/agenda/2017/01/why-we-should-all-have-a-basic-income/

Consider for a moment that from this day forward, on the first day of every month, around $1,000 is deposited into your bank account – because you are a citizen. This income is independent of every other source of income and guarantees you a monthly starting salary above the poverty line for the rest of your life.

What do you do? Possibly of more importance, what don’t you do? How does this firm foundation of economic security and positive freedom affect your present and future decisions, from the work you choose to the relationships you maintain, to the risks you take?

The idea is called unconditional or universal basic income, or UBI. It’s like social security for all, and it’s taking root within minds around the world and across the entire political spectrum, for a multitude of converging reasons. Rising inequality, decades of stagnant wages, the transformation of lifelong careers into sub-hourly tasks, exponentially advancing technology like robots and deep neural networks increasingly capable of replacing potentially half of all human labour, world-changing events like Brexit and the election of Donald Trump – all of these and more are pointing to the need to start permanently guaranteeing everyone at least some income.

A promise of equal opportunity

“Basic income” would be an amount sufficient to secure basic needs as a permanent earnings floor no one could fall beneath, and would replace many of today’s temporary benefits, which are given only in case of emergency, and/or only to those who successfully pass the applied qualification tests. UBI would be a promise of equal opportunity, not equal outcome, a new starting line set above the poverty line.

### Adv 1

**No food wars**

**Rosegrant 13 –** M ark W., Director of the Environment and Production Technology Division at the International Food Policy Research Institute, et al., 2013, “The Future of the Global Food Economy: Scenarios for Supply, Demand, and Prices,” in Food Security and Sociopolitical Stability, p. 39-40

The food price spikes in the late 2000s caught the world’s attention, particularly when sharp increases in food and fuel prices in 2008 coincided with **street demonstrations and riots** in many countries. For 2008 and the two preceding years, researchers identified a significant number of countries (totaling 54) with protests during what was called the global food crisis (Benson et al. 2008). Violent protests occurred in 21 countries, and nonviolent protests occurred in 44 countries. Both types of protest took place in 11 countries. In a separate analysis, developing countries with low government effectiveness experienced more food price protests between 2007 and 2008 than countries with high government effectiveness (World Bank 201la). Although the incidence of violent protests was much higher in countries with less capable governance, **many factors** could be causing or contributing to these protests, such as government response tactics, **rather than the initial food price spike**.

Data on food riots and food prices have tracked together in recent years. Agricultural commodity prices started strengthening in international markets in 2006. In the latter half of 2007, as prices continued to rise, two or fewer food price riots per month were recorded (based on World Food Programme data, as reported in Brinkman and Hendrix 2011). As prices peaked and remained high during mid-2008, the number of riots increased dramatically, with a cumulative total of 84 by August 2008. Subsequently, both prices and the monthly number of protests declined.

Several researchers have studied the connection between food price shocks and conflict, finding at least some relationship between food prices and conflict. According to Dell et al. (2008), higher food prices lead to income declines and an increase in political instability, but **only for poor countries**. Researchers also found a positive and significant relationship between weather shocks (affecting food availability, prices, and real income) and the probability of suffering government repression or a civil war (Besley and Persson 2009). Arezki and Bruckner (2011) evaluated a constructed food price index and political variables, including data on riots and anti-government demonstrations and measures of civil unrest. Using data from 61 countries over the period 1970 to 2007, they found a direct connection between food price shocks and an increased likelihood of civil conflict, including riots and demonstrations.

Other researchers have broadened the analysis by **considering government responses** or underlying policies that affect local prices, and consequently influence outcomes and the linkage between food price shocks and conflict. Carter and Bates (2012) evaluated data from 30 developing countries for the time period 1961 to 2001, concluding that when governments mitigate the impact of food price shocks on urban consumers, the **apparent relationship between food price shocks and civil war disappears**. Moreover, when the urban consumers can expect a favorable response, the protests only serve as a **motivation for a policy response** rather than as a prelude to something more serious, such as **violent demonstrations or** even **civil war**.

Many in the international development community see war and conflict as a development issue, with a war or conflict severely damaging the local economy, which in turn leads to forced migration and dislocation, and ultimately acute food insecurity. Brinkman and Hendrix (2011) ask if it could be the other way around, with food insecurity causing conflict. Their answer, based on a review of the literature, is "a **highly qualified yes**," **especially** for intrastate conflict. The primary reason is that insecurity itself heightens the risk of democratic breakdown and civil conflict. The linkage connecting food insecurity to conflict is contingent on levels of economic development (a stronger linkage for poorer countries), existing political institutions, and other factors. The researchers say **establishing causation directly is elusive**, considering a **lack of evidence** for explaining individual behavior. The debate over cause and effect is ongoing.

**No empirical or statistical evidence that antitrust decreases inequality**

Jonathan **Klick** **et al. 19**—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

On the whole, the relationship between the enforcement metrics and consumption is **comparable** for the households in both the **first and fifth income quintiles**. There is not much **empirical evidence** to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence **significant enough** to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new(-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades – Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about 3 percent, and because they have detailed longitudinal data on household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are **substantial** and they are most pronounced for those at the lower end of the socio-economic spectrum.158 In addition to this price effect, David Matsa shows that Wal-Mart’s entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.159 Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe **consumption** is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of **income** and wealth. Using Census data,160 in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

As with consumption measures, there is generally **no statistically significant effect** (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the **income** shares of those at the **bottom or the top** of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the **opposite effect**. Further, many of the investigation coefficients are **positive for the fifth quintile** income share as well. If we examine **combined ratios of the shares** as we did with the consumption data, we still find **no support** for the assumption that an increase in antitrust enforcement has **any systematic effect on inequality**.16

#### Ukraine thumps trade

Dai 3/11 (Tinglong Dai, Professor of Operations Management & Business Analytics, Carey Business School, Johns Hopkins University, March 11th 2022, last sentence is a photo description that I thought was funny, “Ukraine war and anti-Russia sanctions on top of COVID-19 mean even worse trouble lies ahead for global supply chains” The Conversation, <https://theconversation.com/ukraine-war-and-anti-russia-sanctions-on-top-of-covid-19-mean-even-worse-trouble-lies-ahead-for-global-supply-chains-178486>) MULCH

The war has also had a devastating impact on global trade movements, with hundreds of tankers and bulk carriers stranded at ports as a result of sanctions imposed on Russian-connected ships. It has also resulted in severe travel and transport restrictions imposed on Russia and Belarus in an unprecedentedly rapid and broad manner that has been coordinated among multiple nations.

In addition, the disruption of the route from China to Europe and the U.S. could do severe damage to China’s “Belts and Roads” initiative. That’s the ambitious trillion-dollar project aimed at reshaping global trade and affirming the dominance of a China-centric global supply chain, especially in Europe and Asia. Because both Russia and Ukraine are critical links in the initiative, it will almost certainly need to scale back in size and scope.

#### Ukraine thumps ILO

Lynch 22 [David J. Lynch joined The Washington Post in November 2017 from the Financial Times, where he covered white-collar crime 3-5-2022 https://www.washingtonpost.com/business/2022/03/05/global-economy-russia-ukraine/]

Russia’s invasion of Ukraine and the financial reckoning imposed on Moscow in response are proof that the triumphant globalization campaign that began more than 30 years ago has reached a dead end.

Fallout from the fighting in Ukraine will take a meaningful bite out of the global economic recovery this year, with the greatest impact in Europe, economists said. A spike in oil prices to more than $110 per barrel and renewed supply chain disruptions — including fresh headaches for the auto industry — also are likely to aggravate U.S. inflation, already at a 40-year high.

But the war’s long-term consequences could be more profound. Even before Russian President Vladimir Putin sent tanks and missiles hurtling toward Ukraine, years of deteriorating U.S.-China relations and failed global trade talks had stalled the tighter integration of finance and trade flows that had been anticipated during globalization’s heyday.

