# 1AC R2 v Liberty

## 1AC

### Plan

#### Plan: The United States federal government should prohibit the refusal to license climate mitigation and adaptation technologies as an anticompetitive business practice.

### Solvency

#### The SQ denies antitrust remedies for patent abuse

Gunderson 14 [Adam, practicing attorney at the Gunderson Law Group, “Protecting the Environment by Addressing Market Failure in Intellectual Property Law: Why Compulsory Licensing of Green Technologies Might Make Sense in the United States: A Balancing Approach,” *BYU Law Review* 2014.3, p.679-81, JCR]

Concern over patent suppression is not hypothetical. There have been a number of documented cases in which this phenomenon has taken place. In each case, patent suppression has been a means of hindering the progress of new technologies. Inasmuch as patent law is authorized under the Constitution in order to “promote the progress science and the useful arts,” patent suppression—whereby patent holders purposefully acquire patents only to prohibit their use or development—is contrary to that purpose and represents a clear abuse of that law. This section briefly explores a few examples of patent suppression and explains how the current legal framework of intellectual property [IP] and antitrust law is generally insufficient to stop the abuse. Perhaps one of the most well-known examples of patent suppression was brought to the forefront of public attention by the film Who Killed the Electric Car. 42 This documentary details the development and eventual suppression of battery technology capable of powering zero-emission automobiles.43 According to the documentary, General Motors acquired a small battery technology company, Ovonics—which had made tremendous advances in battery technology—and began to develop an electric car that would eventually be named the EV-1.44 When California’s political climate and the looming threats of burdensome regulations made GM nervous about the timing of the technology’s release, Texaco (which was soon after acquired by Chevron) stepped in and purchased the rights to the battery technology in order to suppress it.45 Another example occurred in the light bulb industry in the early 1900s.46 General Electric, which had a large stake in the incandescent light bulb industry, purchased the patent for a moreefficient fluorescent light bulb.47 In order to maximize its profits for the incandescent light bulbs, General Electric sat on the patent for the fluorescent lights, refusing to either bring the technology to market itself or to license the technology to other market participants.48 Not until Sylvania, another electronics company, successfully marketed a similar technology did General Electric begin to use its patented florescent light bulb technology.49 Bell Telephone also implemented patent suppression techniques in order to preserve the status quo.50 A 1920s investigation by the federal government found that Bell Telephone had purchased and suppressed over 3,000 patents.51 Bell had developed a practice of acquiring patents for the sole purpose of keeping those technologies out of the hands of their competitors.52 The law regarding patent suppression has not always been clear and while it appears that antitrust remedies may be available as a means of preventing some instances of patent suppression, such remedies are still not generally available.53 In 1886, a federal district court held that a patent holder could only be guaranteed legal protection of its patent if the holder was actually using the patented technology.54 However, in 1908, the U.S. Supreme Court held that patent non-use does not foreclose the patent holder’s right to protection under the law.55 With the birth of antitrust law, new remedies became available to stop anticompetitive behavior through which powerful companies tried to eliminate competition.56 While it may appear that patent suppression would fall into this category of behavior, courts have demonstrated an unwillingness to apply antitrust remedies to cases of patent suppression.57 For example, in SCM v. Xerox, the Supreme Court held that so long as a patent is acquired legally, it is not a violation of antitrust law to use the patent to the “full extent allowed under patent law,” which includes preventing third parties from using a technology, even when the patent holder itself is not using the patented technology.58 The holding of this case has been followed in subsequent decisions and is still good law.59 Thus, despite the similarities between patent suppression and those problems generally meant to be addressed by antitrust laws, it seems that antitrust law by itself is insufficient to stop patent suppression.

#### Federal action on climate patent monopolization is a prereq to innovation and development

Cayton 20 [Samuel, Adjunct Prof at Seattle Univ School of Law, legal intern at the Media Law Group, “The ‘Green Patent Paradox’ and Fair Use: The Intellectual Property Solution to Fight Climate Change,” *Seattle Journal of Technology, Environmental & Innovation Law* 11.1, p.239-45, JCR]

Congress has the constitutional authority to create laws that advance the development of technology through patents.197 Therefore, the optimal step to promote the use of green patents is to pass a federal law that provides a defense to patent infringement for green technology. While fair use is not codified in any form within Title 35 of the U.S. Code, Congress has enacted patent provisions tailored for specific purposes that involve loosening patent protection for the rightsholder.198 For instance, the Patent Act permits infringement where secondary use is part of a process to obtain approval of a new drug from the Federal Drug Administration.199 Additionally, the Act limits a patentee’s ability to recover damages when a patented invention is used in a medical or surgical procedure.200 These statutory exceptions to patent infringement reflect the notion that American society values technologies that provide a public health benefit, even if it is at the expense of a patent holder’s right to exclude.201 To ensure that the policy motives around green technology in the American industries are captured, Congress should engage in extensive fact-finding through congressional hearings and research. A bill from either chamber should incorporate the international consensus that climate change is a global threat to the planet that also has the potential to jeopardize public health.202 It should also make clear that climate change is anthropogenic and has accelerated in part due to environmentally hazardous industrialization.203 Furthermore, the bill should capture factual findings that touch on the following: that technological innovation plays a vital role in mitigating the effects of climate change;204 that a mass expansion of environmentally sustainable technology is needed to substitute the environmentally hazardous technologies;205 and that altering the U.S. patent law is a necessary action to promote this expansion.206 These findings should also qualify that patent holders’ incentives are equally important to the development of an environmentally sustainable economy.207 The elements of fair use in the law should not only be specific enough to guide the courts in their analysis of whether the secondary user is privileged as a fair user of a green patent but also general enough to provide a working template for courts to use in infringement suits. Even if Congress does not implement a fair use doctrine for green patents–a probable scenario given its current state of dysfunction–the federal court system is also authorized to intervene on its own. Two justifications permit the courts to allow fair use in patent law: first, fair use in copyright law was originally judicially created208 before Congress codified it,209 and, second, federal courts have already ruled on patent infringement cases with outcomes that favor continued use by second-comers as seen in eBay and Paice. 210 Whether or not the primary authority comes from the legislature, courts should undergo the following analysis in its fair use defense: (1) Does the patent at issue cover a field of green technology? The first part of the analysis requires courts to determine whether the patent at issue covers environmental sustainability or protection. To properly guide their analysis, the courts would benefit from having Congress enumerate a non-exhaustive list of industries that can utilize a fair use defense, such as alternative energies, fuel-efficiency, GHG and pollution reductions, and so on. Nevertheless, courts are equally capable of making their own determination. (2) If the patent covers green technology, and the second-comer infringes on its use, is that user privileged as a fair user? Under this prong, the court will assess several considerations regarding the patent regime, much like Dean Emerita O’Rourke’s aforementioned proposal. However, the factors for this green patent fair use proposal will be tailored to capture the considerations of green technology industries. Although Congress should enumerate these factors into the law, the court can further develop and define them: (1) the market potential; (2) the patentee’s developments; (3) the purpose and nature of the secondary use; and (4) the interests of the patentee and industry. First, the court should consider the potential market impact of the patented technology at issue. To adequately assess this factor, experts in technological fields can testify in federal infringement suits and make reasonable valuations of the patented technology’s capabilities in the market. This judicial assessment can reveal the untapped potential that may justify secondary use. Second, the court should evaluate the patentee’s developments of each patent. This part of the test will determine whether the patentee is sitting on the patent or whether they are capitalizing on its potential found in factor one. This step in the test aims to remedy the concerns around the Green Patent Paradox by determining whether the patent holder is making the best use of the patent. If the patentee has no intention of using their patent to fill the market demand, then this factor would weigh strongly in favor of its fair use. Third, the court should look at the purpose and nature of the second-comer’s advance on the technology. This factor combines two of Dean Emerita O’Rourke’s factors211 and prompts the court to look at the secondary use itself. However, this part of the test is more tailored to the innovations in green technology. Ultimately, the crux of this factor is determining whether the secondary user’s use of the technology is meant to provide positive results for the sustainability market. For example, using lucrative solar panel technology that achieves an environmentally beneficial purpose can be deemed fairer than using an eco-friendly pet product that may be in a smaller potential market. Additionally, if the secondary user is mainly striving to achieve a particular sustainability standard for their innovative pursuit, rather than directly compete with the patent holder in the market, then this factor would weigh in favor of secondary use. Finally, the court should analyze whether permitting secondary use would drastically impact the interests of the patent holder or the green technology industry at large. Here, a court should consider the incentives, resources, and commercial interests of the patentee as well as the interests of the relevant green technology industries. If the patent holder has a legitimate reason to hold onto their patent rights, this factor would weigh strongly in favor of excluding the second-comer from using the technology without a license. Otherwise, this factor should be equally weighed together with the other three factors. (3) If the secondary user is a fair user, does justice require compensation for the patent holder? Because the second part of this proposal imposes a heightened standard against the patentee’s incentives, court-ordered royalties should remain an option much like Dean Emerita O’Rourke’s proposal.212 This part of the test recognizes that the fair use assessment is binary: secondary use of the green patent is either allowed or not allowed. Thus, awarding a modest, reasonable amount of royalties can offset any grievances that may arise if the patentee loses their exclusive right over the green patent at issue. Because the four factors in the second prong of this proposal are more strictly applied against the patent holder, rather than imposing the same four factors as Dean Emerita O’Rourke proposes, the court should instead determine on its own whether royalties should be awarded. However, depending on the capital and resources of the secondary user, these royalties should be limited so as not to chill the subsequent implementation of the green technology. B. Further Considerations This technology-specific proposal is designed to speed the process of implementing green technology in the U.S. while still recognizing that the patent scheme is inherently designed to promote innovation. Once secondary users are permitted to use patented green technology, they can actively work toward bringing the U.S. into a sustainable economy without fear of infringement action. Ultimately, the issues raised by the Green Patent Paradox would be resolved by this proposal, which seeks to streamline and advance outside innovation while ensuring patent holders arer sufficiently compensated. However, with any proposal, several considerations remain to be addressed. 1. The Patentee’s Rights Although this proposal directly addresses concerns surrounding the climate crisis, it must be acknowledged that many scholars are skeptical of both the expansion of patent rights beyond the patentee and the impact it would have on the patent incentive scheme.213 Patentees in the field of green technology have a particular incentive to hold onto their rights, especially companies with larger carbon footprints.214 Moreover, fair use of patented green technologies, unlike certain transformative uses of copyrighted works, would almost always be for commercial purposes. However, the overarching goal of this proposal is to change the dynamics within the green technology industry. As Dean Emerita O’Rourke points out, fair use would promote standard-setting whereby companies can set their own guidelines regarding the allocation of their intellectual property based on reasonable terms.215 Moreover, it would serve as a bargaining chip for licensing, which can reduce the royalty rate for second-comers.216 Hence, as this proposal promotes sharing within the private sector, companies can work together toward the common goal of combatting climate change. Another consideration involves whether to allow fair use if the patentee specifically refuses to license their patent to the infringer. In copyright law, a fair user of copyrighted work is still allowed to go forward with their derivative creation, regardless of whether the rightsholder denied that user permission.217 In recognition of the existential threat posed by the climate crisis, patent law should follow suit and bypass this potential concern. As previously mentioned, a patentee’s reasoning behind the refusal to license can be considered in the assessment of fair use or whether ongoing royalties should be awarded. 2. Implementation Additionally, even with fair use in patent law, the ITC’s independence from the federal judiciary remains a concern for expanding green technology to the market. Because of its independence, it is unknown whether it would incorporate fair use into its investigations, and thus, a plaintiff who loses in court may still use this alternate forum to preclude secondary use.218 To prevent a patent holder from utilizing other avenues to curb secondary use, this proposal will include guidelines on congressional action that would help establish boundaries on what the ITC can investigate regarding green technology. While it conducts its investigations, the ITC should recognize the global threat of climate change. Furthermore, because patents and trade secrets can protect the same subject matter,219 a prospective inventor could seek trade secret protection for their intellectual property to avoid the prospect of fair use by others.220 Thus, rather than apply for a patent, an inventor or company that invents a novel green technology could employ security measures to keep their idea secret and, in effect, the schematics of the invention would never reach public view and society would not benefit. However, trade secrets have their downsides as they can be difficult to enforce and risk losing their protections if others utilize the same idea.221 Additionally, from an investor’s perspective, the value of a patent is more tangible than the value of a trade secret.222 This realization is an important distinction given that green technology is a capital-intensive industry.223 Moreover, inventors in green technology industries can benefit from having their works made public because in the long run because public access “can support the diffusion and adaptation of existing green technologies that are in the public domain.”224 Lastly, concerns around timing need to be addressed. If Congress does not codify this proposal and leaves any developments to the courts, expansions of green technology will not accelerate at a necessary rate. Instead, a judicially created fair use doctrine for patent law may merely provide incremental change to green patents at best as it would only develop case-by-case through individual lawsuits.225 Regardless of whether federal institutions will initiate this proposal, industries at large should still strive to advance green technology at a rapid pace. Although inventors and entrepreneurs risk becoming defendants to patent infringement suits, eBay remains a shield for their technologies’ continued development.226 Eventually, the climate crisis’s growing threat will pressure the U.S. to tolerate transfers of patented green technology so that such technologies receive their highest and best use at the lowest cost to the patent holders and other users The world faces an imminent threat from climate change that requires drastic structural attention. The U.S. has always led the world in promoting and preserving global security, but political gridlock within the nation could stall the massive changes to steer the world in the right direction. Fortunately, the private sector has an equally important role and duty in the pursuit to reform various industries. However, while industry and entrepreneurship can further develop necessary green technology, a comprehensive transformation in the U.S. patent regime must take place in order to fix the inherent issues around secondary innovations. The Green Patent Paradox demonstrates that the patent system impedes innovation by allowing rights’ holders to sit on their patent rights further slowing the transition to an environmentally sustainable economy. Although eBay is a victory in that it helps encourage continued use of other patent holder’s green patents, the ITC functions as a loophole for patent holders who want to halt secondary users or pressure them to take unwanted licensing agreements. The public and private sectors have both revealed possible solutions in the wake of the climate crisis. While the public sector can fix the patent regime through various means, these solutions either have substantial barriers to becoming reality or pose implementation issues that inhibit inventor incentives. Even with goodwill gestures from large companies, not all businesses are positioned to donate their intellectual property. The doctrine of fair use does not exist in patent law under conceivable rationales even though many viable justifications support its application. However, the lurking effects of the climate crisis demonstrate the societal need to implement a system that tolerates secondary uses of patented green technologies.

#### The innovation disad doesn’t apply to new areas of research like climate tech – patent accessibility is key

Bernardini 21 [Jessica, JD from Lewis & Clark Law School, works at the small business legal clinic at the Patent Program at Lewis & Clark Law School, registered Professional Engineer and engineering consultant with focus on renewable energy development, “Leveraging Mandatory Licensing Under the Clean Air Act – A Novel Framework to Domestic Reduction of Greenhouse Gases,” *Environmental Law* 51.1, p.324-8, JCR]

The use of compulsory licensing would be especially valuable for forcing a patentee to work a patent in an area that is relatively new. Opponents of compulsory licensing believe it will reduce incentive for innovation and encourage inventors to maintain their knowledge as a trade secret rather than disclose through patents.153 And while obtaining a patent requires sufficient disclosure so that a “person having ordinary skill in the art” may practice the patent, disclosure (without actual reduction to practice and use in the industry) of newer technologies, such as carbon capture, is not as useful as it is for more established technologies. Consequently, in areas of newer technology, innovation is stifled when there is no practicing of the technology, which allows innovators to understand how the technology works.154 Especially in the case of newer technologies, compulsory licensing would actually support innovation by forcing the technology’s real-world application, thereby allowing other innovators to improve upon the technology. While the EPA has significant discretion in selecting a BSER, no existing precedent allows the EPA to establish regulations on the sole basis that a patent exists but has not been demonstrated to be technologically feasible, on even a very small scale. Therefore, the absence of a working requirement under the Patent Act jeopardizes the EPA’s ability to regulate GHGs.155 The Mandatory Licensing provision provides authority for the EPA to pursue mandatory licensing of patented technologies necessary to achieve emissions standards. Invocation of the provision does not require a showing that the patented technology has been adequately demonstrated.156 However, to establish the emission standards in the first place, the technology used to achieve the standards must have been adequately demonstrated (i.e. worked and put into practice even in some small fashion).157 If a technology has not been adequately demonstrated, it should not be considered by the EPA to be part of an emission reduction system.158 In this instance, a general compulsory licensing provision under the Patent Act would help work technologies, show them to be technologically feasible, and ultimately allow the EPA to consider them as part of a BSER. Opponents to compulsory licensing argue that it is unnecessary to invoke compulsory licensing to mitigate non-working of patents because inventors of useful inventions will want to recoup their investments and will do so through working or licensing of the patent.159 However, this argument fails to take into consideration that some entities will not want the patent to be put into use. When a patent is subject to use as part of an environmental regulation, its use would adequately demonstrate the patented material and make it readily available. Therefore, regulated entities would rather have these categories of patents suppressed in an attempt to avoid potential environmental regulation. Patent suppression by fossil-fuel companies has already occurred, as discovered by state prosecutors.160 The prosecutors were looking into whether fossil-fuel companies misled their investors by making statements dispelling climate change and the impacts that it would ultimately have on the companies’ viability.161 These investigations led to the discovery that these same companies patented carbon-capture technologies and never put them into use, suppressing them since the 1960’s.162 The non-working of patented carbon-capture technology is already occurring, possibly to keep patented technologies from EPA consideration. For example, Exxon has the highest number of patented carbon-capture technologies and is funneling millions into research,163 yet it does not operate any plant in the U.S. with large-scale carbon-capture. It is obvious that, with no regulatory driver to reduce carbon dioxide emissions and require the installation of carbon-capture technologies, industry will not utilize these technologies in the absence of a compliance threshold. The proposed framework provides a regulatory driver to implement the technologies. The emission threshold would deter patent suppression, and if not, then the second step of the framework— mandatory licensing—prevents suppression. Under the second step, the EPA would threaten to step in and require licensing of those technologies if industry was not willing to provide reasonable licenses to others in the industry. Refusal to license patents after the enactment of the new emission standards could have a detrimental effect on industry’s ability to comply with the strict standards. Once emission standards are in effect, patentees could reasonably license their patents to other industry participants without government intrusion or proceed to practice monopolistic market power. A refusal to license a patent could mean a unilateral outright refusal, or that restrictions on the patent use are unreasonable or the price to license is so prohibitive that it equates to an outright refusal.164 In the U.S., a refusal to license typically will not lead to a finding of monopolization unless there is a finding that the refusal is completely unrelated to the patent.165 It is unlikely that court-mandated compulsory licensing will be used to require licensing solely to address refusal to license or the use of monopolistic pricing. In Verizon Communications v. Law Offices of Curtis V. Trinko,166 the Supreme Court emphasized that “[t]he opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth.”167 Furthermore, monopolistic power alone is not unlawful, but rather it needs to be “accompanied by an element of anticompetitive conduct.”168 However, the Court goes on to clarify that, while the right to refuse to license with other firms may be allowed, it “does not mean that the right is unqualified.”169 Because the threshold for finding anticompetitive behavior by a patentee is quite high, it may be necessary to resort to statutorily authorized compulsory licensing to overcome monopolistic behavior and establish reasonable and fair licensing agreements. In addition to a refusal to license existing carbon-capture technologies, another opportunity exists for patent holders to further monopolize the market when existing patent holders build upon existing carbon-capture technologies. For example, companies are investing in research and development for scaling up and integrating carbon-capture into plant design, as opposed to retrofitting, and developing more integrated approaches to carbon-capture utilization.170 The ability to build upon existing patented technologies with no willingness to license (or work) these technologies is troublesome because these improvements will result in new patents which will be valid for up to another twenty years, the critical time period necessary for deployment of technologies that reduce emissions contributing to climate change.171 Even though statutory compulsory licensing has never been invoked by the government, some individuals contemplate the threat of compulsory licensing when considering the cost of their innovation.172 Their concern is that the government will step in before they can recoup their research and development costs. The potential negative effect of compulsory licensing on the incentives for innovation could be outweighed by the positive impact on innovation for an industry as a whole, particularly in the context of climate change action.173 The potential threat of compulsory licensing alone may be enough to encourage entities to license on more flexible terms to avoid governmental intrusion.174

#### If the federal government doesn’t act, the states will – and it will destabilize the entire patent system.

Mazur 07 [Tanya, attorney specializing in intellectual property law, winner of the Southern California Rising Star award in Intellectual Property Litigation, “Free for the ‘Taking’: Why States Should Not Be Able to Invoke Sovereign Immunity in Patent Infringement Disputes,” *The George Washington Law Review* 75.2, p.398-9, JCR]

There is a crisis looming on America’s horizon, whether in the form of bioterrorism, an avian flu pandemic, or the bankrupting of the federal government due to the aging population’s need for health care. All of these crises demand widespread access to patented inventions, such as pharmaceuticals, to prevent the enormous suffering of Americans. Emergency situations, such as the flu pandemic, will require production of patented products on a scale so massive that it would require circumventing a patent’s normal protections.2 Even the aging baby boomer population’s need for access to low-cost prescription drugs through programs like Medicare could be considered an emergency situation.3 Never before has the health and well-being of our nation been so inexorably linked to patented inventions. In recent years, Congress has attempted to address the coming crises and has proposed a number of changes to the patent laws; these changes, however, have failed to provide adequate solutions.4 States, therefore, are becoming increasingly proactive with regard to their residents’ needs in these crisis situations and are beginning to look to a loophole created by the Eleventh Amendment that exists in the patent laws.5 This loophole threatens to destabilize the United States’ incredibly successful patent system and the hundreds of years of technological innovation this system has provided to the nation.6 This Note examines the delicate balance between the public’s need for ready access to patented goods and the patent protections necessary to promote innovation, within the framework of the present patent system. Also discussed in this Note are problems that result from the approaches to patent “takings” and compulsory licensing that states and local governments have begun to employ. This Note proposes a vital amendment to the patent laws that would alleviate the aforementioned crises while still encouraging innovation and protecting the basic tenets of the patent system. Furthermore, this Note advocates that state sovereign immunity in patent cases be abrogated to curtail states’ abilities to impose compulsory licenses upon patent holders. By allowing only Congress to wield the power to extract compulsory licenses, rather than state or local governments or officers or appointees of the executive branch of the federal government, this proposal protects the sanctity and stability of the patent system. This protection furthers the aims of the Constitution and fosters the progress of the useful arts and sciences. In cases of national emergency, however, Congress would retain the authority to implement takings or compulsory licensing of patents.

