## CP – Counter-Cyclical

### Overview

### Solvency---AT: Delay

#### 2. Zero delay. It creates some protections just as fast. Adjustments are dynamic and instant.

Yair Listokin 19, Professor of Law at Yale Law School, Milton Friedman Fellowship, Visiting Professor at Columbia Law School, Visiting Professor at Harvard Law School, Visiting Professor at New York University School of Law, “The Costs of Expansionary Legal Policy,” in Law and Macroeconomics: Legal Remedies to Recessions, Harvard University Press, 2019, pp 139–162

In addition, some regulatory interventions are less subject to the problems of delay than others. Formulating entirely new rules to stimulate the economy is hard. Delaying the application of rules that impede spending until the economy is more robust or hastening the implementation periods of rules that stimulate demand so that spending is concentrated in the bust are easier, and more timely, interventions. By focusing on timelier interventions, regulators can have meaningful impacts on spending within time frames appropriate for episodes of the zero lower bound.

### Solvency---AT: Certainty

#### 2. The CP is certain. Benchmarking to an objective set of economic criteria solves.

Tianna Larson 21, J.D., 2021, Wake Forest University School of Law, "Countercyclical Antitakeover Law," Wake Forest Journal of Business and Intellectual Property Law, vol. 21, Spring 2021, pp. 319-362, Lexis

1. Practical Challenges of Dynamic Legal Rulings

Judicial decisions have a real and lasting economic impact on the business environment. Judge-made law affects business entry, 276stakeholder rights, 277innovation and competition, 278and business valuations. 279Judges also influence the market for corporate control when they decide the scope of directors' rights to defend against potential proxy battles. If lawyers anticipate their clients' liability for implementing preclusive antitakeover defenses, they will advise against their use. Conversely, if lawyers expect judges to uphold certain antitakeover devices under particular facts, they will advise clients to implement the devices. The common law of antitakeover devices directly impacts the freedom of the market for control. Countercyclical antitakeover law should encourage judges to uphold takeover defenses to a greater extent during zero lower bound recessions than during ordinary times.

As an initial matter, it is difficult to weigh the cost of implementing countercyclical judicial rulings. Maintaining legal certainty is a deeply ingrained goal of judicial decision-making, and it is especially [\*361] important to maintaining financial market stability. 280Unrestrained decisions and selective enforcement of contracts--whether a result of judges' biases or economic shortcomings--could chill market participants who are faced with unpredictable outcomes.

Fortunately, there is a convenient solution to the certainty problem: the countercyclical decision trigger can be benchmarked to the fed funds rate. While no technical definition of a zero lower bound environment exists, it occurs when the fed funds rate is at or near zero percent. 281Given the direct relation to interest rates, benchmarking the trigger to the fed funds rate is appropriately responsive to deep recessions constrained by perpetually low interest rates. 282Moreover, interest rates can sometimes be constrained by the zero lower bound, even if the economy is technically not experiencing a recession--a phenomenon known as the "liquidity trap." 283In liquidity traps, monetary and fiscal policy are ineffectual at providing the necessary stimulus. 284In those circumstances, expansionary legal policy remains justified.

Benchmarking the trigger of countercyclical law to the fed funds rate is superior to imposing change on the basis of individual judges' opinions about the economic status. It is unrealistic to expect judges to properly define the precise limits of a recession--we do not even expect economists to do so. 285Moreover, the threat to legal certainty is mitigated by relying on the fed funds rate. The rate is easily accessible, which gives all parties equal notice of the prevailing DHPP law. 286And, [\*362] the Federal Reserve periodically indicates the direction in which it is likely to push rates. 287While by no means a promise, these predictions, coupled with the prevalence of interest rate speculation by financial experts, give parties equal access to notice about the probable state of DHPP law. This anticipatory access alleviates the risk to parties being blind-sided by the shifting interest rates.

The triggering rate for permissive DHPP law should be at or near zero percent. To ensure consistency across jurisdictions, a committee of economists should be assigned with the role of determining the precise rate that necessitates the adapted DHPP law. Assigning a committee with the duty to determine--based on the fed funds rate--when judges should flip their DHPP decision switch thus accounts for liquidity traps and mitigates the concern for inconsistent application. Practically, doing so will require funding and the selection of a qualified committee. This Note does not attempt to quantify the costs in doing so and proceeds on the assumption that those costs are not prohibitive.

#### 3. Responsiveness to real world considerations and expert review enhances perceived regulatory certainty.

Frank Naert 10, Faculty of Business and Public Administration, University College Ghent, "Credibility of fiscal policies and independent fiscal bodies," paper presented at the International Association of Schools and Institutions of Administration, Nusa Dua, Bali, Indonesia, 2010, https://biblio.ugent.be/publication/1086232/file/1086234.pdf

2. Independent agencies and credibility

We start with a general description of the link between credibility of policymaking and the position of the policymakers. It is a general belief that credibility can be enhanced by creating institutional agencies operating independently from politics and from the target groups of the specific policy.

Two approaches to the credibility question can be found in the literature. The first approach (e.g. followed by Gilardi (2002)) is narrow and only looks at independence of agencies from government. The second and broader approach also considers independence from stakeholders and consumers.

In the first approach the starting point is the decision made by governments to delegate authority. This decision has to do with the time-inconsistency problem that is connected to credible policy making.

Credibility is the capacity for inspiring belief. A credible policy is a policy worthy of being accepted as true or reasonable. A politician/government/regulator is credible when agents believe he will fulfil his promises. Credibility is needed when coercion is not an option for policy makers.

A typical situation is posed by investment decisions in a liberalized setting. These decisions are made by private investors and not longer by government itself or by public companies. Another typical situation is when economic actors make decisions about wages and prices in the context of the goals for monetary policy set by government.

This latter kind of situation was the starting point for the literature on central bank independence. In a seminal paper, Kydland and Prescott (1977) stress the importance of an independent central bank because there is a potential conflict between policymakers’ discretion and policy optimality, called the ‘time inconsistency of policy’. Often policymakers need to credibly bind themselves to a fixed and preannounced course of action. Otherwise the danger exists that policy is altered because of changes in preferences of policymakers (Gilardi 2006).

In a more general sense a time consistent policy is a policy that will be sustained as circumstances change over time. Adhering to a policy rule may require pursuing a policy at a particular point in time that is not optimal at that time. In contrast, policy that is time inconsistent will be reversed in the future due to predictable developments over time.

In a typical democratic setting time inconsistency will be the rule rather than the exception as democracies are characterized by the short term time horizons of politicians in view of elections and by the accompanying changes of the ruling party or coalition.

In regulatory policy credibility is important, especially in the aftermath of utilities privatization and liberalization (Gilardi 2002 and 2006). There are clear links between the literature on central bank independence and this literature. Policy makers have incentives to promise a favourable regulatory environment to attract investors, necessary for fostering competition. Once relatively irreversible investments are made, policymakers may be tempted to go back on their commitment. Rational investors will not invest in the first place, creating a suboptimal situation. In the literature this is called the ‘hold up’ problem (Kirkpatrick, Parker & Zheng 2006).

A device to guarantee a time consistent policy is to create a commitment mechanism for removing the risk of opportunistic policy in particular contingencies. Independence for regulators can act as such a commitment mechanism (Gilardi, 2002). In this way, governments prohibit themselves and future policymakers from taking these short-sighted decisions.1 They ‘tie their hands’, so it will be politically more costly to overrule a decision made by an agency. Thus policymakers cannot use discretionary policy as a mechanism to favour a particular interest group.2 [FOOTNOTE 2 BEGINS] 2 Another explanation for delegation has to do with political uncertainty (Gilardi, 2003). Several authors state that, because of political uncertainty, a government may delegate authority to an agency because it wants to increase its own political influence for longer periods in time (Johannsen, 2001; Gilardi, 2006). A government has a political property right today, but is uncertain about still having such a property right tomorrow. Future policy makers will be less able to change the policy of current decision makers when authority is delegated. [FOOTNOTE 2 ENDS]

The more independent an agency is, the more credible the policy is for stakeholders, potential investors, consumers, etc. Policymakers delegate to increase the credibility of their policy commitments.

The ‘credibility hypothesis’ is stated extensively in the literature (Gilardi, 2002; Gilardi 2006, Genoud, 2003, Larsen et al. 2006). Credibility is a valuable asset for governments, because rational individuals base their expectations on all economically available information at the moment of decision. Rational actors’ beliefs are influenced by beliefs about future actions of policy makers.

#### 4. No impact to uncertainty. Their cards are bad science.

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Little evidence exists, either in policy debates or academic research, that a patchwork of local laws harms businesses, residents, and consumers. When proponents of preemption provide examples, their arguments are generally arguments about the supposed harm of the regulation itself, rather than about the marginal costs of a patchwork of local laws.

Pro-preemption arguments tend to cite the patchwork most plausibly when it can be linked to clear economic harms caused to businesses, consumers, or residents, because of variation in regulation or costs. Preemption debates about labor laws are the most likely to make these claims. However, concrete examples refer to overall regulatory costs and not the marginal costs of variation.

Research on policy costs and benefits tends to focus on the regulation’s overall costs and not the local patchwork’s marginal effect. Research on these marginal costs—to businesses, consumers, and residents (and to a somewhat lesser extent, local/state governments)—could help inform ongoing policy debates and future policy design. However, because research on these policies has shown both positive and negative economic effects that can be smaller than both opponents and proponents claim, we expect that the actual marginal effects of a regulatory patchwork would be small even if measurable.

These arguments have ramifications for the concept of cities as “laboratories of democracy.” If a local law does not work or the costs outweigh the benefits, it can be amended or dropped. If the local law works, other governments, even at the state or federal level, can pass it. To the extent that state-level preemption debates are making claims about the harms of a local patchwork, then, there is an underpinning of paternalism: the state is protecting cities from themselves.

### AT: Perm: Do Both---2NC

#### Displacing collective bargaining rights with antitrust is the only way to prevent unions from causing inflation in tight market conditions.

Laura M. Alexander 25, Assistant Professor at Ohio State University, J.D. from Georgetown University Law Center, B.A. from Reed College, "Competition and Countervailing Power," Ohio State Legal Studies Research Paper No. 935, Antitrust Law Journal, 08/08/2025, SSRN

Countervailing power is a response to market power. It is the idea that market power on one side of a market can be countered by developing market power on the other side of the market. The relative market power of the parties to a bargain affects their bargaining dynamics. For example, the market power of a labor union in the market for selling labor might allow workers to countervail the market power of a large employer. Or, faced with a powerful producer, retailers might seek to consolidate or collude to obtain countervailing market power to obtain better prices or terms from the producer.

Both competition and countervailing power can be viewed as potential solutions to the problem of market power. As a matter of economics, one or more market participants with significant market power (a monopolist or monopsonist is an extreme case) is suboptimal because the company with market power maximizes its profits by reducing its output to drive up prices. This results in higher downstream prices (or lower upstream prices), which harms downstream consumers (or upstream sellers), and also in deadweight loss, which is a loss to the economy generally. This situation is typically illustrated with a graph like Figure 1.

It is generally accepted that, to avoid these harms, one must move the market back toward the price and output level that would have obtained under perfect competition.2 There are various ways, in theory, to do this. The traditional antitrust approach deploys competition, to avoid the accretion of market power in the first place and to address market power when it occurs. It does so by, for example, barring mergers that would increase the merged entity’s market power, and by prohibiting conduct by a party with market power that prevents efforts by existing competitors and new entrants to undermine the dominant firm’s market power.3 If successful, this will prevent any firm from becoming dominant or will create the conditions where rivals of the dominant firm erode its market power. By keeping or quickly returning the market to the competitive state, traditional antitrust seeks to use competition (i.e. horizontal rivalry) to maintain an efficient level of transactions, avoiding deadweight loss and a transfer of surplus from consumers to dominant firms.

The countervailing power approach also seeks to eliminate the economic loss from the market power of a dominant firm and to move the market back toward the optimal price and output level. Rather than relying on horizontal rivalry, i.e. competition, to do so, however, countervailing power solutions are premised on the idea of countervailing the dominance of the upstream (or downstream) firm with an equally dominant downstream (or upstream) firm. The idea being that bilateral monopoly or bilateral oligopoly, i.e. powerful but equally matched entities at both levels of the market, is better than unilateral monopoly. “Better” in this context means that the scenario results in price and output levels closer to the optimal level.

Whereas the competition-based approach in traditional antitrust focuses on maintaining or restoring rivalry between parties in a horizontal relationship (i.e., firms at the same level of the market), the countervailing power approach focuses on achieving balance between parties in a vertical relationship (i.e., operating at different levels of the supply chain).4

Large parties in a vertical relationship, such as a buyer and a seller of a given product, bargain with each other. Accordingly, economists speak of the relative power of the parties in those bargains as bargaining leverage. 5 Where companies confront a powerful buyer or sell into a concentrated market or, conversely, are dependent on a single large supplier or purchase inputs from a highly concentrated market, the companies are subject to the superior bargaining leverage of their counterpart(s). By increasing their own bargaining leverage, the theory goes, the companies facing the powerful counterparty can countervail the other parties’ bargaining leverage. In this sense, countervailing power is an inherently vertical concept.

But, bargaining leverage and countervailing power are also inseparable from the horizontal aspects of market power. A party’s leverage in a given bargain derives from the alternatives available to it if it fails to strike a bargain, its “walk away” options.6 When a party’s bargaining partner is a monopolist, the party has, by definition, very few if any walk away options, and thus very little bargaining leverage.7

But for purposes of bargaining theory, what matters most is not the absolute level of bargaining leverage a party has, but the relative bargaining leverage of each party to the other, that is, the balance of bargaining leverage between the parties. Where two parties to a bargain have comparable levels of horizontal market power in their respective markets, their walk away options will be similarly unattractive, and their bargaining leverage will be balanced.8 Where one party to the vertical bargain has market power in its horizontal market and the other does not, that imbalance gives the party with horizontal market power a relative advantage in bargaining leverage over the party without market power.9 And, when small players with lots of horizontal competitors negotiate with a monopolist, the monopolist has the ultimate bargaining leverage. Indeed, in this scenario no bargaining takes place at all and the monopolist simply imposes the monopoly price.

Countervailing power reduces the disparity in relative bargaining leverage that the two parties to a bargain experience. The primary means by which it does so is to increase the horizontal market power of the company with less leverage to balance out the market power of the company with more leverage. Or, put another way, to reduce the walk away options available to the monopolist or monopsonist. 10 The result is that efforts to assert countervailing power decrease the imbalance in bargaining leverage (a vertical effect) by increasing market power (a horizontal effect). The interaction between these two dynamics determines the effect of countervailing power on downstream and upstream market outcomes.11

For example, take the case of a group of manufacturers who buy a necessary input for their products from a monopolist but sell their finished products into a competitive downstream market. In this scenario, assuming the standard downward sloping demand curve, the monopolistic supplier will opt to sell fewer inputs at inflated prices, leading to deadweight loss and monopoly profits for the supplier. To mitigate the effect of the upstream monopoly, the manufacturers might seek to form a collective buying agreement. If the collective buying agreement is successful and includes all of the buyers of the input, then the buyer power of the collective will countervail the seller power of the monopolistic supplier, and the supplier’s bargaining leverage over the manufacturers will be neutralized.

One important question is whether deploying countervailing power as a response to market power will actually move the market toward the optimal outcome. Put differently, does shifting from monopoly to bilateral monopoly move the price/quantity in Figure one from point M towards point C? (Figure 4)

The answer appears to be sort of, sometimes, maybe, at least within the immediate market where it is deployed. Compared to the pure monopoly scenario, where buyers without market power face a single seller with monopoly power, models suggest that allowing the buyers to collude or merge will lead to price and quantity closer to the optimal level.12 In theory, parties to a bilateral monopoly could actually transact the optimal quantity of goods, although in practice they rarely do so.13

Even where the exercise of countervailing power leads to a bilateral monopoly where an optimal quantity of goods is transacted, however, both theory and practice suggest the bilateral monopoly will have an uncertain effect on prices.14 This is because the price is determined by how the bargaining parties divide the mutual benefit of the bargain they strike, i.e. the surplus. This, in turn, is determined by the parties’ relative bargaining skill and tenacity, what economists call bargaining power and which is distinct from bargaining leverage.15 It does appear, though, that compared to a pure monopoly scenario (a single seller of an input to an atomized group of buyers), bilateral monopoly improves the quantity of goods transacted and, at least generally does not make prices worse. In Figure 4, then, the shift from monopoly to bilateral monopoly can be expected to bring the quantity of goods transacted closer to QC, but not necessarily to point C, as price may fall anywhere between PM and PC.

The pure monopoly scenario, however, is vanishingly rare.16 In the much more realistic scenario where there is not a single seller with absolute market power, but one or more sellers with some market power facing a heterogenous group of buyers, the outcome to be expected from deploying countervailing power is much less certain. Because the sellers have some intermediate level of market power—somewhere between perfect competition and monopoly— allowing the buyers to collude or otherwise join forces could result in buyers that have more, less, or an equal amount of bargaining leverage as the sellers have. In this scenario, deploying countervailing power could actually push the market past the optimal point C and result in a monopsony outcome. This monopsony scenario could, in turn, decrease incentives for new entrants in the upstream market (due to subcompetitive pricing) and push out marginal suppliers, compounding the very concentration problem the countervailing power was deployed to resolve.

In sum, deploying countervailing power in markets that are completely monopolized will be expected to move the quantity of goods transacted toward the optimal level while having an indeterminant but positive impact on prices. Deploying countervailing power against sellers with market power short of monopoly power, however, has the potential to push the market outcome beyond what would obtain under competition and convey market power on the buyers.

Where countervailing power is deployed by workers or end consumers, the above analysis is largely complete. But where countervailing power is being deployed by intermediaries in the supply chain, there is the further question of whether the benefits of countervailing power are passed on to the buyers’ customers (or the sellers’ suppliers) and ultimately to end consumers (or workers). The answer to this question is almost always no.

In a recent study, Dranove, et al., concluded that mergers between intermediaries may well cause prices to end consumers to go up, even if the merger equalizes bargaining leverage between the merging buyers and powerful sellers.17 The authors found that pricing benefits are only passed on to consumers (that is, those that buy from the buyers) under highly specific circumstances that rarely obtain in the real world: namely, when the when the upstream seller market is highly concentrated, the downstream market is highly competitive, and the two merging parties (or cooperating parties) are not close competitors in the downstream market competing for the same customers.18

In the retail sector, Chen studied the interplay between input price reductions from countervailing power exercised by consolidating retailers and the upward pressure on downstream prices from the corresponding increased concentration in the retail market.19 They concluded that the net impact on downstream prices depends on several factors, but that “[g]enerally, however, a countervailing buyer power effect does not compensate the price hike driven by the increase in market power, and consumers are worse-off when the retail market becomes more concentrated.”

Moreover, any potential benefits to consumers must be heavily discounted by the very real risk that such cooperation or merger will facilitate vertical collusion rather than vigorous bargaining between the various levels of the supply chain. Bilateral monopoly carries significant risk of collusion between the buyer and the seller. The reason is straightforward: vertical collusion in this context is profitable. Just as a monopolist at one level of a market will set a monopoly price to maximize profits, two monopolists at adjacent levels in a market will quickly realize their interests align in imposing a monopoly price on the downstream market and dividing the resulting monopoly profits amongst themselves.20 One example of this dynamic occurred in the 1960s with industry-wide unions. Moreover, because this outcome can be achieved without a tacit or express agreement, it is perfectly legal under U.S. antitrust laws.21 Accordingly, bilateral monopolists have every incentive and ability to impose monopoly prices on the downstream market. 22

An interesting scenario where countervailing power deployed by an intermediary might benefit end consumers is the cooperative buying organization or group purchasing organization. A cooperative buying organization is a membership group that negotiates collective pricing with an upstream seller on behalf of its members. Importantly, the CBO does not place any limits on the amount its members can purchase at negotiated prices or any restrictions on terms of sale in the downstream market. Properly administered, in a market with strong downstream competition, such an organization could potentially obtain the benefits of balancing upstream bargaining leverage while maintaining the benefits of downstream competition which would cause some or all of the benefits of the countervailing power to be passed through to end consumers. When negotiating with an upstream monopolist, one would expect a sufficiently large CBO could achieve higher output and lower prices than could be obtained by independent negotiation of its members. When negotiating with upstream oligopolists, however, the risk of overcompensating remains if the CBO becomes powerful enough that the balance of bargaining leverage tips in favor of the CBO. There are also risks that collaborating in the CBO would provide an avenue to collusion in the downstream market. And, the existence of the CBO would undermine incentives for new upstream entrants. All of which are risks generally with countervailing power solutions. Nevertheless, the CBO scenario is the most promising application of countervailing power by intermediaries in terms of potential benefits to end consumers and, as discussed below, the most difficult case for antitrust doctrine.

In sum, economic theory suggests that countervailing power—whether exercised by buyers or sellers—may have modest improvements over pure monopoly or pure monopsony in the market where it is deployed, but that countervailing power deployed in intermediate markets—particularly when accomplished via a merger or other agreement that eliminates downstream competition--does not reliably drive down prices for consumers and cannot even be relied on to bring intermediate prices closer to competitive levels. Moreover, it increases the incentives for vertical collusion between the countervailing parties while simultaneously making it easier for those parties to collude.

II. A BRIEF HISTORY OF COUNTERVAILING POWER

John Galbraith is often credited with coining the term “countervailing power,” but the idea and the term predate him, and are at least as old as the antitrust laws themselves. Indeed, there is at least some recognition of countervailing power at common law. Always controversial, interest in countervailing power has waxed and waned in academic and policy circles. Antitrust enforcers, on the other hand, have been much more uniformly and consistently hostile to countervailing power ideas and defenses.

In this section, I begin with a discussion of the history of countervailing power as a policy idea, particularly as it relates to antitrust and competition scholarship and policymaking. I then contrast this with how countervailing power has been treated by antitrust enforcers and courts.

A. COUNTERVAILING POWER IN THEORY

John Kenneth Galbraith is generally credited with coining the term “countervailing power” in his 1952 treatise on the subject.23 Galbraith, though, argued he was only giving name and recognition to an idea already being deployed throughout various New Deal policies.24 In fact, the roots of countervailing power ideas reach back even further, at least as far back as late-19th century discussions surrounding the enactment of the Sherman Act.

Oliver Wendell Holmes’s antitrust philosophy was tinged with countervailing power ideas. Indeed, Spencer Weber Waller has dubbed Holmes a “direct ancestor” of the countervailing power movement. 25 Like Galbraith, “Holmes saw the process of combination as both inevitable and desirable,”26 and viewed collective action to counteract market power as entirely legal and reasonable.27

While countervailing power was not new, it gained new prominence as a policy concept during the New Deal. As Ellis Hawley recounts, in the early days of the New Deal, seeking a solution to market concentration beyond atomized competition on the one hand and government regulation on the other hand, “[g]radually, haltingly, incoherently, almost haphazardly, another possibility [emerged], one that sprang not from any preconceived plan, but rather from the process of political compromise, the conflict of ideals, and the interplay of power between rival pressure groups.”28 The “dominant theme” of this new alternative, according to Hawley, was “pitting one power concentrate against another, and developing an economic system of ‘countervailing powers’ capable of achieving the full utilization of resources that a free market was supposed to achieve.”29

Countervailing power, according to Galbraith, was the key to understanding how the American economy was thriving post World War II, despite the palpable and enduring rise in the power of large corporations moving markets away from a state of pure competition.30 To Galbraith, the question was not so much a choice between pure competition and countervailing power—as far as Galbraith was concerned, the pure competition model was already dead31 and the tendency toward concentration of ownership in an industry was “deeply organic.”32 Rather, Galbraith took as fact that oligopoly is inevitable and offered countervailing power as an explanation for why its “consequences, which in theory are deplorable, are often in real life quite agreeable.”33

Galbraith’s argument that countervailing power is an inevitable and socially desirable response to monopoly or oligopoly power34 was controversial from the outset; Scholars, Stigler and Hunter most notably, argued that there was no reason to believe that any gains reaped by the party asserting countervailing power would be passed on to end consumers.35

Since Galbraith’s seminal work, economic theory has advanced considerably, and we have gained experience with a post-war economy characterized by ever larger and more sophisticated corporations. In those intervening years, as discussed above, economists have identified only narrow circumstances in which countervailing power can substantially improve market outcomes over a one-sided monopoly, and even more narrow circumstances where those gains are passed on to downstream markets. Empirically, accumulated experience with legally-sanctioned cartels suggests that state-sponsored countervailing power largely fails as a practical solution to market power.