What comes next is unlikely to mirror the Cold War’s distinct blocs. Even as the global economic order fractures, no rival ideologies compete for supremacy. And China’s harsh authoritarian turn under President Xi Jinping co-exists with extensive commercial ties to the United States, Europe and Japan. But governments, corporations and investors all are adjusting to a new reality.

“It’s the end of one era and the beginning of another, which is a less complete form of globalization than we had ambitions for in the immediate post-Cold War era,” said Michael Smart, managing director of Rock Creek Global Advisors. “We have to think differently about what we mean by the global trading system. There are certain requirements that, if you don’t meet them, you’re not part of it. You can’t be in the club.”

With the United States, Europe, Canada, Britain and Japan uniting to punish Russia with unprecedented financial sanctions, the war has triggered a “major geopolitical realignment” akin to the aftershocks from the 9/11 terrorist attacks, according to Citibank analysts.

Virtually overnight, most major Russian banks were blocked from moving money across borders. Moscow’s stock market has been closed for a week. Russian customers are cut off from much of the world’s most advanced technologies.

On Friday, Russia’s isolation deepened as the country’s communications regulator blocked access to Facebook, one of the few sources of information that the government already did not control, saying it had discriminated against Russia media.

End of carousel

In Washington, top Democrats and Republicans have begun demanding that the United States stop importing oil from Russia, a move that would intensify Moscow’s financial plight if European nations followed suit. Meanwhile, the International Monetary Fund warned Saturday that the war and rapidly accumulating sanctions on Russia would “have a severe impact on the global economy.”

“This event does seem to be one that is a game changer and will be with us for a very long time,” Federal Reserve Chair Jerome H. Powell told Congress last week.

Russia’s financial exile caps more than a decade of erosion in globalization, beginning with the 2008 financial crisis and continuing through the rise of Xi in 2012, the U.S.-China trade war that began in 2018, and diplomats’ repeated failures to agree on trade liberalization. The coronavirus pandemic, which highlighted the risk of ocean-spanning supply lines and restricted international travel, further thinned cross-border links.

#### Ukraine thumps fast rate hikes – food prices, supply issues and inflation

Rai 2-28 [Sarakshi Rai, Staff Writer, 2-28-2022 https://thehill.com/policy/finance/596203-five-ways-the-russian-invasion-of-ukraine-could-impact-americans]

Faster Fed rate hikes

Higher energy and food prices and deeper supply chain bottlenecks could put pressure on inflation and force the Fed to accelerate its pending series of rate hikes.

The Fed was already poised to hike interest rates several times this year, beginning next month, after inflation rose well above levels the bank expected. Prices rose 6.1 percent in the 12 months ending in January, according to personal consumption expenditures (PCE) price index, the Fed’s preferred gauge of inflation.

While a drop in economic activity could ease inflation, experts believe the combination of a strong U.S. economy and potentially severe supply disruptions could make the Fed move quicker to tighten rates.

### Adv 2

**Harmonization is impossible.**

Logan **Breed &** Falk **Schoning, 18**. Both authors are partners at the law firm Hogan Lovells. They handle antitrust reviews of mergers and acquisitions since as well as numerous nonmerger conduct investigations and antitrust litigation matters. “Exploring the contrasting views about antitrust and big data in the U.S. and EU.” September 27, 2018. <https://www.hoganlovells.com/en/publications/exploring-the-contrasting-views-about-antitrust-and-big-data-in-the-us-and-eu> Accessed: 9/28/21 3:00pm

What’s your perspective as to why Europe and the U.S. have such different approaches to big data and antitrust enforcement?

Schöning: I think some Europeans are more concerned with data in the hands of companies than in the hands of the State. This is very different from the understanding of freedom in the United States, which is more about ensuring that your data is not in the hands of the state. That’s very different, and it triggers why the EU has things like GDPR, which basically regulates how private companies can deal with your data, but not what the state can do with it.

#### To solve they need to create a constitutional change – they don’t

Patel & Chantry 20 Oliver Patel is Research Associate and Manager at the UCL European Institute. Dr Nathan Lea is Senior Research Associate at the UCL Institute of Health Informatics. William Chantry, Research Assistant at the UCL European Institute, and Dr Uta Staiger, Executive Director of the UCL European Institute. May 2020. “EU-U.S. Privacy Shield, Brexit and the Future of Transatlantic Data Flows.” <https://www.ucl.ac.uk/european-institute/sites/european-institute/files/privacy_shield_brexit_and_the_future_of_transatlantic_data_flows_1.pdf> {DK}

There are important practical and philosophical differences between data privacy in the U.S. and data protection in the EU. EU data protection laws are both comprehensive and harmonized. The GDPR covers the processing and use of personal data for any commercial purpose. It applies to all economic sectors, as well as all entities processing personal data both within the EU and those processing EU citizens’ data but based outside the EU. As such, unlike the U.S. system, the GDPR is a comprehensive data protection law with extra-territorial applicability. The GDPR provides for harmonised data protection standards across the EU. As a regulation, it is directly applicable in all EU member states. However, many member states have also passed separate data protection laws (e.g. the UK’s Data Protection Act 2018), which either take advantage of GDPR derogations or strengthen its protections. This harmonised data protection framework enables the free flow of data within the EU and, in contrast to the patchwork of U.S. state laws, makes it easy for organisations to comply with the law across Europe. Philosophically, the U.S. system is more laissez faire and neoliberal. Successive U.S. governments have prioritised innovation and the growth of the technology sector, and have been loath to regulate its activities in a substantial way.16 Private sector self-regulation has long been favoured and promoted. In the 1990s, the Clinton administration sought to “embed the U.S. self-regulatory approach as the global standard”. There was alarm at the EU’s 1995 Data Protection Directive,17 not least because it imposed restrictions on the transfer of personal data between the EU and the U.S., which was perceived as threatening transatlantic trade.18 That Directive later evolved into the 2018 GDPR, which is commonly (and ironically) described as the most significant piece of U.S. internet legislation of the past decade.19 Respect for private life and data protection are fundamental rights under EU law, which are protected at the highest constitutional level, i.e. in Articles 7 and 8 of the EU’s Charter of Fundamental Rights (the Charter). These rights are vigorously upheld by the European Court of Justice (CJEU). This underlies the EU’s belief that data protection cannot be left to the free market. The CJEU also draws upon the separate European Convention on Human Rights (ECHR), which is upheld by the European Court of Human Rights (EctHR) and protects the right to respect for private life (Article 8). Several member states, including Germany, Czechia and Greece, have also enshrined the right to privacy in their constitutions. The rights to privacy and data protection are not absolute and both the CJEU and the EctHR perform ‘proportionality tests’ when they conflict with other fundamental rights. However, the relevant case law (e.g. the 2014 Google Spain judgement on the right to be forgotten) demonstrates that the CJEU does not consider the economic benefit of free data flows as a higher value than the fundamental right to data protection.20 In the U.S., privacy is not a fundamental right and it is not protected by the Constitution. The U.S. Constitution is one of negative rights and was largely designed to limit government power. In some ways, the Constitution actually strengthens the rights of data processing organisations.21 For example, the First Amendment, which prevents Congress from ‘undermining freedom of speech’, has been used to curtail data privacy in the U.S.22 In 2011, the Supreme Court used the First Amendment to strike down a Vermont data privacy law. The law prohibited pharmacies and health insurers from selling prescribers’ personal information or allowing such information to be used for marketing without the consent of the prescriber. By six votes to three, the Court concluded that these measures restrict the free speech rights of the affected companies.23 Similarly, internet service providers (ISPs) are currently suing the state of Maine, claiming that Maine’s new privacy law violates their rights to free speech.24 Legal scholars Schwartz and Peifer argue that the U.S. and the EU have constructed different legal identities around data privacy.25 In the US, there is a ‘marketplace discourse’, as the FTC protects ‘consumers’ from unfair practices in the ‘marketplace’, but the legal system generally favours data processors over consumers. In the EU, by contrast, the right to data protection s strongly anchored at the constitutional level. The EU’s system is characterised by ‘rights talk’ and protecting the ‘fundamental rights of data subjects’. This philosophical difference gives rise to a major legal difference. Under EU law, organisations must have a lawful basis for processing personal data. Article 6 of the GDPR outlines the six lawful bases; at least one of these must apply for an organisation to process personal data: (a) Consent, (b) Contract, (c) Legal obligation, (d) Vital interests, (e) Public task and (f) Legitimate interests. There must be a legal basis for data processing irrespective of whether there is potential for harm. Under U.S. law, the default is that companies can process personal data, without a lawful basis, unless it causes harm or there is a specific legal requirement against that processing.26 This means that organisations generally do not need the consent of individuals, or a valid contract, to collect and process personal data.