### TRIPS

#### ‘Refusal to license’ has kept climate tech out of the hands of developing countries

Qin 18 [Dong, Assoc Prof at Nanjing Univ of Information Science & Technology, “After Paris: Do we need an international agreement on green compulsory licensing?” in *The Implementation of the Paris Agreement on Climate Change*, ed. Vesselin Popovski, p.183-7, JCR]

This patent suppression behaviour has many negative impacts on technology research, development and diffusion. For example, many patentees build patent thickets, which are thick patent webs consisting of various related and overlapping patents, so that their competitors will have much more trouble researching and developing new technologies. Facing patent thickets, firms can require access to dozens, hundreds or even thousands of patents to produce just one commercial product20. The most troublesome quality of a thicket is the risk that one may not be able to conclusively determine that all of the patents have already been read on a product or service21. Relevant patents can pop up and catch even sophisticated manufacturers by surprise22. Addressing this awkward situation, the Secretary General of the United Nations pointed out that the rise of strategic patenting and a series of legislative changes to expand monopoly rights had led to a very complex system of patents, which was increasingly geared to support the rights of incumbent large firms over new, smaller, innovative firms23. Additionally, the system in many countries had moved from its original objective of stimulating innovation through the provision of incentives to innovators, to preventing new domestic and foreign market entrants24. In many green industries, core technologies have already been monopolized by a few large companies. For example, the technologies in hybrid vehicles are very important for developing countries in reducing greenhouse gases under the Paris Agreement. However, more than 90% of patents in hybrid vehicles belong to companies in the United States, Germany and Japan25. It is very difficult for developing countries to get access to these technologies at affordable prices. In the field of LED, a kind of low-carbon light, some companies in developed countries monopolize most of the core technologies and never permit companies in developing countries to use their patents. Because of patent suppression, the technology gap between developing countries and developed countries keeps widening. On the one hand, patenting rates for clean energy technologies have increased faster than for other sectors, at a rate of about 20% per year since the adoption of the Kyoto Protocol by the United Nations Framework Convention on Climate Change, in 199726. On the other hand, most green technology patents continue to be controlled by only a few developed countries. According to statistics provided by the Secretary-General of the UN, six developed countries, including Japan, the United States, Germany, the Republic of Korea, the UK and France, account for almost 80% of all patent applications in clean energy technology27. Some other statistics show that developing countries own too few high-value inventions in the field of climate change technology. Taking China and Brazil as examples, the former owns only 2.3% high-value inventions in the field of climate change technology and the latter owns only 0.2%. Although green patent suppression is now very serious and has become an important barrier to technology transfer, it is not right to jump to the conclusion that the governments of parties to the UNFCCC are devoid of political willingness to deal with it. On the contrary, these governments have already shown some resolve on removing barriers to the international transfer of green technology. Article 4, para. 5, of the UNFCCC states that the developed countries shall take all practicable steps to promote, facilitate and finance the transfer of environmentally sound technologies to other parties, particularly developing countries, to enable them to implement the provisions of the Convention. Article 5 of the UNFCCC also states that the parties shall support international and intergovernmental efforts to strengthen national technical research capacities and capabilities, particularly in developing countries. Moreover, Article 10 of the Kyoto Protocol also rules that all parties shall take all practicable steps to promote, facilitate and finance the transfer of environmentally sound technologies pertinent to climate change, in particular to developing countries. The parties of the UNFCCC tried to develop more detailed plans to promote the international transfer of green technologies after the signing of the Kyoto Protocol in 1997. For example, the Conference of the Parties, on its seventh session held in Marrakesh from 29 October to 10 November 2001, made the decision on development and transfer of technologies (Decision 4/ CP.7)29. According to this decision, the parties would establish an expert group on technology transfer, the objective of which was enhancing the implementation of Article 4, para. 5, of the Convention, including, inter alia, by analysing and identifying ways to facilitate and advance technology-transfer activities. The decision also decided to urge developed country parties to provide technical assistance through existing bilateral and multilateral co-operative programmes. The decision even provided a framework for meaningful and effective actions to enhance the implementation of Article 4, para. 5, of the Convention30. According to the framework, all parties of the UNFCCC were urged to improve the enabling environments for technology transfer, which focused on government actions, such as fair-trade policies, removal of technical, legal and administrative barriers to technology transfer, sound economic policy, regulatory frameworks and transparency. Although many efforts have been made by the international community to promote international transfer of green technologies, the results are quite disappointing. For example, the Kyoto Protocol created the Clean Development Mechanism (CDM) to help developing countries to contribute to the ultimate objective of UNFCCC. According to Article 12 of the Kyoto Protocol, developing countries will benefit from CDM project activities resulting in certified emission reductions. Other countries that have qualified greenhouse gas reduction obligations may use the certified emission reductions accruing from s project activities to contribute to compliance with part of their own quantified emission limitation and reduction commitment. When the Clean Development Mechanism was designed during the negotiations of the Kyoto Protocol, almost all parties of the UNFCCC expected the mechanism to be a helpful tool in promoting green technology transfer between developed countries and developing countries. In fact, it was estimated that about 26% of the projects in relation to the CDM would involve at least some kind of technology transfer31. However, the results have proved very frustrating. Statistics shows that only 0.6% of projects involved technology transfer and the contribution of the CDM to technology transfer can at best be regarded as minimal32. Of course, the reasons for the frustrating results are many, but undoubtedly one of them is that some entities who own advanced green technologies have strong IP protection tactics, including building patent thickets, so that others have little opportunity to get technologies relating to their CDM projects. Yet another important reason why many efforts of the parties of the UNFCCC have been frustrated is that they only aim to regulate the behaviour of governments rather than the behaviour of patentees. However, the fact is that patentees, rather than governments, have the final say in green technology transfer. The right of patentees to refuse to share their patents with other people is strictly protected by the international intellectual property rights system. According to Article 28 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), where the subject matter of a patent is a product, the owner of the patent has exclusive rights to prevent third parties from the acts of making, using, offering for sale, selling or importing for these purposes that product unless they have the consent of the owner. Where the subject matter of a patent is a process, the owner of the patent has exclusive rights to prevent third parties from the act of using the process unless they have the consent of the owner. Accordingly, the problem of green patent suppression can never be solved if the parties of UNFCCC cannot manage to improve the current IP system. If the owners of green technologies neither use their technologies nor permit others to use their technologies to reduce greenhouse gases, the goal of the Paris Agreement can never be fulfilled. If we want to make the Earth, which is becoming warmer and warmer, safer for us to live, attention should be paid not only to the protection of the private interests of patentees, but also to the protection of public interests.

#### This puts the US in breach of international obligations, which collapses climate treaty implementation globally – IP is the bottleneck

Zhou 19 [Chen, Assist Prof in the Law School of Xiamen Univ, “Can intellectual property rights within climate technology transfer work for the UNFCCC and the Paris Agreement?” *International Environmental Agreements: Politics, Law and Economics* 19.1, p.108-10, JCR]

Climate change is a well-researched issue both scientifically and in terms of legal scholarship. It is widely recognized that technological solutions play an important role in climate mitigation and adaptation. Due to historical and practical reasons, relevant technologies are distributing unevenly across the world.1 To combat climate change, the wide and rapid diffusion of such technologies is in the global self-interest (Watal 2010: 14). There is evidence that technology transfers increase the incentives for participation in multinational environment agreements (MEAs) (Shephard 2007: 10548). In the context of climate change, the United Nation Framework Convention on Climate Change (UNFCCC 1992) requires industrialized countries to facilitate technology transfers to developing countries to enable them to minimize their emissions of greenhouse gas emissions (GHGs). The 2015 Paris Agreement (Paris Agreement 2015) emphasizes this once more as it further commits the Parties to strengthening cooperation on climate technology. However, in reality, state-of-the-art climate mitigation and adaptation technologies are not being automatically transferred through business-as-usual practices where traditional legal protection of intellectual property (IP) operates under the Climate regime. In the light of the growing urgency of climate risks and damage and the emerging recognition of the potential violation of human rights, it is critical to examine what is the key bottleneck to technology transfer and how this can be addressed. Hence, this article explores how IP laws can be used by climate change policymakers in the post-Paris era to enhance technology transfer. To capture the entire picture, I use a statutory perspective to summarize and analyse the UNFCCC (see Sect. 2) and the WTO (see Sect. 3), the legal setting in which climate technology transfers operate, and explore possible solutions to situate IP in the context of climate change. In the context of climate change, technology transfer is predominantly regulated by the UNFCCC. Designed as a broad framework to comprehensively deal with the climate crisis, the UNFCCC has, since 1992, endeavoured to reduce GHG emissions through a range of solutions.2 As early as 1992, the UNFCCC shed light on technology as a solution by framing technology development and transfer as an essential international assistance tool. Two core articles were laid down to facilitate technology transfer: Article 4.5 and Article 4.7. Article 4.5 is cited as a classic clause and has been placed at the heart of the technology transfer commitment system.3 It obliges the developed country Parties of the UNFCCC (Annex I countries) to commit to technology transfer in order to fulfill the principle of common but differentiated responsibilities and respective capabilities. This principle aimed at substantive equity, international solidarity and assistance. To further confirm this commitment, Article 4.7, known as the conditionality clause, made the fulfilment of the developing countries’ commitments conditional on actions taken by developed countries.4 Under this Article, the developing country Parties could suspend the Convention’s implementation if the developed country Parties did not provide technology transfer and financial assistance. Therefore, it can be said that the conditionality clause makes technology transfer absolutely indispensable for the effective implementation of climate change agreements. A violation of the provisions on technology transfer might consequently constitute a material breach and would conflict with the purpose and objective of the Convention (Verhoosel 1998: 66).

#### The US leverages the WTO/TRIPS Agreement to block patent access – application of antitrust allows legal triggering of compulsory licensing

Ni 15 [Kuei-Jung, Prof of Law at the National Chiao Tung University School of Law’s Institute of Technology Law, “Legal Aspects (Barriers) of Granting Compulsory Licenses for Clean Technologies in Light of WTO/TRIPS Rules: Promise or Mirage?” *World Trade Review* 14.4, p.708-17, JCR]

The concept of developing countries granting themselves compulsory licenses and gaining access to climate-related technologies was an unwelcome, or even disturbing, proposal for developed countries and their resident companies who hold the IPRs for these technologies.32 They disagreed with the statement that an IPR constitutes a barrier to technology transfer and instead argued that poor IPR enforcement and high tariffs on environmental products should be blamed for the stalemate on transfers.33 On the basis of various promising instances in which Western companies have transferred clean technologies to and deployed them in emerging markets, Lane remains skeptical of the rhetoric that claims IPRs to be an obstacle to technology transfer and dissimilation.34 Thus far, the compulsory licensing of clean technologies seems not to have occurred, despite strong appeals by developing countries for the use of this mechanism. Although the UNFCCC does not have applicable rules specifically pertaining to the use of compulsory licenses per se, the WTO/TRIPS forum appears eligible to govern them, especially regarding the negotiation of a new agenda and law enforcement. The UNFCCC is the major global forum through which developing countries have consistently proposed using compulsory licenses as one means, among others, of gaining access to clean technologies. However, the climate regime does not specify any binding rules or disciplines for regulating the application of such a measure. Instead, the WTO/TRIPS is the competent regime governing the use by national authorities.35 In effect, all WTO members must guarantee that their national laws and measures relating to compulsory licenses are in compliance with the TRIPS obligations in question.36 During the mid-1990s, under the threat of economic sanctions resulting from US Section 301, the GATT Uruguay Round negotiations finally resulted in crafting comprehensive and multilateral protection for IPRs, which operates with an effective dispute settlement mechanism.37 The effectiveness of the TRIPS Agreement represents a triumph for developed countries, particularly the US, which have long called for strong global IP protection. The TRIPS Agreement specifies a minimum threshold of IP protection and enforcement by WTO members.38 To balance the rights of IP owners, most of whom are from developed nations, with the interests of general users and developing countries and to pursue members’ legitimate public objectives, certain measures limiting the prerogatives of IP owners are permissible, especially regarding their monopoly rights. A patentee may prevent others from using a patented technology before the patent expires.39 However, Article 30 of the TRIPS Agreement provides for exceptions to this right. In addition, patentees who are not using the patent themselves may authorize others to make use of their protected subject matter by voluntarily signing a licensing agreement.40 The freedom of contract that individuals and firms have in choosing their partners and deciding the content of deals would be constrained by the governmental authorization of compulsory licenses to other users. Article 31 of the TRIPS Agreement specifies the rules for implementing such licenses.41 An analysis of the structure of Article 31 of the TRIPS Agreement indicates that the provision does not explicitly provide grounds on which compulsory licenses can be based but simply specifies the 12 conditions with which WTO members ought to comply. All conditions are obligatory. Although the incorporation of compulsory licenses into the TRIPS Agreement is part of a balancing act for countering the predominant power of patentees, such a move should not be interpreted merely for the convenience of developing countries.43 The use of compulsory licenses is not intended to be a ‘free lunch’ because the challenges associated with observing the requirements are quite severe and the costs of implementing the collateral duties may be relatively high. The following sections first examine whether a new declaration or similar document is likely to be finalized to underpin developing countries’ proposal. The focus is then on the legal challenges in, and obstacles to, complying with the TRIPS obligations with reference to the compulsory licensing of Philips CD-R patents, which can serve as a benchmark practice. In response to the HIV/AIDS health crises affecting many developing countries, the WTO adopted the Declaration on TRIPS Agreement and Public Health at its 2001 Fourth Ministerial Conference in Doha. The conclusion of the agreement exemplified how the global IP regime can support, rather than hinder, access to the affordable medicines, most of which are covered by IPRs. Regardless of its legal status,44 the Declaration provides developing countries with powerful leverage and flexibility when interpreting and implementing their TRIPS obligations. The flexibilities elaborated by the Declaration consist of compulsory licenses. First, the right to grant compulsory licenses and the freedom to determine the grounds on which to do so are recognized.45 Second, the Declaration confirms the right of WTO members to define the circumstances that constitute a national emergency and explicitly equates public health crises to national emergencies.46 Third, because many members have insufficient manufacturing capacities, the Declaration requested that the TRIPS Council sort out a solution that makes compulsory licenses more effective for these countries.47 Overall, the flexible approach streamlines the compulsory licensing with a view to promoting access to essential drugs. The Doha’s position on global IP enforcement presents an opportunity for balancing private property rights with other societal values, such as human rights and environmental protection. The mandate on IP and public health signals that multilateral trade negotiations and law-making processes can accommodate the interests of developing countries when their demands are on strong moral and legal grounds. The successful experience in Doha provides momentum for developing countries to pursue other similar goals. Although the appeal for adopting a TRIPS declaration on IP and climate-related technologies seems acceptable, at least morally, the feasibility of concluding a similar text as for public health, especially in the WTO community, remains in doubt. From the perspective of international politics, the WTO members’ lack of political will to earnestly negotiate seems unchanged.48 In addition, as opposed to the mandate of the Doha Declaration, most free trade agreements (FTAs) concluded by the US after 2001 have constrained the use of compulsory licenses.49 The prevalence of alleged TRIPS-plus arrangements in US-initiated FTAs heralds greater difficulties ahead for adopting a new declaration on TRIPS-related social concerns at the WTO. Without the support of the US, it would be difficult to achieve a result that facilitates access to climate-related technologies in multilateral trade negotiations. Discrepancies between access to medicine and access to clean technologies and their products may create obstacles for constructing a new declaration. The possible discrepancies can be divided into three parts (Table 1). First, accessing patented drugs appears unaffordable for the public in developing countries, but whether climate-related technologies are too expensive is uncertain. Second, regarding emergency levels, there are strong moral and legal grounds for protecting people from public health crises by, among other approaches, using compulsory licenses as flexibly as possible. Without access to essential drugs, millions of people could die. However, climate change, despite its considerable impact on human society, is a gradual process and not an emergency similar to that of HIV/AIDS.50 In addition, the effective use of compulsory licenses depends on the presence of a competitive local production capacity. Given the relative infancy of climate-related technologies,51 manufacturing capacities for these products may be more insufficient or entirely absent in many developing countries. This limitation could make granting compulsory licenses less fruitful.52 By comparing the distinctive features of pharmaceutical and clean technologies, McManis and Contreras emphasize that market and patent coverage factors may considerably diminish the effects of green compulsory licensing as opposed to that of essential medicines.53 Thus, they are skeptical that ‘an international accord modeled on the Doha Declaration is achievable or desirable in the area of clean technologies’. 54 The authority to grant compulsory licenses lies with governments but is subject to a number of conditions that each WTO member is required to observe. The requirements, listed under Article 31 of the TRIPS Agreement, impose strict discipline on the members and provide competent national authorities with limited discretion. Observing the obligations is a twofold task: first, national authorities must determine the grounds on which such licenses are granted; second, they must fulfill each of the listed conditions, which begin with an appeal for granting the licenses in question and end on their termination. Article 31 does not explicitly regulate the right of members to stipulate the grounds for resorting to a compulsory license, nor does it provide definite parameters for determining the scope of the grounds, apart from the grounds for semiconductor technology.55 Such an omission causes ambiguity concerning the legality of the grounds chosen by national authorities under the TRIPS Agreement. During the Uruguay Round negotiations, most developed countries, including the US, favored a restrictive approach allowing only for matters of anti-trust, public non-commercial use, and national emergencies to legally trigger such licenses.56 In contrast, developing nations argued for an open approach under which there would not be any constraints regarding setting the grounds. In the end, the proposal to limit the grounds for issuing a compulsory license was not adopted. Instead, the final text on compulsory licenses focused on procedural matters and the substantial conditions to be observed.57The TRIPS preparatory work may support the assertion that the drafters had no definite intention of limiting the scope of the grounds.58 Subsequent developments regarding the interpretation of the TRIPS Agreement, particularly evident in the 2001 Doha Declaration, endorse the views of developing countries. However, the controversy regarding the legal status of the Doha text persists, and no judicial decisions have yet been made by the WTO relating to its legal authority. The US considers the Declaration to be a political statement that lacks any binding power on WTO members.59 By contrast, because the Declaration was adopted by consensus, developing countries claim that it represents a genuine and legitimate expectation among WTO members. Despite this disagreement, many academics consider the Declaration as a subsequent agreement that facilitates the interpretation of the TRIPS provisions in question.60 Irrespective of its function for treaty interpretation, debate continues regarding whether the Doha document can shape fields beyond the contexts of IP and public health. Countries in the midst of public health crises may encounter fewer challenges when availing themselves of the TRIPS flexibilities; however, when addressing situations that do not clearly represent public emergencies or that lack nearly uniform public support, a government’s selection of grounds may be severely questioned. Certain grounds specified in the patent laws of many developing countries are applied to balance the prerogatives of patent owners, such as their refusal to deal, failure to produce locally, and failure to obtain licenses under reasonable terms.61 The legality of invoking such grounds appears quite controversial. De Carvalho is strongly skeptical of the contention that countries are free to decide any grounds or can grant licenses on frivolous grounds.62 Considering that the use of compulsory licenses constitutes an exception to the normal exercise of patent rights, he argues that the grounds should be confined to exceptional or critical situations, such as national emergencies and public non-commercial use.63 According to de Carvalho’s argument, compulsory licenses should not be pursued to remedy individual benefit at the expense of eroding patentees’ right to license voluntarily (i.e., ‘say no to third parties’).64 Therefore, commercial disputes between licensees and patent owners, such as disputes over a refusal to license or failure to reach reasonable commercial deals, should not constitute a sufficient cause.65 After a Taiwanese business failed, after a considerable amount of time, to obtain licensing under reasonable commercial terms and conditions from Philips, the Taiwan Intellectual Property Office (TIPO) decided to grant compulsory licenses of the Philips CD-R patents to the local company. The action incited the critical complaints of both the patentee and the EC. The CD-R technologies and correlated patents were owned by Philips, which had acquired patent protection from the Taiwan Intellectual Property Office (TIPO) during the late 1980s.66 By the 1990s, CD-R production in Taiwan had increased considerably, with most production being licensed by Philips.67 However, Gigastorage, a Taiwanese CD-R manufacturer, was unable to reach a licensing deal with the patentee because of a disagreement over royalty rates. TIPO reviewed the appeal of Gigastorage for compulsory licensing of Philips’ five patents and determined the situation facing Gigastorage matched the grounds in question. TIPO’s interpretation as to what amounted to a reasonable commercial term was mainly subject to alleged suitable royalty rates. After reviewing the opinions and findings of public officials and professional institutions, TIPO concluded that Philips’ offer was not a fair and reasonable royalty arrangement.68 Because Gigastorage had spent almost a year engaging in negotiations with Philips, TIPO was satisfied that the period of negotiations had been considerable. In July 2004, according to Taiwan’s Patent Act,69 the decision of TIPO to grant the compulsory licenses was rendered.70 The EC protested that the reason used for triggering the compulsory licenses was a violation of the TRIPS agreement. The EC’s argument was largely based on a textual analysis and was offered with a view to preserving the patentee’s right to license voluntarily. First, the EC argued that Taiwan’s granting of compulsory licenses based on a failure to reach reasonable terms would diminish the protection extended to patent holders and that this effect conflicted with the essence of Article 28 of the TRIPS Agreement. In analyzing Article 28, the EC contended that the provision bestows on patent owners a freedom to license, which inherently carries with it a right to refuse to negotiate.71 Furthermore, the EC emphasized that Article 28 does not obligate patentees to engage in a licensing agreement but rather clearly states that patent owners have a right to do so.72 Second, the alleged ‘failure to obtain reasonable commercial terms’ was strictly categorized by the EC as a procedural condition as opposed to a substantial condition, which is one of the grounds for granting compulsory licenses. Because such a condition is explicitly specified in the first sentence of paragraph (b) of Article 31 as a procedural rule to be observed prior to an authorization of compulsory licenses, the EC insisted that it fell outside of what might be considered substantial grounds. The second sentence of the same paragraph stipulates that the obligation of WTO members to obtain licenses (voluntarily) under reasonable commercial terms in advance may be waived in the event of a national emergency or for public non-commercial use. According to paragraph (k), the members’ obligation to observe such conditions can also be waived when addressing an anti-trust situation. Reading the text restrictively, the EC insisted that Article 31 embodies the intent to distinguish such procedural elements from substantial grounds.73 Thus, the EC concluded that Taiwan’s allowance of Gigastorage’s failure to obtain licenses under reasonable commercial terms as grounds for issuing compulsory licenses was illegitimate. Climate change is a grave global concern; however, as mentioned previously, it may not, in terms of national emergencies, be universally recognized as equivalent to a global public health crisis because it affects countries differently and the problem persists over a long time frame. Some nations, such as small Micronesian island states, are obviously more vulnerable to the effects of climate change, whereas particularly well-developed countries can prove more resilient and adaptive to the challenges. Thus, most developed countries may not be persuaded by the arguments of developing countries and rising powers such as China and India, which attempt to equate the threat of climate change with more immediate national emergencies. Of course, the restrictive European approach toward establishing convincing grounds is open to dispute. In addition, whether a refusal to license or intransigence in negotiations on the part of rights holders constitutes sufficient reason to grant compulsory licenses remains controversial. It has been observed that the practice of refusing licensing for climate-related technologies may grow more common as companies find it profitable to invest in the technologies and ‘thus seek to maintain their competitive advantage’. 74 As tensions between developing countries (including their local companies) and climate-related technology owners increase, undercutting those IP rights by resorting to compulsory licenses under the guise of mitigating global warming will certainly provoke serious complaints from the governments of developed countries. Developed countries will not always ignore the granting of compulsory licenses on technologies critical to their industries and may opt for further legal action. The challenges to Taiwan’s authorization of the use of the Philips CD-R patents, as mentioned previously, could have become an international litigation brought to the WTO mainly because the format of the EC’s trade barrier report nearly constituted a complaint submitted to the WTO. More importantly, the proceedings that occurred both locally and internationally as a whole provide a vivid example of how difficult it is for a WTO member to satisfy the requirements for issuing compulsory licenses under the TRIPS Agreement.