The one area where countervailing power has had some modest success is with collective buying associations discussed above. In shipping, aggregators like Pirateship and Shippo have been able to access discount rates negotiated by large purchasers by pooling shipping purchases from independent parties. Another example is Ace Hardware, which jointly negotiates terms for upstream purchases on behalf of all Ace Hardware stores, which stores then operate independently in downstream markets. It is hard to know in either case the extent to which the better terms offered to these purchases stem from countervailing power as opposed to economies of scale and other efficiencies. For example, the rates Pirateship can access from the US Post Office depend not just on purchase volume, but standardization of address format, labeling, and packaging materials, all of which make packages cheaper for USPS to handle.

Despite this longstanding skepticism and limited success in operation, countervailing power remains a persistent idea in competition policy, particularly as corporations have grown larger and markets more concentrated. Although not always identified as such, countervailing power ideas are regularly entertained in antitrust and competition circles.

In the 1990s, countervailing power ideas emerged in the concept of “power buyers,”36 particularly as a defense to merger challenges. Advocates of the power buyer theory posited that, where a merger between sellers might otherwise tend to negatively affect competition by providing the merged entity incentives to raise prices or reduce output, the presence of a powerful buyer could neutralize the ability of the merged firm to act on those incentives. While not always identified as such, the power buyer is just a specific case of the more general countervailing power concept.37

After enjoying a period of some acceptance by courts and agencies, the power buyer concept has since lost salience. But interest in countervailing power, generally, has never fully been extinguished. Instead, the concept lay somewhat dormant during the first decades of the 21st century, only to reemerge in slightly different form recently.

Notably, more recent interest in countervailing power in academic circles has come both from traditional conservative sources advocating for narrower application of the antitrust laws and also from progressive voices who typically advocate on behalf of disenfranchised and under-privileged actors in the economy. For example, the liberal-leaning Warren Grimes has written that “a wholesale failure of antitrust to acknowledge a collective action defense in the face of, say, a dominant buyer possessing monopsony power, leads to economic consequences that are the very antithesis of competition and to well-founded cynicism about the antitrust laws.” 38 On the other hand, Daniel Sokol and Roger Blair, who lean decidedly more conservative, have likewise argued that mergers to monopoly should be allowed to counter a monopolistic bargaining partner.39 Tom Campbell has also argued that mergers to monopoly should be allowed to counter a monopsonistic buyer.40 All of these proposals are rooted in countervailing power.

Outside academia, legal arguments and policy solutions rooted in countervailing power abound. For example, recently it has been suggested the antitrust laws should allow rideshare drivers to collaborate in ways that would otherwise be illegal in order to counter the bargaining leverage of Uber and Lyft. Others have suggested we should allow medical device makers to merge, even if such a merger would impair horizontal competition among the device makers, because it would even out the bargaining leverage between device makers and the highly-concentrated hospital market into which they sell their products. When Apple coordinated a cartel of book publishers, many justified the collaboration as necessary to offset Amazon’s market power in ebooks, despite the fact that the scheme would increase retail prices of ebooks. 41

In progressive policy circles, there are increasing calls to deploy countervailing power to counteract market power, reduce wealth inequality, protect small businesses, and promote democracy. Some progressives support countervailing power solutions because they view the antitrust laws, at least as currently applied, as inadequate to effectively check corporate power and too narrowly focused on prices. On this view, countervailing power is seen as a second-best solution in the face of a perceived failure of antitrust enforcement.42 This cynicism from certain groups about the effectiveness of the antitrust laws is not entirely new. Indeed, his perception of the limited utility of the antitrust laws in the face of widespread oligopoly was fundamental to Galbraith’s embrace of countervailing power.43 But, these long-circulating ideas have recently been picked up by some progressives seeking to expand the antitrust laws to account for goals beyond or instead of consumer welfare or even total welfare.44

Some progressive antitrust scholars argue that, beyond low prices and high output, the antitrust laws should also be used to empower the disenfranchised, promote democracy, and decrease inequality by embracing a Brandeisian conception of the antitrust laws as a tool for protecting and preserving small businesses; allowing small(er) businesses to collude or collaborate to countervail powerful counterparties is seen as consistent with that view.45 Accordingly, they argue that there is a social need to “protect democratically owned and governed businesses and collectives from antitrust suits and to support these entities as a means of countering the power of monopolistic corporations.”46 Some adherents to this school further argue that it is not just bad policy but fundamentally unfair to allow those organized within a corporation to collude, while denying the same protection to collaborations between small competitors.47 Members of this camp often argue that countervailing power promotes competition and that, by counteracting market power, countervailing power will yield healthier, betterfunctioning markets.48

According to this line of reasoning, despite the antitrust laws, markets have become concentrated and large companies have acquired market power. At the same time, the Sherman Act and, in particular, its condemnation of collaborations among competitors, prevents small buyers and sellers from banding together to bargain against huge corporations with market power.49 To protect small businesses and to mitigate the harm from the market power held by large corporations, some progressive policymakers and academics advocate for exceptions to the antitrust laws to allow smaller businesses to band together to collectively bargain with powerful corporations and countervail their market power.

On the other end of the spectrum, a second vein of interest in countervailing power comes from those who believe antitrust should be guided by a total welfare, rather than a consumer welfare, standard. Members of this camp, such as Daniel Sokol and Roger Blair, find support for countervailing power in a rejection of the consumer welfare standard in favor of a total welfare standard.50 They argue that “[m]ergers (or agreements) that convert monopoly (or monopsony) to bilateral monopoly are welfareenhancing,” not because of benefits from wealth distribution but because bilateral monopoly, theoretically, generates more surplus than monopoly or monopsony.51 Importantly, these authors are measuring total surplus, not consumer surplus. Nevertheless, because they argue that the goal of antitrust should be to maximize total welfare—a minority position at odds with the broad acceptance of the consumer welfare standard in modern antitrust—they take the position that mergers or agreements that enhance total welfare should pass muster under the rule of reason.52 Blair and Sokol acknowledge that this position—advocating for merger or collusion to monopoly—is “disconcerting,” and that the outcome is much less clear under a consumer welfare standard, but nonetheless adhere to this position.53 Notably this view fails to distinguish and separate the idea of competition from that of “welfare enhancing.” This conception of competition as amounting to anything welfare enhancing, which is discussed in more depth in Part IV, mirrors Bork’s view that “‘[c]ompetition,’ for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.”54

This same bipartisan embrace of countervailing power can be seen how scholars and commentators have treated some recent antitrust cases. For example, in the eBooks case, Apple and a group of publishes collaborated to fix prices on electronic books to countervail Amazon’s market power in the distribution of ebooks. DOJ sued Apple and the publishers for price fixing, and a diverse coalition of thinkers and advocates from camps that normally oppose one another united behind Apple’s defense of its conduct. Although the court rejected Apple’s argument that it organized a cartel to countervail Amazon’s eBook monopoly for the good of consumers, the argument was surprisingly well received by the public; a wide array of commentators and industry participants defended Apple’s blatant orchestration of a horizontal conspiracy among the major publishing houses because they perceived that it was a beneficial response to counter Amazon’s market power in the eBooks market.55 This support came from a combination of corporate representatives of competing tech firms and from champions of the proverbial little guy.

In an ironic twist on the eBooks case, there is now a movement to allow app developers to collude and collectively bargain against Apple to countervail Apple’s market power resulting from its control of its app store.56 Such collective bargaining by competing app developers would be prohibited under current antitrust law. But, it is argued, allowing an exception for app developers would be a simple and meaningful way to counteract Apple’s power as a gatekeeper to all iPhone users and force it to provide more reasonable and evenhanded rules.

These examples are not exhaustive. Nevertheless, they illustrate the extent to which countervailing power is being put forward in antitrust academic and policy circles as a potential solution to market power. 57

B. COUNTERVAILING POWER AND ANTITRUST LAW

Whatever its appeal in academic and policy circles, courts and agencies have historically rejected countervailing power as a defense or justification for mergers and conduct that would otherwise violate the antitrust laws. For good reason. Countervailing power, and policy solutions rooted in countervailing power, are in considerable tension with traditional antitrust law.

Although both the traditional antitrust approach and countervailing power approaches seek to counteract and moderate the effects of market power, they do so by very different mechanisms: Traditional antitrust law relies on diffusing and holding separate centers of decisionmaking among market participants. Countervailing power, on the other hand, relies on concentrating decisionmaking to enable collective action by market participants.

Antitrust law has historically been deeply skeptical of countervailing power as a justification for otherwise anticompetitive conduct. Courts generally have not recognize countervailing power justifications as permitted defense in antitrust cases, and the agencies do not accept countervailing power as a cognizable efficiency for mergers.58 The Supreme Court has never expressly accepted countervailing power as a defense in an antitrust case, and lower courts likewise have been skeptical.59 This hostility to countervailing power arguments within antitrust law reflects the deep conflict over how to regulate markets that is embodied by these two approaches. There are some signs, though, that this rejection of countervailing power as antitrust doctrine may be changing.

1. Countervailing Power Justifications for Cartels

Courts in conduct cases tend to view defendants’ countervailing power arguments as an attack on or end-run around the antitrust laws themselves. In cartel cases in particular, the few defendants that have been brash enough to assert a countervailing power defense have seen it rejected. Apple, for example, raised a countervailing power argument in the eBooks case. Although the argument was surprisingly well received by a wide swath of the public, as discussed above, the majority of the appellate court roundly dismissed Apple’s argument that the conspiracy should escape per se condemnation because “the presence of a strong competitor—[Amazon]— justifies a horizontal price conspiracy.”60 The majority characterized that argument as “endors[ing] a concept of marketplace vigilantism that is wholly foreign to the antitrust laws.”61 It went on: “Plainly, competition is not served by permitting a market entrant to eliminate price competition, as a condition of entry.”62

In California ex rel. Harris v. Safeway, Inc., the majority resolved the case without addressing defendant grocery store owners’ argument that their cartel agreement would generate efficiencies by providing them increased bargaining leverage to drive down labor costs. 63 The defendants, a collection of grocery stores, had entered into a revenue sharing agreement to strengthen their bargaining position during a labor strike. They argued that, to the extent the agreement enabled them to prevail in the strike, it would reduce their cost of labor (by strengthening their bargaining position vis-à-vis the labor union, a monopoly seller of labor), which would allow them to compete more effectively in the grocery market. Thus, they asserted, what appeared to be straightforward collusion was actually an attempt to use countervailing power to combat a monopoly labor supplier. The case was ultimately decided on other grounds, but the dissent strongly condemned defendants’ countervailing power argument.64

2. Countervailing Power and Buying Cooperatives

Some have cited to the courts’ acceptance of cooperative buying schemes as a limited endorsement of countervailing power as a defense to collusive conduct, but the courts have generally limited their endorsement of cooperative buying (and selling) schemes to situations where cognizable efficiencies of the scheme derive from reduced transaction costs and not from countervailing bargaining leverage. Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.65 and Broadcast Music, Inc. v. Columbia Broadcast System, Inc.66 are the most notable examples.

In Appalachian Coals, Inc. v. United States, the Court included language that could be read to endorse a countervailing power rationale for cartel conduct,67 but the Court effectively rejected that reading less than a decade later in United States v. Socony-Vacuum Oil Co. 68 Both of these cases are somewhat unusual, cautioning against overreading them. Scholars have since characterized the Appalachian Coals decision as a “Depression-era aberration” explained by the idea that “the Court appeared to have lost faith in free market competition and welcomed experiments with sector-wide private ordering.”69 Socony-Vacuum, on the other hand, is arguably not a countervailing power case at all. Although the alleged conspiracy centered on a purchasing cartel, the purpose was to drive up input prices for independent gas stations to undermine their ability to compete with the defendants in the downstream retail market and to elevate retail prices. In other words, raising rivals’ costs.

Courts, admittedly, have not directly addressed the scenario that would present the most compelling case for countervailing power by a buyer cooperative. That is, a cooperative formed to leverage joint purchasing power against an upstream monopolist, where the members of the cooperative continue to compete downstream in a competitive market. As discussed in Part I, such an arrangement could lead to an upstream market where a competitive volume of goods are transacted at a price below the monopoly price and where those price savings are passed on to downstream consumers. Such a case would be exactly the sort that modern antitrust doctrine, where concepts of classical competition have been partially displaced by efficiency justifications, would be hard-pressed to find fault, but where I argue concerns remain. Those concerns are discussed in Part IV.A below.

3. Countervailing Power as a Justification for Mergers

Countervailing power arguments in merger cases, likewise tend to be rejected, but perhaps less consistently, with the most notable exception centering on the “power buyer” defense in the 1990s.

As discussed above, the 1990s saw the emergence of the power buyer defense, which was primarily applied in merger cases. In United States v. Baker Hughes, the D.C. Circuit upheld a lower court’s finding that merging parties had successfully rebutted the government’s initial showing of harm to competition by, inter alia, providing evidence that their sophisticated customers would constrain their ability to raise prices. The unanimous panel’s (which included then-Judge Ruth Bader Ginsburg) decision, written by thenJudge Clarence Thomas, explained “[t]his sophistication, the court found, was likely to promote competition even in a highly concentrated market.”70 Likewise, in United States v. Country Lake Foods, a district court approved a merger of two milk sellers because, in part, “the food distributors possess substantial power over the sellers of fluid milk…and are generally very sophisticated buyers.”71

In United States v. ADM, the court approved a long-term leasing arrangement between two large manufacturers of high-fructose corn syrup (“HFCS”), noting that “[t]he existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices.”72 A “growing consolidation among HFCS buyers,” the court explained, had resulted in a dynamic where “they have more leverage over HFCS sellers.” The court went on to conclude that “this consolidation of buying power is an effective means of counteracting any potential market power that might be exercised by sellers.” Courts in other cases of this era, including some conduct cases, likewise invoked the presence of large, sophisticated counterparties to overcome concerns about market power of defendants.73

More recent merger cases have not been framed in “power buyer” terms, but have nonetheless grappled with countervailing power defenses. In defending the Anthem-Cigna merger, for example, witnesses and lawyers for Anthem and Cigna attempted the difficult if not impossible task of asserting a countervailing power defense without also conceding an increased ability and incentive to exercise market power.

On the one hand, Anthem argued that by merging with Cigna it would be able to secure the lower of Anthem’s and Cigna’s rates for each provider contract.74 Anthem’s lead economic expert also testified that the merged entity could, potentially, use its combined size to leverage even more favorable provider contracts in the future.75 On the other hand, Anthem’s Answer disclaimed that the merged entity would exercise its enhanced leverage to seek new volume discounts post-merger, and Anthem’s CEO hedged on this point in his trial testimony.76 The government strongly objected to the idea that increased bargaining leverage is a cognizable efficiency, and ultimately, the court rejected all of the merging parties’ efficiency defenses based on countervailing power, as a combination of noncognizable, unproven, and not merger-specific.77 Notably, however, thenJudge Brett Kavanaugh dissented from the decision and would have accepted the countervailing power defense.78

Smaller healthcare mergers have played on some of these same themes. Somewhat ironically, in light of the health insurers’ arguments discussed above, the need to increase bargaining power to countervail market power held by insurance companies has been repeatedly cited as a justification for hospital mergers and physician group acquisitions.79 Physician groups have likewise cited the need for countervailing power as a justification for joint bargaining agreements.80 For many years these arguments were either unaddressed or tacitly accepted, but agencies and courts have more recently treated them much more directly and skeptically.81 Courts have likewise consistently blocked discovery aimed at building a countervailing power defense. 82

4. The Antitrust Agencies on Countervailing Power

The FTC and DOJ have not endorsed countervailing power as a defense to anticompetitive conduct. Indeed, as a defense to collusion, they have unequivocally condemned it.83 In the merger context, the agencies have been less direct, but have nonetheless shown considerable skepticism to the idea that a merger increasing market power could be justified by a need to countervail market power at another level of the market.

As discussed above, in the Anthem-Cigna merger, the DOJ forcefully opposed the argument that the merged entity’s ability to use its increased bargaining leverage from powerful providers could justify an otherwise anticompetitive merger.

Although the so-called “power buyer” defense did momentarily gain purchase with courts in the early 1990s, it did so over the strong objections of government enforcers.84 While the agencies’ stance on power buyers did appear to soften in the early 2000s, the agencies since then have gradually and then completely abandoned the idea that a powerful bargaining partner could justify or excuse consolidation.

The 2010 Horizontal Merger Guidelines clarified that the presence of a powerful buyer does not fully mitigate the anticompetitive effects of a merger and notably declined to endorse a power-buyer defense. 85 The 2010 Merger Guidelines recognized that the impact on prices and competition from a powerful buyer as mixed, at best.86 Agency officials in the first decades of the 2000s also expressed skepticism about the relevance of large buyers in their speeches and articles, litigation, and in their Dose of Competition report.87

The 2023 Merger Guidelines completed the reversal of the agencies’ brief softening toward the power buyer defense. Guideline 7 of the 2023 Guidelines highlights the risk of an “arms race for bargaining leverage” in consolidating industries. Such an arms race, the guidelines note, can exacerbate problems with “increasing barriers to single-level entry, encouraging coordination, and discouraging disruptive innovation.” In other words, recognition that a firm is seeking bargaining leverage through merger to countervail consolidation at other levels in its industry is now viewed as an additional reason for concern about the merger.

Notably, the 2023 Merger Guidelines were published by antitrust agencies whose leaders are often associated with the neo-Brandeisian movement. Lina Khan, then-Chair of the FTC, is considered by many to be a leader of the movement,88 although she herself has expressed ambivalence about the label. Nevertheless, that a progressive-led FTC and DOJ would acknowledge the risks of countervailing power and power buyer defenses illustrates the fraught nature of their embrace within antitrust.

The formulation of the power buyer defense itself also reflects the struggle within antitrust doctrine over the role of countervailing power. One notable feature of the power buyer defense is that it does not pretend to remedy an existing exercise of market power by a dominant firm; rather, it seeks to explain away the potential harm from an acquisition of additional market power by the merging or price-fixing entities. As such, the defense includes an implicit argument that the increased concentration and/or decreased rivalry will not actually affect the balance of bargaining leverage between the parties in a meaningful way. The defense posits that prices will remain unaffected by the merger, held in check by the power buyer. But, presumably, the power buyer is already holding prices at the lowest level it can under pre-merger bargaining dynamics. Accordingly, the only way price would be unaffected is if the leverage gained by the merging or price-fixing parties is negligible. If the merging or price-fixing parties gain enough leverage to influence the bargain, it will inevitably lead to a price increase, no matter how powerful the buyer, since the pre-merger or price-fix terms already represented the best bargain the powerful buyer could achieve. Faced with an extremely powerful buyer—a monopsonist—a countervailing power proponent might argue that this price increase is a good thing and a reason to support the deal. But this is not the basis on which the power buyer defense is traditionally defended. This reluctance to fully embrace the countervailing power rationale makes the power buyer defense incoherent, leading to uneven treatment by courts and agencies.

On the whole, though, antitrust courts and enforcers reject countervailing power justifications for mergers and collusive conduct. The brief embrace of the power buyer defense, particularly by then-Judges Thomas and Ruth Bader Ginsburg89, and the dissent by then-Judge Kavanaugh in the Anthem-Cigna merger being the notable exceptions. This hostility toward countervailing power justifications reflects the fundamental incompatibility between the countervailing power approach to market power and the traditional antitrust approach rooted in competition. Despite the tension between countervailing power and traditional competition, and agencies’ and courts’ ambivalent hostility toward countervailing power, though, it is an idea that persists in antitrust circles and periodically resurges. For reasons discussed in the next section, the current flirtation with countervailing power may be received differently than in the past.

III. ANTITRUST’S CURRENT VULNERABILITY TO COUNTERVAILING POWER

In many ways, markets today resemble those of the 1950s when Galbraith elevated countervailing power ideas. A combination of rapid technological change and globalization of markets has left us with markets radically different than those which our antitrust laws were designed to govern, and left many questioning whether antitrust and competition remain effective means for regulating markets. But at least two features of our current moment are significantly different than the 1950s: first, we are experiencing historical economic inequality; and second, economists have shifted antitrust away from a focus on classical competition, i.e. rivalry, and toward a focus on efficiency and other economic measures. Both of these changes make countervailing power an appealing policy solution and explain its current resurgence in discourse and how it appeals to conservatives and liberals alike. The latter shift, in particular, makes antitrust doctrine vulnerable to countervailing power arguments to a greater degree than it ever has been before.

A. THE SOURCE OF ANTITRUST’S VULNERABILITY

While we are not experiencing anything comparable to the Great Depression, our economy, like that of the New Deal era, is marked by tremendous upheaval and uncertainty. Between the housing market collapse, the Great Recession, the COVID-19 pandemic, and the looming threat of climate change, there is a pervasive sense of anxiety and uncertainty about the economic future. Tremendous technological change, in the form of AI and robotics, is also threatening to upend industries and markets.

At the same time, an evolution in the dominant antitrust paradigm has undermined the basis for antitrust doctrine’s hostility to countervailing power arguments and to arguments rooted in bargaining power, generally. The welldocumented shift in antitrust away from a classical concept of competition as a rivalrous process and toward a modern concept of competition as any arrangement or conduct that decreased prices by increasing output means, among other things, that many of the arguments against countervailing power defenses no longer apply. Simply put, the modern definition of competition does not clearly distinguish between rivalry and countervailing power.

Before going on, it is necessary to spend a moment discussing what is meant by classical competition. Since they were enacted, there has been broad consensus that the goal of the antitrust laws is to protect competition.90 Indeed, this consensus predates the Sherman Act and is evidenced in the common law of restraint of trade. As discussed above, however, the meaning of “competition” in antitrust law has evolved in the modern era. The term “competition” is now often used to mean simply, “any arrangement or activity that increases output.” Because of this evolution, it is helpful to distinguish between this modern concept of competition and the older concept of competition, what I call “classical competition.” Even without offering a precise definition of classical competition, I contend that we can at least say a few things about competition that will at least make clear how classical competition differs from modern competition.

First, classical competition is a process, not a static state of affairs or a particular price and quantity. Those who favor classical competition, including Congress in enacting the Sherman Act, believe that it is a process that leads to good outcomes. Those outcomes include low prices and high quality in consumer goods and services, but also (depending on who you ask) democracy, innovation, opportunities for small businesses, freedom, economic mobility, and many other goods. Importantly, while competition is thought to promote these various goods, the process of competition is not the goods themselves, but one way to achieve them. Inversely, observing that conduct or an agreement positively impacts these goods does not imply that conduct or agreement is competitive; other means besides competition may promote these ends. Indeed, historians describe how various factions opposed to the Sherman Act and antitrust enforcement argued that different processes, such as government regulation of markets or self-regulation of markets by business cooperatives would lead to better outcomes.91 By enacting the Sherman Act, Congress chose a particular process and that process was competition.92 Justice Scalia made this point about statutory interpretation generally, but it is not less applicable to the Sherman Act: “Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means….”93

Second, classical competition is a process rooted in rivalry between individuals or firms who each seek to be selected by the same buyer or seller to sell or buy goods or services. As Galbraith put it, “where the power of the firm as ‘say’ a seller is checked or circumscribed by those who provide a similar or substitute product or service…[t]his, in the broadest sense that can be meaningful, is the meaning of competition.”94 It is that rivalry that is at the core of distinguishing competition from other processes. All seem to agree that the laws are not intended to preserve perfect or protect against any dimunition of rivalry, which would outlaw even the tiniest merger and make nearly every contract an antitrust violation.95 But equally dubious is the idea that one can have competition without rivalry.96

Reflecting the understanding that the competition protected by the antitrust laws must be limited and imperfect, courts have generally interpreted the antitrust laws to prohibit “unreasonable” restraints on competition. In the late 70s and early 80s, Chicago School scholars and others took issue with the lack of rigor in this approach and largely succeeded in shifting antitrust away from a qualitative “unreasonable restraint on competition” approach and toward an approach where the reasonableness of a restraint is measured exclusively by its impact on so-called consumer welfare.97 As Gregory Werden explains, Prof. Robert Bork advanced this position in his seminal book:

THE ANTITRUST PARADOX also advanced Professor Bork’s argument on consumer welfare by addressing the meaning of ‘competition’ in antitrust law. Bork concluded that antitrust must use the word metonymically, as a ‘shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternate state of affairs through judicial decree.’ Thus, Professor Bork equated competition and Pareto optimality.98

From there, it was a short analytical leap to where antitrust seems to find itself today, where whether conduct or a restraint is “pro-” or “anticompetitive” is entirely determined by its effect on output and prices.99

This is not just a conservative fringe view; this is the current mainstream view, ensconced in Supreme Court opinions and dominant antitrust scholarship. Recent attention on labor markets and monopsony more generally has led some to re-think the exclusive focus on consumer prices. But scholars and courts have dealt with this not by reviving a notion of competition as a rivalrous process of inherent value, but by broadening the blinkered focus on prices to include not just consumer prices but also prices to other market participants, like workers. 100 Alternatively, some scholars have suggested that antitrust should focus not on price, but on output, and that any merger or conduct that increases output in a market should be considered “procompetitive.”101 This latter approach has the advantage of a single standard that applies to monopsony and monopoly, but it obtains that advantage by disconnecting itself from any notion of competition distinct from market optimization. A focus on output over prices also invites countervailing power arguments. As discussed above, while equalizing bargaining leverage has indeterminate effects on prices, it does theoretically lead the parties to transact the efficient quantity of goods.