### Bedoya

#### Nothing in the bill thumps --- it’s a non-antitrust bill, consistent with existing rules, and is self-enforced by carriers

Fatka 4/1 --- Jacqui Fatka, Farm Progress, “House and Senate approved ocean shipping reform bills have distinct differences that will have to be reconciled”, Apr 01, 2022, https://www.farmprogress.com/farm-policy/full-senate-passes-ocean-shipping-reform-act

The Senate’s Ocean Shipping Reform Act will:

Require ocean carriers to certify that late fees —known in maritime parlance as “detention and demurrage” charges—comply with federal regulations or face penalties.

Shift burden of proof regarding the reasonableness of “detention or demurrage” charges from the invoiced party to the ocean carrier.

Prohibit ocean carriers from unreasonably declining shipping opportunities for U.S. exports, as determined by the FMC in new required rulemaking.

Require ocean common carriers to report to the FMC each calendar quarter on total import/export tonnage and 20-foot equivalent units (loaded/empty) per vessel that makes port in the United States.

Authorize the FMC to self-initiate investigations of ocean common carrier’s business practices and apply enforcement measures, as appropriate.

Establish new authority for the FMC to register shipping exchanges.

Path ahead to president

On Tuesday, the U.S. House of Representatives again overwhelmingly passed its version of the bill as part of a broader legislative package that authorizes Coast Guard programs, marking the third time the House has passed the legislation. The House initially passed the bill last year as a stand-alone measure, and again as a part of its version of a China competitiveness bill in February.

While overall granting the Federal Maritime Commission authority to regulate ocean carriers, the House and Senate bills have distinct differences that will have to be reconciled.

The Agriculture Transportation Coalition says it “strongly supports” the Senate-passed bill which can restore reasonable and fair ocean carrier practices consistent with the Federal Maritime Commission’s excellent, but still unenforced, Interpretive Rule on Demurrage and Detention. The Senate bill, like the House bill, establishes an obligation for carriers to self-police compliance with that rule, AgTC adds. In addition, the bill addresses the ocean carriers’ responsibility to carry U.S. export cargo. The bill provides the FMC with additional enforcement tools to address injurious ocean carrier practices.

#### Not a thumper --- specifically designed to NOT expand antitrust

GRISALES 4/1 --- CLAUDIA GRISALES, NPR, April 1st 2022, “Bipartisan bill to address supply chain kinks moves closer to the president's desk”, https://www.npr.org/2022/04/01/1090313383/bipartisan-bill-to-address-supply-chain-kinks-moves-closer-to-the-presidents-des

Klobuchar acknowledged the bill is one piece in a much larger puzzle. That is, supply chain troubles can also be alleviated with the end of the pandemic, labor market improvements and infrastructure fixes at U.S. ports.

For now, the authors hope overwhelming congressional support for the plan, including the unanimous vote in the Senate, sends a signal to carriers to charge better rates. If not, Congress will have to consider other legislation, such as antitrust exemptions, next, Klobuchar said.

"I think it's going to put max pressure on these shipping conglomerates to not keep misbehaving because if they do, there's actually more things we could do on antitrust exemptions and others things," she said. "I think when they see the unanimous vote, they know trouble could be on the way."

### AI

#### Erosion of administrative SOP collapses the administrative state

SOHONI 16 --- MILA SOHONI, Associate Professor, University of San Diego School of Law, ARTICLE: THE ADMINISTRATIVE CONSTITUTION IN EXILE, 57 Wm. & Mary L. Rev. 923, 940, February, 2016, Lexis

Like the other components of the administrative constitution, the rules protecting internal checks and balances serve not only a practical purpose but also play a legitimating function. Michaels notes that "the separating and checking of administrative powers is about more than simply preventing abuse. Administrative separation of powers has an affirmative component as well: the legitimization of administrative power." 71 By preventing the concentration of state power in a single unchecked source, administrative separation of powers protects pluralism in administrative governance and thereby enhances support for the administrative state. "Administrative separation of powers," in this account, represents nothing less than "an act of constitutional restoration, anchoring administrative governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law." 72

#### Impact is great power wars – turns adv 1

Fuchs 17 --- Michael Fuchs, Senior Fellow at American Progress, where his work focuses on U.S. foreign policy priorities and U.S. policy toward the Asia-Pacific, “ The Deconstruction of America’s Global Leadership”, March 17th 2017, https://www.justsecurity.org/38946/deconstruction-americas-global-leadership/

Stephen Bannon, President Donald Trump’s chief strategist, has made it clear that the Trump administration wants to see the “deconstruction of the administrative state.” While this alarming philosophy has obvious consequences domestically, it is less clear what it means for U.S. foreign policy.

Based on what we’ve seen so far though, we have to begin to consider the possibility that an “America First” foreign policy is the natural extension of the deconstructive approach that Bannon outlined. There is growing evidence that Trump is gearing up for a proactive, all-out assault on the very structures of global influence and power that the US built in the 20th Century.

Rather than beginning with speeches outlining a foreign policy vision or setting its sights on big foreign policy victories that could be achieved, the Trump administration appears to be looking inward – inside federal agencies, institutions, and international commitments – at ways to tear down the fabric that upholds American leadership, security and prosperity.

One of the scariest aspects of this approach is that we may not know the extent of the undertaking until it’s too late. American leadership abroad is in some ways the invisible hand of global order: preventing the outbreak of great power wars through the upkeep of alliances, institutions, and constant diplomacy. But a hostile attitude toward multilateral institutions and a foreign policy that undermines the confidence of allies, and slashes budgets to the point where diplomats are withdrawn from around the world and foreign assistance dries up, can happen rapidly and out of the spotlight. The American people rarely see the daily work of U.S. diplomacy. This means the world will only notice the absence of U.S. leadership when it is gone and catastrophe strikes.

It is hard to overstate the disastrous consequences of this approach. If successful, it would unilaterally disarm America abroad by giving up our most cost-efficient and effective assets for advancing U.S. interests: diplomatic reach and development support. It would sap U.S. leverage in the security and economic realms at exactly the time that American interests are under threat from Asia to Europe to the Middle East. Deconstructing the pillars of American leadership would help spark a return to a Hobbesian world where no country feels safe and each one fends completely for itself. This may very well be Trump administration’s goal.