#### TRIPS has become an instrument of economic colonialism by reinforcing Western notions of IP – this has become a legal basis for political and economic pressure on independent states.

Rhanaian 10 (Andreas, University of Glasgow - School of Law, Neo-Colonial Aspects of Global Intellectual Property Protection, The Journal of World Intellectual Property, Vol. 12, No. 1, pp. 40-74, 2010 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629228>, MAM)

The TRIPs Agreement and the long-established intellectual property conventions which it incorporates serve as an essential device in the building and strengthening of an **informal empire of economic colonialism** by the industrialised nations in the non- Western world. These international instruments introduced or **reinforced Western style i**ntellectual **p**roperty rights in non-Western countries according to minimum standards which predominantly advance the interests of the intellectual property producing and -owning industrialised nations. One justification for this development has been the promotion of global technology transfer; an argument which overlooks the economic and social imbalances between industrialised and developing countries. Actual technology transfer is thus far less effective than perhaps envisaged. In fact, the principal concern in the drive for global intellectual property protection of a Western nature and Western level is the successful enforcement in developing countries of intellectual property rights which originate in the West or are owned by enterprises of industrialised nations. The intellectual property-owning enterprises are often large multi-national corporations which are able to wield impressive power by asserting worldwide their intellectual property rights that are backed by international conventions. These conventions are, in turn, **the legal basis for political and economic pressure** on formally independent and sovereign states. In this way, an informal system of socio-economic dependence with similarities to the colonial era is established. Formal imperialism has come to an end with decolonisation, but informal economic colonialism continues to exist and increases in its importance, and intellectual property rights play a far more significant role in this process than in the past. Informal colonialism does not seek formal political control in the dependent states, most commonly developing countries. This phenomenon can therefore be termed as neo-colonialism as opposed to the historical situation in the formal colonial (and later imperial) epoch, when, unlike today, national pride, international political power and prestige were at least as important as commercial success. Modern informal neo-colonialism establishes a network of economic, social, and consequently political, dependence which is increasingly based on licensing and enforcement of intellectual property rights. Western countries, especially the United States, now constantly press for higher levels of intellectual property protection **beyond** the standards of **TRIPs** in bilateral agreements and thus **consolidate the framework of dependence**. Connected with the present tendency towards the expansion of exclusive rights is another, less apparent, neo-colonial legislative project: the protection of “traditional cultural expressions”, in so far as this term is understood in the limited sense of what Western lawyers would loosely associate with traditional art and the scope of copyright protection. Again, this idea reflects colonial features. The protection of the “tradition” (essentially a Western construct) in fact creates this tradition and serves Western interests, and is to be administered by organs of the indigenous community in a kind of indirect rule. Modern non-Western art and its potentially critical force can in this way be defused, and the worldwide commodification of “ethnic” and “traditional/authentic” artefacts can be pursued even better, though with a moral label. The requirement of ascertaining the members of the indigenous community, the intended beneficiaries of this protection, invites racialist and segregationist legislation if this measure wants to be effective at all.

#### The US stance generates massive political tension – countries will impose their own antitrust laws, leading to regulatory uncertainty and trade retaliation

Sarnoff & Chon 18 [Joshua, Prof of Law at Depaul College of Law, served as a Distinguished Scholar at the US Patent and Trademark Office, Margaret, Prof for the Pursuit of Justice at the Seattle Univ School of Law, “Innovation Law and Policy Choices for Climate Change-Related Public-Private Partnerships,” *The Cambridge Handbook of Public-Private Partnerships, Intellectual Property Governance, and Sustainable Development*, eds Margaret Chon et al, p.265-7, JCR]

As stated earlier, many people and institutions have recognized the unequal technology transfer framework for climate change and energy innovation. To address these concerns, numerous changes, some highly controversial, have been proposed to the global patent regime.130 These include: broad, categorical exclusions of environmentally sound or climate friendly technologies from the patent system; and regulation of licensing and market behaviors, including compulsory licensing, antitrust scrutiny, and price controls.131 These direct means of regulating prices and competition will remain legally available to governments that hope to induce – but may be forced to compel – more favorable licensing and pricing practices than would voluntarily occur.132

\*\*\*Begin Note 132\*\*\*

Concerns over IP rights and climate change technologies have already caused significant political tensions. At an earlier stage of international negotiations, the UNFCCC Ad Hoc Working Group on Long-term Cooperative Action (WG-LCA) considered various proposals that had been suggested by some countries in the South. These measures would have placed significant restrictions on the traditional operation of the patent system. The measures ranged from requiring patent pooling and royalty free compulsory licensing to excluding green technologies entirely from patenting – even retroactively revoking existing patent rights. See, e.g., Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, 23 UNFCCC (2009); Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention on its Seventh Session, UNFCCC Doc. No. FCCC/AWGLCA/2009/14, 156 (2009).

\*\*\*End Note 132\*\*\*

Although further amendment of the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) – as has been discussed by the United Nations Secretariat133 – is a theoretical possibility, consensus for adopting amendments in the short term is highly unlikely. Without such treaty amendments, countries (particularly those in the developing South) may seek to make greater use of existing TRIPS Agreement flexibilities to tailor their patent doctrines to assure access and to lower costs. They may adopt exclusions from patent eligibility, exceptions to patent rights, and alternatives to private licensing (such as a global technology pool). They also may expand access to publicly funded technologies to better promote technology development, transfer, and use.134 These options may provide greater ex ante predictability “in accessing technologies and [may] further enable much-needed research and development for local adaptation and dissemination, which would further reduce the cost of the technologies.” 135 Governments addressing private refusals to license patented technologies or high prices for access to those technologies may regulate such conduct directly, by adopting compulsory licenses or by imposing price control regulations.136 Alternatively, they may regulate such conduct indirectly, by treating restrictive or costly licensing as a competition violation (for example, as an abuse of dominant position) or by treating the patents themselves as essential facilities (that is, as products or services that are considered competitive necessities and for which access also can be required by compulsory licenses).13 Such direct or indirect regulation, moreover, may be largely ineffective in regard to assuring transfers of tacit knowledge.138 Both direct and indirect approaches to regulating access and prices will be highly controversial, and may threaten substantial trade retaliation or may prompt withholding by businesses of technology and foreign investment. Compulsory licensing, price regulation, and antitrust treatment have been repeatedly resisted by the United States and (somewhat less so) by other developed countries, particularly in foreign markets where the countries do not bear the costs but reap the benefits of technology exports.139 The developing South may be unwilling to resist such trade pressures, even if the threats and trade sanctions would be found illegal under WTO rules.140 These legal and political constraints bring us to proposals discussed in the next Part of this chapter, which emphasize private sector, voluntary initiatives to increase access and technology transfer, within a context of public sector laws and policies that promote innovation and access.

#### Wrecks the green tech market – need consistency to provide regulatory certainty

Choi 20 [Jay, University distinguished Prof in the Dept of Economics at Michigan State Univ, Prof in the School of Economics at Yonsei Univ, “Competition Law and Economics: International cooperation and convergence in competition policy,” in *Competition Law and Economics: Developments, Policies and Enforcement Trends in the US and Korea*, ed Jay Pil Choi et al, JCR]

Thus, it is a welcome development that more countries are adopting competition laws and plan to implement competition policies. For instance, when the International Competition Network (ICN, hereafter) was formed in 2001, only 16 competition agencies from 14 developed countries were participating members. The number now stands at 126 competition agencies from 111 jurisdictions (as of April 26, 2013).1 One of the most noteworthy developments on this front is China’s adoption of the Anti-Monopoly Law (AML), which took effect on August 1, 2008 after more than 10 years of drafting. However, promulgating competition law and setting up a competition agency, however, are not enough. In fact, mushrooming competition agencies in every country may turn out to be counterproductive if competition laws are applied in an inconsistent manner. As the globalization of the world economy entails a growing interdependence among national economies, a nation’s competition policies are no longer confined to domestic firms within the nation’s jurisdiction. With the prominence of multi-national firms, what counts is not the nationalities of firms but the locus of their economic effects. Antitrust authorities often take action against foreign firms if the firms affect competition in their jurisdictions. As a result, it is a distinct possibility that multinational firms may be subject to contradictory policies in the absence of policy harmonization among countries, which may significantly add to the complexity and costs of doing business and severely hamper the proper functioning of the market economy. In this paper, I discuss several issues that arise with “decentralized” enforcement of antitrust across jurisdictions due to the proliferation of independent antitrust authorities. These issues necessitate harmonization and coordination of policies in antitrust enforcement. However, divergence in economic conditions and policy goals in different jurisdictions presents a stumbling block in achieving harmonization in antitrust enforcement. Thankfully, economic analysis has a common methodology that is applicable across national boundaries in the assessment of antitrust enforcement effects. Antitrust law enforcement thus should be effects-based and be guided by the economic model of competition. The rest of the paper is organized as follows. In section II, I discuss potential pitfalls of antitrust proliferation with a focus on enforcement externalities. Section III considers specific enforcement areas in which enforcement externalities pose a serious problem. Section IV considers potential pathways to achieve policy harmonization across jurisdictions. I also briefly comments on the use of economics as a facilitating analytical tool in the harmonization of antitrust enforcement. Concluding remarks are contained in section V. The proliferation and potentially independent implementation of antitrust enforcement across more than a hundred different jurisdictions can lead to a variety of problematic issues, especially when the rules and enforcement procedures vary across jurisdictions. I will discuss some of the most important issues below, which call for harmonization of antitrust rules and cooperation among enforcement agencies. With the globalization of the economy and many multinational firms operating in so many different jurisdictions, the effects of an antitrust enforcement activity in one country is not necessarily confined to the country of enforcement. This often leads to what Geradin (2009) calls the “Strictest Regime Wins” problem and the risk of overregulation. To see the nature of the problem, imagine that there are two independent antitrust authorities in two different countries. Consider a unilateral conduct by a dominant firm such as tying or rebates. Let the effects of such a conduct on national welfare be W1 and W2, in country 1 and country 2, respectively. Such a conduct will be globally efficient if W1 + W2 ≥ 0. However, such a conduct will be prohibited and subject to antitrust enforcement in country i, if Wi < 0, where i = 1, 2. Suppose that a unilateral conduct confined to an individual country is not feasible. Then, the unilateral conduct in question will be allowed only when W1≥ 0 and W2 ≥ 0, 2 which is a more stringent condition to satisfy than W1 + W2 ≥ 0, and may lead to overregulation of unilateral conducts. The shaded areas in Figure 1 represent the overregulated areas. In both areas A and B, the unilateral conduct is globally efficient. However, the antitrust authority in country 1 prohibits such conduct in area A and the antitrust authority in country 2 does the same in area B. The same logic applies to other areas of antitrust enforcement. If we consider enforcement costs, the enforcement externalities can also lead to a collective decision dilemma and the concomitant free-rider problem in antitrust enforcement. To see this, let us now assume that the welfare effects of the unilateral conduct is the same and harmful for both countries, that is, W1 = W2 =W < 0. In addition, assume that there are enforcement costs C. Then, it is optimal to enforce against this conduct in one country as long as 2W + C < 0. There can be two types of inefficiencies. If W + C > 0 and 2W + C < 0, no country is willing to enforce against this conduct unilaterally because the cost of enforcement is not justified although the enforcement is globally efficient. In this case, the only way to enforce against this conduct is to share the enforcement costs between the two countries. If W + C < 0, each country is willing to unilaterally enforce against the conduct, but each country may have incentives to free ride on the other country’s enforcement efforts unless both countries can coordinate. Independent and uncoordinated antitrust enforcement can be a considerable burden for multinational firms operating in many different countries if the antitrust rules differ and/or procedural rules of enforcement vary across countries. Merger proposals may need to satisfy the conditions of the agency with the strictest antitrust rules. The same applies to unilateral conducts. A nightmare scenario may be the case where different agencies require conflicting rules that cannot be satisfied simultaneously. Multiple jurisdictions with independent agencies can also significantly increase the complexity of defense strategies of a firm that is investigated for an alleged antitrust violation. Defense lawyers need to be extra cautious so that a position taken in one country cannot be adversely used against the alleged company in other countries with different rules and procedures. The need to adopt a cohesive defense strategy in the face of many different antitrust rules may severely limit the ability to defend the alleged firms. Language can be another issue. The in-house general counsels of firms investigated for alleged conduct need to formulate coordinated defense strategies in multiple languages without anything being “lost in translation.” There is a broad consensus that the main objective of antitrust enforcement should be the protection of consumers. However, there may be countries that pursue additional or different objectives with antitrust policies, which would certainly create inconsistencies in the policy implementation. For instance, the newly enacted Antitrust Monopoly Law (AML) in China states that one of its objectives is to “promote the socialist market economy.“ Considering the growing importance and influence of the Chinese economy, it may be a concern if the antitrust authority in China actively pursues this objective, even though it is too early to tell. Its merger review also considers among other factors the "effect on the development of the national economy and public interest." It remains to be seen how this consideration will affect actual merger decisions in China. Even in countries where the stated goal of antitrust authorities is purely the protection of consumers, we cannot rule out the possibility that antitrust authorities misuse their power for other purposes or succumb to “regulatory capture,” to which any regulatory agency is susceptible. This possibility is especially worrisome in developing countries where antitrust authorities are not completely independent and usually political appointees. First, there is a concern that antitrust decisions can be used as a disguised protectionist policy. This is especially so in antitrust cases that pit domestic firms against foreign multinational firms and domestic firms have previously been shielded from foreign competition. In such cases, antitrust policy could be enforced in a discriminatory fashion against foreign companies as an instrument of protectionist policy. Second, politically-minded and overzealous enforcement officials may also see high-profile antitrust cases (especially those against foreign multinationals) as a stepping stone that leads to promotion in their bureaucratic or political career. They can use such an opportunity to portray themselves as crusaders who bravely stand against powerful foreign multinationals to protect domestic interests. There could be a race to be the toughest in an attempt to be a relevant player, which can preclude many pro-competitive mergers and single firm conducts. Finally, the lack of uniform antitrust enforcement across jurisdictions raises the possibility of “forum shopping” in the presence of antitrust enforcement externalities. With multiple antitrust authorities in different jurisdictions, competitors of the merging parties or an allegedly dominant firm have incentives to bring the case to the antitrust authority with the most sympathetic ear, which ensures that the strictest antitrust rule is enforced in the global economy. In this section, I focus on three important classes of antitrust enforcement in which enforcement externalities become a problem due to the proliferation of antitrust agencies. If multiple antitrust jurisdictions are in place, enforcement externalities naturally arise in cases of international mergers. The increasingly global nature of business transactions has resulted in a growing number of mergers falling under multiple jurisdictions and corresponding competition authorities. This inevitably invites potential conflicts among competition authorities. For instance, the European Commission can block or force changes to company mergers and takeovers, even when they do not involve any European firms, if they are deemed to adversely affect the competitive landscape in the European market.4 The same applies to US antitrust authorities such as the Department of Justice and the Federal Trade Commission. They routinely take actions against foreign firms if the firms’ actions harm competition and adversely affect consumers in the US market.5 The current situation naturally raises concerns about the potential for intergovernmental disagreements about the effects of antitrust actions. This type of potential conflict is best illustrated by the proposed merger between General Electric (GE) and Honeywell, which was approved in the U.S., but blocked by the European Commission.6 With the proliferation of antitrust authorities that enforce merger regulations, this type of conflict can only be magnified. As of 2001, the American Bar Association identified 46 international merger notification requirements.7 China is now an active player in this area. For instance, the Anti-Monopoly Bureau of the Ministry of Commerce (“MOFCOM”) reviews the filing of “concentration of operators” under the AML and recently denied the acquisition of Huiyuan by Coca-Cola by claiming that Coca-Cola would have the ability to transmit its dominant position in the soda soft beverage market into the juice beverage market. 8 The proliferation of decentralized antitrust enforcement agencies implies that any merger between large multinational firms that have a presence in any of these countries needs to notify and receive approvals without any single exception; any veto from any of these countries can torpedo the proposed merger. The problem with the current regime without any harmonization of policies is that any international merger will essentially be determined by the least permissive agency without any considerations of its effect on consumers in other jurisdictions. This decision mechanism is likely to be inefficient, and the degree of inefficiency will be exacerbated as more agencies are involved, since the view reflected in the decision would be the one most extreme. This is true even if all antitrust agencies pursue the same economic goal (either social or consumer welfare maximization) without any political considerations and the effects of mergers are uniform across jurisdictions. If we consider the outcome of each investigation as an independent estimate of the effects of the proposed merger, the best estimate in the statistical sense would be the average view unless there is any systematic bias in the evaluation process. With the current system, however, the merger enforcement would be driven by the first order statistic, i.e., by the competition authority with the most pessimistic view about the proposed merger. Even if there is no uncertainty in the evaluation of the effects of mergers, there could be conflicts if the effects of mergers are not uniform across jurisdictions. Suppose that there is a proposed merger that affects two countries, 1 and 2. The welfare impacts of the merger on each country are given by W1 and W2. As discussed above, the merger is globally efficient if and only if W1 + W2 ≥ 0. However, the merger will be approved if and only if W1≥ 0 and W2 ≥ 0 under the current system. The latter condition is more stringent than the former condition, which implies that efficient mergers can be blocked since each agent ignores external effects. Once again, the scope of this type of inefficiency certainly increases as more agencies are involved. The issue of externalities also arises in the context of single firm conduct. As in the merger cases, the decision of one agency may have positive or negative impacts on consumers in other jurisdictions. If a country has no antitrust enforcement, other countries’ enforcement against unilateral conduct can have positive effects on the country’s welfare. However, if the country also has an active enforcement agency and deeds a firm’s unilateral conduct efficient and welfare-enhancing, other countries’ enforcements against the same conduct can eliminate efficiency-enhancing business practice by the firm, leading to overregulation. Recent examples in which the U.S. antitrust agencies and the EC made divergent decisions include the British Airways conditional rebate case. In the US, the rebate scheme used by British Airways was deemed to be permissible but the same conduct was condemned to be anticompetitive by the EC.9 Intel was another case in which the conduct was deemed lawful in the US, but condemned to be anticompetitive in Europe and Korea. The Microsoft case is another example in which the company was subject to allegations of antitrust violations in multiple jurisdictions and faced different remedies that are not necessarily consistent. In antitrust cases that involve intellectual property rights [IPRs], additional issues may arise. As an example, consider the case of compulsory licensing as an antitrust remedy to solve an interoperability problem.10 When an “essential facility” is a physical property, the access can be limited to a particular geographic area. Thus, the issue of different antitrust approaches can be confined to the areas of dissonance without affecting others. In contrast, if the essential facility is intellectual property, limiting the use of the property in other areas or related fields may be difficult. To use the example of the Microsoft case in Europe, it would be impractical to enforce that the interoperability information shared with third party vendors of Windows server software be limited to the products sold only in Europe. Thus, compulsory licensing enforced in Europe can affect competitive conditions in other areas as well. This also raises the possibility of “forum shopping,” as explained above. With multiple antitrust authorities in different jurisdictions, competitors of the essential facility owner have incentives to bring the case to the antitrust authority with the most sympathetic ear for the competitors. This possibility highlights the need to harmonize competition policies across jurisdictions. There is a near consensus that the first priority of antitrust enforcement should be to combat price fixing, and the economic harms caused by hard core cartels are universally recognized. Thus, there is less conflict in this area among antitrust agencies. In addition, the enforcement in this area usually confers positive benefits on other countries. The main issue in this area is underenforcement rather than over-enforcement. When multinational firms operate in several jurisdictions in the presence of arbitrage opportunities across markets, the sustainability of collusion in one local market can be affected by the existence of collusion in other markets. Consider, for example, the vitamin cartel case of Empagran S.A. v. F. Hoffman-LaRoche. Empagran S.A. of Ecuador and other foreign companies (that purchase and resell vitamins) filed a suit against F. Hoffman-LaRoche of Switzerland and numerous other foreign companies for an alleged international price-fixing conspiracy.11 The case concerned a price-fixing conspiracy that allegedly took place overseas even though the case itself was filed in a US federal district court. The foreign plaintiffs, suing under the U.S. Foreign Trade Antitrust Improvement Act (FTAIA), claimed that "the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage" and therefore that "the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad." The interdependence of cartel stability across markets leads to potential externalities in antitrust enforcement across jurisdictions with independent antitrust authorities. For instance, cartel detection and desistance in one market can lead to cartel breakdown in other markets, conferring positive externalities. The domino effect may induce each antitrust agency to free ride on other agencies’ enforcement efforts. This calls for cooperation and coordination among antitrust agencies to eliminate a collective decision problem. To understand the nature of the free-rider problem when there are enforcement costs, consider the following simple cartel enforcement game. There are two antitrust agencies that must decide whether or not to spend resources on cartel detection and prosecution. For simplicity, let me assume that the welfare effect of a hardcore cartel on consumers is the same across jurisdictions. Let us denote the welfare loss due to the cartel in each country by L. The cartel should desist, but the agency’s enforcement cost is C. The game can be described by the following matrix (Table 1). Each enforcement agency independently decides whether or not to enforce. We assume that the cartel in both countries can be broken up by enforcement in any one of the two countries due to the domino effect. We further assume that L > C >0, which implies that the cartel enforcement is beneficial in each country if there is no other enforcement agency. There are multiple equilibria in this game, with two asymmetric pure strategy equilibria and one symmetric mixed strategy equilibrium. In the two asymmetric pure strategy equilibria, one agency enforces while the other chooses not to, and the resulting equilibrium is efficient. However, the most natural equilibrium may be the symmetric mixed strategy equilibrium since both agencies are symmetric in this game. Without any coordination and information sharing, the unique, symmetric equilibrium is that each agency enforces with probability p = L C L − . With the symmetric mixed strategy equilibrium, however, we have a coordination failure and the price fixing will continue with probability (1-p)2 . Another source of inefficiency with independent investigations is the possibility of duplicative efforts in the event that both agencies decide to enforce, which occurs with probability p 2 . In this stylized situation, it would be beneficial for both parties to consider the designation of a “lead agency” to eliminate duplication and streamline the process. All the reasons listed above support a more integrated approach in the enforcement of international mergers. In addition, information sharing among antitrust authorities would be a very important tool in the fight against hardcore cartels. Information sharing arrangements would allow antitrust agencies to coordinate their investigative strategies and provide them with access to subjects, evidence, and witnesses that are located outside each country’s borders.12 In previous sections, we pointed out potential perils from the proliferation of antitrust agencies and emphasized the need for policy harmonization and coordination across jurisdictions. It is important not to impose any additional burden on businesses with unnecessary regulatory uncertainty. Different substantive and procedural regimes make conducting businesses with an international locus of effects complex, time consuming, and expensive. Clear and consistent standards across jurisdictions will facilitate global businesses and eliminate any bureaucratic burdens associated with uncertainty. Given this broad consensus on the high desirability of a uniform substantive and procedural antitrust regime, the difficult question is a more practical one of how we can achieve the needed policy harmonization among countries with sovereign rights.