Neo-Brandeisians have objected to modern antitrust’s fixation on prices, arguing that low prices are not the only goal of competition, and that antitrust analysis must take account of these other goals.102 In other words, whether an agreement or conduct is procompetitive should be measured by its impact not just on prices, but also its impact on other social goods like small businesses, privacy, worker power, the democratic process, or sustainability. But not only is such an approach unadministrable, 103 it makes the same fundamental error as an approach focused only on prices; it mistakes an end for a means.104 Other processes than competition, say cartels or regulated prices, may promote some of these ends, but that does not make them competition, at least not in a classical sense. 105

Whatever goal Congress sought to promote through the competitionbased approach of the antitrust laws, whether low consumer prices, a flourishing small business community, or democratic values is beside the point; in adopting the antitrust laws, Congress endorsed competition and the protection of competition as a means for regulating markets.106 While Congress may have done so based on a belief that competition would yield an optimal allocation of resources while promoting democracy and social institutions, the validity of the law and its protection of competition does not depend on whether or not that belief is correct. As Justice Black put it Northern Pacific Railway Co. v. United States:

The Sherman Act…. rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.107

It is the movement away from classical competition to the modern, results-oriented conceptions of “competition” that makes modern antitrust vulnerable to countervailing power arguments. This evolution in antitrust whereby what was once viewed as an artifact of competition (low prices and high output) is now viewed as competition itself, is profoundly troubling for many reasons.108 Most salient among them for current purposes, this shift in antitrust where competition is flattened into “positive impact on prices or output” or even, from a neo-Brandeisian perspective, where the focus is on the other goals that may have been behind the antitrust laws, also opens the door to ideas like countervailing power, which may in some circumstances lower prices or increase output (or promote democracy or worker power), but which also run counter to classical competition and have significant implications beyond their immediate impact on prices.

Countervailing power arguments are not an effective rebuttal to a claim that a merger or conduct impermissibly harms classical competition. While countervailing power can sometimes mitigate some of the price effects from a loss of classical competition, countervailing power does not restore the dynamic rivalry that defines classical competition. Accordingly, to the extent antitrust protects classical competition, and harm to classical competition is the measure of antitrust harm, countervailing power is not a valid antitrust defense or an effective solution to problems of market power and a lack of effective competition. This is why antitrust courts have historically been hostile to countervailing power arguments and defenses.

As Hawley explains of the countervailing power movement during the early days of the New Deal, “[o]nly upon closer examination did it become obvious that there were striking differences, that in reality the new economic control measures were based upon assumptions that ran directly counter to traditional antitrust concepts.”109 Indeed, Galbraith largely conceived of countervailing power as an alternative to competition.110 Bargaining is often an adversarial process—focused on dividing surplus—but it is not competition or a substitute for competition. Allowing companies to merge or form their own cartel to collectively negotiate with, and serve as a counterweight to, powerful counterparties simply creates another monopolized market. Exempting companies facing trading partners with market power from the antitrust laws would not promote competition; it would just lead to self-interested bargaining between two powerful parties.

While the case that countervailing power is not compatible with classical competition is relatively straightforward, the distinction between countervailing power and modern conceptions of competition is much harder to discern. The embrace of this modern conception of competition is what, I argue, makes modern antitrust vulnerable to countervailing power arguments in a way that previous incarnations of antitrust doctrine were not. Put differently, if the meaning of competition in modern antitrust is reduced to price or output effects, then the distinction between countervailing power and competition dissolves.

B. ANTITRUST SOFTENING ON COUNTERVAILING POWER?

There is some evidence that courts’ and enforcers’ traditional hostility toward countervailing power has been lessening recently. But, somewhat surprisingly given the above discussion about evolving conceptions of competition, courts and enforcers have, with some notable exceptions, largely retained the position that countervailing power is not an antitrust defense.

Then-judge Kavanaugh’s dissent in Anthem-Cigna, though, exemplifies how the modern conception of competition leaves antitrust open to countervailing power arguments: namely, the idea that any market force or edict that moves the market price and/or output level closer to the level that would obtain in a competitive market is “procompetitive” and therefore legal.

Anthem and Cigna were two health insurance companies that sought to merge. As insurers, Anthem and Cigna were buyers of healthcare provider services. Anthem and Cigna also operated as purchasing agents of selfinsured employers who purchased healthcare directly from providers at rates negotiated by Anthem and Cigna. Anthem and Cigna argued that their merger should be allowed, because it would result in decreased prices to their customers, employers that bought health insurance from them and selfinsured employers that used their negotiated rates. The government opposed the merger, arguing that it would give the combined company market power in both upstream provider markets where the insurers buy healthcare and downstream employer markets where the insurers sell insurance, which it would then use to raise prices to employers and reduce payments to providers. The majority sided with the government, holding that the merger threatened higher prices for consumers.

In dissent, then-Judge Kavanaugh conceded that the merger would give the merged firm market power in the downstream market, but argued the evidence showed that the firm would also obtain countervailing power in the upstream provider market and allow it to obtain lower prices from providers, which it would be contractually obligated to pass on to employerconsumers.111 Because the merger might, under his view, lead to lower downstream prices, then-Judge Kavanaugh viewed the potential to exercise market power against providers as an “efficiency” that supported the merger. That is, the lower prices the combined Anthem-Cigna would be able to obtain from providers would be an efficiency, unless “the merger would give Anthem-Cigna monopsony power in the upstream market.”112 “To be clear,” he explained, “if Anthem-Cigna would obtain lower provider rates merely because of its enhanced ability to negotiate lower prices with providers, that alone would not necessarily be an antitrust problem. But if Anthem-Cigna would obtain provider rates that are below competitive levels because of its exercise of unlawful monopsony power against providers, that could be a problem, and perhaps a fatal one for this merger.”113 In other words, in thenJudge Kavanaugh’s view, firms facing powerful bargaining partners should be allowed to join forces to countervail the market power of their bargaining partners up to the point where the countervailing power would outweigh the market power of the originally powerful party, pushing the market past point C and into monopsony territory.

The Anthem-Cigna dissent suggests that then-Judge, now Justice Kavanaugh, would agree with the views of Sokol and Blair that collective action to countervail existing market power is not anticompetitive and, therefore, not illegal, until it gives the cooperating parties so much combined power that the countervailing power outweighs the original market power. But how can one call a merger that combines two competitors, thus eliminating the rivalry between them, and gives the merged entity enhanced bargaining leverage “pro-competitive”? This is the trick of modern antitrust, whereby the idea of competition as a rivalrous process is completely replaced with the notion that any conduct or combination that moves the market closer to C is deemed “procompetitive.”

Another interesting example of a countervailing power argument against antitrust enforcement is the recent petition from Cooperativa De Farmacias Puertoriqueñas to the Federal Trade Commission to revisit that agency’s 2012 decision and order prohibiting independent pharmacies from collectively negotiating with pharmacy benefit managers.114 Coopharma, the petitioner, is a non-profit cooperative regulated under a Puerto Rican law designed to encourage small business development. Coopharma operates as a joint purchasing entity to achieve efficiency benefits from economies of scale, but the 2012 decision and order prohibits Coopharma from collectively negotiating contracts and contracting jointly with third parties, which the agency alleged amounted to price fixing.115

In an August 2024 petition, Coopharma petitioned the FTC to set aside the 2012 order, arguing that a change in Puerto Rican law brought the prohibited activities within the ambit of state action immunity but also that the order should be modified or set aside in the public interest due to the increasing market power of pharmacy benefit managers. Coopharma argued that the FTC’s withdrawal of prior guidance on PBMs and recent issuance of an in interim report116 noting competition concerns with PBMs evidence a policy shift by the agency and recognition of the market power and anticompetitive practices of PBMs. The petition argued that, because of this policy shift, the FTC should release Coopharma from the prior prohibitions, which inhibited its members from using their collective power to bargain against the PBMs.

The petition was unanimously approved by order of the FTC on state action grounds, without comment on the countervailing power arguments.117 Separate statements from Chair Khan and Commissioner Holyoak accompanying the order alluded to the countervailing power arguments. Chair Khan argued that prosecutorial discretion should be used to focus on large dominant players and avoid spending resources to go after small businesses attempting to countervail powerful bargaining partners.118 Commissioner Holyoak, on the other hand, argued that collusion is collusion, regardless of the size or nature of the party being colluded against, and accused the Chair of political favoritism.119 The fact that the parties made the countervailing power arguments in the first place suggests a perceived softening of enforcers to countervailing power arguments. The varied response of the commissions, both of which rejected the countervailing power defense as doctrine, but one of which suggested it is prudentially relevant, is a tidy encapsulation of the conundrum of countervailing power and antitrust in the current moment.

IV. A SENSIBLE DISCUSSION OF COMPETITION AND COUNTERVAILING POWER

The disparate and conflicting meanings ascribed to the term “competition” in antitrust doctrine and policy is problematic in its own right. So much so that some have suggested antitrust should dispense with the term altogether.120 In the context of countervailing power, the confusion over the meaning of “competition” means that countervailing power ideas are often not recognized or discussed as a distinct policy approach from antitrust. This matters because there are risks to deploying countervailing power solutions that are not inherent in an antitrust approach.

A. RISKS OF SUBSTITUTING COUNTERVAILING POWER SOLUTIONS FOR ANTITRUST SOLUTIONS

There are any number of reasons to be concerned about antitrust’s current vulnerability to countervailing power arguments and the increasingly thin line between countervailing power and what antitrust considers to be competition. Here are a few:

Inflation. Galbraith’s primary concern with countervailing power as a mechanism for restraining the exercise of market power was his conclusion that it is wholly ineffective in an inflationary environment.121 [FOOTNOTE 121 BEGINS] 121 GALBRAITH, supra note 23 at 133 (“It [countervailing power] does not function at all as a restraint on market power when there is inflation or inflationary pressures on markets.”). [FOOTNOTE 121 ENDS] “Some slack in the economy is what keeps countervailing power from being converted into a coalition against the public.”122 An extensive discussion of the interplay between competition, countervailing power, and inflation is well beyond the scope of this Article. But it is notable that even Galbraith, who exalted the capacity of countervailing power as a competition complement or counterpart, felt this was a severe limitation on the use of countervailing power as a policy tool. The recent experience with inflation at the end of the COVID-19 pandemic led several commenters to argue that a lack of competition was a contributing factor.123 Perhaps, instead, we ought to wonder whether Galbraith was correct that what contributed to that inflation was not a lack of competition per se, but a failure of countervailing power as a substitute for rivalry.

Fostering Collusion. The risks to consumers from deploying countervailing power go beyond the immediate price effect—most notably, countervailing power solutions significantly increase incentives to collude. The economic case for countervailing power is often premised on the notion that bilateral monopolists will (as adversaries) bargain to a competitive and efficient solution.124 The economic evidence that this occurs is mixed, at best.125 But perhaps the greater concern is “that ‘powerful buyers might find it more profitable to share in their suppliers’ excess profits and/or collaborate with their suppliers to exclude competitors rather than trying to get supply prices down to competitive levels.’”126 That is, once there is concentration at two levels of the market, it only increases the incentives for the powerful parties at both levels to work to exclude rivals and extract monopoly rents from the other levels of the market. And, there is some empirical and historical127 evidence that this is exactly what happens in markets characterized by countervailing but concentrated power. 128

Arms Race. Beyond harm to certain players and competition generally, mergers to counter bargaining power “perpetuate the cycle of ‘reactive’ consolidation in [the] supply chain as [participants at one level] leverage up to counter the greater bargaining power of other, rapidly consolidating parts of the supply chain with which they do business.”129 Scholars and the most recent Merger Guidelines have aptly analogized this phenomenon to an arms race.130 Over time, “competition at each level [is] gradually eliminated…, leaving just a few large rivals in each segment.”131 Even those who advocate for deploying countervailing power to mitigate the effects of monopoly acknowledge that this is a real risk.132 Private health care markets over the last 40 years provide a prime example of this sort of recursive consolidation to exert countervailing power—as insurers consolidated, hospitals and providers consolidated to improve their bargaining positions vis-à-vis the insurers, as did drugmakers and PBMs in upstream markets.

The end result of such an arms race is not competitive markets, but monopoly at every level of the supply chain. This has significant consequences for market dynamism, innovation, and mobility. It also results in an extremely fragile supply chain. The redundancy in the supply chain that is the result of robust competition at each level is lost through reactive consolidation,133 leading to a more fragile supply chain that is less able to withstand exogenous shocks such as input market disruptions, shortages, or even information technology failures.134

Error Costs and Capture. Implementation of countervailing power solutions is premised on a judgment that the countervailing power will mitigate or completely offset existing market power by better balancing bargaining leverage. But if the market power problem is overstated in the first place or if the countervailing power exceeds what is needed to offset the initial market power, there is a real risk that by attempting to enable countervailing power, a court or legislature could, in fact, enable market power. 135 This risk is compounded by the fact that the parties most likely to have the resources and political wherewithal to obtain legislative exceptions to the antitrust laws are those least likely to actually lack bargaining leverage.

Administrative Risks and Costs. Allowing countervailing power as a defense to otherwise anticompetitive conduct and mergers under existing antitrust laws as enforced by courts and agencies also imposes significant administrative costs and risk. If countervailing power is accepted as a cognizable efficiency, one can expect to see it asserted by defendants in virtually every antitrust case. We already see large corporations trying to use countervailing power to escape liability for revenue sharing agreements,136 mergers,137 and even cartels.138 Few markets are perfectly competitive, and almost every company deals with at least one buyer or seller some degree of market power.139

The mere availability of a countervailing power defense would lead to increased cost and complexity in prosecuting antitrust cases. The per se rule against horizontal price fixing is motivated not only by doctrine, but also by practicality. Rule of reason cases are significantly more complicated, costly, and time-consuming to litigate. The nuanced case-specific nature of the rule of reason standard further makes outcomes less predictable, which is itself costly. Carving a class of conduct out of the per se rule or recognizing a novel defense to a per se claim is costly. In some cases, those costs are worth the doctrinal clarity, increased efficiency, or basic fairness that comes from a more flexible rule. But, in all cases, those costs must be recognized and weighed against the benefits to be achieved by the relaxed standard.

B. PROMISING ANTITRUST EXEMPTIONS BASED ON COUNTERVAILING POWER

While countervailing power does not reliably improve market outcomes or foster competition, what it does reliably do is improve the outcomes for the parties allowed to exercise it. Whereas overall market outcomes are only improved where there already exists an imbalance of bargaining power and where the countervailing power brings the balance of bargaining power closer to equipoise, the impact of countervailing power on the parties exercising it is uniformly positive whether it moves the parties’ bargaining balance toward equipoise or whether it tips the balancing of bargaining power toward the parties allowed to collude. As discussed in the following section, this feature of countervailing power provides a strong incentive for interest groups to use countervailing power justifications to seek exemptions from the antitrust laws, even where countervailing power will not actually improve the overall market outcome.140 Put simply, market power is valuable to whoever holds it.

Several legislative exceptions to the antitrust laws have been rooted, at least in part, in the concept of countervailing power, but uncountably many more have been proposed and failed.141 By far the most prominent example of a countervailing power exemption made into law is antitrust’s labor exemption, which is discussed in more detail below. Others include the Capper-Volstead Act, which creates an exemption for agricultural cooperatives, and the Webb-Pomerene Act, which creates an exemption for firms attempting to compete in foreign markets.

The decision to confer bargaining power on a given group is not one that should be taken lightly, nor should any decision to displace competition in favor of another process. The reason for this is the same one that motivated the antitrust approach in the first place: other solutions generally do not produce better outcomes. There are some situations where persistent structural imbalances in bargaining power may justify departures from a general reliance on competition, but they are few and far between. Most proposals for antitrust exemptions rooted in countervailing power are simply a means to benefit one group over another at the expense of competition. While conferring such benefits is a legitimate exercise of the legislature’s authority, it should be recognized for what it is and not put forth as a means for promoting competition.

One area where principles of countervailing power have shaped policy and markets is agriculture.142 Agricultural cooperatives have long been recognized as a necessary force to ensure the continued viability of small farms. To enable such cooperatives, the Capper-Volstead Act exempts such arrangements from the Sherman Act and other antitrust statutes.143 Importantly, however, the purpose of this exception has not primarily been to aid competition; rather, the exception for agricultural cooperatives in the Capper-Volstead Act reflects a policy decision to elevate other values—such as the continued viability of small farms to preserve a way of life and diversity and robustness in the food supply—above the values of competition enshrined in the antitrust laws.144 While it is not clear that the CapperVolstead Act has actually succeeded in achieving these goals, this is a legitimate use of Congress’s policymaking authority to convey an advantage to one group over another to promote a certain vision of the social good.

Another policy choice to displace competition is the Webb-Pomerene Act, which can be viewed as an attempt to deploy countervailing power as a weapon in international trade and warfare.145 By allowing exporters to collude, the Act sought to enrich American firms and promote American exports without regard to the impact on (foreign) consumers or efficiency.146 This Act is often framed as a competition measure, because its proponents argue it will make America more successful in world markets. Separate and aside from whether this is true, it is disingenuous to say that this measure increases competition. It does not. Since the victims of the cartels enabled by the act are foreigners, and the benefits flow to American companies, it may well have benefits to American interests, but those benefits are not derived from increased competition.

Most recently, legislation was put forth that would allow local news outlets to negotiate collectively with large online platforms.147 If passed, the legislation would effectively carve out an exception from the antitrust laws to allow content creators to cooperate horizontally to increase their bargaining leverage with online platforms. Such cooperation would, but for the proposed exception, be per se illegal as a violation of Section 1 of the Sherman Act. The bill’s authors argue the legislation is necessary because “[i]n recent years, the control of information online has been centralized among just a few online gatekeepers.”148 These are markets undergoing significant and rapid transition, making it hard to say whether the problem is a persistent and structural imbalance in bargaining power (where countervailing power might provide a reasonable solution) or whether a combined technological and cultural shift is creating a messy transitional period that is exactly where competition can be most effective at facilitating efficient change.

To understand such proposals, it is helpful to look to the past. As Hawley describes it, the adoption of countervailing power initiatives in the 1930s was driven not by a particular and unified ideology, but out of a combination of reformers frustrated with market concentration and the resistance of powerful business interests to “centralized planning and detailed regulation.”149 Accordingly to Hawley, “[e]ven the antitrusters seemed willing to go along, especially if the departure from competitive standards could be justified on grounds other than market control and especially if there was an appeal to public sympathy for the underdog, for the ‘little fellow’ struggling against the sinister, organized interests.”150 Ultimately, however, Hawley concludes that “most of the New Deal planning was in the nature of government-sponsored cartelization” and that “[a]n open, avowed, and generalized policy of cartelization, though, was just as unrealistic as a policy of planned expansion.”151 The result was piecemeal planning, “on a partial, group-bygroup basis, and only when the right combination of factors was present.”152 Namely, those willing to pay the price of partial regulation, organized enough to exert political pressure, and possessing a “covering rationale” for why their group is a “special case” whose promotion is in the national interest.153

Contrast the current situation in tech and journalism with the longstanding struggles over bargaining power in the labor movement, where countervailing power has a long history.154 The imbalance in bargaining leverage between individual workers and the companies that employ them is, absent collective bargaining, often extreme. 155 Moreover, that imbalance is structural; labor is deeply individualized and often does not lend itself to organization under the traditional firm model. This imbalance is not temporary or transitory, but baked into the capitalist model itself. Labor is also not an intermediate product or service in a supply chain; workers are the ultimate source of labor, which means there are no questions about whether they will pass-through their bargaining gains upstream to others in the supply chain. While workers do use their wages to buy goods, there is little reason to expect their collaboration in labor markets will lead to collusion or reduce competitiveness in, say, food or housing markets.156 Because of the permanent and structural nature of the imbalance in bargaining power between workers and firms, antitrust’s labor exemption is arguably justified not only by a desire to confer benefits on workers as a favored group, but because competition and other natural market forces will never work to resolve the bargaining power disparity between workers and firms. Accordingly, collective bargaining among workers has long been exempted from the antitrust laws.157 [FOOTNOTE 157 BEGINS] 157 See HAWLEY, supra note 28 at 383–88 (providing a historical account of the separation of labor regulation from antitrust). Although, with the decline in labor power, increased employer concentration, and the erosion of labor law protections for workers, recent years have brought a resurgence of interest in antitrust laws as a means for combatting market power, anticompetitive conduct, and bargaining imbalances in labor markets. [FOOTNOTE 157 ENDS] But even if justified, this exception is not without costs and organized labor is not immune from all the ills of countervailing power solutions generally. As discussed above, there have been instances of labor unions collaborating with their employers to monopolize markets and extract monopoly rents from the businesses’ customers.

Antitrust exemptions based on countervailing power should be strongly disfavored. Displacing competition with collective action should be limited to situations where longstanding, structural market dynamics result in extreme imbalances in bargaining power, such as labor markets. Moreover, countervailing power should be deployed with extreme caution in intermediate levels of the supply chain due to the risk of collusion in adjacent markets and the lack of reliable pass-through. While Congress may legitimately seek to bolster or favor one group or another for various social or political ends, deploying countervailing power and exceptions to the antitrust laws is not a good mechanism to do so, because it is not reliably effective and carries considerable risk of permanent collateral damage to markets.

CONCLUSION

Imbalances in bargaining power are a serious social and economic problem—they foster and perpetuate wealth inequality, stifle small business opportunities, and allow large companies to extract socially undesirable terms and conditions. Moreover, in many instances, the failure of antitrust enforcement and competition policy to effectively check increasing concentration and the accumulation of market power has contributed to skewed bargaining dynamics.158 In the absence of effective antitrust enforcement, and in the presence of economic inequality and uncertainty, countervailing power is a superficially appealing response to combat this dynamic. But, beneath its surface appeal, a deeper examination of countervailing power reveals that it is not compatible with competition and should not be adopted instead of rivalrous markets. 159 While Galbraith was certainly right that countervailing power does exist and plays a role in restraining the exercise of market power, he was also right that “[n]o one should conclude, from the foregoing, that an exemption of countervailing power should now be written into the antitrust laws.”160

#### Retaining a non-derogable core labor right prevents the CP from achieving competition.

Theodore J. St. Antoine 76, Dean and Professor of Law, University of Michigan Law School, "Connell: Antitrust Law at the Expense of Labor Law," Va. L. Rev., vol. 62, 1976, pp. 603-631, HeinOnline

Inevitably, there will be an overlap between labor and antitrust regulation. Although we may assume that union activity protected under the NLRA will never be held violative of the antitrust laws, it does not follow that labor-management conduct is immune to antitrust remedies simply because it may also be subject to NLRA prohibitions and remedies. Allen Bradley involved labor activity that would obviously have been forbidden under Taft-Hartley's subsequently enacted Section 8 (b) (4) ban on secondary boycotts; nonetheless, Allen Bradley remains the paradigm union antitrust violation. Drawing the line between union activity that is subject to antitrust sanctions and union activity that is subject, if at all, only to labor law and remedies will continue to be one of the most delicate, demanding tasks confronting the judiciary. In my view, primary reliance should be placed on the labor laws. Unions and the antitrust laws are premised on fundamentally opposing philosophies of competition. There will be anomalies at best, and grave distortions at worst, in attempting to regulate labor organizations through an instrument so at odds with their nature and purposes. We have long since concluded that the value of unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences.

#### In an inflationary environment, the impact to deviations is exponential.

Yair Listokin & Peter Bassine 22, Listokin is the Shibley Family Fund Professor of Law at Yale Law School; Bassine is an Associate at Latham & Watkins in Orange County, California, "Better Rules for Worse Economies: Efficient Legal Rules Over the Business Cycle," Harvard Business Law Review, vol. 12, Winter 2022, pp. 55-79, Lexis

A. Why We Cannot Ignore the Problem

Any time-invariant legal rule will be inefficient in some phases of the business cycle. Given the inevitability of error, we might justify the status quo's emphasis on a rule's performance in expansions as follows: If every possible rule is flawed, why not focus on the expansion period rule that is inefficient the least often? True, the expansion period rule proves inefficient in recessions, but recessions are rare. Rules that perform well in recessions fare poorly in expansions. As we saw in Table 1, the likelihood of a recession is much smaller than the likelihood of an expanding economy. Expansion is the norm, occurring about 92% of the time in the United States since World War II. If we accounted for recessions when setting the legal rules, the efficiency gains in recessions might be offset by regular efficiency losses in expansions.