#### And turns coop internal links

Rapp-Hooper 17 --- Dr. Mira Rapp-Hooper is a Senior Fellow in the Asia-Pacific Security Program and the Center for a New American Security., “TIES THAT BIND: WHY ASIAN ALLIANCES WILL SURVIVE TRUMP”, War on the Rocks, JANUARY 12, 2017, https://warontherocks.com/2017/01/ties-that-bind-why-asian-alliances-will-survive-trump/

When allies fear abandonment, however, these “veto points” can be good things. Renegotiation of a commitment or a burden-sharing arrangement could take years for allies to complete. And, it would be difficult, and perhaps impossible, to keep this secret. During the process, other branches of government and opposition parties would have time to intervene and to oppose changes. Recall that President Jimmy Carter’s furtive attempts to slash U.S. troop levels in South Korea were made public, prompted a fiery backlash, and were derailed. President Richard Nixon promised Beijing that he would end the U.S. alliance with Taiwan and moved his plans forward in secret to evade the “China Lobby.” But when Carter moved to recognize China and abrogate the U.S. defense pact with Taipei several years later, Democrats and Republicans in Congress were so enraged that they passed the Taiwan Relations Act — not quite a mutual defense commitment but not far off. Treaties, by definition, engage Congressional interests, and U.S alliances are so longstanding that many partners have robust ties to legislators, the military, the civil service, and interest groups. If the new administration decides to modestly revise some agreements, these forces may not stand in the way, but allies who fear radical, precipitous change will have no greater friends than thorny bureaucracy and domestic infighting.

Rather than fear alliance demise, then, U.S. partners should begin to devise strategies for how they will use these sturdy structures to manage potential volatility in the Trump era. Indeed, alliances work both ways and may provide some opportunity for partners restrain their security patron in the years ahead. This will be relatively harder to accomplish in Asia, where the hub-and-spokes system gives individual partners less leverage over the United States than NATO’s multilateral structure grants to Europe. Asian allies are already working to forge closer security ties among themselves, and more capable partners like Japan and Australia should pick up the pace on these “networking” efforts. Whatever form it takes, however, 70 years of alliance building in Asia will be hard to undo. The president-elect, after all, knows a good structure when he sees one.

#### Weakened FTC turns EU harmonization – turns adv 2

Hartzog 14 --- Statement by Woodrow Hartzog, Associate Professor, Samford University, HEARING before the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES, July 24th 2014, https://www.govinfo.gov/content/pkg/CHRG-113hhrg90892/html/CHRG-113hhrg90892.htm

The second point that I would like to make is that the overwhelming pattern that is apparent from the FTC's data protection jurisprudence is that the agency has acted judiciously and consistently in outlining the contours of impermissible data protection practices. Section 5 of the Federal Trade Commission Act generally prohibits unfair or deceptive trade practices. This is an intentionally broad grant of authority. Congress explicitly recognized the impossibility of drafting a complete list of unfair, deceptive trade practices. Any such list is destined to be quickly outdated or easily circumvented.

Despite this broad grant of authority, the FTC actually brings relatively few data security complaints, especially compared to the total number of reported data breaches. The Privacy Rights Clearinghouse has reported that since 2005, there have been over 4,300 data breaches made public, with a total of 868 million records breached. Yet the FTC has filed only 55 total data security-related complaints, averaging around 5 complaints a year since 2008. Instead of attempting to resolve all of the data breaches, the FTC typically pursues only what it considers to be the most egregious data security practices.

The FTC has used a reasonableness standard to determine what constitutes an unfair, deceptive data security practice. What constitutes reasonableness is determined virtually entirely by industry standard practices, and is contingent upon the sensitivity and volume of data, the size and complexity of a company, and the costs of improving security and reducing vulnerabilities. This deference to industry keeps the FTC from creating arbitrary and inconsistent data rules.

The FTC does not pull rules out of thin air. Rather, it looks to the data security field and industry to determine fair and reasonable practices. Virtually all data security regulatory regimes which use a reasonableness approach, of which there are many, not just the FTC, have four central requirements in common: identification of assets and risks; data-minimization procedures; administrative, technical and physical safeguards; and data breach response plans. The details of these requirements are filled in by industry frameworks, accessible resources online, and a vast network of privacy professionals and technologists dedicated to helping companies of all sizes understand their data protection obligations.

Of course there is always room for improvement with any regulatory agency, but diminishing FTC power will probably not ultimately make the climate easier for business. In fact, given the vital importance of data protection in commerce, a reduction in FTC authority would likely result in the passage of more restrictive and possibly conflicting State laws regarding data security, more actions by State attorneys general, more lawsuits from private litigants, and more clashes with the European Union over the legitimacy of U.S. privacy law. In the long run, a weakened FTC would likely result in a more complicated and less industry-friendly regulatory environment.

Data protection is a complex and dynamic area for consumers, companies, and regulators. Section 5 enables the FTC to be adaptive and serve as a stabilizing force for consumers and companies. Thank you very much.

#### Data privacy rift turns econ impacts

Mueller 3-4 --- Benjamin Mueller is a senior policy analyst at the Center for Data Innovation, focusing on AI and technology governance, “As the EU Begins to Fight for Liberalism in Earnest, Its Technology Policy Must Catch Up”, Center for Data Innovation, March 4th 2022, https://datainnovation.org/2022/03/as-the-eu-begins-to-fight-for-liberalism-in-earnest-its-technology-policy-must-catch-up/

It is against this dramatic backdrop that an urgent rethink of technology policy on both sides of the Atlantic is required. For Europe and the United States to stage a robust and credible defense of freedom and democracy, its leaders should now embark on a path of deep and wide-ranging collaboration that strengthens their joint capacity to promote and defend liberal interests. World War One was the first whole-of-nation conflict in the modern era where victory was a product not simply of the superior application of military force, but also of nations’ ability to harness their economy and society in pursuit of their strategic goals. If the EU and the United States cannot align their social, economic, and technological systems, it will undermine their capacity to mount a sustained campaign in defense of their way of life.

In the realm of foreign policy, technology connects goals and capabilities. Electricity, the steam engine, and metallurgy drove economic development in the 19th century. In the 21st century, digital technology is the driving force behind progress. The first two decades of this millennium were characterized by the emergence of a digitally connected society, giving rise to entire new industries powered, ultimately, by the ability to generate, connect, and act on digital data. In response to the dislocations this has brought about, the European Union is in the midst of a multi-year effort to pass landmark legislation that regulates the use of digital technologies. If the EU does not pay sufficient attention to the second-order effects of regulatory and economic misalignment with the United States, its closest natural ally, it risks driving a permanent wedge between the two, benefiting only the authoritarian powers who are challenging them both.

Policymakers should therefore urgently re-evaluate five major areas of technology policy in light of their impact on U.S.-EU digital alignment.

First, European legislators should examine whether the strategic goal of “digital sovereignty” is, in fact, a smokescreen for digital protectionism and decoupling. The proliferation of data localization rules, most recently revived in the EU’s Data Act, threatens the viability of the digital free trade principles that have generated immense economic benefits on both sides of the Atlantic. Since David Ricardo’s analyses of Britain’s protectionist Corn Laws in the 19th century, economists have generally accepted that trade should be driven by comparative advantage, not arbitrary governmental interference regarding the location of businesses. The erection of digital barriers to trade will make both Europe and the United States poorer and weaker. In principle, European policymakers understand this—now they should ensure that new laws do not undermine the free flow of data across the Atlantic.

Second, the United States and the EU should, as a matter of urgency, conclude a new Privacy Shield framework to guarantee the free flow of data across the two jurisdictions. Without such an agreement, the entire transatlantic digital economy risks fracturing in the coming years as courts strike down ever-greater numbers of data flow arrangements. Privacy Shield II should offer U.S. and European citizens new and meaningful redress mechanisms. Any such agreement should also clarify the legal definition of personal data under Article 4(1) of the GDPR. The risk today is that activist European courts can take an overly broad view of personal data, such as deeming IP addresses to be personal data merely because they could in theory be used to identify an individual (by that logic, phonebooks should never have been allowed in the European Union). Relatedly, an EU-US Cloud Agreement is of great importance in order to resolve a number of connected issues on data and access rights for law enforcement on both sides of the Atlantic. Both the U.S. Cloud Act and the EU Data Act contain provisions on access and personal data transfers which are likely incompatible and could create further barriers to digital trade unless the EU and US align the two laws.