#### Concessions on IP licensing restores WTO credibility – key to pandemic recovery and ensures developing country transition to green tech

Okonjo-Iweala 21 (Ngozi Okonjo-Iweala, director-general of the World Trade Organization, 3-2-2021, Ngozi Okonjo-Iweala: WTO members must intensify co-operation, Financial Times, <https://www.ft.com/content/0654600f-92cc-47ad-bfe6-561db88f7019>, MAM)

On Monday I became the first woman and the first African to lead the World Trade Organization. Now we must roll up our sleeves and get to work. The WTO already faced acute challenges, and they have been **amplified by Covid-19.** The pandemic has wreaked havoc on the global economy, affecting supply chains and disrupting transport and travel. The crisis has upended trade and economic activities, leading to job losses and reduced incomes around the world. It has erased years of economic gains made by developing countries and even decades of growth in some low income and least-developed countries. There is hope on the horizon. The WTO expects world merchandise trade to rebound strongly this year. The IMF forecasts an 8 per cent growth in global trade volumes in 2021 and a 6 per cent growth in 2022. It estimates global gross domestic product to rebound from falling 4.4 per cent in 2020 to growing 5.5 per cent in 2021. However, for the global economy to return to sustained growth, we must intensify co-operation to ensure equitable and affordable access to vaccines, therapeutics and diagnostics. The WTO can and must play a more forceful role in encouraging members to minimise or remove export restrictions and prohibitions that hinder supply chains for medical goods and equipment. WTO members have a further responsibility to reject vaccine nationalism and protectionism while co-operating on promising new treatments and vaccines. We must find a “third way” on intellectual property that preserves the multilateral rules **that encourage research and innovation while promoting licensing agreements** to help scale-up manufacturing of medical products. Some pharmaceutical companies such as AstraZeneca, Johnson & Johnson and the Serum Institute of India are already doing this. More broadly, WTO members agree that the organisation needs reforms. But a lack of trust means they do not agree on what changes are needed or their sequencing. If we are to restore the WTO's credibility, we must set aside our differences and agree on reforms when trade ministers meet later this year. We must contribute to ocean sustainability by agreeing to eliminate harmful fisheries subsidies which lead to too many vessels chasing too few fish. A robust deal will signal that **the WTO is back** and that it can conclude a multilateral agreement vital for future generations. The WTO cannot afford to stumble over this; the negotiations have been going on for 20 years. This is far too long. Absent an agreement, there will be no fish left over which to argue. The dispute settlement system has been central to the security and predictability of multilateral trade. But it needs reform and ministers need to agree this year on the nature of these reforms and how to make them. The WTO rule book must be updated to take account of 21st-century realities such as the digital economy. The pandemic has accelerated the use of ecommerce, enabling women and small and medium-sized enterprises to participate in international trade. But we must bridge the digital divide that makes some developing countries reluctant to join the ecommerce negotiations. Negotiations among some WTO members on facilitating investment and removing regulatory red tape in services trade have continued fairly intensively despite the pandemic. Participants need to broaden the support for these initiatives and attract interest from developing countries with the aim of concluding talks by the end of the year. More can be done to ensure the WTO addresses the nexus between **trade and climate change**. Members should reactivate and broaden **the negotiations** on environmental goods and services. But climate-related restrictions cannot become disguised restrictions on trade, and we must assist developing countries as they transition to the use of more environmentally friendly technologies. The WTO’s work in new or innovative areas does not mean that we have forgotten traditional topics such as agriculture. Improving market access for export products and dealing with trade-distorting farm subsidies remain of paramount importance to developing and least-developed countries. One area ripe for early agreement involves the removal of export restrictions on farm products purchased for humanitarian purposes by the World Food Programme. Ensuring that government support for state-owned industrial enterprises does not distort competition is also a top priority for many WTO members. The WTO faces numerous tricky challenges, but **they are not insurmountable**. There is hope if we work together in a manner that builds trust and builds bridges.

### Climate

#### Plan key to solve climate change – ‘refusal to license’ is the roadblock to all solutions

Cayton 20 [Samuel, Adjunct Prof at Seattle Univ School of Law, legal intern at the Media Law Group, “The ‘Green Patent Paradox’ and Fair Use: The Intellectual Property Solution to Fight Climate Change,” *Seattle Journal of Technology, Environmental & Innovation Law* 11.1, p.218-22, JCR]

The justification for a patent holder’s right to exclude rests on the principle that it promotes innovation by giving the inventor an incentive to use their invention and benefit the public.30 However, while patent law assumes patent holders will efficiently license their technologies to make the best use of its potential, this notion is not always true.31 Even with the U.S. antitrust system geared toward preventing an entity’s full market control over products, patent grants give the rightsholder the power to exclude others from unauthorized secondary use of that technology.32 Furthermore, the refusal to license is not a defense against patent infringement in a lawsuit.33 If this principle is carried out to its fullest extent, there could be a prohibitive effect on initiatives to combat climate change. Globally, companies have filed numerous green patents at varying rates among specific subsectors.34 While trends show that green patent applications are declining in part because of delays in research and development (R&D) and investment,35 certain technologies such as renewable energy are becoming “more profitable” and “less reliant on government subsidies.”36 Moreover, although the U.S. remains dependent on oil and thus resistant to transforming its energy system,37 these statistics demonstrate significant innovation within green technology. Although the U.S. is now very likely to rejoin the global efforts to combat climate change, the consensus remains that private sector innovation is needed to effectuate the challenges ahead.38 This tension between the rights of the patent holder and the need to use their green technology can be described as the Green Patent Paradox, whereby patented technologies geared toward mitigating the effects of climate change or substituting environmentally hazardous industries may not reach their full potential in part because patentees refrain from licensing their products. Whether a major crisis within the patent regime concerning green technology exists is still too early to determine.39 However, recent suits in federal court foreshadow the prospect of this issue developing in the years to come. With regard to patent reform specifically, progress has been made around the world to actively combat the effects of climate change.40 At the same time, many lawsuits have been filed and argued in federal court concerning secondary and more expansive uses of patented green technology. A patent holder is entitled to relief when a secondary user “makes, uses, offers to sell, or sells” the patented invention regardless of whether the secondary user possesses41 However, the degree to which patentees can gain relief was limited by the Supreme Court in eBay v. MercExchange whereby permanent injunctive relief in patent infringement suits must meet four basic requirements for an injunction.42 A heightened standard for plaintiffs means that secondary uses of patented technologies have a better chance of surviving infringement suits. For commentators as well as secondary users, this decision is seen as a partial victory because the patent infringement gravitated from the old standard which automatically gave injunctive relief to the plaintiff.43 Since eBay, many subsequent green patent infringement cases have come before federal courts, providing mixed signals for future developments of green technology.44 In 1992, Paice LLC, a startup company in the business of hybrid gas-electric vehicles, filed a patent for its developed hybrid technology.45 Paice’s patent application covered the utilization of an electric motor in conjunction with the standard internal combustion engine (ICE) that supplies additional power and transfers torque to the drive wheels of conventional automobiles.46 In 1994, the USPTO granted Patent No. 5,343,970 (“the ‘970 patent”) to Paice.47 One year later, Toyota started developing hybrid gas-electric vehicles in Japan and later launched the Prius in 1997, which was subsequently released to the U.S. in 2000.48 Paice founder, Dr. Alex Severinsky, met with representatives of Toyota USA to demonstrate Paice’s hybrid technology and offer a license agreement; however, Toyota refused because it had “no intention of developing [Paice’s] technology.”49 At subsequent meetings between the parties, Toyota acknowledging Paice’s strong contributions but still refusing its offer to license the patent.50 Thereafter, Paice filed suit against Toyota in the Eastern District of Texas for infringement of the ‘970 patent.51 Pursuant to eBay, the District Court denied permanent injunctive relief for Paice; however, the Court went on to hold that Toyota infringed on the patent rights of Paice and awarded ongoing royalties of $25 per infringing hybrid Toyota vehicle to Paice.52 On appeal, the Federal Circuit Court affirmed the denial of the injunction but remanded on the issue of royalties, holding that the District Court could not allow further use by Toyota without clarifying how to calculate the ongoing royalty.53 On remand, after providing the parties an opportunity to settle on a rate themselves, the District Court raised the ongoing royalties to $98 per hybrid vehicle.54 Paice demonstrates the sheer benefit that eBay has toward resolving the Green Patent Paradox. If Dr. Severinsky had his way, Toyota would not have been able to sell the Prius, Highlander, Lexus RH400h, or other hybrid models in the U.S.55 Given Toyota’s success and leadership in the fuel efficiency market, such a result could have imposed a severe impact on the climate.56 However, given Dr. Severinsky’s zealousness to hold dominion over the hybrid motor, this case also reveals the potential threat of a patent holder not fully utilizing their rights on the rights of valuable green patents. Infringement suits on green patents have also covered alternative energy. In 2002, General Electric (GE) obtained U.S. Patent No. 5,083,039 (the ‘039 patent),57 which covered a “wind turbine mechanism operating at variable speed under different wind condition[s].”58 This advancement was beneficial because U.S. electric companies previously had to adjust wind turbines based on “a standard fixed frequency [of 60Hz].”59 A few years later, GE and Mitsubishi, a Japanese wind turbine manufacturer, engaged in a patent dispute over the ‘039 patent. GE brought an infringement action against Mitsubishi.60 Mitsubishi countered by filing61 a complaint in the Western District of Arkansas, accusing GE of violating antitrust law by dominating the market of variable speed wind turbines.62 These suits illustrate what is considered “the beginning of an arms race for IP in the clean energy industry.”63 While these companies are advocating for what they believe are their rights to use this technology, the need to expand this technology in the pursuit of mitigating the effects of climate change is sidelined. The ‘039 patent is a quality patent that effectively blocked use by other companies wishing to achieve an energy quality standard without proper licensing.64 If a patent of this nature gets into the hands of an entity that sits on their intellectual property rights,65 then the benefits of the green technologies covered will not be imputed on society. While Paice and GE are two major lawsuits in the area of green technology, other forms of patent infringement actions have reached federal court involving a wide variety of green patents.66 For example, one technology that has gained success in the realm of alternative energy is energy-efficient lighting such as light-emitting diodes (LEDs). LEDs are an effective substitute for standard incandescent lightbulbs and are more environmentally friendly; producing more light per watt, emitting particular colors of light without utilizing other color filters, and radiating very little heat.67 Additionally, LEDs are eco-friendly substitutes for technologies such as traffic lights and cell phones.68 Given the potential widespread use of LEDs, patent infringement disputes are inevitable. In 2019 alone, Technical LED Intellectual Property and Lighting Science Group collectively filed nineteen patent infringement lawsuits against other companies, alleging that certain products infringe on their LED patents.69 Additionally, numerous infringement lawsuits have arisen in other green technology sectors such as solar power, batteries, and even eco-friendly pet products.70

#### IPR key to solve climate change – meets stakeholder interests and is necessary to disperse climate tech.

Rosencranz et al 18 [Armin, founder of Jindal Global School of Environment and Sustainability at OP Jindal Global University, Sangram Parab, P. Modi, A. Vora; OP Jindal Global University, January 2018, “Climate Change and the Patent Regime: Are Patents the Answer?” *Journal of Intellectual Property Rights* 23, MAM]

It is almost certain that developing countries desperately need greenhouse gas abatement technology. How will that happen? Clean energy is the answer. To get the technology, they'll need to create it themselves or buy it from the patent-holder. The avenues discussed above aim to enable developing countries to shift to clean energy, and thereby to make our planet a greener and safer place to live in. The advent of clean energy technologies is **inevitable.** The only question that needs to be addressed is **how the government will regulate this transition**. The faster that developing countries implement the transition, the better for everyone involved. How will that happen? Intellectual property laws are the answer. In this article, by comparing the success of IPR in the pharma and technology sectors, it is shown that IPR is the way forward in the energy sector as well. The trinity of patent pools, patent databases and compulsory licensing will ensure that the interests of all stakeholders are met and that clean energy is pushed forward. At the same time, the importance and benefits of providing a legal framework for transactions in this nascent sector; and that maintaining a level of regulation **is essential** to meet the aim of providing clean and environmentally-friendly technology are also highlighted. It may lead to a hope to start a conversation with this article and invite people to explore various strategies and policies to mitigate the effects of climate change. Time is of the essence — polar bears are in the path toward extinction in the North Pole as we speak — and any step taken away from fossil fuels, however small, is the way forward.

#### Aggressive action from the U.S. and China is necessary – patent access fast-tracks the process and gears competition towards solving climate change.