More concretely, consider the optimal UI eligibility rule. The efficient eligibility rule in expansions proves too tight in recessions, while the efficient rule in recessions provides for overly generous UI eligibility in expansions. By applying the efficient rule in expansions in all periods, we get the efficient rule more often than not. And the inefficiency associated with the tight UI rule in recessions should be offset by the inefficiency caused by more generous rules in expansions. As a result, the efficient rule in expansions appears to be just as efficient as any other time-invariant UI eligibility rule.

[\*88] Not so. In most economic models, the inefficiency associated with a rule does not grow proportionally to the rule's unsuitability. Instead, the inefficiency increases with the square of unsuitability. A legal rule that is far off the mark causes a disproportionate amount of inefficiency. It is better for a rule to be slightly inefficient most of the time and mitigate the worst outcomes than to maximize efficiency in most conditions but facilitate occasional catastrophic outcomes.

#### 3. Doesn’t solve SPILLOVER.

#### Perm sends conflicting messages about policy priorities---destroys norm internalization.

Aneil Kovvali 22, Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School, "Countercyclical Corporate Governance," North Carolina Law Review, vol. 101, 12/01/2022, pp. 141, Lexis

Courts and scholars could advance a countercyclical corporate governance scheme by placing the precedents in their proper context, thus eliminating confusion. It could also provide useful support by changing norms. Any system of corporate governance including one based on pure shareholder wealth maximization will ultimately depend on directors and officers internalizing a correct understanding of what values they are supposed to serve.197 Mixed messages from the legal system interfere with internalization of the proper norms.

#### Perm’s hybrid system is unmoored from macroeconomic theory---that degrades its effectiveness AND doesn’t set precedent.

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Law and regulation played almost no role in the macroeconomic policy response to the Great Recession. But policymakers have not always spurned law, as we’ll explore in this chapter. The New Deal response to the Great Depression consisted largely of legal interventions rather than fiscal stimulus. And the U.S. “stagflation” of the 1970s was met with the full force of law. As inflation exceeded 6 percent a year, Congress authorized the Economic Stabilization Act of 1970. Using his authority under this Act, President Nixon imposed a set of wage and price controls. In both cases, macroeconomic challenges prompted legal responses.

Why have we forgotten about law as a macroeconomic policy tool? The simplest explanation is that previous legal interventions for macroeconomic purposes have not worked well. Price controls failed during the 1970s. The record of the New Deal attempts at expansionary legal policy was better. Although the Supreme Court ruled the National Recovery Administration— the centerpiece of the efforts to stimulate the U.S. economy through legal means during the Great Depression—unconstitutional, the U.S. economy dramatically rebounded shortly after Congress enacted the (mostly legal) reforms of the first “hundred days” of Franklin D. Roosevelt’s presidential administration in 1933. Even the New Deal efforts at law and macroeconomics, however, did not reflect the macroeconomic “state of the art.”

For the most part, I agree that price controls and central planning are like magic bullets that too often miss their targets. But I submit that we should not therefore eschew macroeconomic tools of law entirely. Legal intervention is potentially dangerous, but it can also provide a powerful remedy. The New Dealers had the right intuitions about turning to law and macroeconomics at the zero lower bound. Indeed, even their unfocused attempts at legal stimulus worked impressively from 1933 to 1937. If future law and macroeconomic interventions enjoy better grounding in macroeconomic theory and directly adjust aggregate demand in conditions when other macro tools are wanting, then we can expect law and macroeconomics to become an invaluable policy option.

The Law and Macroeconomics of the new deal

Whereas lawmakers balked at expansionary legal policy during the Great Recession, such an approach was almost self-evident to President Franklin D. Roosevelt and other New Dealers amid the Great Depression. The signature piece of legislation passed during the first hundred days of Roosevelt’s administration was the National Industrial Recovery Act (NIRA). Upon the passage of the NIRA, Roosevelt declared:

History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress. It represents a supreme effort to stabilize for all time the many factors which make for the prosperity of the nation and the preservation of American standards.

NIRA inaugurated sweeping legal changes. The goal of many was to increase prices in order to facilitate spending: if people expected prices to rise in the future, then real interest rates at the zero lower bound would decrease even if nominal rates stayed at zero; with real rates lower, spending would increase. To this end, NIRA suspended antitrust laws that prevented the formation of cartels. It strengthened labor unions. And it created the National Recovery Administration, an agency charged with reducing unemployment by imposing standards of fair conduct on most employers. Time magazine named the Administration’s chief, Hugh Johnson, “Man of the Year” in 1933.

President Roosevelt and Congress also passed other laws and regulations with important macroeconomic effects during the first hundred days. Upon taking office, FDR declared a “bank holiday,” temporarily closing banks to prevent bank runs. Congress ratified FDR’s declaration with the passage of the Emergency Banking Act shortly thereafter. It worked. The bank holiday effectively suspended depositors’ contractual rights to their money, but this extraordinary invasion of contractual rights “ended the bank runs that had plagued the Great Depression.”1 The Emergency Banking Act also weakened the United States’ adherence to the gold standard, decreasing deflationary pressures.

The Supreme Court ruled NIRA unconstitutional in A.L.A. Schechter Poultry Corp. v. United States because the law delegated too much congressional authority to the National Recovery Administration.2 In addition, the Court held that the legislation violated Congress’s powers under the commerce clause of the Constitution, reasoning the Court disavowed just two years later.

Even after the demise of NIRA, the United States continued to pursue law and macroeconomics. As Steven Ramirez explains, much of the New Deal legal apparatus, such as the introduction of corporate income taxation and the National Labor Relations Act of 1935 (NLRA), sought to stimulate the economy.3 As originally conceived by President Roosevelt, the corporate income tax reached only cash rather than profits and encouraged corporations to spend rather than hoard cash.4 The NLRA aimed to empower unions so that workers’ wages would increase. This would raise inflation expectations, stimulating spending.

Many have criticized NIRA—and, to a lesser extent, the NLRA—on microeconomic grounds. In ordinary times, suspending antitrust laws reduces output, decreasing the economy’s potential even as prices increase.

For many, the New Deal policies also appeared flawed from a macroeconomic perspective. Notably, most of the legal interventions did not aim to stimulate aggregate demand directly. In a 1933 open letter to President Roosevelt, John Maynard Keynes acknowledged that raising the price level through the suspension of antitrust law might indirectly stimulate aggregate demand in theory but criticized Roosevelt’s economic policy for excessive reliance on this effect.5 Instead, Keynes preferred policies that directly increased aggregate demand. He argued that increases in “governmental expenditure,” not increases in the price level, were the “prime mover” of recovery. Keynes wrote of “the failure of [FDR’s] administration to organize any material increase in . . . expenditure during your first six months in office.”

The early New Deal thus looks like a failure on both macroeconomic and microeconomic grounds. But we should not be too hasty in condemning this early example of expansionary legal policy. In the short run, NIRA and the other legal interventions of the first hundred days dramatically increased inflation expectations and stimulated spending.6 The U.S. economy, which shrank an incredible 30 percent from 1929 to 1933, rebounded noticeably in 1933–1936, growing by more than 10 percent per year before slumping again in late 1937. Although NIRA likely decreased economic potential over the long run, Gauti Eggertsson argues that the U.S. economy was not constrained by potential in 1933 but rather by inadequate demand. As a result, NIRA’s indirect aggregate demand-enhancing effects outweighed its harm to long-term potential.

I do not disagree with those accusing New Dealers of making legal interventions that imposed considerable microeconomic harm. But this is not a reason to condemn law and macroeconomics generally. From the macro perspective, the New Deal was at least a short-term success. In spite of their flaws, New Deal laws helped U.S. output rebound. Other legal and regulatory interventions, which directly increase aggregate demand while imposing smaller microeconomic harms, should offer economies even more stimulus than NIRA did, without NIRA’s long-term harms to potential output.

The rise and Fall of Price Controls

After World War II, law continued to play a vital role in macroeconomic policy. As described in Chapter 3, the Bretton Woods system of international macroeconomics was premised on capital controls, which subordinated fundamental principles of law, such as the enforcement of contracts, to macroeconomic needs. By using law to restrict international capital flows, the Bretton Woods regime enabled countries to enjoy stable exchange rates while retaining control over monetary policy.

Bretton Woods came to an end with the “Nixon Shock” delivered on August 15, 1971. Unwilling to undertake the painful macroeconomic reforms needed to support an overvalued dollar, President Nixon suspended the United States’ participation in the international currency system. But the suspension of Bretton Woods did not end the reliance on law and macroeconomics. Instead, President Nixon replaced one law and macroeconomics regime—capital controls—with another—price controls. In the same speech that suspended the Bretton Woods currency system, Nixon imposed price controls authorized by the Economic Stabilization Act of 1970. President Nixon’s Executive Order 11615 sought to tame inflation by initially freezing all U.S. prices and wages for a period of ninety days. After the ninety days ended, all increases in wages and prices needed to be approved by governmental “pay boards” and “price commissions.”

Wage and price controls seemed to succeed at first. Just before the imposition of price controls, inflation exceeded 4 percent a month on an annualized basis. After the price freeze, inflation quickly fell below 4 percent. In mid-1972, during the second phase of price controls, inflation dropped under 3 percent.

But by 1974, annual inflation had exploded to more than 10 percent. It remained high into the 1980s. Consumers faced shortages of gasoline, meat, and other goods and were forced to queue for them.7

To reduce inflation, the government finally turned to monetary, not legal, policy. Under the leadership of Chair Paul Volcker, the Fed tightened monetary policy sharply, raising short-term interest rates from roughly 11 percent in 1979 to 20 percent in 1981. Inflation in the United States plummeted from more than 13 percent annually in 1981 to slightly over 3 percent in 1983. Since then, it has never exceeded 5 percent. But taming inflation came at the high cost of successive severe recessions, with unemployment reaching its post–World War II peak in 1982.

Criticisms of Wage and Price Controls

Wage and price controls are potentially powerful tools of contractionary legal policy, at least in the short run. But price controls do not offer the only means of quelling high inflation. In addition, price controls did not prove effective over the long run. Contractionary monetary policy, and not price controls, quelled rampant inflation in the United States and elsewhere. And price controls also caused significant microeconomic harms. Thus, the failure of price controls supports the conclusion that we should consider using law for macroeconomic ends only when monetary alternatives are inaccessible. Indeed, price controls illustrate many of the institutional weaknesses of law and macroeconomics.

Lack of Expertise

Experts, who know that inflation is caused by a money supply that is expanding too quickly and aggregate demand that exceeds capacity at the current inflation level, know that price controls are not a long-term solution to inflation. But price controls offer an intuitively direct “solution” to the problem of rising prices. As a result, nonexperts engaged in law may prefer price controls to better alternatives for controlling inflation.

Inequity and Microeconomic Inefficiency

When we use law for macroeconomic purposes, we sacrifice goals of equity, justice, and microeconomic efficiency. If the sacrifice is too great, then we should refrain from using law as a macro policy lever. That was the case in the 1970s: price controls imposed excessive efficiency and equity costs.

Wage and price controls necessarily come at great cost because they degrade the capacity of the price system to do its essential task: coordinate the market economy.8 When coordination breaks down, shortages and rationing result. These impose serious microeconomic harm. (If the price mechanism perfectly coordinated the economy, then there would be no recessions, also known as coordination failures. Thus, price is not a perfect coordination mechanism. But price works better than price controls.)

To reduce these harms, sophisticated regulators developed clever price control mechanisms that restricted average prices without undermining the price system entirely. But these mechanisms introduced complications in addition to improving incentives. In particular, complicated price control mechanisms wreaked havoc with contract terms and engendered considerable litigation.

The body formed to implement price controls in the United States in the 1970s, the Cost of Living Council, did its best to keep a lid on prices while retaining incentives for producers to produce. Although it might have placed a price ceiling on all oil produced in the United States, a simple price cap would have reduced incentives to produce additional oil. Instead, the regulator separated oil production into two categories and capped only one of them. “Old oil”—the amount produced in the previous year—was subject to a price freeze. If an oil producer produced the same amount of oil in the current year as in the previous year, then all of the producer’s production for this year would be considered “old oil” and subject to a price cap. In order to create incentives to produce additional oil, however, the price of “new oil” was uncontrolled. A producer’s new oil equaled the excess of this year’s oil production over last year’s production. Additional production was therefore rewarded with a higher price than steady production. To give even stronger incentives to increase production, each barrel of new oil enabled the producer to relabel a barrel of its old oil as new. If a producer produced one more barrel of oil than last year, then it would be allowed to sell two barrels of oil at an uncontrolled price (one barrel of new oil and one barrel of old oil relabeled as “new”).

This creative pricing system aimed both to limit inflation and to stimulate oil production. By regulating the price of old oil for which producers already had the capacity to produce, the Council hoped to limit inflation. But with the price of new oil uncontrolled, firms were also incentivized to keep producing in spite of the price caps. Indeed, the ability to relabel old oil as new made producers’ incentives to increase production stronger than they would have been in an economy without any price controls. If the ingenious scheme worked, producers would have every reason to increase their output, but the average price of all barrels of oil (new and old) would be lower than it would have been without price controls.

Although it looks good on paper, the scheme proved less viable than its architects hoped. In order to mitigate the harm caused by price controls, the Council needed to calculate the value of old oil for every producer and measure its new oil production, a crushing administrative task. The system also created inefficiencies and inequities, as illustrated by a contract law battle between Gulf Oil and Eastern Airlines.9

Before the imposition of price controls, Eastern signed a contract indexing the purchase price of Gulf oil at certain airports to an oil price measure calculated by Platt’s Inc.’s OilGram. When price controls were imposed, Platt’s had to revise its indexing method. Platt’s decided to index according to old oil, which slanted the contract in Eastern’s favor. Now the airline could buy oil from Gulf at the old oil price, making Gulf oil cheaper than oil from many other suppliers at the same airports, who were selling new oil. Instead of turning the profit it otherwise would have, Gulf wound up losing from the contract, a direct result of the price controls.

In addition to creating an unfair outcome, the contract incentivized inefficiency. Before the price controls, Eastern did not usually fill its tanks with Gulf fuel at airports subject to the contract. A full tank added weight to the airplane, reducing efficiency. But when the price controls artificially lowered the contracted price of Gulf fuel, Eastern began filling its tanks when it had access to Gulf’s product. Gulf’s fuel was so cheap that Eastern didn’t mind wasting it. Gulf eventually took Eastern to court over the contract, and in 1975 a federal court decided that Eastern could continue to fill its airplanes with Gulf oil at the desirable price. This inefficiency and the litigation that ensued were all direct results of the price controls.

Uncertain Effects

The effects of price controls proved volatile and unpredictable. They may have been beneficial in the short run but failed to restrain inflation over the longer term. If we cannot rely on price controls to restrain inflation over the long run, then we should refrain from using them for purposes of longrun macroeconomic policy.

Political Opportunism

Like any legislative effort, price controls are subject to political calculation. Such was the case in Congress, according to William N. Walker, the general counsel of the Cost of Living Council. “Congressional Democrats had championed the Economic Stabilization Act, enacted in 1970 over Nixon’s opposition,” Walker wrote. “Congress assumed a conservative President like Nixon would never invoke the authority and they intended to use it to embarrass him.”10 In turn, Nixon’s decision to implement the authorized controls “was aimed at deflecting Democratic criticism of his economic performance as the countdown began to the 1972 elections,” Walker alleges.

The imposition of price controls was politically popular, but it harmed the economy, without restraining inflation. Price controls and other such instruments, which enable politicians to impose long-run harms in exchange for short-run benefits, should be discouraged. Indeed, price controls epitomize the high institutional costs that may be associated with using law for macroeconomic ends.

Reconsidering Wage and Price Controls: The Case of Greece

While wage and price controls proved costly and ineffective forms of contractionary legal policy, even they are worth considering if the macroeconomic alternatives are sufficiently dire. Under the right conditions (which will be rare), price controls offer a powerful tool for overcoming price rigidities that keep output below potential in depressed economies. If even the most unlikely tools of law and macroeconomics, such as price controls, occasionally have their uses, then we s hould never dismiss law and macroeconomic interventions absolutely. Rather, we need to compare legal solutions to macroeconomic problems with fiscal and monetary alternatives.

Greece is a signature case. The term “Great Recession” fails to convey Greece’s struggles from 2009 to the present. Unemployment there peaked at a remarkable 29 percent in 2013 and remained well above 20 percent into 2018. Seven years into the Great Recession, Greek output was 26 percent smaller in real terms than at its pre-recession height. For comparison, U.S. output during the Great Depression bottomed out at 25 percent below its peak. Seven years after the onset of the Great Depression, real output in the United States had fully recovered. Greek social indicators, such as plummeting birthrates and a sharp increase in incidence of depression and suicide, testify to the human cost of Greece’s economic tragedy.

Many economists blame Greece’s astronomic unemployment rates on prevailing wages. Greeks who do work are paid too much in relation to overall labor productivity, and those who don’t work demand too much to get back into the labor market. Since Milton Friedman’s seminal analysis of this issue, the conventional macroeconomic prescription for a country in Greece’s position has been currency devaluation, which would be accomplished by expansionary monetary policy.11 By devaluing its currency, Greece would, in a single stroke, make its labor and capital more competitive, enabling it to increase exports and mitigate the depression.

However, as a member of the Eurozone, Greece does not control its own currency. It cannot devalue its currency in order to make its economy competitive with its neighbors’. Instead of devaluing its currency, Greece was forced to “internally devalue” by allowing wages and other prices to decline. A market-led process of wage declines, however, moves fitfully and painfully, leading to further reduction in output. Because the market system cannot coordinate rapid downward wage and price adjustment, inefficiencies such as sky-high unemployment also follow. As Friedman explained, “Wage rates tend to be among the less flexible prices. In consequence, . . . a policy of permitting . . . [wages] to decline is likely to produce unemployment rather than, or in addition to, wage decreases.”

Greeks have borne witness to the accuracy of Friedman’s prediction. Instead of lowering wages, many Greek employers chose to keep nominal wages fixed and instead cut employment. Prices and wages have since decreased, but the process has been agonizingly slow and economically painful.

Even with currency devaluation off the table, Greece need not have left macroeconomic management to market forces: there are other ways of combating the notorious downward inflexibility of wages. Expansionary legal policy was still available. And law—in particular, price controls—offered yet another alternative, an instrument for lowering real wages and prices rapidly and in a more coordinated fashion than isolated market actors could achieve. If Greece had passed a law requiring all nominal wages, prices, and domestic debts to be briefly reduced by a significant amount—say, 10 percent for three months—then real wages and prices would have adjusted as quickly as if Greece had devalued its currency. (A simpler alternative would cut wages by 10 percent, but leave other prices unregulated.) In one stroke, a regime of price controls would have made Greek labor and production more competitive relative to those of other Eurozone countries.12

There would have been, as one might expect, trade-offs. Any devaluation— whether through currency devaluation or legally imposed deflation—puts the financial system at risk. And devaluing via price controls adds an additional complication. Greek banks’ domestic assets would lose value, but foreign liabilities wouldn’t, taxing the banks’ solvency. A financial meltdown would, of course, exacerbate the depression. In addition, Greek products included inputs from outside the country. The cost of these inputs would not have changed, even as the domestic revenues of those firms would lose value. Either Greek businesses would have to bear this painful shock—which might cause many to collapse—or be able to adjust their individual price deflation to reflect the foreign component of their inputs, which would make legally imposed deflation very complex. More broadly, devaluation squeezes the profits of importers who charge consumers in domestic currency but pay their suppliers in foreign currency. Finally, there is no simple way to determine what debt is domestic, and therefore subject to price controls, and what is foreign. This means that lawyers would have had to draw fine lines between what accounts are subject to price controls and what are not. To mitigate these harms, Greek price controls would have needed the cooperation of the European Central Bank and Greece’s most important creditors.

But desperate times called for desperate measures. Greece was suffering an unprecedented economic cataclysm, with both supply-side (uncompetitive labor costs) and demand-side (aggregate demand short of supply capacity) dimensions. European monetary policy was stuck at the zero lower bound, limiting monetary stimulus. Greek fiscal policy also had no scope for stimulus, as national debt levels were astoundingly high. And in spite of the horrendous costs, neither Greece nor the “troika” of the IMF, ECB, and European Commission were willing to accept a Greek exit from the Eurozone, which would enable direct devaluation. (Like a legally imposed domestic deflation, “Grexit” would also require difficult determinations of what assets would remain denominated in Euros versus drachmas.)

Legally mandated deflation didn’t have to be perfect. It just had to be better than internal devaluation, which proved incredibly costly. Mandated deflation would have used law to coordinate a rapid change in prices, potentially facilitating less painful adjustment to the problem of wages disproportionate to productivity. And unlike the Nixon-era price controls in the United States, which targeted inflationary symptoms rather than inflation’s causes, mandated deflation in Greece would have directly addressed one of the central problems of Greek macroeconomic underperformance: the downward rigidity of prices.

Amid the worst economic crisis in modern history, a short period of legally mandated deflation, so long as it was developed cooperatively by Greece and the troika, was probably worth the accompanying risks.

As we’ve seen in this chapter, law and regulation plays a more prominent, if checkered, role in the history of macroeconomic policy than many appreciate. The New Deal’s primary response to the Great Depression was legal, not monetary or fiscal. An extraordinary incursion into contract law (the bank holiday) facilitated the end of a series of bank runs. And even though the NIRA increased aggregate demand only indirectly (by raising inflation expectations to encourage more spending in the present), inflation expectations and spending rose rapidly after its passage, contributing to a remarkable recovery.

In the aftermath of World War II, industrialized democracies created an international macroeconomics regime with law—in the form of capital controls—at its heart. The Bretton Woods era witnessed historically unprecedented growth rates in industrialized democracies and rapid increases in international trade (facilitated by the fixed exchange rates established by Bretton Woods). Although there are many causes of this economic miracle, the success of the Bretton Woods economy proves that a macroeconomic regime that leans heavily on law is consistent with a “Golden Age of Capitalism.”

Given this historical success, the choice of law—price controls—to address the primary macroeconomic ailment of the 1970s—inflation—looks less surprising. Unlike the New Deal and Bretton Woods, price controls failed as macroeconomic policy. They harmed microeconomic efficiency without controlling inflation.

Wage and price controls demonstrate the power and the peril of law and macroeconomics. By intervening in the price system, law can respond directly to the most pressing macroeconomic problems. At its best, law can coordinate macroeconomic rebalancing when other tools for such coordination, such as monetary or exchange-rate policy, prove wanting. But given the major downsides of wage and price controls, they should be used only when the macroeconomic policy toolkit is almost bare, as in Greece from 2010 to 2017.

During its long history, legal policy stabilization has been plagued by the absence of theoretical grounding. Although the NIRA and the Nixon-era price controls sought to improve macroeconomic conditions, macroeconomic theory did not guide their design. (Bretton Woods, by contrast, enjoyed expert macroeconomic input. Keynes himself was one of its chief architects.) Without theoretical guidance, neither NIRA nor price controls implemented programs whose primary effect was to adjust aggregate demand, compromising the effectiveness of each policy.

Effective law and macroeconomics requires more attention to macroeconomic theory. In Chapter 11, I develop three types of expansionary legal policy that increase aggregate demand without causing microeconomic distortions as severe as suspending antitrust law or limiting the use of price as a coordination mechanism. These policies, and others like them, offer stimulus alternatives when monetary and fiscal policy are hamstrung.

[CHAPTER 11 BEGINS]

Expansionary Legal Policy Options

In this chapter, I apply the lessons about law and macroeconomics developed in the previous chapters. I formulate novel legal tools that stimulate aggregate demand without requiring comprehensive legislative action or increasing government budget deficits. These tools provide options for stimulating moribund economies at the zero lower bound.

The tools I describe here—countercyclical utility-rate regulation, adjusting debtor–creditor law for the business cycle, and changing the law of remedies with the business cycle—do not exhaust the universe of expansionary legal policy options. Almost every law and regulatory policy could be modified to stimulate (or depress) aggregate demand. Instead, the tools illustrate how law and regulation can provide economically meaningful stimulus when monetary and fiscal policy are hamstrung.

One important category of expansionary legal policy that I sidestep here is interventions in the labor market. Legal interventions in the labor market, such as minimum wage laws, could have important effects on unemployment and aggregate demand. When the economy is producing below capacity, changes to labor law offer a potentially powerful tool of expansionary legal policy.