Third, the EU’s digital laws should be examined for protectionist biases. The Digital Markets Act, according to its lead negotiator in Parliament, is intended to target the biggest U.S. tech firms, with the absurd implication that they pose a greater threat to the EU’s economy than China’s largest tech companies, all of which are subservient to a Chinese government intent on dominating the EU. The passage of such a law should rightly be considered an unfriendly act by the United States, made all the more tragic because regulatory co-operation between the two blocs is desirable. One fix is easily enacted: the DMA should be amended to cover meaningful European and other foreign competitors as gatekeepers, not just U.S. firms.

Fourth, the EU’s ongoing effort to regulate AI should not be in thrall to Chinese efforts at AI governance. When the Chinese Communist Party passes a law that meddles with the operational and technological design of AI tools, European policymakers should not respond with rapture, but carefully consider whether their own approach embodies liberal or authoritarian values. The inspiration for the AI Act should not be a one-party state’s vision of technology governance designed to control its population. Instead, Europeans should create a forward-looking law that reduces risks and harms from AI whilst encouraging the adoption of the technology.

Fifth, the EU should begin to systematically cooperate with the United States on strategic areas of digital policy. While most of the focus has been on regulating Big Tech, it would be much more productive to develop transatlantic cooperation on issues such as cybersecurity, AI R&D, and military AI applications. For example, developing a Geneva Convention on Data could establish international norms to limit harms from cyber attacks during both military conflicts and times of peace. Other important areas for collaboration include export controls for dual-use technologies, semiconductor R&D cooperation, and supply chain resilience.

All of these issues can be addressed by the EU-U.S. Trade and Technology Council’s upcoming meeting in May. The risk of a transatlantic rift in digital affairs should be confronted head-on to avoid cracks emerging in the technological and economic alignment of the two blocs. If our technology laws are in endless conflict, not only will the overall EU-U.S. digital economy weaken, but so too will the critically necessary partnership between the two. At this critical juncture for the future of freedom, this cannot be in the interest of either the EU or the United States. Liberalism’s innate strength lies in its ability to trade, exchange information, and build extensive trade and social links that create a whole greater than the sum of its parts. At the dawn of the digital age, it is incumbent that policymakers allow the flow of data to flourish between like-minded liberal democracies.

#### Root cause of adv 1’s inequality impact

**Rahman 18** --- K. Sabeel Rahman, Assistant Professor of Law, Brooklyn Law School, “Reconstructing the Administrative State in an Era of Economic and Democratic Crisis”, 131 Harv. L. Rev. 1671, April 10th 2018, https://harvardlawreview.org/2018/04/reconstructing-the-administrative-state-in-an-era-of-economic-and-democratic-crisis/

The rise of the administrative state was thus not a politically neutral endeavor. The checks and balances that legitimate administrative authority in essence make possible (but do not guarantee) the contestation of deep forms of economic and social inequality, subordination, or hierarchy. This is not to say that administrative authority is always equality or inclusion promoting — hardly. But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place. The dismantling of administrative institutions, then, is similarly nonneutral. Scholars of the administrative process have long warned of the dangers of special interest capture of regulatory agencies, which would cause administrative authority to be redirected to serve some interests over others. But agencies can also be captured and neutered through inaction — through what political scientists call “drift,” where highly resourced and sophisticated players are able to produce substantive policy change simply by holding existing rules in place in the face of changing external conditions. Dismantling agencies altogether would be an even more extreme form of opposition to these potential uses: rather than trying to capture or simply neuter the agency, more radical efforts to deconstruct regulatory institutions cut off the very possibility by eliminating the regulatory capacity itself, a kind of complete and total capture through deconstruction.

This substantive valence of administrative power and its potential deconstruction adds an important layer to Michaels’s critique of privatization. Michaels alludes to the ways in which privatization risks permanently dismantling institutional tools and capacities that are difficult to rebuild. As Michaels warns, under privatization, “we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized” (p. 12). He rightly notes that privatization emerged as a “pivot[]” strategy in the Reagan era, a “second-best” to dismantling regulatory bodies themselves (p. 97). This is a problem in particular because “the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. . . . It is the world of Schumpeter and Coase, not Montesquieu or Madison” (p. 5). Private corporate governance, meanwhile, cannot replicate the kinds of checks and balances that the separation of powers principles require (p. 164).

Dismantling administration and returning to private ordering is therefore troubling for democracy in three senses. First, given prior background structural patterns of exclusion and disparities of wealth, power, and opportunity, a return to private economic and social ordering is by definition a return to economic inequality, social hierarchy, and exclusion. Second, the dynamics of market competition or of corporate governance cannot replicate or replace public institutions of democracy or of checks and balances. They operate fundamentally differently and are not substitutes. Third, a dismantling of regulatory institutions removes some of the most vital and effective mechanisms through which we as a democratic public seek to contest and reshape these background structural inequities and exclusions: without tools of general administrative policymaking and enforcement, these structural inequities are harder to overcome and reshape.

B. CENTRALIZATION AND THE PROBLEM OF ADMINISTRATIVE EXCLUSION

Though privatization occupies top billing as the villain in Michaels’s book, his framework also highlights the problem of centralized control of the administrative state in a “unitary executive” as an inverse to the privatization ethos — another approach to bypassing the clunkiness of the administrative process. Citing a well-developed literature in administrative law scholarship, Michaels warns that the unitary executive approach concentrates too much power in the President and bypasses the very moral and institutional value of the administrative separation of powers and its institutions of internal checks and balances within the executive branch (pp. 153–57). Here too Michaels’s argument implies a much broader critique of administration and its opponents. The unitary executive is not just a theory of administrative legitimation. The problem of relatively consolidated, discretionary bureaucratic power is one that already exists in several different domains, such as national security and surveillance (p. 154). It also arguably describes other forms of bureaucratic domination and exclusion, from poverty law to the overly powerful and unchecked discretion of the criminal justice system. These domains of state power reflect Michaels’s second fear: the centralization of executive authority in ways that bypass the kinds of checks and balances offered by the administrative separation of powers.

Michaels first takes issue with unitary executive theories of administrative law, which seek to streamline agency decisionmaking by tethering regulatory bureaucrats more directly to the decisions of the elected President. While presidential administration theories see this as promoting faster and more accountable decisions, for Michaels this approach raises concerns. Specifically, taken to its logical extreme, a presidential administration theory threatens to override other checks and balances in the administrative process, like an independent civil service and other structural constraints imposed by courts, or statutorily mandated procedures (p. 156). But Michaels also raises a concern not with the President per se, but rather with the danger of a “unitary agency” — an administrative body that might run roughshod over the need to engage stakeholders in participation, imbuing its responsibilities with overly political or ideological motivations, tainting the exercise of its authority (pp. 169–70). Michaels rightly sees this kind of unchecked agency authority as a real instance of special interest capture (p. 170). For Michaels, this kind of unchecked administrative authority is indeed a real problem — but it is a problem that arises from efforts to “ease or erase” the checks and balances of the administrative separation of powers (p. 154), not from the dangers of administration per se.