Ladislaw 21 (Sarah Ladislaw is senior vice president and director of the Energy Security and Climate Change Program at the Center for Strategic and International Studies, 1-21-2021, Productive Competition: A Framework for U.S.-China Engagement on Climate Change, CSIS, <https://www.csis.org/analysis/productive-competition-framework-us-china-engagement-climate-change>, MAM)

The United States and China remain two of the most important countries for addressing climate change. They are the largest greenhouse gas emitters globally, though China far surpasses the United States on a national basis, and the United States surpasses China on a per capita basis. They are both significant contributors to the creation of low-carbon energy technology. Here, too, China has surpassed the United States as both a market for clean energy technology and as a manufacturer of those technologies. From a scientific perspective, it is impossible to address climate change and the goal of keeping global temperature rise to less than 2 degrees Celsius above pre-industrial levels without **both China and the U**nited **S**tates taking aggressive action to reduce emissions within the next decade. There is precedent for cooperation between the United States and China on climate change: the partnership between the two during the Obama administration created the global political dynamic that enabled the Paris Agreement. Given the urgency of the task at hand and the diplomatic muscle memory of the Biden administration, it is tempting to once again seek bilateral cooperation between the United States and China as the anchor in a new model of global climate leadership. But times have changed. First, and most importantly, the relationship between China and the United States has grown much more contentious since the end of the Obama administration. Beijing’s economic, technological, and military power has grown along with its ability to assert its distinct agenda on the global stage. It is unclear which issues will take top priority for the Biden administration regarding U.S.-China relations, but there will be many areas where U.S. and Chinese interests will conflict, and even more where the two will regard each other as competitors. Still, some degree of compartmentalization will likely be necessary to manage a contentious but essential relationship. Worsening U.S.-China relations under the new administration will likely have significant repercussions for the climate agenda. Trade disputes, concerns over human rights, and national security concerns could all disrupt clean energy supply chains between the United States and China, not to mention other countries. National security and competitiveness pressure could lead to less collaboration between the U.S. and Chinese scientists and institutions. Second, how we think about the climate challenge is different too. The main goal is no longer to negotiate a global agreement but to deliver on the actions pledged in those agreements. The United States' reentry to the Paris Agreement is a positive first step, and it needs to submit a new pledge of climate action (National Determined Contribution) to the UN Framework Convention on Climate Change. Still, beyond that, the high-stakes items are not about negotiations and agreements. The economic and political atmosphere in which climate change exists is different too. Countries are still reeling from the Covid-19 pandemic. Even before the pandemic, countries were pulling back from one another due to a crisis of confidence in globalization and free trade sparked by inequality-fueled domestic populism. Add to this an unprecedented growth in climate activism in civil society, climate risk awareness in global financial institutions, and pledges to be carbon neutral by countries and significant corporations alike. The result is enormous pressure for actions that deliver economic and climate benefits to domestic constituencies. Europe, China, India, Japan, and the United States, among others, are adopting more industrial strategy-oriented models of climate action that seek to create clean energy economic opportunity as they do emissions reduction. At one point, the vision for reducing greenhouse gas emissions was through a system of globally linked carbon markets and integrated supply chains that would drop the cost of technology. Now countries exist in an uneven playing field consisting of varying approaches to dealing with climate change and rising incentives to compete to extract maximum domestic economic value from their climate investment and policies. This environment might foster less of a tendency toward bilateral cooperation, and instead toward competition. The goal should be to make it a productive competition where players compete to achieve good rather than destructive outcomes. In this case, the United States could challenge China to be the first country to reach net-zero greenhouse gas emissions and to be the top provider of clean energy technology solutions to the world. Others will compete too, of course—formidable challengers like Europe, India, South Korea, and Japan. This productive competition dynamic will still require some elements of cooperation as well as efforts to co-opt China. For example, the United States, China, and other countries should continue to facilitate cross-border collaboration on energy research and development. Here, cooperation among scientists, industries, and sectors is critical. When it comes to research-led innovation, there are no benefits to breaking down scientists and innovators' network, which will deliver the essential breakthroughs we need. The United States and China might also need to agree on some things, like new rules to ensure the multilateral financial, development, and trade systems encourage climate change measures. While concerns over China’s unfair trade practices are indeed valid, the United States should find ways to protect the climate agenda from these ongoing economic tensions. A strategy of working with like-minded countries to pressure China to come on board may be necessary. In the current trade environment, it is quite likely policies to manufacture and deploy clean energy technologies will run into trade barriers (as they have in the past) due to China's massive use of state subsidies to develop technologies and protect domestic industries. One way to avoid this is to **agree to a climate waiver** **under the** World Trade Organization (**WTO**), which would allow countries to subsidize and protect clean energy industries and technologies that help them to meet their climate commitments. Thus far, the European Union, Japan, and the United States have been leading the charge to reign in the Chinese overall state-led economic model using pressure in the WTO. Working within this group to propose a climate waiver to China would allow these countries to remain united on other aspects of their agenda while compelling China to address climate change. The United States might also want to find other ways to co-opt China into doing more positive things for the climate. For example, in the context of Covid-19 debt relief, the United States and other countries could pressure China to restructure existing debt holdings from developing countries into climate-beneficial projects. These so-called debt-for-climate swaps could be similar in format to the debt-for-nature swaps that became popular following the sovereign debt crisis of the 1980s. There may be other ways to co-opt Chinese investment in global infrastructure projects to be greener by granting them recognition for their green performance as part of a multilateral initiative. The first and most important part of this strategy is for the United States to get serious about its clean energy and climate policy and commit to being more competitive. The Biden administration has already pledged to do this as part of its Build Back Better plan, but there is reason to believe both parties in Congress could support some of this agenda. As I wrote in an earlier commentary on the topic, the last remaining bipartisan area of agreement in Washington concerns U.S. competitiveness relative to other countries, particularly China. As the American Council on Competitiveness notes, no matter the measure or sector of the economy, the United States is either newly lagging or weakening its leadership across the board. Before the end of 2020, Congress passed a clean energy innovation package that makes a substantial down payment toward a more competitive U.S. clean energy sector. But more must be done. The final thing to note is that there will likely still be areas where the United States and China simply cannot and will not trust each other. These could be concrete issues like the inclusion of Chinese-made equipment in our critical infrastructure, including the electric power grid. Or significant, principle-related matters like human rights violations in the clean energy supply chain for solar panels. There may be excellent reasons for the United States to confront China on a range of trade or security issues, but **getting tough on China is no substitute for launching a viable U.S. strategy to compete in** the field of **clean energy** technologies. A productive competition strategy means leaning into our instincts to compete with China but in a way that advances shared global interests.

#### Climate change causes widespread violence – feedback loops make adaptation impossible.

Beard et al. 21 (S.J. Beard; Senior Research Associate and Academic Programme Manager at the Centre for the Study of Existential Risk, S.J. Beard, Lauren Holt, Asaf Tzachor, Luke Kemp, Shahar Avin, Haydn Belfield; Centre for the Study of Existential Risk research associates, Phil Torres of Torres 16; visiting scholar at the Centre for the Study of Existential Risk at Leibniz Universität Hannover, Assessing climate change’s contribution to global catastrophic risk, Futures Volume 127, March 2021, 102673, [https://www.sciencedirect.com/science/article/pii/S0016328720301646#](https://www.sciencedirect.com/science/article/pii/S0016328720301646)!, MAM)

While most of the impacts of climate change so far have fallen within the range of what was experienced during the Holocene, the rate of change is **faster than** in **the Holocene** and we are now beginning to see climate change push **beyond these boundaries**. In the latest edition of the planetary boundaries’ framework, climate change is placed in the zone of increasing risk, implying that while this boundary has been breached, there remains some **potential** for normal functioning and recovery (Steffen et al., 2015). It thus lies between what the authors identify as the ‘safe zone’ and other ‘high risk’ transgressions, such as disruption to the biochemical flows of nitrogen and phosphorus and loss of biosphere integrity. As part of their discussion of BRIHN Baum and Handoh (2014) note that climate change is the planetary boundary for which the risk to humanity has received most meaningful consideration and they suggest that this attention is deserved. Yet little research attention has been paid to climate change’s extreme or catastrophic effects. Kareiva and Carranza (2018) argue that, despite currently falling outside of the area of high risk, climate change has the clear potential to push humanity across a threshold of irreversible loss by “changing major ocean circulation patterns, causing massive sea-level rise, and increasing the frequency and severity of extreme events… that displace people, and ruin economies.” Even if humanity was resilient to each of these individual impacts, a global catastrophe could occur if these impacts were to occur **rapidly and simultaneously**. One scenario that has received comparatively more attention is that of the global climate crossing a tipping point that would trigger environmental feedback loops (such as declining albedo from melting ice or the release of methane from clathrates) and cascading effects (such as shifting rainfall patterns that trigger desertification and soil erosion). After this point, anthropogenic activity may cease to be the main driver of climate change, making it accelerate and become harder to stop (King et al., 2015). Other scenarios can be discerned from the numerous historical cases in which the modest, usually regional, climatic changes experienced during the Holocene have been implicated in the collapse of previous societies, including the Anasazi, the Tiwanaku, the Akkadians, the Western Roman Empire, the lowland Maya, and dozens of others (Diamond, 2005, Fagan, 2008). These provide a precedent for how a changing climate can trigger or contribute to societal breakdown. At present, our understanding of this phenomena is limited, and the IPCC has labelled its findings as “low confidence” due to a lack of understanding of cause and effect and restrictions in historical data (Klein et al., 2014). Further study and cooperation between archaeologists, historians, climate scientists and global catastrophic risk scholars could overcome some of these limitations by identifying how the impacts of climate change translate into social transformation and collapse, and hence what the impacts of more rapid and extreme climatic changes might be. There is also the potential for larger studies into how global climate variations have coincided with collapse and violence at the regional level (Zhang, Chiyung, Chusheng, Yuanqing, & Fung, 2005; Zhang et al., 2006). However, these need to be interpreted and generalized with care given the differences between pre-industrial and modern societies. Societies also have a long history of adapting to, and recovering from, climate change induced collapses (McAnany and Yoffee, 2009). However, there are two reasons to be sceptical that such resilience can be easily extrapolated into the future. First, the relatively stable context of the Holocene, with well-functioning, resilient ecosystems, has greatly assisted recovery, while **anthropogenic climate change** is more rapid, pervasive, global, and severe. Large-scale states did not emerge until the onset of the Holocene (Richerson, Boyd, & Bettinger, 2001), and societies have since remained in a surprisingly narrow climatic niche of roughly 15 mean annual average temperature (Xu, Kohler, Lenton, Svenning, & Scheffer, 2020). A return to agrarian or hunter-gatherer lifestyles could thus have more devastating and long-lasting effects in a world of rapid climate change and ecological disruption (Gowdy, 2020).7 Second, modern human societies may have developed **hidden fragilities that amplify the shocks** posed by climate change (Mannheim 2020) and the complex, tightly-coupled and interdependent nature of our socio-economic systems makes it more likely that the failure of a few key states or industries due to climate change could cascade into a global collapse (Kemp, 2019). A third set of plausible scenarios stem from climate change’s broader environmental impacts. Apart from being a planetary boundary of its own, Steffen et al. (2015) point out that climate change is intimately connected with other planetary boundaries (see Table 1). Climate change is thus identified by the authors as one of two ‘core’ boundaries with the potential “to drive the Earth system into a new state should they be substantially and persistently transgressed.” This transformative potential was elaborated on in subsequent work exploring how the world could be pushed towards a ‘Hothouse Earth’ state, even with anthropogenic temperature rises as low as 2 ◦C (Steffen et al., 2018). The connection between climate change and biosphere integrity (the survival of complex adaptive ecosystems supporting diverse forms of life) is particularly strong. The IPCC is highly confident that climate change is adversely impacting terrestrial ecosystems, contributing to desertification and land degradation in many areas and changing the range, abundance and seasonality of many plant and animal species (Arneth et al., 2019). Similarly, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has reported that climate change is restricting the range of nearly half the world’s threatened mammal species and a quarter of threatened birds, with marine, coastal, and arctic ecosystems worst affected (Diaz et al., 2019). According to one estimate, climate change could cause 15–37 % of all species to become ‘**committed to extinction’** by mid-century (Thomas et al., 2004). Disruption to biosphere integrity can have profound economic and social repercussions, ranging from **loss of ecosystem services and natural resources** to the **destruction of traditional knowledge and livelihoods.** For instance, desertification, which threatens a quarter of Earth’s land area and a fifth of the population, is already estimated to cost developing nations 4–8 % of their GDP (United Nations, 2011). Many other rapid regime shifts involving loss of biosphere integrity have been observed, including shifts in arid vegetation, freshwater eutrophication, and the collapse of fish populations (Amano et al. 2020). There is a theoretical possibility of still more profound regime shifts at the global level (Rocha, Peterson, Bodin, & Levin, 2018). However, the contribution of loss of biosphere integrity to GCR is yet to be assessed. Kareiva and Carranza (2018) argue that it is unlikely to threaten human civilization, due both to a lack of plausible mechanisms for this threat and the fact that “local and regional biodiversity is often staying the same because species from elsewhere replace local losses.” However, in their classification of GCRs, Avin et al. (2018) suggest the potential for ecological collapse to threaten the safety boundaries of multiple critical systems with diverse spread mechanisms at a range of scales, from the biogeochemical and anatomical to the ecological and sociotechnological. Note that both these studies were conducted for largely conceptual purposes and should not be taken as rigorous analyses of this risk, this topic warrants further investigation.

#### Each tenth of a degree matters and saves millions of lives

Aronoff & Denvir 21 [Kate, staff writer at the New Republic, writing fellow at In These Times, Daniel, visiting fellow in International and Public Affairs at Brown Univ, “Capitalism Can’t Fix the Climate Crisis,” *Jacobin*, 08/25/21, <https://jacobinmag.com/2021/08/capitalism-climate-crisis-global-green-new-deal-clean-energy-fossil-fuel-industry>, accessed 08/26/21, JCR]

The text of the Paris Agreement says that warming should be constrained to well below two degrees Celsius. 1.5 degrees is an aspiration. It’s good to understand where that demand comes from; it has been a standing call from the folks in climate-vulnerable countries in the Global South, for whom the difference between 1.5 and 2 degrees is huge. The folks talking about 1.5 degrees have been marching through the halls of UN climate talks, chanting “1.5 to survive,” because for low-lying island states, warming of 1.5 degrees represents an existential threat. Currently we are on track for about 1.1 degrees Celsius of warming. That gives us a punishingly short window in which to meet even two degrees, which is a bit of a fabrication; there’s some debate about where the two-degree target came from. Some people credit that to the economist William Nordhaus, who is not the most reliable source on a lot of these things. But there’s something comforting about a target. There’s something comforting about saying that this thing that is happening is far-off, and that we can potentially avoid it. We have a bit of time, and two degrees gives us more time than 1.5 degrees. Reaching targets has been the popular goal. That’s what you see in the fossil fuel industry assessments. But the conversation about targets can sometimes obscure what’s actually happening. It’s not as if somebody who is living through a hurricane or a natural disaster will say, “Oh no, we’ve hit two degrees Celsius.” The climate crisis is playing out all around us. There’s not a point at which we cross the boundary toward a disastrous future. Every tenth of a degree of warming that we avoid makes an enormous amount of difference, saving on the order of tens of thousands of lives. If we cross 1.5 or even two degrees of warming, it’s not that we should all pack up, go home, and wait to die. There are still millions of lives that can be saved by preventing each additional tenth of a degree of warming.

#### The impacts of warming cascade and are felt the hardest by developing countries – industrialized countries do not have stringent enough climate standards.

Friedman et al. 8/9 (Lisa Friedman, Hiroko Tabuchi – climate reporters for the New York Times, and Winston Choi-Schagrin, NYT reporting fellow covering climate, 8-9-2021, Climate Change Is a ‘Hammer Hitting Us on the Head,’ Developing Nations Say, New York Times, https://www.nytimes.com/2021/08/09/climate/climate-change-UN-report.html)

At this point, every fraction of a degree of warming would bring ever more destructive floods, deadlier heat waves and worsening droughts as well as accelerating sea-level rise that could **threaten the existence of some island nations**, the report said.

The United States, which historically has pumped more carbon dioxide into the atmosphere than any other country, in April pledged to roughly halve its greenhouse gas emissions by 2030. While that is an ambitious goal, it is slightly below the target enshrined in law by the European Union and significantly below that of Britain.

John Kerry, President Biden’s climate envoy, said the U.N. report showed that “we need all countries to take the bold steps required” to limit global warming to relatively safe levels. Unmentioned was the fact that current United States laws and regulations are **insufficient to meet its own climate goals.**

China, the world’s biggest current producer of greenhouse gases, is still increasing its emissions from power plants, transportation and industry. It plans to hit peak emissions by 2030 before starting to cut back until it no longer produces a net increase of carbon dioxide by 2060.

The Chinese government **didn’t respond to the U.N. findings**. But in a recent talk, the country’s top climate negotiator, Xie Zhenhua, objected to proposals to set new goals to cut global emissions beyond the level agreed upon by nations in 2015 as part of the Paris climate accord.

“As we’ve already achieved this consensus, there’s no need to ignite fresh controversy now over this goal,” Mr. Xie told an event organized by a Hong Kong foundation, adding, “Our issue now is taking action and stepping up.”

And in India, where emissions per capita are a fraction of those of wealthy nations yet growing at a rapid pace, the government said the U.N. findings point to the need for industrialized nations to do more. India also has been resistant to new language demanding all nations take stronger action to hold global temperatures to a 1.5 degree Celsius increase, arguing wealthy countries have not yet made good on their own targets.

“Developed countries have usurped far **more than their fair share** of the global carbon budget,” Bhupender Yadav, India’s environment minister said in a statement. The report “vindicates India’s position that historical cumulative emissions are the source of the climate crisis that the world faces today,” he said.

Referring to the report as **“a code red for humanity**,” the United Nations Secretary General Antonio Guterres renewed his call for an end to the construction of new coal-burning plants as well as an end to fossil fuel subsidies by governments. “This report must sound a death knell for coal and fossil fuels, before they destroy our planet,” he said in a statement.

#### Expanding application of compulsory licensing would ensure needed access to environmental tech

Gunderson 14 [Adam, practicing attorney at the Gunderson Law Group, “Protecting the Environment by Addressing Market Failure in Intellectual Property Law: Why Compulsory Licensing of Green Technologies Might Make Sense in the United States: A Balancing Approach,” *BYU Law Review* 2014.3, p.683-4, JCR]

Broadening the application of compulsory licensing laws can help to reduce the suppression of important technologies; it is impossible to completely suppress a technology when the law requires that the holder license it to others. While there are some risks associated with expanding compulsory licensing,70 there are tremendous benefits as well. As discussed previously, the constitutional justification for the protection of a patent is to promote scientific and technological progress.71 Given the pressing nature of many of our environmental problems, progress in this area of science and technology is especially important. Expanding the application of compulsory licensing to include more green technologies will promote scientific and technological progress in solving environmental problems. Specifically, compulsory licensing can promote such progress by: 1) ensuring prompt access to important technologies, 2) increasing the likelihood of future innovation, and 3) decreasing judicial inefficiencies. The most obvious advantage of a compulsory licensing policy is that it ensures that technological advances cannot be suppressed. There is no progress when a patent holder obtains a patent and refuses to use the patented technology. In these instances, progress can be slowed by twenty years or more, as current patent laws give a filed patent a life of twenty years, and that timeline may also be extended for various reasons.72 Given the inherent urgency of solving certain environmental problems (such as climate change), a prolonged suppression of important technology could be detrimental. Any social costs associated with the expansion of compulsory licensing may be worthwhile if society can make swift progress in addressing environmental concerns—ending environmental tragedies decades earlier than otherwise possible.