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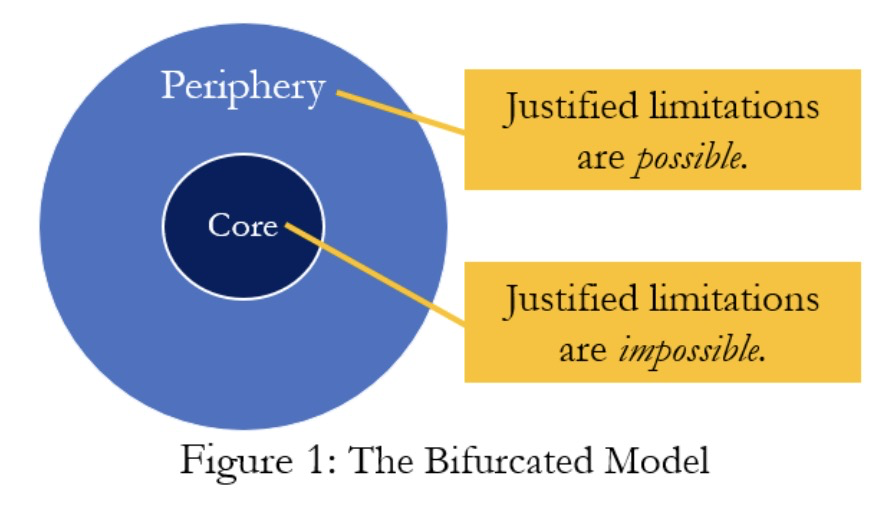
#### Strengthening a right means redistributing its existing content from a qualified periphery to an irreducible core. The CP does the opposite: it denies that *any core exists at all* by rendering the *entire* ‘right’ susceptible to macroeconomic override.

Jacob Weinrib 23, Associate Professor at Queen's University, "The Essence of Rights and the Limits of Proportionality," The Promise of Legality: Critical Reflections upon the Work of TRS Allan (eds, Geneviève Cartier and Mark Walters), SSRN

I. The Bifurcated Model

Constitutional rights have two structural features, scope and strength. The scope of a right consists in the particular protections that fall within its reach. The strength of a right consists in its power to withstand opposing considerations. My aim in this chapter is to formulate an account of the strength of constitutional rights.

In debates about the strength of rights, constitutional theory and practice have become disconnected. As a matter of constitutional practice, in recent decades a bifurcated model of the strength of constitutional rights has assumed increasing prominence. The model divides the scope of a right into a core (or an essence) and a periphery.2 [FOOTNOTE 2 BEGINS] 2 In a pathbreaking article on the essence of rights, Esin Örücü outlines the structure in terms of a core, circumjacence, and an outer edge, before adding that the core is “that part of a right which is essential to its definition.” See Örücü, “The Core of Rights and Freedoms: The Limits of Limits” in Tom Campbell, ed, Human Rights: From Rhetoric to Reality (New York: Blackwell, 1986) 37 at 38. I accept this structure, but to avoid cumbersome and archaic formulations, I will simply refer to the core (or essence) and the periphery that lies beyond it. [FOOTNOTE 2 ENDS] The core possesses absolute strength and is therefore not susceptible to limitations. In contrast, the periphery is subject to limitations that satisfy the doctrine of proportionality.3 [FOOTNOTE 3 BEGINS] 3 According to a prominent formulation of the doctrine, when government seeks to justify the limitation of a constitutional right, it must demonstrate that the limitation pursues an appropriate objective, that it employs means that are rationally connected to this objective and minimally impairing of the right, and, finally, that the extent to which the objective is furthered justifies the extent of the right’s restriction. [FOOTNOTE 3 ENDS] In some jurisdictions, these commitments appear explicitly in constitutional texts4 and human rights instruments. 5 In others, these commitments emerge through interpretation.6 This bifurcated model of the strength of rights is presented in Figure 1.



Each of the leading models of constitutional rights rejects the bifurcated model. What I will call the absolutist model conceives of rights as unlimited in strength but limited in scope.7 When the scope of an absolute right is appropriately specified, it binds without exception. Accordingly, any restriction to any absolute right is necessarily unjustified. In this way, absolute rights maintain a categorical distinction between permissible and impermissible state actions and omissions. What I will call the relativist model reverses this structure.8 Relative rights are unlimited in scope but limited in strength. Persons have a relative right to engage in any conceivable form of conduct. Because this right inevitably conflicts with other rights and interests, this right is subject to justified limitations, as determined by the doctrine of proportionality. Each of these models offers a non-bifurcated account of the strength of rights: the entire scope of an absolute right is immune from incursion; the entire scope of a relative right might be balanced away.

These non-bifurcated models have received extensive exploration by legal, political, and constitutional theorists. In contrast, the bifurcated model has been the preserve of constitutional lawyers and judges elaborating legal doctrine, disconnected from an explicit overarching theoretical framework. Trevor Allan’s innovative and illuminating engagements in the world of constitutional theory form an important exception to this trend.

In discussing the strength of rights, Allan distances himself from both the absolutist and relativist models. On the one hand, he rejects the absolutist tradition by claiming that the subjection of rights to proportional limits is integral to constitutional justice:

Because justice consists in the correct regulation of affairs or resolution of disputes, according to the moral principles applicable, it invokes the notion of proportionality: there must be an appropriate weighting of relevant principles to reflect their proper balance in all the circumstances. Principles of justice are always dependent on context in the sense that what they permit or require must be determined by analysis of all the relevant facts… Restrictions of individual rights must be proportionate to the aims and benefits envisaged.9

On the other, Allan rejects the relativist model by maintaining that each right has an “irreducible core” that may never be breached regardless of the benefits to be attained or the burdens to be avoided.10 Referring to the right to procedural fairness, he explains that a limitation of a right’s periphery might be justified or unjustified, but a limitation of a right’s core is unjustifiable:

[P]owerful considerations of public interest may properly qualify the procedural rights that would otherwise apply: reasons of national security, in particular, may justify restrictions on the disclosure of evidence or relevant sources. But such limitations or qualifications must not be so extensive as wholly to undermine procedural rights, making a trial or hearing unfair…Like other fundamental rights, procedural fairness has a conceptual core that cannot properly be ignored or overridden.11

For Allan, the limitations to which procedural fairness and other rights are subject must cease wherever the core of the right begins. As he puts the point: “No matter how important the countervailing interests,” the essence of rights “must be preserved.”12

Allan’s pioneering account of the strength of rights joins what the leading theories sever: a commitment to the absolute strength of rights and to the idea of justified limitations, as determined through doctrine of proportionality. Within Allan’s bifurcated account, these ideas can be combined because each takes a different object. The idea that rights possess absolute strength applies solely to the core of a right, while the idea that rights are subject to proportional limits applies solely to the periphery.

In a recent article, Koen Lenaerts, the President of the Court of Justice of the European Union (CJEU), makes the following methodological remark about the bifurcated model:

[T]he case law of the CJEU reflects the fact that that court will first examine whether the measure in question respects the essence of the fundamental rights at stake and will only carry out a proportionality assessment if the answer to that first question is in the affirmative. The application of that method of analysis is not simply empty formalism, but rather seeks to emphasize the point that the essence of a fundamental right is absolute and not subject to balancing. 13

In this passage, Lenaerts identifies two methodological pillars on which the bifurcated model rests. The first is that one can determine whether a measure has respected the essence of a right without engaging in balancing. The second is that when a measure breaches the essence of a right, proportionality justification is precluded. Each pillar has attracted extensive criticism.

The claim that the bifurcated model offers a method of identifying the essence of a right without engaging in balancing is attacked on both doctrinal and theoretical grounds. 14 As a doctrinal matter, critics of the bifurcated model observe that the case law surrounding the essence of rights is “rife with ambiguities and inconsistencies”15 and fails to disclose “a consistent methodology.”16 As a theoretical matter, critics claim that the bifurcated model is doomed from the outset: “The problem with the ‘very essence’ is that it is almost impossible to define usefully without reference to competing public interests” that might override the right in a particular setting.17 But if the essence cannot be determined without considering the reasons that oppose constitutional protection in a given context, then the “final untouchable areas of a right” will depend upon the balance of reasons that support and oppose constitutional protection.18 With this, critics conclude that the bifurcated model short-circuits by relying on balancing, the very method that the model repudiates.

The second methodological challenge concerns the status of the doctrine of proportionality within the bifurcated model. As we have seen, the bifurcated model claims that when the essence of a right is breached, justification is impossible and the doctrine of proportionality is inapplicable. Relativist critics of the bifurcated model regard these claims as baseless. Even when a right is restricted in its entirety, it remains possible that the breach will be justified because the reasons that oppose the right might outweigh the reasons that support it. Accordingly, critics claim that where a right is restricted, the restriction might be justified or unjustified depending on the interplay of the reasons apposite to that context. But there is no basis, critics conclude, for the bifurcated model’s claim that the restriction of the essence of any right is unjustifiable as such. 19

My overarching aim in this chapter is to continue Allan’s project of elaborating the bifurcated model by confronting the methodical challenges that surround it. If one proceeds on the assumption that a general balancing of interests represents the exclusive method of justifying claims about rights, then these methodological challenges will seem irresolvable. However, this assumption need not be accepted. Our constitutional practices present doctrines concerning the scope and strength of rights that both form an alternative to a general balancing of interests and illuminate the inner workings of the bifurcated model. These doctrines explain how the methodological challenges surrounding the bifurcated model can be overcome.

I proceed as follows. Part II explores the diverging structures of the non-bifurcated models of rights and shows that each converges on the idea that balancing is the method of identifying the essence of rights. Parts III shows how purposive interpretation offers resources for identifying the essence of rights without engaging in balancing. Part IV explains why justification is impossible when the essence of a right is breached, by articulating the distinctive conception of proportionality on which the bifurcated model relies. Part V concludes that the key to elucidating the bifurcated model lies in identifying and elaborating the distinctive doctrines that animate it.

II. The Non-Bifurcated Models

Debates between the absolutist and relativist models of rights are often staged as though relativists support and absolutists oppose the idea that rights hang in the balance. This is not the case. Here, I contrast the structure of each model, locate their fundamental dispute, and explain why both models are ultimately committed to the idea that every judgment about what constitutional rights demand ultimately depends on balancing.

The absolutist and relativist models mirror the other’s structure. Absolute rights are indefeasible in strength but narrow in scope, while relative rights are boundless in scope but defeasible in strength. Table 1 contrasts the structure of these models.

Table 1

Models of Constitutional Rights

Each of these models draws our attention to different justificatory projects.

From the standpoint of the relativist model, what stands in need of justification are claims about the strength of rights rather than their scope. Since the 18th century, relativists have claimed that, as a matter of the scope of rights, persons have a “right to everything indiscriminately.”20 Contemporary proponents of rights relativism embrace the radical ramifications of this idea by claiming that wherever a constitution protects liberty or autonomy, persons possess a prima facie right to engage in any conceivable form of conduct, including theft and even murder.21 This claim about the scope of rights has ramifications for their strength: “rights do not have a special importance, and precisely because of the lack of special importance they do not have special normative force.”22 Because relative rights encompass conduct that is virtuous, vacuous, and even vicious, such rights enjoy no necessary primacy over opposing claims. 23 From this standpoint, the justificatory task that rights present involves determining their strength, that is, their capacity to withstand whatever reasons oppose constitutional protection in a given context.

In contrast, the absolutist model insists that if we are to retain the simple idea that constitutional rights distinguish between permissible and prohibited conduct, then the relativist understanding of rights must be inverted. Constitutional rights must be regarded not as prima facie claims that are forfeited whenever the opposing reasons are sufficiently weighty, but as categorical claims. Once rights are conceived of as prevailing over any opposing consideration, the protections that rights afford must be confined to specific claims of overriding importance.24 Absolute rights are “specific high-priority requirements, and thus though their force is great, their scope is narrow.”25

What divides the leading models of constitutional rights is the question of what it is about rights that stands in need of moral justification. Absolutists insist that it is their scope, while relativists maintain that it is their strength. However, when it comes to the method of identifying what rights demand, each of these models endorses balancing.

Absolutists often attack their relativist counterparts for being unable to accommodate the idea that rights have a “core content that cannot be compromised under any circumstances.”26 Once constitutional rights are subject to balancing, “[a]nything which the Constitution says cannot be done can be done if…the interests thereby served outweighed those which were sacrificed.”27 Because relative rights occupy a constitutional world devoid of categorical constraints, even the right not to be tortured or enslaved may, in principle, be set aside in contexts where the benefits obtained (or the burdens avoided) are sufficiently weighty. Thus, absolutists conclude that wherever the relative model prevails, “everything, even those aspects of our life most closely associated with our status as free and equal, is, in principle, up for grabs.”28

Defenders of relative rights respond to this charge in two ways. The first seeks to accommodate the objection by stipulating that certain constitutional rights – for example, those that protect persons from torture and enslavement – are exempt from balancing.29 I will set this response aside as it stands in tension with relativism’s organizing idea: “Constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles.”30 The second response follows this idea to its conclusion: “There is no such thing as an absolute principle.”31 From this standpoint, even the prohibition of torture “is only an apparently categorical claim,” true in most circumstances but susceptible to being “outweighed.”32

When proponents of rights relativism encounter constitutional provisions that proclaim that the core or the essential content of a constitutional right may not be restricted, they maintain that balancing is the method of identifying the essence of a right. Consider, for example, article 19(2) of Germany’s Basic Law, which imposes a limit on the restrictions to which rights may be subject: “In no case may the essence of a basic right be affected.”33 Robert Alexy, the leading theorist of the relativist model, interprets this provision as follows:

[T]he essential core is what is left over after the balancing test has been carried out. Limitations which correspond to the principle of proportionality do not infringe the essential core, even if they leave nothing left of the constitutional right in an individual case. This reduces the guarantee of an essential core to the principle of proportionality. Since this applies anyways, this would mean that article 19(2) Basic Law simply has declaratory effect.34

When confronted by a provision that prohibits restricting the essence of any right, relativists explain that the essence of the right is what (if anything) survives balancing in a given context. Since balancing determines the extent to which rights may be restricted, rights are susceptible to being balanced away in their entirety.35 From this standpoint, a constitutional prohibition against restricting the essence of a right has no impact on the constitution’s meaning.36

When absolutists repudiate relativism for placing categorical rights in the balance, relativists respond that absolutism does not know itself. Absolutists insist that a right is “designated only after the final interaction of all of the reasons bearing upon the justifiability of a given action.”37 Once this designation occurs, whatever falls within the scope of the right is essential to it, conclusive in strength, and exempt from balancing. Relativists object that the absolutist opposition to balancing is more apparent than real: wherever the reasons bearing upon the justifiability of a given action divide into supporting and opposing reasons, there is no alternative to assessing the weight of the competing reasons, and that is what balancing is. Even if absolute rights cannot be balanced away, the scope of each right is nevertheless “the outcome of an underlying balancing approach.”38 Far from offering an alternative to balancing, absolutism merely resists applying the label rights until after the task of balancing all of the reasons bearing upon the justifiability of a given act has concluded.

Ultimately, rights relativists and absolutists conceive of claims about the essence of rights as dependent on balancing. Relative rights are the inputs of balancing, and whatever aspect of a right is not balanced away in a given context constitutes its essence. Absolute rights are the outputs of balancing, and what is essential to the right is whatever the balance assigns to its scope.39 Thus, each of these opposing models converges on the same conclusion: balancing is the method for identifying the essence of a right. If this conclusion is inescapable, then the bifurcated model finds itself in the hopeless position both of requiring the essence of a right to be identified and of repudiating the only method for identifying it.

III. Identifying the Essence

However, as I will now argue, there is a familiar constitutional doctrine that enables the essence of a right to be identified without engaging in balancing. What then is that method?

Proponents of the bifurcated model usually shy away from this question. On those rare occasions where an answer is advanced, the magnetic pull of balancing proves overwhelming. In a recent article, Takis Tridimas and Giulia Gentile embrace the bifurcated model and reject rights relativism when they write: “Respect for essence is … best understood as an autonomous condition that must be satisfied separately from the requirement of proportionality.”40 However, when turning to the question of how the essence of a right is to be identified, the authors state: “Although the concept of essence as a legal threshold must be understood as an autonomous limit, in effect, it is impossible to determine it without engaging in a balancing process which is best carried out through a proportionality analysis.”41 With this, the authors’ allegiance to the bifurcated model collapses into a hardboiled relativism.

When lawyers and judges claim that the essence of a right has been breached, they set aside the language of infringement or limitation and speak of the right being abolished,42 destroyed,43 extinguished,44 emptied of its contents,45 or having its very existence called into question.46 What unites these formulations is the idea that the essence of a right is breached by public acts and omissions that treat the purpose of the right as a nullity and public power as plenary with respect to it. In what follows, I explain how purposive interpretation determines the essence of a constitutional right without engaging in balancing.

Purposive interpretation is a method of determining the scope of a constitutional right. This doctrine integrates a series of ideas.47 First, a charter of rights is a system of standards (or what we might call purposes) that regulate the relationship between public authorities and the free persons subject to their governance. Second, purposive interpretation is interpretive insofar as its task is not to determine which provisions in a charter of rights are to be given effect, but to explain how each provision can be given effect. Accordingly, when imputing purposes to provisions, purposive interpretation eschews purposes that render particular provisions inert or duplicative of others and instead seeks to formulate an interlocking set of general and particular purposes that make sense of a charter of rights in whole and part. Because different constellations of purposes may inform different charters of rights, both the scope of rights and the boundary delineating the core and the periphery of rights may vary from one jurisdiction to the next. Third, the purpose of each right must be fulfilled by public authorities in the context of a constantly changing world. Thus, the “social reality” to which a provision applies “becomes an integral part of interpretation.”48 Fourth, a right is fulfilled when the acts and omissions of public authorities conform to what the relevant purpose demands in a given context. In contrast, a right is breached to the extent that public acts or omissions deviate from what that purpose demands. So conceived, purposive interpretation identifies the purposes that animate a charter of rights and requires the legal order to live up to them.

A right might be breached in two ways. The first limits some aspect of the right’s purpose. The second negates that purpose and thereby compromises the right’s essence. An illustration of the distinction between a limitation and a negation arises in Schrems v Data Commissioner with respect to the rights to private life and to access effective judicial protection. 49

Schrems is the first case in which the CJEU declared a measure invalid because it compromised the essence of rights held under the Charter of Fundamental Rights of the European Union (the EU Charter). The case concerned the transfer of personal data of Facebook users in Europe to the United States where the company’s servers are located. The European Union’s General Data Protection Regulation authorizes the transfer of data to third countries that ensure an adequate level of data protection.50 In its Safe Harbour Decision, the European Union determined that the United States provided adequate protection, and authorized companies to store the personal data of Europeans in the United States.51 In the aftermath of Edward Snowden’s disclosures regarding the access that public authorities in the United States had to personal data transferred from Europe, an Austrian national challenged the Safe Harbour Decision.52 In Schrems, the CJEU interpreted the General Data Protection Regulation as requiring third countries to provide “a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order.”53 On this basis, the CJEU declared the Safe Harbour Decision invalid because the Commission failed to ensure that the United States offered equivalent protection. More specifically, the decision breached the essence of two rights held under the EU Charter.

First, the decision breached the essence of the right to private life. Schrems was handed down a few months after Digital Rights Ireland, in which the CJEU held that the retention of metadata54 constituted a “particularly serious interference” with the right to private life,55 but did not breach that right’s essence because “the content of the electronic communications” remained private.56 In Schrems, the Safe Harbour Decision enabled public authorities in the United States, such as the National Security Agency, to access both metadata and the content of all personal data transferred from the European Union to the United States.57 As the CJEU noted, the Safe Harbour Decision “does not contain any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States.”58 Because the subjection of the content of personal communications to unrestricted surveillance by public authorities treats the right to private life as a nullity – an empty claim imposing no constraint on the exercise of public authority – the decision breached the essence of the right.59

Second, the CJEU held that the essence of the right to effective judicial protection was breached because domestic legislation in the United States failed to provide individuals with an “administrative or judicial means” of pursuing “legal remedies in order to have access to personal data … or to obtain the rectification or erasure of such data.”60 Accordingly, the right of individuals to seek a remedy to protect their rights was treated as non-existent because persons were left without any mode of legal recourse to constrain the use of their personal data.61

As these examples show, the essence is breached in contexts where the purpose of the right is not limited but denied. This idea extends in two directions. First, where the purpose of the right requires public authorities to exercise restraint, the essence of the right is breached where a public authority acknowledges no limit on its power to interfere with that purpose. The prospect of an unrestricted invasion of privacy in Schrems illustrates this possibility. Second, where the purpose of the right demands state action, the essence of the right is breached where the public authority fails to act to create the conditions of the right’s protection. In Schrems, the absence of any mode of legal recourse negates the right to effective judicial protection. Similarly, the European Court of Human Rights has held that the essence of the right to vote is “completely denied” in contexts where a state creates no mechanism for its exercise.62

Of course, the distinction between limits and denials will not always be easy to draw. The structure of constitutional adjudication addresses this ambiguity by placing the onus on the party seeking to establish the breach of a constitutional right. In cases where the claimant fails to establish that the breach compromises the essence of a right, justification remains possible. Whether it is actual depends upon considerations of proportionality.

Purposive interpretation is not a form of balancing. Balancing seeks to resolve conflicts between competing principles by considering the intensity of the interference to one principle, the importance of satisfying a competing principle, and, finally, whether the “importance of satisfying the competing principle justifies the detriment to, or nonsatisfaction of the first.”63 Purposive interpretation is not a form of balancing because it does not apply to competing principles. As we have seen, purposive interpretation concerns the relationship between the purpose of a right and the context in which public authorities must give effect to it. Purpose and context are not principles that compete against one another. Rather, context must conform to purpose. From the standpoint of purposive interpretation, the opposite idea – that there is some context to which the purpose of rights must conform – is inadmissible because it would render rights powerless to protect persons from the various social realities to which they apply, including historical traditions, societal consensus, and policy preferences. Because determinations about whether (and the extent to which) context conforms to purpose does not involve competing principles, purposive interpretation is not a form of balancing.

One might object that the bifurcated model is incapable of accommodating nonderogable rights, such as the right not to be tortured or enslaved. Because these rights may not be restricted under any circumstances, they resist the distinction between a core that is immune from restriction and a periphery that may be restricted in accordance with the doctrine of proportionality. In the terminology of the birfurcated model, a non-derogable right has a core but no periphery. And so, it would seem, non-derogable rights cannot be reconciled with the bifurcated model. My response to this objection hinges on an earlier claim: purposive interpretation presumes that a charter of rights is an interlocking set of general and particular standards that regulate the acts and omissions of public authorities. From this standpoint, the rights not to be tortured or enslaved are not stand-alone rights, but instead form the core of a standard embodied by a more general right. For example, torture violates the core of the broader right to security of the person, while enslavement violates the core of the broader right to liberty. These rights are derogable insofar as their peripheries remain subject to justified limitations. However, the cores of these rights are non-derogable insofar as their breach cannot be justified. In this way, the bifurcated model subsumes the distinction between derogable and non-derogable rights.

The bifurcated model offers a distinctive answer to the question: What exceptionless rights do we have? Relativists answer that because the strength of every right is determined through balancing, there are no exceptionless rights. In contrast, absolutists answer that because what is susceptible to restriction is not a right, there are only “a small number of rights,” such as “the right not to be tortured, not to be subject to cruel and unusual punishment, and not to be held in slavery or servitude.”64 All other supposed rights are subject to the vicissitudes of the political process. The bifurcated model departs from each of these approaches by maintaining that the core of every right imposes an unconditional obligation, including the right to privacy, the right to effective judicial protection, the right to vote, and – as Allan reminds us – the right to procedural fairness.65

IV. Why the Essence is Absolute

The bifurcated model claims that when the essence of a right is breached, the breach is not unjustified but unjustifiable. I will now explain why the bifurcated model is entitled to the claim that derogation from the essence of the right is unjustifiable.

Relativist critics of the bifurcated model insist that “[t]he conviction that there must be rights which even in the most extreme circumstances are not outweighed … cannot be maintained as a matter of constitutional law.”66 Relativists buttress this conclusion with a series of familiar ideas: rights are reasons that support constitutional protection; limits are reasons that oppose constitutional protection; and balancing is the appropriate method of determining the relative moral weight of these reasons in a given context.67 If the strength that constitutional rights possess is determined by balancing, then it follows that every claim of right is subject to balancing, that rights may be balanced against any consideration that opposes them, and that rights are susceptible to being outweighed in part and whole.