This is an important insight, which extends to a number of areas of contemporary state authority. Consider, for example, the critiques in poverty law scholarship about the problem of “bureaucratic disentitlement.” For many individuals, even accessing entitlements like food stamps, unemployment insurance, and other safety net protections is fraught, requiring multiple trips to social services offices, extensive paperwork, and often demeaning and arbitrary interviews. Some state welfare agencies instead combine privatization with selective exercise of administrative power to extract revenue rather than provide vital services. This problem of arbitrary bureaucratic power stems arguably from a lack of the kind of administrative checks and balances that Michaels describes, prompting efforts to create more effective procedural protections, expertise, or democratic accountability of welfare bureaucracies. The problem of arbitrary administrative power is even more pronounced in context of the carceral state, the criminal justice system, the immigration system, and the post-9/11 surveillance apparatus. In each of these areas too we see Michaels’s perceptive warning of how abandoning administrative checks and balances can in fact aggrandize executive power in action: the welfare system, criminal justice system, immigration system, and surveillance state all involve toxic combinations of private contracting and outsourcing with centralized executive control, the result of which is an even more unchecked concentration of power.

#### Anit-trust Key – Agencies WANT to utilize algorithmic governance --- it’s a question of capability not desire

DOJ 21 --- “Justice Department Joins Computational Antitrust Project at Stanford Law School”, Jan 19th 2021, https://www.justice.gov/opa/pr/justice-department-joins-computational-antitrust-project-stanford-law-school

WASHINGTON – The Department of Justice announced today that it will participate in the Computational Antitrust project, hosted by the Stanford University CodeX Center and created by Professor Thibault Schrepel. The project brings together academics from law, computer science, and economics as well as developers, policymakers, and antitrust agencies from around the world to discuss how technology and automation can improve antitrust enforcement.

“There are important debates happening today about how we should enforce the antitrust laws, but everyone agrees that enforcement agencies should make decisions using the best tools available,” said Assistant Attorney General Makan Delrahim of the Antitrust Division. “We look forward to being part of this valuable dialog about antitrust enforcement.”

As part of the Computational Antitrust project, representatives from the Antitrust Division will participate in regular workshops and dialogs about how to integrate cutting-edge computational developments into antitrust law and policy. The Antitrust Division’s initial representatives will be David Lawrence, Chief of the Competition Policy and Advocacy Section, and Eric Dunn, an attorney in that section. The project’s focus is described in further detail in a recent paper by Professor Schrepel.

#### Especially for mergers

Lambert 14 --- Thomas A. Lambert, Wall Family Foundation Chair in Corporate Law and Governance, University of Missouri Law School, “Defining Unreasonably Exclusionary Conduct: The 'Exclusion of a Competitive Rival' Approach”, NORTH CAROLINA LAW REVIEW, 2014, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1494&context=facpubs

Courts have provided little assistance in defining unreasonably exclusionary conduct. The U.S. Supreme Court has said that such conduct consists of "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."' But that is an unhelpful definition; virtually every firm "wills" to win business from its rivals and thereby attain monopoly power.' Recognizing as much, courts have emphasized that exclusionary conduct must involve practices other than "competition on the merits."6 But what exactly is that? As Einer Elhauge has observed, these verbal formulae are "not just vague but vacuous" because they "are utterly conclusory, failing to identify a coherent norm that provides any real help in distinguishing bad behavior from good or even in knowing which way certain factual conclusions cut.”7

#### 2) Gut check – CX was crystal clear – Specifying objectives in enforcement clears the way for algorithmic antitrust – that’s the only way they solve case 😊

Casey & Niblett 21 --- Anthony J. Casey, Donald M. Ephraim Professor of Law and Economics and the Faculty Director of the Center on Law and Finance at the University of Chicago Law School, Anthony Niblett, Associate Professor at the University of Toronto Faculty of Law, the Canada Research Chair in Law, Economics and Innovation, and a faculty affiliate at the Vector Institute of Artificial Intelligence, “Micro-Directives and Computational Merger Review”, 1 Stanford Computational Antitrust 132, 12-15-2021, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4007518

For us, the major challenge to fully automated computational merger review— and perhaps all of computational antitrust law—is the difficulty in specifying the objective that an Al-infused algorithm should optimize." Micro-directives in merger review would require a clear objective function. But what if there is little consensus as to what that objective function is?

Indeed, many of the recent calls for a more aggressive approach to mergers in the United States are centered on the idea that the agencies have sought the wrong objectives.12 While some have argued that antitrust agencies should continue to look at economic harms to consumers—but do so more aggressively—others have suggested a broader set of objectives. They have argued that antitrust law should seek to achieve broader social goals, such as maximizing fairness, minimizing inequality, minimizing privacy harms, fostering free speech, or promoting a healthy democracy

Things get complicated when one considers the full scope of potential objectives for antitrust law. In the United States, the putative objective of antitrust law has changed markedly over time. And the current goal of maximizing consumer welfare—which is professed by agencies and found in the controlling doctrine—has many dimensions and lends itself to many interpretations.'4 Looking further afield, antitrust authorities around the world seek a broad and diverse range of potential objectives for competition law and in regulating markets.

Questions remain about how these various possible objectives are to be balanced ex ante. Fully automated computational merger review would require a clearly stated choice among competing views of antitrust law. The reviewing agencies must be explicit about what ends they are pursuing and how they prioritize competing values.

#### You can’t follow an overturned shipping exemption with AI, but you can follow the aff by escribing a well-defined meaning to enforcement

Casey & Niblett 21 --- Anthony J. Casey, Donald M. Ephraim Professor of Law and Economics and the Faculty Director of the Center on Law and Finance at the University of Chicago Law School, Anthony Niblett, Associate Professor at the University of Toronto Faculty of Law, the Canada Research Chair in Law, Economics and Innovation, and a faculty affiliate at the Vector Institute of Artificial Intelligence, “Micro-Directives and Computational Merger Review”, 1 Stanford Computational Antitrust 132, 12-15-2021, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4007518

But the technology will also expose a very human problem with the law. Identifying a precise objective is essential to the creation of micro-directives. For antitrust law, such objective is difficult to locate. The oft-stated purpose of maximizing consumer welfare lacks consistent meaning. And antitrust law is often used as a tool to address various other goals. This diminishes our ability to define clear objectives for an algorithm to optimize. The biggest challenge to the effective implementation of computational merger review is thus not the adequacy of technology, nor is it the availability of data. Rather, the real challenge is determining what, exactly, we want the law to achieve.

#### They won’t overrule

Nachmany 21 [Eli Nachmany is a third-year law student at Harvard Law School, where he serves as Editor-in-Chief of the Harvard Journal of Law & Public Policy. Prior to law school, Nachmany worked in the White House Office of American Innovation as a domestic policy aide and as the Speechwriter to the U.S. Secretary of the Interior. 8-9-2021 https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/]

But is American Hospital Association the proper vehicle for overturning Chevron? Three main obstacles block the way toward the overturning of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of Chevron exceptionalism for interpretations about appropriations provisions. And the third is the possibility that the Court itself is just not ready to overturn Chevron, instead preferring an alternate path even if it reaches the question.

For starters, the Court could stop short of the Chevron question altogether if it finds that the agency action at issue in the case is unreviewable. The Court has long held that administrative action embodies a presumption of reviewability. Essentially, the Court assumes that a given agency action is reviewable unless a statute precludes judicial review or the court has “no law to apply” in evaluating the agency’s action. The presumption of reviewability may also be a check against broad agency discretion; some judges find such discretion—as the recent revival of interest in the nondelegation doctrine evinces—constitutionally dubious.

But Professor Nicholas Bagley has called the presumption of reviewability itself into question. In a recent Harvard Law Review article, Professor Bagley argued that the presumption has no basis in history, positive law, the Constitution, or sound policy considerations. Professor Chris Walker has made the point that because of the longstanding nature of the presumption, the Court is unlikely to shift gears in American Hospital Association. Still, the Court has asked the parties for briefing on the question whether HHS’s action is reviewable. This presents the Court with the opportunity to (1) find that the statute at issue in this case falls into one of the clearly established exceptions to the presumption of reviewability, (2) cabin the presumption somewhat, or (3) draw on Professor Bagley’s work to eschew the presumption altogether. Any of these three options would allow the Court to resolve the case on non-Chevron grounds.