#### Reliance on public sector funding will be too expensive and controversial. IP licensing and incentives will be key driver of tech adoption

Sarnoff & Chon 18 [Joshua, Prof of Law at Depaul College of Law, served as a Distinguished Scholar at the US Patent and Trademark Office, Margaret, Prof for the Pursuit of Justice at the Seattle Univ School of Law, “Innovation Law and Policy Choices for Climate Change-Related Public-Private Partnerships,” *The Cambridge Handbook of Public-Private Partnerships, Intellectual Property Governance, and Sustainable Development*, eds Margaret Chon et al, p.246-7. JCR]

The Paris Agreement placed substantial emphasis on R&D and technology transfer through private markets, contrary to competing recommendations to rely more on public funding11 and despite the many government alternatives that exist for funding technology development and transfer.12 In particular, governments can play an important role in stimulating innovation and technology transfer. Mechanisms that are available for governments to fund, develop, and transfer innovations include public provision of necessary infrastructure, subsidized research, and prioritized public procurement. All of these options can substitute for, supplement, or support market-driven intellectual property (IP) rights. But there are limits to government resources (particularly at local levels), and the public sector “does not always have the resources required to push through new projects independent of the IP-related costs involved.” 13 Given the political difficulties of committing to massive expenditures as public obligations, the choice to rely primarily on private markets and consequent IP rights to generate the bulk of the committed funding for climate change-related mitigation and adaptation technologies hardly comes as a surprise. Reliance on private sector development and transfer thus will encourage the acquisition of IP rights (of differing kinds, to differing degrees, and in various industries) in the hopes of appropriating greater economic returns. In turn, the costs of climate change mitigation and adaptation measures will depend in part on whether specific climate change technologies are subject to IP rights, on how those rights are licensed, and on what technological substitutes are affordably available.14 For example, widely cited assessments have assumed there would be price constraints on patented climate change technologies because of the availability of ready substitutes for existing technologies, or because of development of incremental rather than breakthrough technologies. But these assumptions may not always hold,15 as climate technologies are very diverse. These assumptions are particularly unlikely to be true if we move to novel geoengineering solutions that have not previously been deployed in markets, such as carbon capture and sequestration technologies or solar climate engineering methods (which include the use of aerosols or marine cloud brightening to increase the Earth’s albedo, i.e., reflectivity).16

#### The state is inevitable and key to solve warming—bottom up movements fail and lack the power to change social realities

Eckersley 4 (Robyn Eckersley, 3/5/04, Professor and Head of PoliSci at University of Melbourne, “The Green State: Rethinking Democracy and Sovereignty”, MIT Press, p.5-7) //SJK

While acknowledging the basis for this antipathy toward the nationstate, and the limitations of state-centric analyses of global ecological degradation, I seek to draw attention to the positive role that states have played, and might increasingly play, in global and domestic politics. Writing more than twenty years ago, Hedley Bull (a proto-constructivist and leading writer in the English school) outlined the state’s positive role in world affairs, and his arguments continue to provide a powerful challenge to those who somehow seek to “get beyond the state,” as if such a move would provide a more lasting solution to the threat of armed conﬂict or nuclear war, social and economic injustice, or environmental degradation.10 As Bull argued, given that the state is here to stay whether we like it or not, then the call to get “beyond the state is a counsel of despair, at all events if it means that we have to begin by abolishing or subverting the state, rather than that there is a need to build upon it.”11 In any event, rejecting the “statist frame” of world politics ought not prohibit an inquiry into the emancipatory potential of the state as a crucial “node” in any future network of global ecological governance. This is especially so, given that one can expect states to persist as major sites of social and political power for at least the foreseeable future and that any green transformations of the present political order will, short of revolution, necessarily be state-dependent. Thus, like it or not, those concerned about ecological destruction must contend with existing institutions and, where possible, seek to “rebuild the ship while still at sea.” And if states are so implicated in ecological destruction, then an inquiry into the potential for their transformation or even their modest reform into something that is at least more conducive to ecological sustainability would seem to be compelling. Of course, it would be unhelpful to become singularly ﬁxated on the redesign of the state at the expense of other institutions of governance.¶ States are not the only institutions that limit, condition, shape, and direct political power, and it is necessary to keep in view the broader spectrum of formal and informal institutions of governance (e.g., local, national, regional, and international) that are implicated in global environmental change. Nonetheless, while the state constitutes only one modality of political power, it is an especially signiﬁcant one because of its historical claims to exclusive rule over territory and peoples—as expressed in the principle of state sovereignty. As Gianfranco Poggi explains, the political power concentrated in the state “is a momentous, pervasive, critical phenomenon. Together with other forms of social power, it constitutes an indispensable medium for constructing and shaping larger social realities, for establishing, shaping and maintaining all broader and more durable collectivities.”12 States play, in varying degrees, signiﬁcant roles in structuring life chances, in distributing wealth, privilege, information, and risks, in upholding civil and political rights, and in securing private property rights and providing the legal/regulatory framework for capitalism. Every one of these dimensions of state activity has, for good or ill, a signiﬁcant bearing on the global environmental crisis. Given that the green political project is one that demands far-reaching changes to both economies and societies, it is difﬁcult to imagine how such changes might occur on the kind of scale that is needed without the active support of states. While it is often observed that states are too big to deal with local ecological problems and too small to deal with global ones, the state nonetheless holds, as Lennart Lundqvist puts it, “a unique position in the constitutive hierarchy from individuals through villages, regions and nations all the way to global organizations. The state is inclusive of lower political and administrative levels, and exclusive in speaking for its whole territory and population in relation to the outside world.”13 In short, it seems to me inconceivable to advance ecological emancipation without also engaging with and seeking to transform state power. Of course, not all states are democratic states, and the green movement has long been wary of the coercive powers that all states reputedly enjoy. Coercion (and not democracy) is also central to Max Weber’s classic sociological understanding of the state as “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”14 Weber believed that the state could not be deﬁned sociologically in terms of its ends, only formally as an organization in terms of the particular means that are peculiar to it.15 Moreover his concept of legitimacy was merely concerned with whether rules were accepted by subjects as valid (for whatever reason); he did not offer a normative theory as to the circumstances when particular rules ought to be accepted or whether beliefs about the validity of rules were justiﬁed. Legitimacy was a contingent fact, and in view of his understanding of politics as a struggle for power in the context of an increasingly disenchanted world, likely to become an increasingly unstable achievement.16 In contrast to Weber, my approach to the state is explicitly normative and explicitly concerned with the purpose of states, and the democratic basis of their legitimacy. It focuses on the limitations of liberal normative theories of the state (and associated ideals of a just constitutional arrangement), and it proposes instead an alternative green theory that seeks to redress the deﬁciencies in liberal theory. Nor is my account as bleak as Weber’s. The fact that states possess a monopoly of control over the means of coercion is a most serious matter, but it does not necessarily imply that they must have frequent recourse to that power. In any event, whether the use of the state’s coercive powers is to be deplored or welcomed turns on the purposes for which that power is exercised, the manner in which it is exercised, and whether it is managed in public, transparent, and accountable ways—a judgment that must be made against a background of changing problems, practices, and understandings. The coercive arm of the state can be used to “bust” political demonstrations and invade privacy. It can also be used to prevent human rights abuses, curb the excesses of corporate power, and protect the environment. In short, although the political autonomy of states is widely believed to be in decline, there are still few social institution that can match the same degree of capacity and potential legitimacy that states have to redirect societies and economies along more ecologically sustainable lines to address ecological problems such as global warming and pollution, the buildup of toxic and nuclear wastes and the rapid erosion of the earth’s biodiversity. States—particularly when they act collectively—have the capacity to curb the socially and ecologically harmful consequences of capitalism. They are also more amenable to democratization than corporations, notwithstanding the ascendancy of the neoliberal state in the increasingly competitive global economy. There are therefore many good reasons why green political theorists need to think not only critically but also constructively about the state and the state system. While the state is certainly not “healthy” at the present historical juncture, in this book I nonetheless join Poggi by offering “a timid two cheers for the old beast,” at least as a potentially more signiﬁcant ally in the green cause.17

#### The status quo cements climate nationalism. Aff is the only way to prevent intensification of xenophobic violence and climate nationalism.

Karlsson 16 [Rasmus, Senior lecturer in Political Science at Umea University, “The Environmental Risks of Incomplete Globalization,” *Globalizations*, http://bit.ly/2jS3RNS]

Every year, more and more people travel by airplane and are able to experience other countries and cultures first-hand. As the world gets smaller, it is becoming increasingly difficult to deny our common humanity and insist on the artificial segregation of people based on mere geographical luck. Yet, in terms of politics or ideology, there has been surprisingly little interest in even imagining a world with universal freedom of movement and shared prosperity. It is reasonable to think that this disinterest in part derives from deeply entrenched Malthusian beliefs and fears of a coming climate crisis. Malthusian discourse often portrays global climate change as ultimate evidence of irresponsibility, greed or even the “cancer stage of capitalism” (Barry, 2012:138). Such descriptions show little tolerance for learning or humility with regard to the difficulties of the task. There has never been a blueprint for how to build a prosperous planetary civilisation or for how to achieve technological maturity in a way that does not destroy the biosphere. Yet, in a world of seven billion actually existing people, the question is where to go from here? As discussed above, to try to reverse the great structural processes of modernity through intentional localisation does not only seem wholly politically unrealistic, it is also most unlikely to actually deliver greater resilience or environmental sustainability. Yet, the problem of lacking realism is just as acute for those advocating breakthrough innovation or seeking to more fully integrate the world (Karlsson, 2013). In a time of public austerity, rising xenophobia, and an almost complete absence of realistic yet transformative visions at the global level, it is not surprising that climate nationalist responses have emerged as the default policy orientation. While these responses may at best slow the rate of warming, they offer little hope for the 3.5 billion people who currently lack access to modern energy and, as such, they are likely to contribute to the creation of new patterns of climate injustice. They are also problematic in the sense that for every year that a more meaningful response is delayed, the need for CDR grows. Already now, such negative emissions technology has become more or less a necessity for achieving the two degree target according to the scenarios represented in the Intergovernmental Panel on Climate Change (IPCC) database (Anderson, 2015). Whereas breakthrough energy innovation could potentially offer a source of sustained global growth as energy would become significantly cheaper, CDR is always going to come at a net cost. If CDR eventually becomes unaffordable due to prolonged political procrastination and generally inefficient mitigation policies, it is likely that the political momentum will shift towards solar radiation management (SRM) and other more risky forms of climate engineering. Instead of fearfully backing into a warming future, there is an obvious need for bold and proactive political action (Garibaldi, 2014; Karlsson, 2016). Yet, as long as mitigation is perceived as a cost and something that runs counter to broader socio-economic goals, such action is unlikely. While accelerating the transition to a high-energy planet would undoubtedly put strong upward pressure on global emissions in the short run, it would also open up a political opportunity space for effective climate action that does not exist today. In a more equal and integrated world, there would be greater financial and human resources to combat climate change. Most of all, by providing a progressive account of globalisation, there would be a meaningful counter-narrative to both nationalist and neoliberal thinking. For some time it has become obvious that the welfare state stands at a disruptive juncture. Either it can try to protect itself from the world by imposing an international apartheid system as it falters under growing migratory pressure, rising costs for retirement, and a self-inflicted energy crisis or it can confront those fears with a politics of radical engagement and accelerate the transition to a world of universal affluence with an abundance of clean energy and open borders. Doing so would require reviving the belief in the public as an active political subject and defeating both neoliberal passivity and the divisive identity politics of contemporary environmentalism. To bring back high growth rates in the mature economies would require a fundamental reconfiguration away from supply-side economics to real wage growth, broad social investments, and accelerated modernisation (rather than as today, artificially delayed urbanisation and subsidies for low-productive jobs in rural economies). Finally, by providing universal welfare services, in particular education but also health care, social trust can be strengthened and corruption reduced (Rothstein, 2011) at the same time as the economy’s long-term growth potential can be increased. Yet, despite the remarkable scientific advancements of the last centuries, or even decades, Malthusians tend to reject the very possibility of universal affluence and what they pejoratively refer to as a “techno-fix” (Huesemann & Huesemann, 2011). Instead of uncertain technological innovation they like to see deep social changes, essentially a far-reaching epistemological homogenisation by which people everywhere adopt strict regimes of frugality and simplicity. However, just as the solution to the contradictions of capitalism in the 1930’s was neither individual moral reform of the capital-owners nor a socialist revolution of society as a whole but rather the institutionalisation of welfare-capitalism and liberal democracy, it seems far wiser to accept the existence of a pluralist society with competing conceptions of the good life and rather focus on applying technology in a conscious way to overcome environmental determinism. Obviously, this is also a question of political tactics. While ecosocialist literature tends to think of capitalism in the 21st century as a mere elite project, it seems fair to say that the logic of capital accumulation has become almost universal today with widely shared material aspirations reaching from home ownership to international travel. Similarly, large groups in the OECD-economies either have retired already or will do so in the coming decades with considerable expectations in terms of retirement income. Failure to deliver on these pension expectations would probably create a state of political crisis in which the “immigrants” but also the “environment” would be easy targets. For these, and many other reasons, it is not surprising that political elites remain deeply wedded to the idea of economic growth. Yet, insufficient demand due to rising inequality and a lack of social investments have made it difficult to deliver that growth. In the best of worlds, the need for growth could hypothetically make policy-makers more willing to challenge the prevailing supply-side paradigm but also consider the benefits of accelerating globalisation (or at least keeping them away from enacting protectionist measures). While it is obvious that economic growth does not benefit everyone equally, and that it can be source of environmental destruction, the same can be said about the lack of growth. A secular stagnation or even degrowth is certainly no guarantee for environmental protection or greater equality. If anything, the rich are likely to try to isolate themselves even more from the rest of society in case they feel threatened, in particular by moving overseas. It is also not surprising that the literature on degrowth has had almost nothing to say about how such strategies would play out at the international level (including what mechanisms that would be needed to prevent other states from taking military advantage of countries pursuing degrowth) or how exactly economic growth is to be “unlearned” at the micro level. Recognising the difficulties associated with imagining degrowth as an effective way of saving the global environment is not the same as defending “status quo” or embracing neoliberalism. As discussed above, it is the rather the failure of laissez-faire thinking that has made government intervention necessary to ensure both climate stability and a world with more equal opportunities. One common objection against climate innovation is that the real problem is not about limitations of renewable energy sources but about overcoming the entrenched interests of fossil industries. Yet, the fact that large multinational corporations such as ExxonMobil have vast political influence can also be seen as one of the reasons why technological change must be disruptive and go beyond, for instance,the scenariosin the IPCC database. Only by shocking markets through breakthrough innovation does it seem possible to break with the path dependence of existing energy systems in a way that would rapidly displace fossil fuels globally. In terms of strategy, it is also likely that fossil industries will be far more successful in thwarting the deployment of existing inferior technologies than in preventing a more general acceleration of science and technology, which would span multiple fields reaching from nanotechnology to basic physics (Victor, 2011:144) that are not immediately related to energy R&D and as such not subject to the same political economic constraints. In mainstream thinking, globalisation is primarily seen as a driver of environmental destruction as it disconnects “those who make decisions that generate ecological risks” from “the ecological victims who suffer” (Christoff & Eckersley, 2013:189). While few would dispute that globalisation has indeed contributed to the displacement of environmental harms as polluting industries have moved from rich to poor countries, a number of authors including Arthur Mol have argued that globalisation also has the potential of fostering environmental reform and facilitating ecological modernisation throughout the global economy (Mol, 2003). The aim of this paper has been to take that argument further yet by suggesting that the hope of an adequate response to many global environmental risks, and climate change in particular, in fact hinges on an accelerated rate of globalisation leading to economic convergence. A more equal and richer world would not only have better resources to deal with environmental stress and the need for climate adaptation, it would also compel policy-makers to actively pursue the development of breakthrough technologies that would once and for all resolve the climate/energy/population dilemma from the supply-side (Brook et al., 2014:2). By working from the supply-side rather than the demand-side, climate politics can finally be depolarised and the current logical schism between “believers” and “sceptics” can be overcome. Yet, it would be naïve to think that all would welcome a radicalisation of the modern project and the transition to a fully integrated high-energy planet. While such a future would probably reflect widely shared public aspirations to freedom of movement, material security, and environmental protection, cultural perfectionists are likely to decry the blandness of diversity in a world of open borders, eco-socialists are likely to see any “techno-fix” as merely a way of ducking responsibility for what they consider to be necessary social reforms, and libertarians are likely to criticise the government “overreach” implicit in the very notion of taking active responsibility for the global future. Another common objection against breakthrough innovation is that time is too short for fundamentally uncertain research. Such an objection would make perfect sense if there was any faster or safer route to restoring a safe climate and protecting the world against broader Anthropocene risks. This paper has argued that there is no such route, at least as long as the interests of people outside the OECD-countries are to be taken seriously. While sustained poverty abroad may seem to temporarily reduce the urgency of action, it will also lead to further lock-in of existing yet inferior technologies and increase the long-term need for CDR/SRM. The fundamental problem here is the scale illusion by which signals of relative local progress towards perceived “sustainability” overshadow other signals of absolute global failure. Just as the example of Iceland that currently has a 100% renewable electricity supply has not taken the world as a whole any closer to fossil independence, little if anything would be achieved if a handful of the world’s richest countries succeed in their transition to a nonscalable soft energy path. Yet, unfortunately, renewable energy but also the idea of “energy savings” continue to occupy a moral high-ground in the public imagination in ways that make meaningful action extremely difficult and obscure how much energy supply, but also overall consumption rates, must increase in the coming decades to ensure that everyone in the world has a chance of achieving a dignified livelihood. Essentially, by turning the traditional environmental idea of “intentional localisation” on its head, this paper has suggested that what most of all will determine humanity’s future in the Anthropocene is to what extent it will be possible to craft a new progressive narrative of global economic convergence capable of simultaneously overcoming Malthusian determinism and neoliberal ignorance of environmental realities. As Bruno Latour has noted, humanity has to learn to “love its monsters” rather than running away in panic from science and technology out of fear for the world that it has created (Latour, 2011). Only through a more conscious and reflexive relationship to technology is there any hope for humanity to realise its axiological potential (Bostrom, 2003) while building a world in which emancipative values, pluralism, and diversity can flourish.

# 2AC R2 v Liberty

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### 2AC: FW

#### Engagement with climate debates develops understanding of continuous climate evolution – current climate curriculum bad- we internal link turn all their activism, political future, and material praxis offense

Mehling et al. ’20 [Michael, Deputy Director, Center for Energy and Environmental Policy Research (CEEPR), Massachusetts Institute of Technology (MIT), Cambridge, MA, USA; Professor of Practice, University of Strathclyde, Glasgow, UK. (mmehling@mit.edu) Harro van Asselt, Professor of Climate Law and Policy, Centre for Climate Change, Energy and Environmental Law (CCEEL), University of Eastern Finland Law School, Joensuu, Finland. Kati Kulovesi, Professor of International Law, Centre for Climate Change, Energy and Environmental Law (CCEEL), University of Eastern Finland Law School, Joensuu, Finland. Elisa Morgera, Professor of Global Environmental Law, University of Strathclyde, Glasgow, UK, *“Teaching Climate Law: Trends, Methods and Outlook”*, Journal of Environmental Law, <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:62H0-BSY1-JFSV-G3J9-00000-00&context=1516831>, 11/1/2020, LexisNexis, NDawson]

As the exploratory survey presented in this article has shown, climate change presents unique challenges for legal education. It is technically complex and normatively contested, evolves at a dynamic pace and freely crosses established boundaries between academic disciplines, branches of law and levels of jurisdiction. Academic instructors therefore face difficult choices when designing a climate law curriculum. As climate law moves closer to maturity, its academic instruction is displaying a tendency towards specialisation and consolidation, just as climate change becomes increasingly mainstream across the legal curriculum. The breadth, scale and variability of climate law caution against exhaustive coverage of legal doctrine and technical detail in climate law teaching. **Engagement with** central concepts and **debates,** instead, appears more apt to **support students in developing skills** for the continuous understanding of evolving climate law and its mutual interactions with other areas of law. Equally, experiential learning methods hold greater promise as ways to prepare students for the demands of climate law practice. Priorities in climate law education will change over time as policy responses progress and climate impacts grow; by contrast, the ability to integrate evolving sets of facts and rules, a capacity for **critical reasoning and systemic legal thinking**, and sound judgment will **remain decisive skills for future climate lawyers**. Going forward, further study-including, ideally, empirical research using structured interviews and questionnaires-will be warranted to refine our understanding of how climate law is being taught at universities, and how learning can be further improved to reflect evolving needs and circumstances.