To be sure, the relativist claim is that rights always hang in the balance, not that rights will always be balanced away. Within the relativist model, the more a right is restricted, the stronger the countervailing reason must be if that restriction is to be justified. Accordingly, as the severity of a restriction increases, the likelihood of its justification diminishes.68 What relativists resist is the further claim that certain restrictions on rights are not merely unlikely to be justified but unjustifiable as such. From the relativist standpoint, this further claim cannot be maintained because it conflates improbability with impossibility. From the relativist standpoint, the bifurcated model rests on a simple error.

This objection takes the form of a conditional: if the bifurcated model relies on the relativist account of justification, then the bifurcated model would not get off the ground. However, if the bifurcated model had something of its own to say about why it is that justification is impossible when the essence of a right is breached, then it is the objection that would not get off the ground. After all, the objection does not show that the bifurcated model cannot succeed on its own terms. The objection simply observes that the bifurcated model is committed to a conclusion that does not follow from relativist premises.

In claiming that there is no justification for breaching the essence of a right, the bifurcated model relies on its own distinctive understanding of what justification means in the realm of constitutional rights.69 This understanding proceeds from the organizing idea that constitutional rights, by virtue of their status as supreme law, enjoy categorical priority over any legal norm that lacks the same pre-eminence. This idea has ramifications for both the scope and strength of constitutional rights. With respect to the scope of rights, the bifurcated model resists the relativist idea that the function of constitutional rights is to “put every conceivable form of conduct under their special protection.”70 Instead, a charter of rights articulates a set of purposes integral to the relations of free and equal persons, elevates these purposes to the rank of supreme law, and looks to these purposes to distinguish what the constitution protects from what “is left to the rules and remedies of ordinary law.”71 With respect to the strength of rights, the bifurcated model rejects the relativist idea that rights enjoy no priority over sub-constitutional considerations of policy, preference, expediency, and tradition. 72 Instead, the bifurcated model preserves the priority of rights by maintaining that a right may be limited only to provide “equivalent protection to the rights and freedoms of others, or for the protection of other legal interests which are essential if man is to continue to enjoy his rights and freedoms.”73 In this way, the bifurcated model resists the twin tendencies of rights relativism to reduce all rights into interests and to elevate all government interests to the rank of rights.74

The bifurcated model’s commitment to the priority of rights generates a distinctive account of the final proportionality substage.75 This substage presupposes a series of prior determinations: that one member of the system of rights has been breached, that the breach furthers the fulfillment of the purpose of another member of that system (appropriate objective and rational connection), and that there is no means of fulfilling the purpose of each member of the system of rights undiminished (minimal impairment). At issue in the final proportionality substage is the question of how conflicts between members of the system of rights are to be resolved where the constitution presents each member as possessing “equal validity and rank” and offers “no specific limitations clauses” for resolving conflicts that might arise between them.76

These conflicts may not be resolved by appealing to the familiar idea that rights are trumps. This idea is decisive when a constitutional right is confronted by a sub-constitutional consideration, but the idea offers no resources for resolving conflicts in which opposing claims issue from the normative apex of law’s hierarchy. Nor may these conflicts be resolved by “postulating an abstract hierarchy” in which one member of the system of rights, say, freedom of expression, is always prioritized over another, say, the right to a fair trial.77 As an interpretive matter, this approach is precluded wherever the constitutional text presents particular rights not as standing in relations of superior and inferior, but as making an equally valid claim to “effective implementation.”78

Where conflicts arise between members of the system of rights, the task “is not to determine which one prevails but to find a solution which leaves the greatest possible effect to both of them (Pracktische Konkordanz).”79 Accordingly, where each member of the system of rights issues an equally valid claim to fulfillment, conflicts may not be resolved by negating one member of the system in order to advance another. The sacrifice of any member of the system of rights is unjustifiable because it violates the idea that animates the final proportionality substage, namely, that each member of the system of rights makes an equally valid claim to implementation. Thus, when the essence of a right is breached, it is not the case that, given the severity of the interference, an adequate justification remains possible but is unlikely to materialize. Rather, justification is impossible because the nullification of a member of the system of rights can neither be justified by appealing to a sub-constitutional consideration nor to another member of the system of rights. In the former case, justification is precluded by the priority of each member of the system of rights over any subconstitutional legal norm. In the latter, justification is precluded because if each member of the system of rights makes an equally valid claim to fulfillment, no member can justify another’s nullification. Thus, where the essence of a right is breached, the final proportionality substage necessarily remains unsatisfied because there is no kind of consideration capable of justifying the breach.

In our collective constitutional terminology and imagination, the metaphor of balancing has become enmeshed with the final proportionality substage. From the standpoint of the bifurcated model, this metaphor is misleading because it denies the priority of the system of rights by subjecting each of its members to a general balancing of interests, in which rights may be restricted by any sub-constitutional consideration, whether political or economic, social or cultural.80 Further, the metaphor suggests that rights may be balanced away in their entirety whenever the benefits to be achieved or the burdens to be avoided possess sufficient magnitude. The relativist model embraces both of these ideas. The bifurcated model rejects both, but for its own distinctive reasons. On the one hand, the priority of rights precludes restricting any right to advance any consideration that does not sound in a constitutional register. Each member of the system of rights possesses absolute strength against any sub-constitutional consideration. On the other, where the members of the system of rights possess an equal claim to fulfilment, no member may be nullified to advance another. Instead, members of the system of rights may be restricted at their periphery to ensure that no member is breached at its core.

V. Conclusion

Allan’s immense contributions to the world of constitutional theory include his articulation of the bifurcated model of constitutional rights. This model leads a double life. As a matter of constitutional practice, judges and lawyers in jurisdictions around the world appeal to the model to conceptualize the strength of rights. As a matter of constitutional theory, however, the model has come in for a rough ride. Critics claim that the model is defective both because it offers no method of identifying the essence of a right and because it provides no basis for its claim that when the essence of a right is breached, justification is impossible. This chapter argues that the key to overcoming these methodological challenges lies in appreciating the distinctive doctrines on which the model relies. On the one hand, purposive interpretation identifies the essence of a right with its purpose. Any public act or omission that treats the purpose of a right as a nullity breaches its essence. On the other, there is a conception of proportionality that explains why justification is impossible when the essence of a right is breached. Where each member of the system of rights makes an equally valid claim to implementation, no member may justify the nullification of any other. Uniting each of these doctrines is the shared idea that a constitutional right enjoys priority over any legal norm that lacks the same pre-eminence. These doctrines and the shared idea that animates them are, as Allan might say, “implicit in our existing constitutional arrangements.”81

#### The CP strengthens antitrust. That weakens collective bargaining rights.

Charalampos Stylogiannis 23, KU Leuven, University of Leuven, "Freedom of association and collective bargaining in the platform economy: a human rights-based approach and an ever-increasing mobilization of workers," International Labour Review, vol. 162, no. 1, 2023, pp. 123-145, https://doi.org/10.1111/ilr.12340

On top of that, such rights can be also restricted, in instances where platform workers’ working activities come into clash with another area of law, namely, competition law. In this respect, such workers are often restricted from joining trade unions and they – de facto – fall outside the scope of collective agreements, which largely rely on employment status for coverage. This occurs because of the existence of strict anti-trust laws, which consider selfemployed workers (including many workers in the ‘grey zone’) as undertakings. Specifically, the introduction of minimum employment terms and conditions can be considered as price-fixing to the detriment of consumers and fair competition; hence, collective agreements as such are in breach of competition law (Lianos, Countouris, De Stefano, 2019). As seen below, a strict application of these rules have already excluded a considerable number of platform workers from the coverage of collective agreements. At this point it should be mentioned that in addition to legal obstacles, there are also practical hurdles upon attempting to exercise their collective rights, even if they are considered employees (Aloisi, 2019). As other workers in NSFE, they deal with frequent turnovers and a limited attachment to a single workplace. Furthermore, many traditional trade unions, at least up until recently, have been hesitant to engage such workers into their actions (Heery, 2015; Gumbrell-McCormick, 2011). These issues will be further discussed in the next section, along with the attempts made by some unions to overcome such problems.

#### That prohibits the plan---‘strengthen’ cannot include weakening.

Merriam-Webster No Date, "Synonyms of strengthen," Merriam-Webster Thesaurus, https://www.merriam-webster.com/thesaurus/strengthen

as in to enhance

to make markedly greater in measure or degree

encouraged the boarding school students to strengthen their ties with the community by doing public service

Synonyms & Similar Words

enhance

intensify

deepen

heighten

consolidate

reinforce

broaden

boost

sharpen

amplify

expand

redouble

accentuate

step up

augment

emphasize

extend

magnify

lengthen

beef (up)

enforce

accelerate

maximize

supplement

enlarge

amp (up)

hasten

quicken

point (up)

enliven

reenforce

restrengthen

exacerbate

stress

aggravate

jazz (up)

Antonyms & Near Antonyms

reduce

weaken

decrease

diminish

moderate

tone (down)

lessen

abate

subdue

#### 2. RIGHTS. The CP treats collective bargaining as a macroeconomic policy instrument, NOT a right. That’s anti-topical---the nature of rights is that they override utilitarian considerations.

Ronald Dworkin 13, Professor of Law and Philosophy at New York University, Professor of Jurisprudence at University College London, Fellow of the British Academy, Queen's Counsel, Holberg International Memorial Prize, Balzan Prize, "Rights as Trumps," Arguing About Law, edited by Aileen Kavanagh & John Oberdiek, Taylor & Francis, 12/16/2013, pp. 335-344

RIGHTS ARE BEST understood as trumps over some background justification for political decisions that states a goal for the community as a whole.’ If someone has a right to publish pornography, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did. Of course, there are many different theories in the field about what makes a community better off on the whole; many different theories, that is, about what the goal of political action should be. One prominent theory (or rather group of theories) is utilitarianism in its familiar forms, which suppose that the community is better off if its members are on average happier or have more of their preferences satisfied. There are, of course, many other theories about the true goal of politics. To some extent, the argument in favour of a political right must depend on which of these theories about desirable goals has been accepted; it must depend, that is, on what general background justification for political decisions the right in question proposes to trump. In the following discussion I shall assume that the background justification with which we are concerned is some form of utilitarianism which takes, as the goal of politics, the fulfilment of as many of people’s goals for their own lives as possible. This remains, I think, the most influential background justification, at least in the informal way in which it presently figures in politics in the Western democracies.

Suppose we accept then that, at least in general, a political decision is justified if it promises to make citizens happier, or to fulfil more of their preferences, on average, than any other decision could. Suppose we assume that the decision to prohibit pornography altogether does in fact, meet that test, because the desires and preferences of publishers and consumers are outweighed by the desires and preferences of the majority, including their preferences about how others should lead their lives. How could any contrary decision, permitting even the private use of pornography, then be justified?

Two modes of argument might be thought capable of supplying such a justification. First, we might argue that, though the utilitarian goal states one important political ideal, it is not the only important ideal, and pornography must be permitted in order to protect some other ideal that is, in the circumstances, more important. Second, we might argue that further analysis of the grounds that we have for accepting utilitarianism as a background justification in the first place—further reflection of why we wish to pursue that goal—shows that utility must yield to some right of moral independence here. The first form of argument is pluralistic: it argues for a trump over utility on the ground that though utility is always important, it is not the only thing that matters, and other goals or ideals are sometimes more important. The second supposes that proper understanding of what utilitarianism is, and why it is important, will itself justify the right in question.

I do not believe that the first, or pluralistic, mode of argument has much prospect of success, at least as applied to the problem of pornography. But I shall not develop the arguments now that would be necessary to support that opinion. I want instead to offer an argument in the second mode, which is, in summary, this. Utilitarianism owes whatever appeal it has to what we might call its egalitarian cast. (Or, if that is too strong, would lose whatever appeal it has but for that cast.) Suppose some version of utilitarianism provided that the preferences of some people were to count for less than those of others in the calculation how best to fulfil most preferences overall either because these people were in themselves less worthy or less attractive or less well-loved people, or because the preferences in question combined to form a contemptible way of life. This would strike us as flatly unacceptable, and in any case much less appealing than standard forms of utilitarianism. In any of its standard versions, utilitarianism can claim to provide a conception of how government treats people as equals, or, in any case, how government respects the fundamental requirement that it must treat people as equals. Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit. The corrupt version of utilitarianism just described, which gives less weight to some persons than to others, or discounts some preferences because these are ignoble, forfeits that claim. But if utilitarianism in practice is not checked by something like the right of moral independence (and by other allied rights) it will disintegrate, for all practical purposes, into exactly that version.

Suppose a community of many people including Sarah. If the constitution sets out a version of utilitarianism which provides in terms that Sarah’s preferences are to count for twice as much as those of others, then this would be the unacceptable, non-egalitarian version of utilitarianism. But now suppose that the constitutional provision is the standard form of utilitarianism, that is, that it is neutral towards all people and preferences, but that a surprising number of people love Sarah very much, and therefore strongly prefer that her preferences count for twice as much in the day-to-day political decisions made in the utilitarian calculus. When Sarah does not receive what she would have if her preferences counted for twice as much as those of others, then these people are unhappy, because their special Sarah-loving preferences are unfulfilled. If these special preferences are themselves allowed to count, therefore, Sarah will receive much more in the distribution of goods and opportunities than she otherwise would. I argue that this defeats the egalitarian cast of the apparently neutral utilitarian constitution as much as if the neutral provision were replaced by the rejected version. Indeed, the apparently neutral provision is then self-undermining because it gives a critical weight, in deciding which distribution best promotes utility, to the views of those who hold the profoundly un-neutral (some would say anti-utilitarian) theory that the preferences of some should count for more than those of others.

The reply that a utilitarian anxious to resist the right to moral independence would give to this argument is obvious: utilitarianism does not give weight to the truth of that theory, but just to the fact that many people (wrongly) hold that theory and so are disappointed when the distribution the government achieves is not the distribution they believe is right. It is the fact of their disappointment, not the truth of their views, that counts, and there is no inconsistency, logical or pragmatic, in that. But this reply is too quick. For there is in fact a particularly deep kind of contradiction here. Utilitarianism must claim (as I said earlier any political theory must claim) truth for itself, and therefore must claim the falsity of any theory that contradicts it. It must itself occupy, that is, all the logical space that its content requires. But neutral utilitarianism claims (or in any case presupposes) that no one is, in principle, any more entitled to have any of his preferences fulfilled than anyone else is. It argues that the only reason for denying the fulfilment of one person’s desires, whatever these are, is that more or more intense desire must be satisfied instead. It insists that justice and political morality can supply no other reason. This is, we might say, the neutral utilitarian’s case for trying to achieve a political structure in which the average fulfilment of preferences is as high as possible. The question is not whether a government can achieve that political structure if it counts political preferences like the preferences of the Sarah-lovers’ or whether the government will in fact then have counted any particular preference twice and so contradicted utilitarianism in that direct way. It is rather whether the government can achieve all this without implicitly contradicting that case.

Suppose the community contains a Nazi, for example, whose set of preferences includes the preference that Aryans have more and Jews fewer of their preferences fulfilled just because of who they are. A neutral utilitarian cannot say that there is no reason in political morality, for rejecting or dishonouring that preference, for not dismissing it as simply wrong, for not striving to fulfil it with all the dedication that officials devote to fulfilling any other sort of preference. For utilitarianism itself supplies such a reason: its most fundamental tenet is that people’s preferences should be weighed on an equal basis in the same scales, that the Nazi theory of justice is profoundly wrong, and that officials should oppose the Nazi theory and strive to defeat rather than fulfil it. A neutral utilitarian is in fact barred, for reasons of consistency, from taking the same politically neutral attitude to the Nazi’s political preference that he takes to other sorts of preferences. But then he cannot make the case just described in favour of highest average utility computed taking that preference into account.

I do not mean to suggest, of course, that endorsing someone’s right to have his preference satisfied automatically endorses his preference as good or noble. The good utilitarian, who says that the push-pin player is equally entitled to satisfaction of that taste as the poet is entitled to the satisfaction of his, is not for that reason committed to the proposition that a life of push-pin is as good as a life of poetry. Only vulgar critics of utilitarianism would insist on that inference. The utilitarian says only that nothing in the theory of justice provides any reason why the political and economic arrangements and decisions of society should be any closer to those the poet would prefer than those the push-pin player would like. It is just a matter, from the standpoint of political justice, of how many people prefer the one to the other and how strongly. But he cannot say that about the conflict between the Nazi and the neutral utilitarian opponent of Nazism, because the correct political theory, his political theory, the very political theory to which he appeals in attending to the fact of the Nazi's claim, does speak to the conflict. It says that what the neutral utilitarian prefers is just and accurately describes what people are, as a matter of political morality, entitled to have, but that what the Nazi prefers is deeply unjust and describes what no one is entitled, as a matter of political morality, to have. But then it is contradictory to say, again as a matter of political morality, that the Nazi is as much entitled to the political system he prefers as is the utilitarian.

The point might be put this way. Political preferences, like the Nazi’s preference, are on the same level—purport to occupy the same space— as the utilitarian theory itself: Therefore, though the utilitarian theory must be neutral between personal preferences like the preferences for push-pin and poetry, as a matter of the theory of justice, it cannot, without contradiction, be neutral between itself and Nazism. It cannot accept at once a duty to defeat the false theory that some people’s preferences should count for more than other people’s and a duty to strive to fulfil the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences. The distinction on which the reply to my argument rests, the distinction between the truth and the fact of the Nazi’s political preferences, collapses, because if utilitarianism counts the fact of these preferences it has denied what it cannot deny, which is that justice requires it to oppose them.

We could escape this point, of course, by distinguishing two different forms or levels of utilitarianism. The first would be presented simply as a thin theory about how a political constitution should be selected in a community whose members prefer different kinds of political theories. The second would be a candidate for the constitution to be so chosen; it might argue for a distribution that maximized aggregate satisfaction of personal preferences in the actual distribution of goods and opportunities, for example. In that case the first theory would argue only that the preferences of the Nazi should be given equal weight with the preferences of the second sort of utilitarian in the choice of a constitution, because each is equally entitled to the constitution he prefers, and there would be no contradiction in that proposition. But of course the neutral utilitarian theory we are now considering is not simply a thin theory of that sort. It proposes a theory of justice as a full political constitution, not simply a theory about how to choose one, and so it cannot escape contradiction through modesty.

Now the same argument holds (though perhaps less evidently) when the political preferences are not familiar and despicable, like the Nazi theory, but more informal and cheerful, like the preferences of the Sarah-lovers who think that her preferences should be counted twice. The latter might, indeed, be Sarahocrats who believe that she is entitled to the treatment they recommend by virtue of birth or other characteristics unique to her. But even if their preferences rise from special affection rather than from political theory, these preferences nevertheless invade the space claimed by neutral utilitarianism and so cannot be counted without defeating the case utilitarianism provides. My argument, therefore, comes to this. If utilitarianism is to figure as part of an attractive working political theory, then it must be qualified so as to restrict the preferences that count by excluding political preferences of both the formal and informal sort. One very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted utilitarianism. A society committed to utilitarianism as a general background justification which does not in terms disqualify any preferences might achieve that disqualification by adopting a right to political independence: the right that no one suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not, or that others care less for him than they do for other people. The right of political independence would have the effect of insulating Jews from the preferences of Nazis, and those who are not Sarah from the preferences of those who adore her.

#### They must be durable, NOT repealable entirely like the CP.

Jack N. Rakove 90, Associate Professor of History, Stanford University, A.B., Haverford College, 1968, Ph.D. Harvard University, 1975, "The Madisonian Theory of Rights," William & Mary Law Review, vol. 31, no. 2, 02/01/1990, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1959&context=wmlr

As we all know, it is no easy matter to define exactly what we mean by rights; but however open or complex our definitions, we think of rights as durable claims that individuals and groups may maintain against the political will of the community or the state. Rights are permanent and inalienable. New rights may be created, but old rights should never be abolished once their legitimacy is accepted. Yet we also know from our own experience that our particular conceptions of rights, and our conceptions of particular rights, vary all the time.

#### Specifically, collective bargaining rights---they are mandatory, NOT permissive.

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With respect to two of the three statutory interpretation issues presented, the ATU v. Donovan court rested its interpretive conclusions first and foremost on the statutory text. See 767 F.2d at 944-46 (holding that "t[he] plain language of the statute" belied the DOL's claim that its certification decisions are unreviewable, and adding that the statute itself, including the "express requirement[ ]" in § 13(c)(2) that collective bargaining rights be continued, "sets out clear guidelines" for making those certification decisions); id. at 946 (holding that this same "plain language" likewise compelled the conclusion that § 13(c)(2)'s requirement that collective bargaining rights be continued was mandatory rather than permissive).

#### 3. LITERATURE PROVES. The plan and CP are totally different proposals.

Yair Listokin 19, Professor of Law at Yale Law School, Milton Friedman Fellowship, Visiting Professor at Columbia Law School, Visiting Professor at Harvard Law School, Visiting Professor at New York University School of Law, “The Costs of Expansionary Legal Policy,” in Law and Macroeconomics: Legal Remedies to Recessions, Harvard University Press, 2019, pp 139–162

At least in theory, law prizes equality. Similarly situated people should be treated the same way under law. The same goes for proposals seeking approval. If law were sensitive to the business cycle, it would seem to violate the principle of equality under the law. How can it be fair that Keystone gets approved at the zero lower bound on interest rates but an otherwise identical project gets denied in periods of normal economic activity?

I submit that there is actually no inequality here, because the two proposals are not the same. Keystone developed during a liquidity trap differs from Keystone developed at other times. While the project itself may look the same, its social cost differs dramatically between zero interest rates and ordinary times. There is nothing inherently inequitable about favoring a proposal that uses an economy’s spare capacity over a proposal that merely reshuffles that capacity.

#### a. SUBSTANTIAL.

Martin C. Ashman 3, United States Magistrate Judge for the United States District Court for the Northern District of Illinois, "Kutka v. DMC Auto Transfer of Chi., Inc.," 2003 U.S. Dist. LEXIS 11486, \*19-20, 15 Am. Disabilities Cas. (BNA) 96, United States District Court for the Northern District of Illinois, 07/02/2003, Lexis

Kutka relies on the first and third definitions to state his claim, both of which require an, actual or perceived, impairment that substantially limits a major life activity. In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, the Supreme Court recently clarified the concepts of "major life activity" and "substantially limits." 534 U.S. 184, 198, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002). 4 As the Seventh Circuit has noted, Toyota Motor raised the threshold level for an impairment to qualify as a disability under the ADA. Dvorak v. Mostardi Platt Assocs., Inc., 289 F.3d 479, 484 (7th Cir. 2002) ("the Court established a higher threshold for the statute than some had believed it contained"). Toyota Motor [\*20] held that the proper inquiry to determine whether an impairment substantially limits a major life activity in the context of performing manual tasks is that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." 534 U.S. at 198. Moreover, the Court directed, "the word 'substantial' thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities." Id. at 197. Lastly, determining the impact a disability has on a major life activity is to be decided in a case-by-case manner. Id. at 198. This Court is not persuaded that a reasonable juror could conclude that Kutka suffered from an impairment that substantially limited a major life activity or that DMC regarded Kutka as suffering from such an impairment.

#### b. SHOULD is mandatory, not permissive.

Russell Stetler & Aurélie Tabuteau 15, Stetler is National Mitigation Coordinator for federal death penalty projects, Federal Public Defender's Office Oakland; Tabuteau is National Mitigation Project Intern, Master's in Public Affairs from Sciences Po Paris, "The ABA Guidelines: A Historical Perspective," Hofstra Law Review, vol. 43, no. 3, Article 5, 2015

Thus, the ABA Guidelines were the product of the dedicated indigent defense professionals, who were representing capital clients effectively, and who freely shared their knowledge and experience through The Champion, training programs, and the manuals that recirculated much of the best material. 70 As the Introduction to the 1989 Guidelines explained: "[T]hey enumerate the minimal resources and practices necessary to provide effective assistance of counsel., 71 They were never meant to be aspirational. As the Introduction to NLADA's original edition said in 1985: "'Should' is used as a mandatory term— what counsel 'should' do is intended as a standard to be met now, not an ideal to be attained at a later time." 72 The Introduction also noted the reality that "poor defendants in this country who face the ultimate criminal sanction--death-frequently do not receive adequate representation from their government-supplied lawyers. 73

IV. CONCLUSION: HARDLY A "CADILLAC DEFENSE"

National standards of practice in capital defense are important for counsel at every stage of representation. Counsel invoke the current national standards in both pretrial and post-conviction proceedings in order to obtain adequate time and funding for investigative and expert services. In post-conviction proceedings, counsel also need to establish what the national standards were at the time of the original prosecution, in order to provide courts with an objective means of assessing trial counsel's performance. As Russell Stetler and W. Bradley Wendel have explained:

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases... continue to stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice. Hundreds of court opinions have cited to the Guidelines. They have been particularly useful in helping courts to assess the investigation and presentation of mitigating evidence in death penalty cases. 74

It is critical to demonstrate to our courts how the Guidelines embody not a "Cadillac defense," but the minimum standards developed by successful capital defenders throughout the modern era.