Next, the Court might decline to apply Chevron deference for a reason that is particular to the facts of this case. While jurists and commentators often speak of Chevron in general terms, some have posited that certain areas of public administration should obtain a sort of Chevron exceptionalism. As it pertains to American Hospital Association, Professor Matthew Lawrence has written that “[c]ourts should adopt a bifurcated approach to the application of Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions.” Because Medicare payment flows from a permanent appropriation of federal money, the argument goes, Chevron deference would be especially inappropriate for HHS’s interpretation of a Medicare appropriations provision. This is because, according to Professor Lawrence, deferring to agency interpretations of permanent appropriations provisions may do significant violence to the separation of powers and seriously encroach on Congress’s domain. The Court could resolve the case on these grounds, or even take a slightly broader view and find that Chevron is inapplicable in the appropriations realm as a general matter. Either way, such a result would likely produce a narrow holding applicable only to a subset of administrative action.

Finally, the Court could squarely answer the Chevron question and still refuse to overrule its precedent. The Court might (1) declare that the statute is clear and, therefore, Chevron deference does not apply; (2) issue a Kisor-esque decision that cabins Chevron’s general applicability but keeps the precedent on life support; or (3) simply reaffirm Chevron on stare decisis grounds and apply it to the present case. There is some overlap among these three doctrinal paths.

Beginning with the first option, Chevron itself set forth a two-step approach. At the first step, if Congress’s intent is clear, the Court must give effect to the clear statutory text. This part of Chevron is uncontroversial—if, for example, a statute commands that an agency “shall” do something, that agency’s interpretation that it “may” (and, by corollary, may not) do the thing would not be entitled to deference, because it conflicts with the clear language of the law. As such, if the Court finds the provision at issue unambiguous, it could answer the question presented in the negative without wading into the deference debate.

The second option laid out above uses the term “Kisor-esque” to refer to the Court’s recent decision in Kisor v. Wilkie. There, the Court was faced with the question whether to overturn Auer v. Robbins, which stands for the principle that courts must defer to agencies’ interpretations of their own ambiguous regulations. In Kisor, the Court upheld Auer, but significantly cabined its application. Writing for the Court, Justice Kagan explained that Auer deference is only proper when a regulation is “genuinely ambiguous,” determined after rigorous deployment of the full set of the canons of statutory interpretation. Moreover, the Court delineated a set of situations in which Auer deference would not come into play, even if the regulation was genuinely ambiguous—these include interpretations that create unfair surprise to regulated parties, interpretations that do not implicate the agency’s substantive expertise, and interpretations that do not reflect fair and considered agency judgment.

In a concurrence, Chief Justice Roberts supplied the key fifth vote for the Kisor majority. To be sure, he wrote that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” citing Chevron. But in recent years, the Court has narrowed the set of situations in which Chevron applies, establishing what Professor Cass Sunstein once termed a “Chevron step zero.” Given what the Court did in Kisor, it would not be unheard of for the Court to come out a similar way in American Hospital Association, summarizing the step zero doctrine and declining to apply Chevron deference for any one of a host of reasons (perhaps because of the permanent appropriations issue, as described above), while leaving Chevron on the books.

#### Oral args prove

Cook 2-15 [Emily Jane Cook, attorney at McDermott Will & Emery. 2-15-2022 https://www.jdsupra.com/legalnews/pending-supreme-court-decision-in-aha-v-5869561/]

The Future of Chevron Deference

This case presents the Supreme Court with an opportunity to consider the vitality of Chevron and the limitations on its application. Indeed, some commentators were surprised that the Court granted certiorari in the case and assume that it did so in order to reassess Chevron (For a sample of these discussions, see here, here and here.).

The Court has several options available to it. First, affirm the decision and reasoning of the DC Circuit Court, which embraced a framing of Chevron that is favorable to the government. Second, overturn Chevron. Third, take a page from Kisor by preserving Chevron and reinvigorating the limits on its application. The second option would shift power from the executive branch to the legislative and judicial branches and create a stronger incentive for Congress to draft legislation that is both comprehensive and clear. The third option would as well, albeit to a lesser degree.

Amicus briefs were filed by a variety of stakeholders, including trade associations representing not only healthcare providers but also entirely different regulated industries. Many healthcare providers argued that 340B hospitals deliver care to underserved and disadvantaged patients, and therefore should not bear the brunt of a rate cut. Other healthcare providers (mainly hospitals ineligible for the 340B program) argued that HHS’s interpretation recaptures dollars that were previously reserved for 340B hospitals, and reallocates those dollars across all acute care hospitals paid under the OPPS system, which furthers the original goal of the OPPS system by incentivizing the efficient delivery of outpatient services.

Stakeholders outside of the healthcare industry typically opined on the scope and vitality of Chevron. Some argued that Chevron presents separation of powers concerns because it enlarges the executive branch at the expense of the legislative and judicial branches. The unintended consequence of Chevron is that it incentivizes Congress to pass ambiguous laws and avoid accountability by handing off complicated policy decisions to unelected agency personnel. Additional stakeholders argued that agency personnel may not be impartial and Chevron enables political interference with the implementing of statutes. Other stakeholders generally supported the preservation of Chevron and argued that it is consistent with separation of powers and does not lead to an expansion of the administrative state when applied appropriately.

At oral argument, the Supreme Court justices repeatedly raised questions about the vitality of Chevron. Justices Kagan, Sotomayor and Breyer raised questions suggesting that they do not believe that this is the case to overturn Chevron. Justices Gorsuch, Kavanaugh and Barrett questioned whether the ambiguity in the statute raises a simple interpretive question that the Court should resolve, or an issue requiring Chevron analysis and implicating delegation to an agency. None of the questioning suggested that a majority of the justices will vote to overrule Chevron.

#### This is distinct from the status quo which PURPOSFULLY doesn’t define anticompetitive practices

Stucke 12 --- Maurice E. Stucke, Associate Professor, University of Tennessee College of Law; Senior Fellow. American Antitrust Institute, “ARTICLE: RECONSIDERING ANTITRUST'S GOALS”, 53 B.C. L. Rev. 551, March, 2012, Lexis

With the Supreme Court's gloss, section 1 of the Sherman Act punishes "unreasonable" restraints of trade. 57 Section 2 of the Sherman Act prohibits a company to "monopolize" or attempt or conspire to monopolize "trade or commerce." 58 Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly." 59 Unlike other countries' antitrust statutes, 60 U.S. antitrust laws do not identify specific objectives. An "unreasonable" restraint ultimately reflects a normative judgment about what is unreasonable.

Nor does the legislative history identify a single objective. 61 Hofstadter, for example, categorized antitrust's goals as (1) economic (competition maximizes "economic efficiency"), (2) political (antitrust principles "intended to block private accumulations of power and protect democratic government"), and (3) social and moral (competitive process was "disciplinary machinery" for character development) . 62

#### The threshold for thumpers is whether antitrust is moving AWAY from vague principles and toward SPECIFIC standards --- none of their evidence comes close to making that argument --- if anything current antitrust expansion has been UTILIZING SQ vagueness

Hatzius 21 --- Jan Hatzius et al, chief economist of investment bank Goldman Sachs, “Concentration, Competition, and the Antitrust Policy Outlook”, Goldman Sachs, July 18th 2021, https://www.gspublishing.com/content/research/en/reports/2021/07/19/ce786051-e0cd-46ba-8923-e30fc3673e9f.html

We think there are three main ways antitrust policy could shift.

A broader focus than “consumer welfare”. The July 9 White House executive order focuses on the interests of producers, suppliers, and workers, not just consumers. A number of congressional Democrats share the position, which is a basic tenet of the “New Brandeis School” of antitrust thinking.