### 2AC: Link

#### Antitrust can be used to reallocate power and as a means of redress for systemic racism

Newman 21 [John, Prof of Law at the Univ of Miami, “Racist Antitrust, Antiracist Antitrust,” Antitrust Bulletin, https://doi.org/10.1177/0003603X211031675, JCR]

Although various stakeholders have long disagreed about its goals, antitrust law is by its nature a tool for allocating and reallocating power. Enforcers and commentators have recently begun to respond to contemporary political movements by raising the possibility of using antitrust as a partial means of redress for systemic racism and economic inequality. Commissioner Slaughter suggests consciously incorporating racial inequity into enforcement prioritization decisions. That, in turn, could translate into a more active role for antitrust enforcers to stop intervening on behalf of powerful employers against workers, especially when those workers are disproportionately people of color. This essay attempts a modest contribution to this nascent body of commentary on antiracist antitrust. It does so by historicizing a pair of cases, one well-known, the other less so. This “compare and contrast” methodology is used frequently in antitrust discourse. When discussing antitrust’s goals, for example, two cases—United States v. Topco and Reiter v Sonotone—are often presented as bookends for the 1970s. In his opinion for the majority in Topco, Justice Thurgood Marshall described the Sherman Act as “the Magna Carta of free enterprise, … as important to the preservation of economic freedom … as the Bill of Rights is to the protection of our fundamental personal freedoms.” By decade’s end, the Supreme Court’s tone had changed considerably—in 1979, the Reiter Court referred to the Sherman Act as a relatively humble “consumer welfare prescription.” But a change in goals does not always yield an immediate change in implementation—put another way, choice of an end does no necessarily dictate the choice of means. The pair of cases discussed below frame the 1980s, a decade in which antitrust’s end was fairly static, yet its means were still in flux. The first, Knights of the Ku Klux Klan (“KKK”), stands as one of the clearest, most admirable examples of antiracist antitrust in U.S. history. The second, Superior Court Trial Lawyers Association (“SCTLA”), is its opposite: the Sherman Act being deployed against an attempt to ensure adequate legal representation for indigent defendants, most of them being people of color. Taken together, these two cases represent divergent paths. Which as the contemporary antitrust enterprise chosen to follow? The Supreme Court’s most recent substantive decision, Ohio v. American Express (“AmEx”), suggests both room for hope and reason for concern. With the latter in mind, the essay concludes by offering four recommendations for how antitrust can retake the high road. By avoiding overemphasis on categorical labels or particular types of effects, and by recentering a focus on power, the antitrust enterprise can play a vital part in addressing—and avoid exacerbating—structural inequality.

#### Policy changes responsive to the climate crisis are a good idea.

Hollis 19 [Adrienne, lead climate-justice analyst at the Union of Concerned Scientists, “Climate Change Isn't Just a Global Threat—It's a Public Health Emergency,” 09/12/21, <https://time.com/5672636/climate-change-public-health/>, JCR]

There can be no discussion about climate change without a meaningful conversation about public health. As leading health experts have affirmed, the climate crisis is a threat multiplier, particularly for communities suffering from environmental injustice. For example, the Fourth National Climate Assessment, published in 2018 by a collaboration among 13 U.S. scientific agencies, highlights how higher temperatures, severe weather events and rising seas can contribute to heat-related cardiopulmonary illness, infectious disease and mental-health issues. Societal factors such as poverty, discrimination, access to health care and pre-existing health conditions make some populations even more vulnerable. Thousands of communities nationwide—often low-income or with many residents of color—that already face environmental risks constantly grapple with issues that others seldom encounter with the same intensity. These include exposure to air pollutants (like particulate matter and soot produced from burning fossil fuels) or soil and water contamination (caused by dumping coal ash or lead in the water supply). These same communities tend to be systematically targeted when corporations and regulators decide where to build hazardous-waste sites, power plants and waste incinerators. It doesn’t help that these populations often lack access to fresh produce, health insurance, affordable homes, public transportation and economic opportunities. Climate change is a public-health issue. It has been linked to chronic conditions, such as kidney disease, depression and chronic obstructive pulmonary disease, and can shove the body’s response to existing environmental assaults into overdrive. For example, people with asthma often experience more attacks during extreme heat and cold weather. As climate change continues to alter disease patterns and disrupt health systems, its effect on human health will become harder to ignore. A recent report by the Union of Concerned Scientists found that climate change is poised to increase extreme heat significantly in frequency and severity, leading to more public-health risks across the U.S. In the U.S., urban communities of color, often also low-income areas, are especially at risk, particularly those living in counties in the Southeast, which have the highest concentration of African Americans. The situation is similar for Latinx populations. In the U.S. and globally, those least responsible for climate change are already the first to bear the brunt of its health effects. Low-income communities often do not have the resources to voluntarily evacuate during extreme weather events. In addition, economic and mental-health consequences abound when communities are displaced by environmental disasters. We need policy changes that drive a just transition to a clean-energy economy and protect vulnerable communities from the impacts of climate change. At-risk communities should be given access to economical renewable energy; programs for affordable, climate-friendly heating or cooling options; and strong resilience measures to better cope with climate impacts. This, coupled with an ongoing honest dialogue and a principled partnership between decisionmakers and vulnerable populations, is fundamental to move forward toward a better, safer world as we work to tackle the mounting climate crisis

### 2AC: Alt

#### Alt wrecks collective mobilization within debate - self-care is an importation of bourgeois capitalist values – true healing comes from collective struggle

Loewe 12 [B, organizer and communicator, served as NDLON's Communications Director, supported the Alto Arizona work against SB 1070 and Sheriff Arpaio, and participated in the organizing of the 2010 US Social Forum in Detroit, “An End to Self Care,” 10/15/12, <http://archive.organizingupgrade.com/index.php/blogs/b-loewe/item/729-end-to-self-care>, accessed 10/9/20]

I’m going to say it. I want to see an end to “self-care.” Can we put a nail in self-care’s coffin and instead birth a newer discussion of community care? As I most often hear it, self-care stands as an importation of middle-class values of leisure that’s blind to the dynamics of working class (or even family) life, inherently rejects collective responsibility for each other’s well-being, misses power dynamics in our lives, and attempts to serve as a replacement for a politics and practice of desire that could actually ignite our hearts with a fuel to work endlessly. Talking about how we sustain ourselves, honor our personal needs, and prioritize our well-being in this brusque and brutal world is a huge advance from movement culture generations before. However, centering that conversation on ‘self-care’ devoid of our place in the collective misses the central point of why we need to care for ourselves. And that is because we must have all of our strength in place to counter the systems which, without our ability to resist and transform, without the self-preservation Audre Lorde describes, would see us destroyed. Yashna Maya Padamsee, in her article Communities of Care, Organizations of Liberation, writes “Talking only about self-care when talking about healing justice is like only talking about recycling and composting when speaking on Environmental Justice. It is a necessary and important individual daily practice- but to truly seek justice for the Environment, or to truly seek Healing for our communities, we need to interrupt and transform systems on a broader level. Speaking in Phoenix, Arizona in 2009 at a rally for migrant rights, Zack de la Rocha of Rage Against the Machine said in a speech, ‘The racism and hatred we are seeing here inflicts in us a collective wound. The only way to heal from those wounds and address those assaults on our dignity is to resist.’ If injustice results in collective wounds, healing comes from collective struggle. At the core, and when at it’s best, the conversation of self-care is seeking an answer to the question, “What must be done so that each one of us can maximize our participation in efforts that move us toward a world where we are more free?” Too often it sounds different. Below I hope to identify some ways ‘self-care’ strays from its path in order to move us further down the road of healthier lives and more vibrant struggles.

#### Their description of policy debate as a monopoly and debate as a ‘market economy’ is reason alone to reject the 1AC. They assume human interaction can and should be explained in economic terms, securing capitalism’s hegemony.

Kip Austin Hinton 15, Assistant Professor, The University of Texas Rio Grande Valley, “Should We Use a Capital Framework to Understand Culture? Applying Cultural Capital to Communities of Color,” Equity & Excellence in Education, 48(2), 299-319, 2015.

Influence of an Economic Metaphor on Communities of Color

It makes sense for a neoliberal economist to embrace the prism of social or cultural capital, because economic research frequently interprets the world as a primarily economic sphere. But what about when a social justice educator embraces social or cultural capital? Many social justice advocates do not define the world in economic terms, and do not see market forces as the primary solution to oppressive systems. Capitalism promotes hegemony, not social justice. The agenda of capital has always run counter to the goals of community empowerment: “Within this transformed system, capital demanded that the household function as a factory” (Perelman, 2000, p. 74). According to Weber, the mere existence of family relationships presents an obstacle to capitalism (Collins, 1986, p. 269). Decades ago, Apple (1971) warned that schools were slipping into a marketplace orientation, prioritizing “maintenance of the same dominant world-view” (p. 27). Public institutions have indeed become more market-driven, focused on capital in a way that disempowers communities of color, making it harder to enact democratic reforms (Apple, 2006; Clawson & Leiblum, 2008). Metaphorical capital does not contribute to this directly, but rather indirectly—through metaphor.

Across metaphorical capitals, each framework is fundamentally economic. Research on funds of knowledge and community cultural wealth mimic economic vocabulary without a conception of investment or of supply and demand. Looking to the source, Bourdieu’s (1977) prominent theories are influenced by the economic work of Marx (2011). This makes it particularly notable that Bourdieu himself ignores most aspects of economic capital when he applies it to cultural interaction. Bourdieu does not theorize systems of exchange, return on investment, loans, entrepreneurship, or the actions of cultural capitalists. In fact, Bourdieu’s original concept is somewhat analogous to money, not to capital. Successive theorists have been reluctant to move beyond Bourdieu’s initial, imprecise articulations (Dika & Singh, 2002; Lin, 1999). So, although it may be unusual to come across a theory of race that ignores racism, it is common for a theory of capital to ignore capitalism.

Metaphors have influence. In a metaphor, one domain of human thought is superimposed on a different domain, creating important influence on the receiving domain (Barcelona, 2003). Lakoff (2004) and others have explained how a repeated metaphor reifies in our consciousness, even altering neural processes (Kovecses, 2010). The way any issue is framed, writes Mehta (2013), ¨ “changes the nature of the debate” (p. 292). A problem’s definition is a political consideration, deeply influencing which questions we ask, and which solutions we consider (Lakoff & Pinker, 2007; Sandikcioglu, 2003). This is illustrated by prominent metaphors in the languages of industrialized nations. We use money metaphors to think about time (spend time, living on borrowed time); we use war metaphors to think about arguments (defend a position, surrender a point). As Lakoff and Johnson (2003) explain, we do not explain arguments using a dance metaphor (p. 5), but if we did, it would influence the way we see our opponents/partners.

In the case of culture, are there limits to what education researchers are willing to characterize as capital? Derrida and Moore (1974) warn us of “deploying” metaphors “without limit”: “Consequently the reassuring dichotomy between the metaphorical and the proper is exploded” (p. 74). S. Smith and Kulynych (2002) claim social capital confuses analytical categories because capital is inextricably tied to economic discourse; this critique applies to all forms of metaphorical capital. In public consciousness, capital will not be divorced from capitalism. Deployments of metaphorical capital, therefore, impose the economic worldview of capitalism. These theories position capital and wealth as the normal ways of defining a relationship. Even if such theories were revised to reflect money instead (e.g., “cultural currency”), they would still precariously assume that human interaction can and should be explained in economic terms.

Metaphorical capital advances an economic framework that interprets educational or cultural situations as capitalist, neoliberal, and market-based. We have adopted a specific paradigm, and now that paradigm dictates policy options (P. Hall, 1993). Neoliberal solutions, including standardized testing and charter schools, already dominate education reform (Jones & Vagle, 2013). Political and social critiques are central to critical race theory—yet are marginalized by neoliberal discourse. It is significant that Friedman (1997), one of the most influential proponents of capital and capitalism, advocated privatization of all public schools through vouchers. Rather than functioning as independent fields, education and economics are deeply connected, often in destructive ways. In the past decades, education research has seen an increase in both capitalrelated social theory and the influence of economics. Privatization and corporatization have increased throughout education systems (Saltman, 2012). Aside from the direct harm caused by market-based reform (Burch, 2009; Saltman, 2000), corporatization has reinforced the economic worldview that was embodied by metaphorical capital. Education reports are filled with finance-related vocabulary: funds, investment, value-added, stakeholder, productivity, buy-in. Economic perspectives infringe on discussions about students, even when topics are ostensibly unrelated to money. “This is the extent of capitalism’s hegemony, that it has colonized our capacity to imagine alternatives” (Hickel & Khan, 2012, p. 221). Language influences thought, and educators begin to accept the market mindset. We normalize an inequitable power structure. The capitalist viewpoint becomes the normal way to see everything, and its opportunistic oppression, likewise, becomes normal. It is not surprising, then, that the assets of communities of color go unrecognized—and as I write this, I struggle to explain the limitations of a capitalist frame without reproducing that frame, with my problematic word choice, “assets.”

Freire (1970) has been influential among scholars who rely on metaphorical capital to write about students of color. It is significant that Freire employs economic metaphors to represent the problem (Oughton, 2010): “Banking education” is his name for the method that dehumanizes students (Freire, 1970, p. 73). Freire recognizes economic power as a destructive force at play in the lives of the poor. He consistently opposes multiple elements of the neoliberal agenda, especially the prioritization of capital (Carnoy, 1998; Freire, 1998). Throughout his work, Freire offers ways to counter the commodification of students and promote true democracy (Marginson, 2006). A Freirean analysis of metaphorical capitals, then, notices the neglect of power relations and the depiction of human relationships as economic exchanges.

Hegemonic cultural values, says Gramsci (2011), are those that are accepted as inevitable. The status quo of the economic system cannot be separated from the status quo of the education system. Gramsci embraces education, believing the development of working class intellectuals will reshape the status quo. Gramsci recognizes resistance and promotes agency, in ways that are echoed by community cultural wealth. Though Gramsci opposes economism, he never claims culture, education, and economics are independent (Jessop & Sum, 2006). These are multiple facets of a single, comprehensive system of power. That is to say, there is no such thing as a non-economic policy goal. Do we choose capital as a metaphor because it is the best metaphor, or because it is the one we are familiar with? A Gramscian analysis by Torres (2013) examines the way a neoliberal framework asserts itself as common sense within educational reforms. In a capitalist system, power is allocated to the financially powerful, structuring our self-definitions. As participants in a capitalist system, capital is our common sense, our default, so it is not a surprise that we append the word even when it is unnecessary. These are “tacit, discursive endorsements of neoliberal ideology” (Ayers, 2005, p. 535). From a social justice perspective, metaphors are not arbitrary tools to assign without consequence. They make claims about truth, using rhetoric that “cannot be neutral” (Derrida & Moore, 1974, p. 41). Discourse matters, whether within controversies over Native American mascots (King & Springwood, 2001) or a politician’s description of a war as a “crusade” (Kellner, 2007). Power relations connect seemingly innocuous discursive practices to broader practices of political rhetoric, discrimination, and global financial institutions (McKenna, 2004). In an analysis of community college mission statements, Ayers (2005) concludes that “neoliberal discourse” directs attention to market concerns, so “curriculum is likely to become heavily laden with a market ideology that reinforces and reproduces power asymmetries” (p. 546). By repeating neoliberal vocabulary, frameworks of metaphorical capital have potentially weakened democracy by re-inscribing a framework of capitalism. Even when a particular study’s content works against oppression, language choices may not.

Although market-based education reforms have become more powerful, those who promulgate theories of metaphorical capital have become less likely to have academic understanding of capital itself (Dika & Singh, 2002). Cultural neglect of students of color cannot be logically separated from the economic exclusion they face, as irrelevant curriculum leads to higher pushout rates (M. Fine, 1991; Solorzano & Yosso, 2001). Yes, the cultures of black, Latina/o, Native ´ American, and Asian American students deserve equal footing inside classrooms, and this is true even—or especially—when those cultural practices are not easily framed as a form of capital. I am inspired by Yosso (2005) in her referral to Anzaldua’s (1990) call for a more empowering ´ theory. Yet I think of Lorde’s (1984) warning, “the master’s tools will never dismantle the master’s house,” because those tools keep a part of us stuck within “the master’s relationships” (p. 123). Wealth and capital are the capitalist’s tools, the capitalist’s relationships. These are not ethical relationships (Schweickart, 2002). The dominance of financial vocabulary empowers non-human (and inhumane) relationships, through capitalism. These are the relationships between supply and demand; between capital and commodity; between powerful and powerless; between legislation and corporation. As argued by Giroux and Giroux (2006), global capital is responsible for making the wealth and achievement gaps worse for black and Latina/o communities.

I specifically claim that this supposed metaphorical capital is not capital at all. As social justice researchers, we are not neutral; we seek ways to fight oppressive conditions. Yet by basing our metaphors on capital, our theoretical frameworks promote a worldview that is inconsistent with our own goals. Letting go of the metaphor of capital, we may find more relevant and more ethical ways to theorize culture.

#### Their call to defer to black women reinscribe white dominance

Jesse A. MYERSON 18, an Indiana-based community organizer with Hoosier Action [“White Anti-Racism Must Be Based in Solidarity, Not Altruism,” *The Nation*, February 5 18, https://www.thenation.com/article/white-anti-racism-must-be-based-in-solidarity-not-altruism/]

The dominant liberal conception of white anti-racism emphasizes altruism. In this mode, white people must set aside our own self-interest in order to extend kindness to those less fortunate. Humanitarian assistance is rewarded, and those who practice it are hailed for their self-sacrifice and generosity.

White people are encouraged to defer, shrink, and assist. It is not our fight, the white-altruism mode says, so we must strive to decenter ourselves and support black people’s “advancement” as peripheral allies, doing what kindnesses we can to compensate them for the privileges we enjoy. We must reliably articulate non-racist positions using suitably non-racist terminology, correct white people who fail to do these, and under no circumstances use racist language out in the open.

Not that people shouldn’t interrupt racist personal acts or respect the expertise of people of color regarding how racism plays out in their lives and communities, but that alone does not constitute a strategy. At best, these interruptions and this deference are a woefully inadequate response to systemic racism. At worst, white altruism is a recipe for disaster. Not only does it treat racism as personal flaw rather than a system of power; it also insists that white people have an obligation to help black communities “advance,” a construction that is vulnerable to white people’s misconceptions of what constitutes “advancement.” Without being anchored to a goal of redistributing power, altruism is often carried along by the prevailing currents of racist capitalism.

At the end of the Civil War, instead of furnishing formerly enslaved black people with the 40 acres Gen. William Tecumseh Sherman had promised, well-meaning moderate Republican Reconstructionists championed the Freedman’s Savings Bank “to instill into the minds of the untutored Africans lessons of sobriety, wisdom, and economy,” which Congress considered crucial to “the economic and industrial development of a people.” According to bank’s founder, Congregational minister John Alvord, black people didn’t want free land: “We hear them saying, ‘We will work and save and buy for ourselves.’”

Over a decade, the bank’s board, made up of highly regarded philanthropists, transformed the bank into an investment outfit conducting risky speculation, bribery, and fraud. When the Panic of 1873 threatened the bank’s viability, the trustees, desperate to reinforce an image of the bank as a trustworthy institution, appointed Frederick Douglass, an abolitionist and former slave, as bank president. In this capacity, Douglass discovered the enterprise to be “full of dead men’s bones, rottenness, and corruption.” The bank folded, leaving over 60,000 depositors without access to millions in strenuously earned deposits, and obliterating more than half of accumulated black wealth.

White altruism fared no better out West than down South. The policy of “allotment,” which broke up tribal lands into individually owned plots, came from white altruists. The architect of the 1887 Dawes Act, which made allotment official federal policy, was Alice Fletcher, an upper-class New York City suffragist who, out of anthropological curiosity, went west to live with and studied the Omaha Indians, ultimately adopting one as her son. She and other reformers were sure that tribal landholding was unproductive, inefficient, and destructive to the individual work ethic, that it thus prevented Indians from making healthy economic advances. In practice, allotment shrunk Indian-held lands from about 150 million acres to 48 million by the time of the Dawes Act’s 1934 repeal, leaving two-thirds of Indians either completely landless or without enough land to subsist.

Later, in the early 1940s, altruism struck again when the Rockefeller Foundation made an effort to alleviate the “tragedy of hunger” in the “backward” country of Mexico, touching off the much celebrated “Green Revolution.” Rockefeller Foundation scientists and policy experts implemented a system designed to raise Mexicans’ daily calorie intake by improving agricultural efficiency through “higher yielding and higher quality crop varieties” and disease control. The white people who designed and implemented the Green Revolution won awards. But for the farmers of Mexico, the program dramatically narrowed the genetic base of crops, destroyed indigenous agricultural practices, supplanted small and communal farming with commercial agribusiness, and displaced millions of peasants into urban slums or across the border.

Still today, manifestations of white altruism undermine the well-being of the very “shithole” denizens whose “advancement” it seeks. Microfinance, or inviting poor people into small amounts of debt, has been held up by its most powerful, enthusiastic advocates as a panacea for the ills that beset impoverished countries. In 2005 the United Nations even gave microcredit its own international year. Honors notwithstanding, microloans tend to worsen livelihoods overall, notoriously driving hundreds of Indian women to suicide. Far from raising living standards, microfinance has calcified the hierarchy that produces such poverty—and enriches Europe and North America.

Time and again, white people acting as allies in other people’s “progress” have not just failed to address racist power relations; they have entrenched white dominance. Altruism cannot be the basis for white anti-racist action. There’s only one thing that can: solidarity.

Solidarity is about unity, not around like-mindedness or affinity but around common interests. Neither having the same opinions nor even mutual fondness is required for one to enter into a solidarity relationship with another. All they need is the acknowledgement that, to achieve liberation, “I need you and you need me.” Solidarity is about fighting for oneself alongside another person, for one’s family alongside another family.