### AT: Perm: Plan + Other Issues---2NC

#### 3. CAN’T SOLVE. ‘Unfocused’ declarations don’t set precedent. It needs to be grounded in a specific act to spill over.

Yair Listokin 19, Professor of Law at Yale Law School, Milton Friedman Fellowship, Visiting Professor at Columbia Law School, Visiting Professor at Harvard Law School, Visiting Professor at New York University School of Law, “Law and Macroeconomics: Lessons from History” and “Expansionary Legal Policy Options,” in Law and Macroeconomics: Legal Remedies to Recessions, Harvard University Press, 2019, pp 163–197

Law and regulation played almost no role in the macroeconomic policy response to the Great Recession. But policymakers have not always spurned law, as we’ll explore in this chapter. The New Deal response to the Great Depression consisted largely of legal interventions rather than fiscal stimulus. And the U.S. “stagflation” of the 1970s was met with the full force of law. As inflation exceeded 6 percent a year, Congress authorized the Economic Stabilization Act of 1970. Using his authority under this Act, President Nixon imposed a set of wage and price controls. In both cases, macroeconomic challenges prompted legal responses.

Why have we forgotten about law as a macroeconomic policy tool? The simplest explanation is that previous legal interventions for macroeconomic purposes have not worked well. Price controls failed during the 1970s. The record of the New Deal attempts at expansionary legal policy was better. Although the Supreme Court ruled the National Recovery Administration— the centerpiece of the efforts to stimulate the U.S. economy through legal means during the Great Depression—unconstitutional, the U.S. economy dramatically rebounded shortly after Congress enacted the (mostly legal) reforms of the first “hundred days” of Franklin D. Roosevelt’s presidential administration in 1933. Even the New Deal efforts at law and macroeconomics, however, did not reflect the macroeconomic “state of the art.”

For the most part, I agree that price controls and central planning are like magic bullets that too often miss their targets. But I submit that we should not therefore eschew macroeconomic tools of law entirely. Legal intervention is potentially dangerous, but it can also provide a powerful remedy. The New Dealers had the right intuitions about turning to law and macroeconomics at the zero lower bound. Indeed, even their unfocused attempts at legal stimulus worked impressively from 1933 to 1937. If future law and macroeconomic interventions enjoy better grounding in macroeconomic theory and directly adjust aggregate demand in conditions when other macro tools are wanting, then we can expect law and macroeconomics to become an invaluable policy option.

### AT: Perm: CP Then Plan / Process---2NC

### Regulate AI – 2NC

#### Finishing MITRE.

Support an at-scale AI Science and Technology Intelligence (AI S&TI) apparatus to monitor adversarial AI tradecraft from open sources such as research literature and publications, while providing continuous red-teaming of U.S. public and commercial AI infrastructure and operations. Doing so is crucial to understanding how our adversaries are using AI to gain advantage globally and to characterizing the reach of adversary capabilities into the United States, as well as the threat such reach poses to national security.

5. ESTABLISH SYSTEM AUDITABILITY AND INCREASE TRANSPARENCY IN AI APPLICATIONS

Issue an executive order that mandates system auditability, developing standards for audit trails, and advocating for policies that increase transparency in AI applications. This would include requiring AI developers to disclose what data was used to train their systems as well as the foundation models on which their systems were built. System auditability is vital for tracking misuse of AI and holding individuals accountable, as well as maintaining public trust in AI technologies.

6. PROMOTE PRACTICES FOR AI PRINCIPLES ALIGNMENT AND REFINE REGULATORY AND LEGAL FRAMEWORKS FOR AI SYSTEMS WITH INCREASING AGENCY

Take the following key actions to ensure the safe and responsible development and use of AI.

• Recognize that purpose (an understanding of objectives or goals) is an inherently human quality, and AI systems with agency (having the ability to act independently) will either directly receive purpose from a human (as instruction) or infer purpose through learning from human behaviors and artifacts.

• For AI principles alignment, create common vocabulary and research frameworks for guiding AI alignment in systems as scientific and engineering advances are made (rather than limiting or regulating advancements toward artificial general intelligence) to mitigate the risk of either humans tasking AI to carry out dangerous actions or AI systems exhibiting dangerous emergent behavior. Resulting guidelines would be similar to those established for research involving human subjects. Such advancements in AI alignment practices will serve to limit emergent, undesirable AI behavior, but research activities will still need safe environments with regulated guidelines like bioresearch and biosafety levels.

• Refine regulatory and legal frameworks to differentiate between appropriate research (with risk mitigations) and bad actors using AI for malintent, establish guidelines that address misuse of AI, and hold all appropriately accountable for harms.

7. STRENGTHEN CRITICAL INFRASTRUCTURE PLANS AND PROMOTE CONTINUOUS REGULATORY ANALYSIS

Direct federal agencies to review and strengthen government-critical infrastructure plans, focusing on safety-critical cyber-physical systems vulnerable to increased threats due to the scale and speed AI enables, and establish a dedicated executive task force to propose regulatory updates as needed. Such actions are necessary to ensure that our critical infrastructure is secure against exploitation by humans, AI-augmented humans, or malicious AI agents.

8. PROMOTE FLEXIBILITY AND ADAPTABILITY IN AI GOVERNANCE

Develop guidelines that allow for flexibility in AI governance implementation across different agencies, considering their unique needs and contexts (e.g., size, organization, budget, mission, AI workforce competencies). This involves enabling each agency to set an AI strategy that aligns with its needs and specific level of AI maturity. The guidelines should provide a range of options for AI governance structures, processes, and practices, and allow agencies to choose the ones that best fit their specific circumstances while ensuring minimum standards for consistency and effectiveness. As AI technologies rapidly evolve, these guidelines should also be flexible to accommodate ongoing innovation and shifting expectations about what is possible.

9. BRING IT ALL TOGETHER

Create a National AI Center of Excellence (NAICE) that promotes and coordinates these priorities, drawing on threat and risk assessment from the AI-ISAC and AI S&TI. The NAICE should not only cross-pollinate lessons learned by sector-specific regulatory authorities and build on and advance AI assurance frameworks and best practices, but also lead in conducting cutting-edge applied research and development in AI. This includes developing new AI technologies, methodologies, and tools that can be adopted across different sectors. The Center would facilitate collaboration among industry, government, and academia, thereby accelerating the transition and adoption of cutting-edge AI capabilities that are safe and secure.

## Turn – Democracy Bad

### War---Offense---2NC

#### This is true in all scenarios, including against other democracies

Dr. Daina Chiba 21, Associate Professor of Political Science in the Department of Government and Public Administration at the University of Macau, Ph.D. in Political Science from Rice University, LL.M in Jurisprudence and International Relations from Hitotsubashi University, and Dr. Erik Gartzke, Professor of Political Science at the University of California, San Diego, PhD in Political Science from the University of Iowa, “Make Two Democracies and Call Me in the Morning: Endogenous Regime Type and the Democratic Peace”, 2/19/2021, https://dainachiba.github.io/research/make2dem/Make2Dem.pdf

We now turn to the results from the outcome stage, where militarized conflict initiation is regressed on democracy measures and other covariates. The univariate clog-log model 32 that ignores the endogeneity, shown in column (1) in Table 1, successfully replicates the standard, dyadic democratic peace finding that democracies are peaceful, though only toward other democracies. Note that, while individual democracy measures have either a positive or insignificant coefficient, joint democracy has a negative coefficient that overwhelms the positive coefficients of individual democracy measures in the univariate model. As a result, the univariate model produces a result that, while democracy may increase conflict against a non-democracy, it decreases conflict against a democracy.

To illustrate this, we calculate the average treatment effect of joint democracy for the challenger and for the target based on the univariate model. These effects are calculated by comparing the predicted probabilities of conflict initiation when changing the regime type of self (challenger or target) from non-democracy to democracy, holding constant the regime type of the other (target or challenger) as democracy. 33 Gray, hollow circles in Figure 4 show the treatment effects of challenger’s and target’s democracy. We can see that both effects are negative and statistically significant at the 95% confidence level.

Once we correct the endogeneity, however, the data no longer support such conclusions. In column (2) in Table 1, the negative coefficient for joint democracy no longer overwhelms the positive coefficient of challenger’s democracy. Challenger’s democracy now appears to increase conflict even against a democratic target. Red, solid circles in Figure 4 show the average treatment effects of challenger’s and target’s democracy, calculated from the trivariate model. The effect is positive and statistically significant for challenger’s democracy, although the effect is indistinguishable from zero for target’s democracy.

Whether we correct for endogeneity thus makes a significant difference in our estimates of the effect of joint democracy on conflict. The key to understanding why these changes occur lies in the estimated correlations between the error terms for different equations. The estimated error correlation between equations for conflict and challenger’s democracy, 12, is negative and statistically significant. This suggests that unobservable or unmeasured determinants of a country’s democracy make it less likely for that country to attack another country. A failure to control for such factors would generate a negative omitted variable bias, making it look as if challenger’s democracy has a pacifying effect on conflict behavior. On the other hand, the estimated error correlation between conflict and target’s democracy equations, 13, is indistinguishable from zero, suggesting that the endogeneity problem does not seem to operate for target’s regime type.

#### It's an empirical question, answered by statistical methods---failing to code based on exogenous variables corrupts their evidence

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Before we review our approach in detail, it may be useful to explain why this type of analysis has not been pursued successfully in the past and what makes our effort different from other, broadly related projects. We are not the first to apply an IV framework (more specifically) or multi-equation models (more broadly) to the democratic peace. However, previous attempts suffer from two major problems. First, previous studies have typically used a dyad (country pair) as the unit of observation in analyzing conflict, which requires some summary measure(s) of democracy for a pair of countries rather than the state-level (monadic) democracy measure. 6 Use of a dyadic aggregate to represent regime type creates a discrepancy between the first stage regression (predicting democracy at the country level) and the outcome stage regression (predicting conflict at the dyad level). 7 We avoid this problem by using the directed dyad as the unit of observation in predicting conflict, distinguishing between the potential challenger and target in a dispute. This allows us to connect the first stage equations (predicting the challenger’s and target’s regime types) and the outcome stage equation seamlessly. Doing so has several benefits: the outcome stage model could directly include country-level covariates (such as challenger’s and target’s democracy) without having to convert them to a dyadic summary. This also allows us to estimate the system of equations jointly rather than relying on the “forbidden regression.” 8

Second, a more daunting challenge in applying an IV approach to democratic peace research is the difficulty of finding a plausible instrument for regime type — a variable that is strongly correlated with regime type but is unrelated to war. This is the challenge that has plagued empirical researchers in many fields. For example, a recent study of the effect of regime type on economic growth uses a diffusion-based measure of democracy (i.e., average value of democracies in a given region) as an instrument for democracy (Acemoglu et al. 2019). However, diffusion-based instruments such as this are unlikely to be a valid instrument, due to spatial spill-over, interdependence, and, most importantly, simultaneity (Betz, Cook, and Hollenbach 2018). Recognizing problems with spatial instruments, McDonald (2015) seeks to exploit the very discrepancy between country-level and dyad-level designs as the source of identification. His discussion, however, lacks a clear explanation as to why some determinants of regime type do not influence conflict. 9

We turn to a demographic variable — average female fertility rate in a given country — as a source of variation in regime type that is exogenous to international conflict. As we will argue below, a lower fertility rate is a strong driver of democratization. We will also present theoretical arguments and a series of falsification tests that support the claim that average national fertility rate does not directly influence international conflict.

#### Existential warming is inevitable AND causes a collapse into extreme authoritarianism---only transitioning from democracy solves

Dr. Chien-Yi Lu 21, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 1-2

The fact that the scientific knowledge on the human contribution to climate change entered human society through the most advanced democratic societies should have been a cause for celebration. Given the congruence of climate mitigation and public interests, the problem of climate change should have been considered solved decades ago. Several decades of inaction later, however, arguments are proliferating that democracy is exactly the reason for inaction.

In The Collapse of Western Civilization, historians Naomi Oreskes and Erik Conway travel to the future to look back and offer a forensic analysis on the climate-induced Great Collapse of Western Civilization of 2074 (2014: 63). The future historians’ forensic report states that “[a]s the devastating effects of the Great Collapse began to appear, the nation-states with democratic governments… were at first unwilling and then unable” to deal with the crisis. These democratic governments realized that they had no “infrastructure and organizational ability to quarantine and relocate people” as “food shortages and disease outbreaks spread and sea level[s] rose.” In China, where there was centralized government, the crisis was handled much more adequately, leading to survival rates exceeding 80%, a development that “vindicated the necessity of centralized government” (2014: 51–2). The gist of The Collapse of Western Civilization is not about critiquing democracy per se but a warning against the stubborn inaction mandated by market fundamentalism that has hijacked Western democracies.1 In their previous book, Merchants of Doubt, Oreskes and Conway documented the way that climate deniers sowed the seeds of doubt about climate change and successfully staved off implementations of mitigation measures. For the authors, the anticommunist ideology that had kept actors vigilant about government encroachment in the marketplace occupied a central place in climate denial (2014: 69). Ironically, this sort of ideology-informed calculation meant that preventative action was blocked, increasing the risk that disruptive climate disasters would eventually necessitate the suspension of democracy and legitimating the sort of heavy-handed authoritarian interventions that the conservatives most abhorred (2014: 52; 69).

An appeal to suspend democracy for the sake of survival can be found in The Climate Change Challenge and the Failure of Democracy, where Shearman and Smith argue that liberal democracy is incompatible with the urgent necessity to prevent catastrophic climate change. The vested interests of politicians, corporations, and media lie in continuing with business as usual and in keeping the public ignorant. Instead of bottom-up reforms to improve democracy and bring about sensible climate policies, Shearman and Smith see a transformation into authoritarian regimes as the only responsible way forward when faced with the extreme ecological stress of climate change. They point out that, as Plato foresaw, those in power in a democracy are seldom able to resist the demands of the populace for long, but as a mass, the populace is seldom able to focus on complex problems and to perceive threats that lie over the horizon. Hence, those able to see further—scientists, experts, and the knowledgeable— should be entrusted with steering the course while there is still time to avoid disaster. It is only under a benign authoritarian rule of the knowledgeable that a saner, fairer, and more rational means of weighing social goods against evils can be introduced (Shearman and Smith, 2007).

### War---Defense---2NC

#### Either causality is the other way (peace causes democracy) or the correlation is spurious (democracy and peace both exist because of some third variable that is unknown)

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Conclusions

We proposed an approach to estimate the causal effect of joint democracy on violent conflict between countries. Our empirical results suggest that democracy does not have a pacifying effect — on the contrary, democratic countries tend to attack other countries more than non-democratic ones do. These findings not only have important policy implications for foreign policy decision making but also contribute to ongoing scholarly efforts to understand, explain, and predict state behavior in world politics. The modern study of the democratic peace started with an empirical observation that democracy and peace are correlated, which was then followed by theoretical efforts to make sense of the observed pattern. Our findings contradict the initial empirical observation and thus bring into question many of the theories that have been proposed to explain the democratic peace.

If democracy is not the driving factor, we naturally wonder, what explains the observed peace between democracies? While our findings suggest that it is not the first-cluster (democracy-as-cause) argument, they do not reveal which variants of the second-cluster (reverse causality) or third-cluster (spurious correlation) argument are valid. Nevertheless, we offer an additional criterion to choose among multiple possible explanations. Any theory of liberal peace must be able to explain not only the observed peace between democracies but also why democratic challengers are more conflict-prone than non-democratic challengers, even against a democratic target. A promising avenue for future research would be to theorize about these (apparently contradictory) empirical patterns.

#### Data for either alternative explanation is plentiful---there’s too much statistical noise

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The second cluster of explanations posit that the causal arrow actually runs in the other direction, that peace causes democracy. Researchers argue that democratization is more likely to occur in a peaceful (or stable) international environment. External threats require states to allocate their resources to defense and lead to a centralization of government power. Within this intellectual community, some scholars are ecumenical, suggesting that the causal arrow can run in both directions—peace causes democracy but democracy also causes peace (Gleditsch 2002b; Rasler and Thompson 2005; Reuveny and Li 2003; Thompson 1996). Others are more emphatic that peace causes democracy but that democracy does not cause peace (James, Solberg, and Wolfson 1999; Gibler and Tir 2014).

A third, much smaller cluster of explanations posit that a confounding variable may be responsible for both democracy and peace, thus generating a spurious correlation between democracy and peace that is the basis for the analysis here. Scholars have identified various factors such as Cold War alliances (Farber and Gowa 1997; Gowa 1999), common national interests (Gartzke 1998, 2000), market based “capitalist” economics (Gartzke 2007; Gartzke and Hewitt 2010),1 so called “contractualist” norms associated with market based economic systems (Mousseau 2013, 2018),2 stable territorial borders (Gibler 2007, 2012),3 as well as other possible confounding factors that might explain away the democratic peace.

#### At best, it’s a minor contributor---other factors will hold

Dr. Andrew P. Owsiak 21, PhD in Political Science from the University of Illinois Urbana-Champaign, Josiah Meigs Distinguished Teaching Professor and Professor of International Affairs in the Department of International Affairs at the University of Georgia, and Dr. John A. Vasquez, PhD in Political Science from Syracuse University, Professor of Political Science at the University of Illinois Urbana-Champaign, “The Limited Scope of the Democratic Peace: What We Are Missing”, International Studies Perspectives, 8/26/2021, Oxford Academic

The democratic peace program arguably constitutes one of the most successful empirical research programs in the discipline. Its main empirical finding motivated extensive theorizing (e.g., challengers, as well as distinct theoretical enterprises), sparked further debate about how to conceptualize and operationalize democracy, and shifted the foreign policy discourse, particularly in the United States. Lost in these successes, however, is a critical unanswered question: how much interstate peace can the democratic peace potentially explain? We explore these limits (i.e., scope, or empirical coverage) in this study. We first identify the peaceful dyadic relationships—namely those that never go to war across long historical periods. We next classify these dyads as democratic (i.e., both members are democracies) or nondemocratic. The empirical analysis then examines this democracy–peace relationship across three time periods, three distinct samples (which address potential false positives), two definitions of “peace,” and two thresholds for democracy. Regardless of how we approach the data, only 4–26 percent of all peaceful dyads qualify as “democratic.” Because we control for the obvious trivial explanation (insufficient capabilities due to distance), some other (set of) factor(s) must account for the majority of interstate peace. We close with a discussion about where future research might search for these factors, as well as the larger policy implications of the study.

### Disinformation – 1NC

#### No disinformation impact

André Gerrits 19, Professor of International Studies and Global Politics at the Institute for History of the Faculty of Humanities, Leiden University, 2019, “Disinformation in International Relations: How Important Is It?,” Security and Human Rights, 29(1-4), pp. 3-23

This article explores the relevance of disinformation in international relations. It discusses the nature of information manipulation, ways to counter disinformation, and possibilities for international organizations, including the osce, to initiate confidence-building measures. The article suggests that although disinformation becomes an increasingly salient aspect of global politics, its security impact should not be overstated. As in domestic politics, international disinformation parasites on existing divisions and concerns, which it exploits rather than creates. This should not be trivialized. Disinformation is disruptive and it further deteriorates the overall international context. But as yet it is not a significant security challenge, and it does not change the international balance of power.

### Polycrisis Defense---1NC

#### Systemic buffers contain the ‘polycrisis.’

Noah Smith 22, former Bloomberg Opinion columnist, was an assistant professor of finance at Stony Brook University, “Against "polycrisis",” Noahpinion, 11/13/22, https://www.noahpinion.blog/p/against-polycrisis

One term I see used increasingly often in the econ opinion-sphere is “polycrisis”. This term was invented by some French folks in decades past, but it has recently been popularized by Adam Tooze. Tooze, a historian at Columbia and a popular blogger, is also the author of some of my favorite history books, including The Deluge (about WW1), Wages of Destruction (about WW2), and Crashed. The latter is the best history of the early 2010s Euro crisis that I’ve ever read (or am ever likely to read), and it does a great job of explaining how problems in various different countries exacerbated each other.

So perhaps it’s not surprising that Tooze sees the world of the 2020s as a system of even larger interrelated crises. In a recent blog post, he pulls a definition of “polycrisis” from a report by the Cascade Institute:

We define a global polycrisis as any combination of three or more interacting systemic risks with the potential to cause a cascading, runaway failure of Earth’s natural and social systems that irreversibly and catastrophically degrades humanity’s prospects…A global polycrisis, should it occur, will inherit the four core properties of systemic risks—extreme complexity, high nonlinearity, transboundary causality, and deep uncertainty—while also exhibiting causal synchronization among risks.

This basically seems like a way of saying that all the bad things you read about in the news — inflation, climate change, war, political turmoil in the U.S., economic turmoil in China — are all of a piece, with the individual crises reverberating back and forth and causing a general system failure. In an earlier post, Tooze attempted to draw a picture of this system of interrelated crises and risks:

I generally enjoy big-think like this. (If I didn’t, I would be somewhat of a hypocrite, given that my recent post about decoupling was entitled “The end of the system of the world”!) But I’m just not sure if the challenges and risks the world faces today are as mutually reinforcing as Tooze and the other “polycrisis” enthusiasts believe.

The polycrisis illusion

For one thing, it’s always very easy to think that we live in an era uniquely chock-full of risks, disasters, and problems. This is because of something called the availability heuristic — we tend to think the things we read about are typical of the world at large. And both the news media and the social media shouters who crave our eyeballs have long ago realized that “no news is good news” — i.e., negative news is uniquely good at grabbing our attention. So the more we’re engaged with current events, the more we’re likely to see the world as defined by things that alarm us — this is the subject of the song “We Didn’t Start the Fire”, quoted at the top of this post.

This is not to say the world is free of crises and risks; there are plenty out there. Nor is it to say that our current era has less than others; this is very hard to judge. But the idea that these crises are all related may be a case of apophenia — our natural human tendency to perceive connections that don’t actually exist, or are far weaker than we think.

Just because we can draw arrows between news items does not mean that the items are strongly coupled. For example, Tooze’s diagram draws an arrow from China to the Russian gas boycott, but China didn’t join the boycott. He draws an arrow between “Biden administration & GOP risk” and the Lend-Lease bill, but there’s no reason to think Lend-Lease was motivated by U.S. domestic politics, and the support for Ukraine has so far remained bipartisan. He draws an arrow from oil prices to the climate crisis, but — as I’ll talk about in a bit — the former actually helps address the latter.

When crises aren’t really strongly coupled, they can act as low-correlation assets in a diversified financial portfolio — when one problem is getting worse, another problem somewhere else is likely to be getting better.

In fact, though, I think there’s an even more important reason to be skeptical of “polycrisis”: buffer mechanisms. The global economy and political system are full of mechanisms that push back against shocks. Supply-and-demand is a great example — when supply falls, elastic demand cushions the short-term impact on prices (this is a little like Lenz’s Law in physics). Political backlashes are another mechanism — people don’t like it when you try to deny elections or invade your neighbors, and they get mad and push back. Policy responses are a third buffer — when central banks see inflation, they restrain it with higher interest rates. And so on.

The reason this makes a polycrisis less likely is that the buffer mechanisms often push back against problems in addition to the ones they were designed to push back against. There are plenty of historical examples of this. The New Deal didn’t just fight the Depression; it finally implemented a long-needed social insurance system that has served us well to this day. The victory over the Axis in WW2 also prompted decolonization and the creation of a global economic system that has allowed most of the world to flourish in the century since. More recently, the 2008 financial crisis led to needed infrastructure spending, Obamacare, and the intellectual revival of industrial policy.

In other words, sometimes instead of a polycrisis we get a polysolution.

Today, I can see a number of examples where the various crises that newsreaders worry about are leading to responses that will help address the others.

Buffer mechanisms in the global political economy of the 2020s

As I mentioned before, one very simple example of a buffer mechanism is supply and demand. In the past year, China’s economy has slowed dramatically due to a combination of a real estate bust, the Zero Covid policy, and various regulatory crackdowns. Normally, a recession in the world’s biggest trading nation would be a cause for global alarm, but in this one it’s more likely a source of relief. A collapse in Chinese demand is helping to restrain oil prices, keeping them at around the same level as the early 2010s:

That in turn is blunting the impact of the Ukraine war and Russia sanctions on Europe’s economy (and America’s, and Japan’s, etc.).