A greater focus on “structures and processes” rather than economic outcomes. Since the 1980s, antitrust enforcement has focused primarily on price effects, often using quantitative empirical analysis. However, a focus beyond consumer welfare makes consumer price effects less central. Moreover, in an era of free digital services, measuring competition on price alone becomes more difficult.

A lower bar to challenging business combinations and practices and a more active antitrust enforcement. Beyond the approach enforcement takes, there is likely to be more of it. A broader scope, heightened focus and greater resources are likely to raise the probability that antitrust agencies investigate a given practice or business.

Competition policy changes are likely to come from three places. First, the antitrust agencies themselves are likely to change their policies. Newly seated FTC Chair Lina Khan gives Democratic commissioners a 3-2 majority and President Biden might soon nominate an Assistant Attorney General for Antitrust. The change in leadership is likely to result in meaningful changes to antitrust enforcement.

Already, the agencies have signaled intent to modify their merger guidelines. Critics of current antitrust policies have argued for revisions to the Horizontal Merger Guidelines and the Vertical Merger Guidelines, which the DOJ and FTC jointly publish as a guide to their analytical techniques, practices, and policies. Courts have followed prior revisions to the guidelines, so changes could affect not only agency decisions but court rulings as well.

The FTC has announced other changes, including rescinding its policy regarding “unfair methods of competition”, which Chair Khan described as having restrained FTC enforcement of unfair business practices, and lowering the bar for subpoenas and other investigative processes, which is likely to increase the frequency and scope of investigations going forward.

Second, the White House and other executive branch departments are set to take a renewed look at antitrust issues. On July 9, President Biden issued an executive order that establishes a new White House Competition Council and instructs executive departments and agencies to consider several general issues, among them:

The intersection of intellectual property and antitrust law: The order targets patent evergreening strategies, pay-for-delay settlements, and the licensing of standard-essential patents. These are of primary importance to biopharma and the tech/telecom sector, but could have implications for other sectors as well.

Regulatory and licensing requirements: The order raises the issue only in general but reforms could potentially lower the bar for new entrants in a number of industries, among them real estate, health care, and agriculture. Licensing requirements reduce labor market competition by limiting the number of eligible workers.

Non-compete clauses: The focus appears to be on lower-skill workers, in particular, though this could affect a broad range of occupations and industries.

The EO also has many industry-specific recommendations, though in most cases it highlights issues and does not call for specific actions. Some of these deal with competition directly, such as manufacturer-imposed restrictions on the repair of products from tractors to cell phones, which could disadvantage independent service providers and parts manufacturers. Others are aimed at addressing the symptoms of industry concentration on consumers, such as potentially excessive fees in the airline, financial, and telecom sectors. Among the sectors named in the EO are: agriculture, airlines, alcoholic beverages, biopharma, container shipping, financials, freight rail, health insurance, hospitals, internet platforms, real estate brokerage, and telecommunications.

#### Expansion of antitrust has been limited to making vague standard BROADER --- not LESS VAGUE

Meyers 3/4 --- Zach Meyers is a research fellow at the Centre for European Reform, “The EU's Antitrust Lessons for America”, Mar 4, 2022, https://www.project-syndicate.org/commentary/eu-competition-policy-more-predictable-than-us-by-zach-meyers-2022-03

Compared to the EU, US antitrust policy in recent decades has been weak. For example, dominant firms can set prices as high as they like, on the assumption that if they raise prices too much, rivals will emerge to undercut them. This approach served America well in the past, but it is now difficult to justify – especially in digital markets, where the likes of Google, despite charging retailers high prices to advertise online, still have no viable rivals.

But the Biden administration’s bold competition agenda may overcompensate for past laxity – and this agenda will be driven by legislation, which will sideline US courts’ past conservatism in competition cases. The basic principles of EU competition law, on the other hand, are set out in international treaties and interpreted by the ECJ in judgments that cannot be as easily circumvented.

The EU – at least outside the tech sector – is therefore sticking to well-understood and enduring competition-law principles. By contrast, US antitrust enforcement agencies have simply reinterpreted vague standards in new ways, for example by planning to prosecute firms that do not breach conventional competition law, but use so-called “unfair methods of competition.”

#### AI not used in antitrust now --- but its being explored

Mattiuzzo & Machado 22 --- Marcela Mattiuzzo, PhD Candidate at the University of São Paulo, Henrique Felix Machado, Master of Laws and Bachelor in Law from the University of Brasília, “Algorithmic Governance in Computational Antitrust—a Brief Outline of Alternatives for Policymakers”, Stanford Computational Antitrust, VOL. 11, 2022, https://law.stanford.edu/wp-content/uploads/2022/03/Mattiuzzo-Machado.pdf

However, paradoxically, antitrust itself is still lagging behind in incorporating digital elements into its own practice.5 Taking note of this situation, a number of scholars and practitioners have very recently started to devise proposals with the aim of closing the gap. In Eliot’s6 terms, the application of “antitrust to AI” is slowly helping to develop its counterpart, the application of “AI to antitrust.” We will refer to this approach, following how some of its proponents have conceived it, as the “computational antitrust” proposition.7

#### No computational antitrust --- the challenge of crafting it under existing laws is too high

Eliot 22 --- Dr. Lance Eliot is a globally recognized expert on AI and previously served as a professor at the University of Southern California, “Response: Artificial Intelligence Dovetails Judiciously into Computational Antitrust”, January 12, 2022, https://law.stanford.edu/2022/01/12/codex-conversations-on-the-trail-of-computational-antitrust/

These stated uses of AI are considered to be embedded within the context of humans and machines working side by side, as it were. I mention this salient point because we are not yet at a juncture of AI systems attaining a semblance of autonomous capacities per se. For now, the idea is that these would be AI-based computational tools that are developed and tuned toward the antitrust realm for active hands-on use by antitrust analysts, regulators, enforcers, researchers, etc.

Few such AI-infused tools exist today in the antitrust space and, thus, suggest there is ample opportunity and challenge ahead in crafting and fielding these sorely needed AI-assisting capabilities.

#### Government AI is at a crossroads --- systems are hard to program and without simplified rules it won’t be developed

Eliot 20 --- Dr. Lance B. Eliot is a world-renowned expert on Artificial Intelligence (AI) and Machine Learning (ML)., Professor at USC, “Insightful New Report Is An Eye-Opening Look At How U.S. Government Is Embracing AI”, Feb 24th 2020, <https://www.forbes.com/sites/lanceeliot/2020/02/24/insightful-new-report-reveals-an-eye-opening-look-at-how-our-government-is-embracing-ai/?sh=24c6d10a3f35>

Indeed, this brings up a worthwhile history lesson, aiming to learn from history lest we are tempted to repeat it (well, repeating those aspects that we’d just as soon have learned to avoid or avert).

We are currently in an era of AI that many refer to as the AI Spring.

Prior to the AI Spring, there was the AI Winter (a time during which AI was less revered and had fallen somewhat out-of-favor).

The days prior to the AI Winter were a heyday of excitement for AI and became known for the advent of expert systems, also called knowledge-based systems or symbolic-AI.

Essentially, the attempt to craft AI-based systems consisted of identifying the golden nuggets of knowledge that domain experts used in performing their day-to-day tasks, and then imparting those bits of wisdom into various machine-executable rules.

Turns out that many of those knowledge-based systems were arduous and costly to build, and likewise arduous and costly to maintain.

To a great extent, the difficulties had to do with getting human domain experts to readily identify the “rules” that they used to perform their tasks. Knowledge elicitation is a messy and stubborn thing to achieve, plus getting the derived knowledge to be packed into simplistic rules was equally onerous to undertake.