A combination of China’s economic slowdown and Russia’s military fiasco in Ukraine also seem to have reduced the chance of U.S.-China conflict, at least in the short term. Seeing Russia fail to conquer a smaller country must have given even Xi Jinping pause about launching a similar military adventure to conquer Taiwan, while economic struggles distract policymakers’ attention.

Though it’s too early to tell, the results of last week’s midterm elections in the U.S. — which were a victory for stability and bipartisanship and a loss for election-denialists — might also have been prompted in some minor way by the Ukraine war and the threat of geopolitical competition with China, which should remind Americans that there are enemies in the world more dangerous than other Americans.

Meanwhile, the war in Ukraine will spur the fight against climate change. Disruptions to Russian energy supplies, especially in Europe, create incentives for the rapid deployment of renewable energy. This is from May:

The Commission proposed that 45% of the EU’s energy mix should come from renewables by 2030, an advance on the current 40% target suggested less than a year ago. Officials also want to cut energy consumption by 13% by 2030…

“It is clear we need to put an end to this dependence and a lot faster before we had foreseen before this war,” said Frans Timmermans, the EU official in charge of the green deal.

Just a few days ago, the European Commission followed through with a temporary emergency regulation to speed the adoption of renewables. (The war is leading to minor outbreak of sanity on energy in general; Germany is keeping its nuclear plants open, at least for a while.)

The rapid adoption of renewables will, in turn, drive down their price, through a mechanism known as learning curves — the more you build, the more cost goes down, creating an incentive to build even more. So the increased adoption of renewables in Europe and other Russia-sanctioning countries in response to the Ukraine war will also make renewables more attractive in China, India, and other countries that aren’t joining in the sanctions.

All this will help the fight against climate change. But it will also help address another longstanding economic problem in the rich world: slow growth. Due to massive continuing cost drops, renewable energy increasingly isn’t just green energy — it’s cheap energy. The forecasters who study learning curves believe that technologies like solar, batteries, and hydrogen are much more susceptible to learning effects than fossil fuel technologies or even nuclear. That means that renewables are going to give us cheaper energy than we’ve ever had in our history as a species. And that in turn will help the developed world shake off the creeping stagnation in productivity and wages that it has endured for most of the time since the oil shocks of the 70s. Cheap energy is highly complementary to human labor — armed with cheap energy, we can rebuild much of our world.

This is not to say that there are no cases in the world where one problem is exacerbating another. Higher interest rates, for example, are sure to cause capital flight and currency depreciation in some developing countries, making it harder for them to buy food and energy. But the global free-market system built in the last three decades is looking more resilient than many expected; most developing countries are doing OK.

Dark Brandon vs. polycrisis

In other words, I look out in the world and I don’t see a polycrisis; I see an emerging polysolution. The looming threats of climate change and authoritarian revanchism, combined with the shocks of Covid and inflation, have stirred both policymakers and businesses to action. And many of those actions will end up addressing multiple crises rather than just one. Nor am I alone in my feeling that the narrative of the world suddenly seems to be improving:

I want to venture out on a limb here and say that this is not a coincidence. A lot of the buffer mechanisms I described above are political in nature, and they share the basic description of “human beings coming together in a crisis to address their collective problems”. During good times, human beings tend to seem irresolute and divided as pursue our individual goals and fight over the pie. External shocks can bring the entire system crashing down, but they can also spur humans to get serious and start working together.

## Case

### Circumvention – 1NC

## Adv 2

### Artificial Intelligence AI Defense---No Upsides Impact---1NC

#### AI laundry lists are nonsense. It can’t create a leap in capability, only produce mediocre writing.

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The summer of AI had returned, and it was all about neural networks. Six months after buying Hinton’s DNNresearch, Google unveiled a new tool at its developer conference: the ability to search your own photos using image recognition. That’s how quickly Google put deep learning to work. ‘We took cutting edge research straight out of an academic research lab and launched it, in just a little over six months,’ wrote Google’s head of the image search team in a blog post.

A year later, in 2014, Google bought DeepMind, a medical AI company, for £400 million, a massive sum of money for another company that hadn’t yet released a single product. As with DNNresearch, the aim here was to capture the people – in this case, Demis Hassabis, Mustafa Suleyman, and Shane Legg. Two years later, DeepMind’s AlphaGo algorithm beat the best human players. Around the same time, Ian Goodfellow, then at Google, came up with the generative adversarial network (GAN), where two different types of neural networks play a game: one makes output that looks real, while the other has to guess what data is made up, creating a positive feedback loop that makes better and better images (or other output) – yes, deep learning is weird.

In short, there was suddenly tons of money floating around for anything deep learning related – the amount of VC money doled out to pure AI startups leapt by 30 times from 2010 to 2014 when it topped $300 million – and breakthroughs were coming thick and fast.

At the core of machine learning is training. The AI systems are trained on sets of data – not every piece of data in the world, as that would be difficult and pointless – but we give the AI enough pictures of cats, it learns what a cat should look like, and then we show it a photo and it can tell us if there’s a cat or not. For that we need a lot of pictures of cats, and many sorts of cats, otherwise the system will only think that cats are orange or fluffy when they can also be calico and short-haired.

Reinforcement learning gives the system a reward for getting a decision right, though it’s difficult to teach the system which bits it got right and which it didn’t, as it may have made several decisions to create the final output. This results in it not knowing which individual instances were incorrect. It’s sort of like training a dog, how it’s important to give instant feedback rather than wait even a few moments, as the pooch might misinterpret its activities in the 10 seconds after rolling over as the reason for the treat, rather than the trick itself.

However bias sneaks into data sets in many ways. Humans need to make decisions on what data points to include, as a system with too many pieces or types of data will be slow, and leaving some out (or including others) introduces bias. Image sets, for example, may not have enough examples of people with black skin, meaning a system has fewer examples and is less good for those people.

Naturally, once AI started to be used in the real world for tasks more serious than spotting pictures of cats online, a mini backlash began. No one was demanding the removal of all AI, but there began to be calls for a better understanding of ‘black box’ systems such as AI-powered algorithms, especially when their results have serious implications for humans. AI is useful, there’s no question. Like any tool, it can be used well or incompetently, or be the wrong tool, or be used (intentionally or not) for outright evil. Take a hammer: perfect for smacking in a nail. You could also use it to dig holes in soil for seeds, though you’d do better with other tools; and it’s of no use with screws and even less use to decorate a cake; but if you want to break a window to rob a house, a hammer will do the trick just fine.

This is obviously a very childish way of looking at the world of technology – hammers don’t make their own decisions, or impact millions of people – though it’s a metaphor that’s trotted out with some frequency. But it’s worth noting that AI can do good work when applied appropriately and intelligently for relevant tasks; that the wrong type of AI, or even AI overall, simply can’t answer all questions or fulfil all tasks; and that when used maliciously or even just unthinkingly it can cause real harm, and even kill someone.

There are plenty of ways AI is used well, to good purpose, without much risk of harm if attention is paid – we’re talking hammer to nail, mind your thumb, here. Modern computer games couldn’t exist without AI to power the hyper-realistic images or reactive game play. Amazon’s Alexa and Apple’s Siri are both AI systems, and the reason smartphone images keep getting better is AI-driven processing. In healthcare, applied with ethics and caution, AI can save the lives of patients and ease the workloads of medical technicians, with deep learning taught to read eye scans, examine mammogram images and spot neck cancer. Alaskan wildlife researchers used facial recognition developed for a dog photo filter app to identify and track bears. Conservationists from the Zoological Society of London turned to AI to automatically analyse thousands of hours of sound recordings to pinpoint British animals as part of a biodiversity project, while deep learning models were trained to count colonies of seabirds and follow whales by their songs. AI has been tasked with everything from modelling the impact of climate change to fighting parking tickets and even unlocking protein structures, a long-running challenge in biology.

We don’t want to lose any of those helpful benefits. But it’s easy to see why people are so against AI when there are so many well-intentioned, poorly implemented instances – sometimes using AI to solve a problem is like using a hammer to ice a cake. Amazon trialled the use of AI to sift through CVs, and the system methodically stacked most of the women in the ‘not this time’ pile. ProPublica revealed in 2016 that software used to predict recidivism was biased against Black people, meaning they are recommended to be held in jail while white people with similar situations were let out on bail. Facial recognition tools can help policing agencies find criminals by comparing CCTV footage to image databases of previous criminals; this might be a time and budget saver, but incorrect arrests have led to innocent, predominantly Black, men spending days in jail. Some of these problems could in theory be solved by better-quality AI trained on unbiased, accurate data sets, but while we experiment with these tools, real humans are being hurt – and more often than not they’re from low-income or minority demographic groups.

And then there are the malicious uses of AI – picking up that hammer to smash windows or skulls. Hackers are turning to generative tools to churn out malware and spam that’s personalised, massive in scale, or simply better quality, all at lower cost. AI-powered image generation and editing tools have contributed to the rise in deepfakes – everything from the Pope in a funny jacket to the Ukrainian president announcing a surrender in the war with Russia – and revenge porn, with ex-partners’ faces superimposed on to porn stars’ bodies. Natural language generators can help churn out misinformation and disinformation, making it easier to sow confusion ahead of an election or flood the internet with so much nonsense that it’s impossible to understand what’s true anymore.

The most bewildering threats are known as adversarial examples. Neural networks don’t know what a cat is, they learn to identify a cat through characteristics that may make little sense to humans. By unpicking that, it’s possible to figure out how to manipulate them: in one example researchers meddled with images to make a picture of a turtle appear, to an AI system, to look like a rifle. Others have tricked driverless car systems into failing to halt at stop signs with the careful placement of a few stickers that tricked the AI vision system into misunderstanding what it saw.

And all of this is before we get into the so-called existential risks of AI, in which machine superintelligence overtakes our own and we can no longer keep up.

Figuring out how to use AI to benefit humanity while regulating misuse is no easy task, but it’s one that’s often superseded by that idea of existential risks. It’s hard for politicians to focus on one Black man incorrectly arrested or someone losing housing benefits or not getting a job at Amazon when billionaire tech geniuses are screeching about mass job losses and even the risk of human life being entirely extinguished by these systems. Though it’s fair enough to find both unsettling, only one set of problems is happening right now and it’s not the dramatic hypothetical.

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Much of the debate as I write this book has been spurred by the rise of a very specific type of AI: large language models (LLMs). These have hundreds of millions of parameters and chew up huge data sets – such as the entire internet – in order to be able to respond to our queries with natural-sounding language. Examples include OpenAI’s GPT, Google’s Bard and its successor Gemini, and Facebook’s Llama.

OpenAI was founded in 2015 – one of its co-founders being Hinton’s former student and DNNresearch co-founder Ilya Sutskever. Initially set up as a non-profit, it was partly funded by Elon Musk, who had a board seat before he ditched in 2018, as well as Reid Hoffman and Peter Thiel. Shortly after, OpenAI shifted away from a non-profit to a capped-profit model, allowing it to take on investment, and after operating relatively quietly for a few years, the company made an announcement: its GPT model was so brilliant – and therefore so terrifying – that it would only release a tiny bit of its capability, so it couldn’t be used by dark forces to meddle with society. Or as the company put it: ‘Due to our concerns about malicious applications of the technology, we are not releasing the trained model.’ Journalists – myself included – cheerfully had a go with the tool, mocking its mistakes and pointing out its inabilities.16

Two years later, the laughing stopped. OpenAI unveiled ChatGPT in November 2022 and journalists – inside tech and in the mainstream media – were astonished by its capabilities, despite it being a hastily thrown together chatbot using an updated version of the company’s GPT-3 model, which was shortly to be surpassed by GPT-4. The ChatGPT bot sparked a wave of debate about its impact and concern regarding mistakes in its answers, but also excitement, with 30 million users in its first two months. It has also triggered an arms race: Google quickly released its own large language model, Bard, and though it too returned false results – as New Scientist noted, it shared a factual error about who took the first pictures of a planet outside our own solar system – it was unquestionably impressive. OpenAI responded with GPT-4, an even more advanced version, and Microsoft chucked billions at the company to bring its capabilities to its always-abridesmaid search engine, Bing.

In response, thousands of industry leaders – including Musk – called in an open letter for AI labs to take a six-month breather on the development of systems more powerful than GPT-4, a very specific milestone that ensures OpenAI keeps its lead. Shared on the website of the Future of Life Institute we discussed at the top of this chapter, the letter does warn about harms happening now – in particular disinformation and the risk to jobs – but focuses largely on concerns about non-human minds replacing us and taking control of our civilisation. ‘Powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable,’ the letter says.

Geoffrey Hinton didn’t sign that letter, but the so-called godfather of neural networks did something even more unexpected: he stepped down from his role at Google so he could more openly discuss the threats. To be clear, he didn’t quit because he was worried about Google in particular, but about the wider industry. Hinton’s warnings were twofold. One, he was concerned about how AI was being used in the here and now, for disinformation and the like. And two, he thought we ought to prepare for the consequences of when superintelligent AI arrived, which was now looming sooner than he’d always thought.

He rationalised his work, he told the newspaper, with the excuse that if he hadn’t developed these technologies, someone else would have – and that it’s difficult to prevent people from misusing AI to bad ends. His argument sounded reasonable among the shrill crowds, and given he actually understood the systems in question, was a welcome voice of concern.

At the time of writing, AGI, or super-intelligent AI or strong AI – whatever you want to call it – doesn’t exist. It might never exist, or it might have been created before this book is published. But there are a few things to note. One, LLMs aren’t AGI. They are good-ish at writing, and will presumably get better. But what they do is put one letter after another, based on a trawl of the internet and Wikipedia and other bodies of words.

They have no sense of what is true, so often write text that sounds good but isn’t accurate. That removal of meaning from language is worth noting; the whole point of writing is to communicate meaning, after all. People have referred to these inaccuracies as glitches or ‘hallucinations’, completely misunderstanding what LLMs do: they generate language, not truth. Despite this, some believe these systems are on the verge of becoming sentient and overtaking our capabilities of understanding, but it’s never really made clear how a system goes from putting one word after another to having a sense of self with wants and desires and the ability to take action.

Some argue LLMs are learning common sense: researchers at Microsoft, which as noted above has invested billions into OpenAI, published a paper arguing that GPT-4 is capable of reasoning and common sense, showing a real step towards AGI. To show that it’s learning rather than just regurgitating, they asked it to draw a unicorn multiple times over the span of a month, subsequently reporting that the images became more sophisticated. It’s hard to take people seriously when they’re arguing that they’ve spotted the seeds of nascent AGI in a frankly terrible vector drawing of a mythical creature.17

With regards to common sense, the researchers argued it can answer questions that require a basic understanding of how the world works – things like gravity, directions and so on. For this paper, the researchers used a classic example: ‘a hunter walks one mile south, one mile east, and one mile north and ends up right back where he started. He sees a bear and shoots it. What colour is the bear?’

The more limited ChatGPT declares the question unanswerable because no data is given about the colour of the bear. This is correct, and it’s a perfectly fine answer: for all the machine knows, before the hunter wasted his time taking this one-mile-each-direction stroll, he may have spraypainted a bear pink.

But according to the Microsoft researchers GPT-4, the more advanced version of the OpenAI system, methodically works out where the hunter is located, because the only place where that walk would bring you back to the same point is at the north pole, where the only bears are polar bears, and therefore white. (Aside from the one I just painted pink.)

Here’s the problem: GPT-4 doesn’t know if I’ve painted a bear pink, or if I’m referring to violence against a teddy bear, or something else equally weird. It’s answering a riddle that is widely found on the internet – a fact the researchers admit. How is that common sense and not regurgitation? So they come up with their own new puzzles to test GPT-4, and it figures those out too. I have basic common sense (feel free to disagree), and I couldn’t do most of these. The researchers assume that GPT-4 has a ‘rich and coherent representation of the world’ because it knows the circumference of the planet is (24,901 miles), as though having that fact to hand and seeing how it slots into this riddle is a sign of AGI. Riddles are just word algorithms, not real life.

It’s easy to laugh at this research, given the unicorns and bear hunts, but figuring out how AI understands our world is something academics have long considered. We don’t really know when humans pick up commonsense knowledge, such as understanding that dropping an egg on hard ground means it’ll smash into a mess. It’d be easier to tell if or when AI learns common sense if we had access to training data and models, but private companies aren’t keen to share those.

LLMs have other problems in the here and now, if that end-of-the-world stuff doesn’t do it for you. These massive models need to be trained on huge amounts of data. They’ve already pulled in the English-speaking internet, even though plenty of the words out there on the web are under copyright or are complete garbage, or both. To get more accurate, AI developers can tweak their systems, improving the model and the weights and how it all corrects itself, but the bigger the model, the more data is needed.

Where will it come from? Online publishers are pushing back: Reddit is asking to get paid to let LLMs mine its huge back catalogue of usergenerated content; newspapers are considering lawsuits for copyright infringement; and governments are looking at how to make AI companies pay for such data, perhaps using the equivalent of the ‘robots.txt’ tool system that tells search engines a page shouldn’t be crawled by their bots. It’s easy to think of other banks of data: digital books, email and messaging accounts, and voice assistants, which transcribe what you say into written text in order to understand it. Those data sets could be sold to the highest bidder or used by the companies that already own them – feeling nervous about your Gmail or WhatsApp yet? – though that may be a decision for the courts. Expect lots of data rights lawyers to be readying for battle.

This potential data grab is a problem for privacy, but most digital technology innovations have privacy implications, be it your phone, computerised medical records or online shopping. But it also has serious implications for people who write for a living, and as that includes me, you’ll understand the nervous tone of the next sentence. My publishers, current and former, own the copyright to my work, generally speaking. They will be more than happy to sell my out-of-date articles that no longer draw many readers to whom they can serve ads, but if I’m honest, they’ll also cheerfully let AI developers hoover up my more recent work too. Why? Because it gives them another much-needed income stream. While I wish my employers nothing but financial success, GPT and the like are already being touted as replacements for writers like me – why pay a person (however poorly), when you can pay a company for use of their LLM to churn out untold paragraphs for $20 a month? By analysing my work, these systems are learning how to replace me.

Well, sort of. They’re already capable of churning out dull marketing blog posts – ‘top ten reasons why our product is just what you need!’ – but real journalism, with its investigations, phone calls and going out in the world, can’t be regurgitated. News Corp is already using AI to automate local weather report stories, but all that does is arrange words to say it’s going to be hot and sunny today. Some people like a chart for that, other people want a sentence. It’s hard to get het up about that. Humans, on the other hand, are still needed for the research side of journalism, but also for surprising, intriguing writing.18

If we use well-designed LLMs carefully to automate the boring, repetitive parts of journalism, that would free up reporters to go out in their communities, investigate wrongdoing and take time carefully crafting their copy. It’s a cute fantasy, but as a journalist who’s been made redundant for budgetary reasons more than once, it’s always safe to assume that any money saved by technologies won’t be invested in better journalism but used to prop up profits (or cut losses) instead.

But this is how AI could impact me. If you want real criticism of LLMs and the great AI panic of the early 2020s, there’s one name you should know: Timnit Gebru.

When Hinton quit Google, he was awarded interviews in all the best publications, with glowing headlines dubbing him the ‘godfather of AI’. But Gebru left Google years before, in 2020 – also over ethical concerns.19

Gebru and five co-authors were set to publish a paper that examined the downsides of large language models – it raised concerns about environmental impact and bias, nothing too controversial, really – but managers at Google asked her to remove her name and those of her colleagues, leaving Emily Bender, director of the University of Washington’s Computational Linguistics Laboratory, as the only author. Gebru refused, and got told her job was gone, though Google’s version of the story differs and suggests she left of her own accord. Jeffrey Dean, the head of Google AI, told employees in an email that the paper didn’t ‘meet our bar for publication’. Whether Gebru quit or was forced out, her departure was followed by that of her colleague, Margaret Mitchell, coleader of the Ethical Artificial Intelligence team, reportedly because she ‘exfiltrated thousands of files’. Why do that? Again, reportedly because there was evidence of discrimination against Gebru, whom she was hoping to support.

Setting aside HR disputes, I’m going to point out something here that perhaps could be left unsaid: both of these individuals are, unlike Hinton, women. It’s an intriguing pattern in AI that the companies and research are often led by men – white and Asian, predominantly – but that so many of the AI experts raising concerns and suggesting solutions are women, and often women of colour (it’s worth also reading Joy Buolamwini and Ruha Benjamin on these subjects).

The paper written by Mitchell, Gebru, Bender and their colleague Angelina McMillan-Major was eventually published in 2021, though now only with four co-authors named. In the acknowledgements, the paper notes there were actually seven authors, but ‘some were required by their employer to remove their names’. Margaret Mitchell was in fact not listed as one of the four, though a ‘Shmargaret Shmitchell’ was.

Their paper raises a few risks about large language models and their quickly growing size. Google’s BERT language model in 2019 used a data set size that was 16GB; in 2020, GPT-3 required 570GB for training. All of that computing processing has a high financial cost, which limits who can build these systems, while the energy required has unquestionable environmental impacts, though the use of renewable sources is increasing in the sector. An average human’s carbon emissions are about 5 tonnes (11,023lb) annually, but the authors say that training a transformer model (a type of neural network) using a technique known as neural architecture search (NAS) emitted 284 tonnes (626,113lb) of carbon emissions.

And the climate crisis is impacting those least likely to benefit from these AI systems. The paper notes that the Maldives is expected to be underwater by 2100, and that 800,000 people were impacted by floods in the Sudan, asking if it’s fair they pay the price of developing LLMs that aren’t being developed in Dhivehi or Sudanese Arabic. It’s past time for energy efficiency to be included in such models.

Another challenge the authors raised is data: it should go without saying that the internet is full of bias. As the paper points out, training LLMs that will have a wide and varying impact on a data set that remains largely written by men in English – Wikipedia editors are at most 15 per cent women, for example – will naturally overrepresent those ideas, styles of writing and so on. And then in turn those LLMs churn out more content that’s identical, exacerbating the problem. Plus, as we rely on increasingly massive data sets, it becomes harder to document those data sets or even understand what they contain.

A third challenge concerns the very nature of LLMs: the paper dubs them ‘stochastic parrots’, meaning they mimic without understanding. The AI system is not applying meaning, that’s up to readers to do. This is why so many people were surprised by ‘hallucinations’ or ‘lies’ in responses from ChatGPT – they didn’t have the AI literacy to understand that such systems do not understand meaning or context, they merely spit out text that matches the pattern of our language. They do it incredibly well, and it fools us. These stochastic parrots create language without meaning. Any meaning in the output is supplied by the reader, and is therefore an illusion.

Bias, strengthening the status quo, misunderstanding the power of AI, environmental concerns and exclusionary costs – none of this is particularly controversial. But this was too much criticism for Google to handle – the same company whose CEO is doing the rounds warning about AI killing us all. What on earth is going on here? In response to that open letter from AI luminaries signed by Musk et al., the paper’s authors (Gebru, Mitchell, Bender, and McMillan-Major) issued their own letter, saying: ‘It is dangerous to distract ourselves with a fantasised AI-enabled utopia or apocalypse. Instead, we should focus on the very real and very present exploitative practices of the companies claiming to build them, who are rapidly centralising power and increasing social inequities.’

Surely the CEOs of AI-producing companies know all this too. So why are they signing open letters about how freaked out they are? There’s a twofold theory, according to which the motivations are marketing (if AI is going to kill us all, it must be really impressive – so your company should sign up now) and regulatory capture (distract politicians by focusing on a way-off-in-the-future hypothetical threat rather than anything that will impact us now). It’s a theory, anyway.

Now let’s step back a bit. We’ve seen AI go through a seasonal cadence of summer and winter, hype followed by backlash, then quiet, real progress before the loop begins again. Is this the point where the hype crash happens again? Perhaps, but hopefully not. Instead, it’d be preferable for AI to break out of this cycle and start to be truly useful, with a careful, close eye on the downsides.

Let’s ditch the historical hype cycle and build AI into a useful tool for people. Over the last several decades, we’ve refused to admit AI is narrow, when it is. Even before it could be built, we debated whether it could overtake human intelligence. And before we managed to put it to work, we shuddered over job losses. We should worry about existential threats and societal disruption, of course. But we need to fix the essential challenges facing us now, too – the costs (environmental and financial), the flaws we’re building in by not taking our time developing data sets, and the wider misunderstanding of how these systems work and don’t. People have been hyping AI abilities and threats for decades. Let’s stop wasting energy on marketing and take the time and effort to make AI work well for people.

How do we do this? Better funding models, openness in corporate research and taking our time. But what we shouldn’t do is listen to CEOs confounding regulators by screaming about existential risks as though the Terminator is standing right behind us. Lads, you’re the ones making it. If you’re so scared, stop what you’re doing – and stop sidelining the people pointing out problems.

### No Civil War – 1NC

### No Disasters – 1NC