The thing is, when two people fight for themselves alongside one another, when they perceive themselves to be teammates, they begin to warm to each other. In 1939, a Chicago stockyard worker, Jim Cole, told a reporter from the Federal Writers’ Project, “I don’t care if the union don’t do another lick of work raisin’ our pay, or settling grievances about anything. I’ll always believe they done the greatest thing in the world gettin’ everybody who works in the yards together, and breakin’ up the hate and bad feelings that used to be held against the Negro.”

Only when white people come to see that our own liberation is bound up in the liberation of others can we achieve solidarity and have a basis for white anti-racism that does not produce the colonial outcomes generated by altruism.

#### The adversarial structure of debate turns aff solvency

Atchison and Panetta ‘9 [Jarrod Atchison, Director of Debate @ Trinity University, and Edward Panetta, Director of Debate @ the University of Georgia, Intercollegiate Debate and Speech Communication: Issues for the Future, p. 317-34 //liam]

The larger problem with locating the “debate as activism” perspective within the competitive framework is that it overlooks the communal nature of the community problem. If each individual debate is a decision about how the debate community should approach a problem, then the losing debaters become collateral damage in the activist strategy dedicated toward creating community change. One frustrating example of this type of argument might include a judge voting for an activist team in an effort to help them reach elimination rounds to generate a community discussion about the problem. Under this scenario, the losing team serves as a sacrificial lamb on the altar of community change. Downplaying the important role of competition and treating opponents as scapegoats for the failures of the community may increase the profile of the winning team and the community problem, but it does little to generate the critical coalitions necessary to address the community problem, because the competitive focus **encourages teams to concentrate on how to beat the strategy with little regard for addressing the community problem**. There is no role for competition when a judge decides that it is important to accentuate the publicity of a community problem. An extreme example might include a team arguing that their opponents’ academic institution had a legacy of civil rights abuses and that the judge should not vote for them because that would be a community endorsement of a problematic institution. This scenario is a bit more outlandish but not unreasonable if one assumes that each debate should be about what is best for promoting solutions to diversity problems in the debate community.¶ If the debate community is serious about generating community change, then it is more likely to occur outside a traditional competitive debate. When a team loses a debate because the judge decides that it is better for the community for the other team to win, then they have sacrificed two potential advocates for change within the community. Creating change through wins generates backlash through losses. Some proponents are comfortable with generating backlash and argue that the reaction is evidence that the issue is being discussed.¶ From our perspective, the discussion that results from these hostile situations is not a productive one where participants seek to work together for a common goal. Instead of giving up on hope for change and agitating for wins regardless of who is left behind, it seems more reasonable that the debate community should try the method of public argument that we teach in an effort to generate a discussion of necessary community changes. Simply put, debate competitions do not represent the best environment for community change because it is a competition for a win and only one team can win any given debate, whereas addressing systemic century-long community problems requires a tremendous effort by a great number of people.

#### The ballot is a poor vehicle for change---wins-as-solidary are an extrinsic incentive, which fails and corrodes more effective intrinsic motivations- means they don’t create more rev v rev debates because people aren’t motivated to have those discussions- turns the aff and means you vote on framework

Kohn 93 – Alfie Kohn, MA in Social Sciences from the University of Chicago, BA from Brown University, internally quoting Edward L. Deci, Professor of Psychology and Gowen Professor in the Social Sciences at the University of Rochester, No Contest: The Case Against Competition, p. 59-60

The idea that trying to do well and trying to do better than others may work at cross-purposes can be understood in the context of an issue addressed by motivational theorists. We do best at the tasks we enjoy. An outside or extrinsic motivator (money, grades, the trappings of competitive success) simply cannot take the place of an activity we find rewarding in itself. "While extrinsic motivation may affect performance," wrote Margaret Clifford, "performance is dependent upon learning, which in turn is primarily dependent upon intrinsic motivation." More specifically, "a significant performance-increase on a highly complex task will be dependent upon intrinsic motivation."59 In fact, even people who are judged to be high in achievement motivation do not perform well unless extrinsic motivation has been minimized, as several studies have shown.60

Competition works just as any other extrinsic motivator does. As Edward Deci, one of the leading students of this topic, has written, "The reward for extrinsically motivated behavior is something that is separate from and follows the behavior. With competitive activities, the reward is typically 'winning' (that is, beating the other person or the other team), so the reward is actually extrinsic to the activity itself."51 This has been corroborated by subjective reports: people who are more competitive regard themselves as being extrinsically motivated.62 Like any other extrinsic motivator, competition cannot produce the kind of results that flow from enjoying the activity itself.

But this tells only half the story. As research by Deci and others has shown, the use of extrinsic motivators actually tends to undermine intrinsic motivation and thus adversely affect performance in the long run. The introduction of, say, monetary reward will edge out intrinsic satisfaction; once this reward is withdrawn, the activity may well cease even though no reward at all was necessary for its performance earlier. Money "may work to 'buy off one's intrinsic motivation for an activity. And this decreased motivation appears (from the results of the field experiment) to be more than just a temporary phenomenon."63 Extrinsic motivators, in other words, are not only ineffective but corrosive. They eat away at the kind of motivation that *does* produce results.

This effect has been shown specifically with competition. In a 1981 study, eighty undergraduates worked on a spatial relations puzzle. Some of them were asked to try to solve it more quickly than the penons sitting next to them, while others did not have to compete. The subjects then sat alone (but clandestinely observed) for a few minutes in a room that contained a similar puzzle. The time they voluntarily spent working on it, together with a self-report on how interested they had been in solving the puzzle, constituted the measure of intrinsic interest. As predicted, the students who had been competing were less intrinsically motivated than those who had originally worked on the puzzle in a noncompetitive environment. It was concluded that

trying to beat another party is extrinsic in nature and tends to decrease people's intrinsic motivation for the target activity. It appears that when people are instructed to compete at an activity, they begin to see that activity as an instrument for winning rather than an activity which is mastery-oriented and rewarding in its own right. Thus, competition seems to work like many other extrinsic rewards in that, under certain circumstances, it tends to be perceived as controlling and tends to decrease intrinsic motivation.114

#### Exclusive experiential focus reinforces essentialism and weakens the struggle against oppression – especially where competition is involved.

Aouragh 19 – second-generation Dutch-Moroccan, Reader at the university of Westminster School of Media Arts & Design, London and author of Palestine *Online: transnational- ism, the internet and the construction of identity*

Miriyam, “‘White privilege’ and shortcuts to anti-racism.” Institute of Race Relations, Vol. 61(2) 3–26. SagePub.

Racism, as a global phenomenon of oppression and exploitation, has specific local configurations with particular processes of othering and marginalising. Important structuring principles have been obscured through the tendency to exception- alise subjective skin-colour, or fixed geographic references as a code for oppres- sion. The increase in references to experientially grounded claims that are focused on skin colour differences have given primacy to anti-blackness, which has in turn reinforced essentialist definitions of race.

The invoked ranking of oppression has implications – firstly, it assumes an incre- mental logic from black to brown to white; secondly, the consequent hierarchies affect solidarities. We see this in certain applications of the term ‘non-black people of colour’ (code for ‘brown’, interchangeable with Arabs, North Africans, Asians, Latinx), where NBPoC either manifests the dropping of the collectivist PoC or highlights a specificity of blackness through ‘black people of colour’(BPoC). While this incrementalism grows into an ontology (a hierarchy that relies on (ascribed) racialised/geographic features), the specification also coincides with a critique of coalition politics that was underwritten by the term PoC that was, ironically, put forward by black feminists. Because ‘anti-black’ oppression also relies on the degree of closeness to ‘white’, such an order carries political meaning: a default complicity in anti-blackness. In practical usage, this ‘NBPoC’ does not refer to a collective group but rather produces the assumption that the individual is the collective- writ-small. Therefore, the NBPoC should not speak about or for (real) black struggles but is told to deal with anti-blackness in their own communities.

There are two immediate objections to this reasoning. First, it is strange to hold individuals accountable for varied (historic) injustices through a subjective demarcation regardless of other categories or conditions. hence, no one is immune if held accountable for what other members of their community do, let alone its general alliance with oppressive forces.27 Secondly, while ‘NBPoC’ indi- viduals (such as Turks or Moroccans in the Netherlands) are criticised somewhat out of proportion, white ‘allies’ remain unchallenged and white supremacy as a social reality, which impacts on all PoC, remains untouched. The idea that, for instance, a Dutch-Moroccan is more privileged than a Dutch-Surinamese or a Dutch-ugandan is mainly a result of a reactionary interpretation. In addition, ‘blackness’ is linked to an Africa romanticised as a continent and understood in an ahistorical way. Africa is divided by a biological hierarchy of skin colour and facial features – as if there are no cultural, linguistic, or religious differences between East, West, South, North and Central Africa.

Noting differentiations between groups is necessary to understand patterns of oppression and the multi-layered status of marginalisation is an important reason to take experiential knowledge seriously. Such internal differences can be over- looked by projecting standardised categories. Racism is generously distributed across a whole range of victims of anti-refugee politics, anti-blackness, Islamophobia, anti-Semitism, etc. But this state of affairs is also used to undermine ‘political black- ness’ or even the collective sense behind PoC. This complexity requires a nuanced approach towards racism; we cannot sweep all kinds of racism into one. The term ‘black’, when used politically, was not meant as a pigment marker. It denoted unity in struggle; a guideline for revolutionaries of colour who saw in the (racist) state a mutual enemy. So, organising in mixed groups together, uniting against police bru- tality, helps nail the lie of biological and essentialist notions of colour/race. Such a praxis actually allows one to raise the issue of prejudice within groups. Moreover, transformative awareness about, and radical commitment to, combating internal oppression is a crucial, if underestimated, possibility offered by unifying struggles. Across western metropoles, during particular eras a political outlook was shaped by struggles informed by internationalism and confidence. For them, the term black was a unifying radical denominator, a context in which activists were involved in an optimistic progressive politics within and across their respective communi- ties. This approach is exhibited in neither the current WP approaches nor the inven- tion of ‘NBPoC’. That this is easily overlooked confirms the difference between analytical and descriptive tools.

Much of my understanding of political blackness, and its breaking down by state policies of ethnicism, originates in the critical work of Sivanandan about multiculturalism and diversity in the uK.28 It is outside the scope of this article to offer a detailed account and compare the different contexts, but we can see how the bases on which state funds are allocated validate ethnic claims. Anthropologist Francio Guadeloupe has demonstrated this dynamic in a detailed account of the role of blackness and Afrocentricity for Dutch artists and activist scenes. The alignment of ethno-racial categorisation with state aims and funding regimes leads, according to him, to ‘strategic essentialism’.29A white versus black descrip- tor in line with uS usage does not actually have the same historic lineage in the Netherlands. This is where a ‘politics of fulfilment’ began to matter, and in turn, this accommodates a practice that encourages material and conceptual rivalries, or a ‘hyper commercialized meta identity’.30 unsurprisingly, this does not sit well with progressive politics. It indicates that the meanings of Africa, Afro, black are adapted and/or conflated as part of the larger re-interpretation of anti-racism. An international black nationalism grounded in a supposed sub-Saharan kinship is very unconvincing. This myth of a unified black identity (in the North American sense of the term) supposedly functions as the enduring reality of how race is understood by all peoples of sub-Saharan African descent, with a clear-cut divi- sion of human beings into black, brown, and white, as Guadeloupe notes.31 In this metanarrative, black identity is the prerogative of persons with what are consid- ered classic sub-Saharan features: dark skin, coiling or curling hair, and genetic ancestry in sub-Saharan Africa. ultimately, this supposed genetic ancestry (an updated version of the ontology of blood) is an invention where ‘Black identity belongs to sub-Saharan people . . . this [is a] metaphysical understanding of colo- nial history by which blood, skin, bone, and genetic ancestry slips in through the backdoor of [the] social constructivist avowal of race’.32 Taking a similar approach to Guadeloupe, olaloku-Teriba identifies a pattern where there is ‘on one hand, the exceptionalisation of a thing referred to as “anti-blackness”; and on the other, the mobilisation of this charge against “non-black people of colour” who attempt to draw comparison between black struggles and their own’.33 The ‘tension between the presumptions of this universalising analysis of racial categories and the as-yet unresolved question of blackness, what it is and who possesses it, plagues anti-racist politics and organising’.34

A problem emerges when emphasising ‘racism denial’, or utilising ‘brown privilege’, nurtures competition between ethnic minority groups. Naturalising differences among oppressed groups gives political currency to the wrong anti- racism. Any criticism of this view by non-black anti-racists is labelled anti-black, and hence, delegitimised. In this outlook, a radical holistic and material analysis of racism is opportunistically coded as ‘erasure’. Just like white people who mainly carry responsibility and will not ‘know’ what racism is, NBPoC will never ‘really’ know what it is like to be black since realising this can only come from personal experience. But what stops this logic from expanding to every subjective group? Men will never know what it is like to be women. Cis women will never know what it is like to be trans. Able LGBTQ women will never know what it is like to be a disabled LGBTQ woman. When political responsibility becomes invested in personal accountability or subjective characteristics outside of genu- ine coalition work, the space for transformative change narrows down. While it can work in a complementary way, replacing social reality with subjective experi- ence and a universal political vision of emancipation with cultural- or colour- based analysis weakens the struggle against oppression rather than strengthening it, as examples in the next section show.

#### They’ve got the prereq backwards: organization IS self-care and is key to broader healing and justice work

Loewe 12 [B, organizer and communicator, served as NDLON's Communications Director, supported the Alto Arizona work against SB 1070 and Sheriff Arpaio, and participated in the organizing of the 2010 US Social Forum in Detroit, “An End to Self Care,” 10/15/12, <http://archive.organizingupgrade.com/index.php/blogs/b-loewe/item/729-end-to-self-care>, accessed 10/9/20]

The movement is my self-care not my reason for needing it. Don Andres awoke every morning at 5:00am to arrive at a street corner to look for work by 6:00am. He’d work a full day of heavy construction and still arrive at the 7:00pm meeting. He’d routinely fall asleep but he was there. Why? Because organizing together to improve conditions, to create alternatives, to band together, was the only option for how care could be anything but alien in his life as a day laborer. Being at the meeting was self-care. Lack of care is systemic. Therefore resistance to those systems is the highest affirmation of care for oneself and one’s community. Movement work is healing work. What self-care often misses is the reality that for the majority of people engaged in social justice movements, participation is out of necessity. That a collective effort in the form of social movement is the highest articulation of caring for one’s own self in a world designed to deny your worthiness of care. Too many people discussing self-care overlook the structural barriers that make access to the care they are speaking of impossible without the struggle they often discuss as the cause of their need to ‘take care of themselves.’ Even for someone like myself who has the majority of my materials needs met, I feel most alive, most on fire, most able to go around the clock, when I’m doing political work that feels authentic, feels like it pushes the bounds of authority, and feels like it is directly connected to advancing my individual and our collective liberation. The truth is that we cannot knit our way to revolution. The issue is not that movements are taxing, because truly they are. It’s called ‘struggle’ for a reason. But they go from strain to overtaxing when we seek to fulfill our political aspirations through vehicles never meant to carry them like in non-political formations or some 501c3s. The crisis of care is also a crisis of organization. Non-profits are built to do a lot of good, but they have inherent limitations that mean they are rarely built to fulfill our visions of the transformative organizing that would usher in a world where we could feel whole. Most engaged in social movements today are originally driven out of either a concrete material necessity and/or a deep connection to the wrong that accompanies inequality and a drive to make it right. However the majority of organizations available to us today are designed for gentle reforms but not the fundamental transformation our spirits crave. As a result, we try to transform a model unfit to nourish our hearts and then treat that frustration with tonics and diets and stretches instead of placing our efforts in creating a collective space that unleashes our heart’s creative desires. Maria Poblet of Causa Justa Just Cause once said, “Burnout is not about the amount of hours you work, it is about the amount of political clarity you have.” What that means is that there is no chance of us consistently burning the midnight oil if we don’t at our core believe what we’re working on will get us to a new day and no amount of yoga or therapy or comfort food we supplement our work with will compensate for that. However, if we can see a better world just over the horizon, like a marathon runner nearing a finish line, we can find endless wells to draw upon as we work to usher it in. I have literally gone from being in debilitating pain and only being able to accomplish three hours of work each day to working 18 hour shifts the same week in a completely different context. The difference was not the conditions of my work. It was my connection to my purpose. The problem with self-care is that there is an underlying assumption that our labor is draining. The deeper question is how do we shape our struggles so that they are life-giving instead of energy-taking processes. When did activities that are aimed to move us closer to freedom stop moving us?

#### That creates disembodied cogito-economic subjects and turns the case.

Dr Carl Rhodes and Dr John Garrick 2, Rhodes is Professor of Organization Studies and Deputy Dean at UTS Business School, University Fellow in Law at Charles Darwin University, “Economic metaphors and working knowledge: enter the ‘cogito-economic’ subject,” Human Resources Development International, 5(1), 87-97, 2002.

Introduction

In this paper we ask the question: what are the effects of defining knowledge in economic terms? In addressing this question, we particularly look at how the language of commerce has appropriated knowledge by defining it in its own terms. We then examine the effects of the metaphorical language that has emerged out of recent theorizations of knowledge, arguing that this has generated a powerful discourse that defines people as ‘cogito-economic subjects’. By defining people in this way, we suggest, there are potential dangers of metaphors becoming reified, such that knowledge becomes describable only in economic terms and people become describable only in cogito-economic terms. This implies that subjects are both ‘knowledge workers’ (cogito) and ‘human resources’ (economic). We propose that this represents a conflation of knowledge and commercial interests. We further argue that this can be problematic in so far as the conflation attempts to bring knowledge ‘under control’. In this way the people through whom such ‘working knowledge’ is mediated are meant to become more manageable. Indeed, the knowledge management systems of postindustrial organizations are, in part, both products and producers of this discourse.

With the advent of the post-industrial economy, knowledge has entered the workplace in ways that it never had before. The use of the term ‘post-industrialism’ itself is suggestive of ‘a shift in the structure of industrial capitalism away from mass production and bureaucracy and indicating changing technologies of production, a growth in the service sector and changes in the knowledge requirements of work’ (White and Jacques 1995: 48). Further, in post-industrial economies the management of work has also changed through the impact of information technology and the development of alternative organizational forms (Alvesson and Berg 1992). These new organizations in turn need people who do work in correspondingly new and different ways as, in the ‘knowledge economy’, work has become less physical and more discursive. Gee et al. aptly put it this way:

Contemporary, globally competitive businesses don’t any longer compete on the basis of their products or services per se. They compete, rather, on the basis of how much learning and knowledge they can use as leverage in order to expeditiously invent, produce, distribute and market their goods and services, as well as to innovatively vary and customize them. (Gee et al. 1996: 5)

Against this complex backdrop of such post-industrial work conditions, where might we epistemologically locate the ‘working knowledge’ that is now thought to be even more important than it was in the past? Further, how might we evaluate the effects of this form of knowledge? The emerging discourse of ‘working knowledge’ is indicative of a pragmatic turn in our orientation towards what counts as knowledge. Epistemologically, working knowledge is not only in work; it is what works. The question of what works is invariably a matter of judgement of the effect of knowledge on economic imperatives, with outcomes shaped by criteria such as economic growth, commercial projections and company research into areas such as consumer satisfaction. Working knowledge can, as a consequence, easily become a vehicle for forging particular policies or projects that represent dominant perspectives that are legitimated by commercial considerations. An important part of this legitimization is the employ- ment of a new language through which the knowledge requirements of the new economy are both articulated and created. This language employs terms such as ‘human capital’, ‘knowledge assets’, ‘the knowledge economy’, ‘the information economy’ and ‘knowledge workers’ to explore, define and create new ways of looking at knowledge. The way that knowledge is theorized has become increasingly mediated through economic, commercial and accounting metaphors such as ‘the balanced scorecard’ and ‘intangible assets’. In turn, these metaphors construct social understandings of working knowledge and professional practices.

The advent of knowledge work

Corporate managers and many academics have increasingly recognized professional knowledge as being ‘valid’ in its own right. It is knowledge that does not rely on validation established by scientific research, nor is it beholden to the legitimizing practices of the academy or the ‘research centre’. Working knowledge emanates from actually doing the work. In The Reective Practitioner, Schön (1983) convincingly argued that knowledge, of an action-oriented character, is embedded in professional activity and can be subject to real-time critical reection by professional practitioners. In Schön’s sense of practice, professional knowledge is potentially open-ended – even in its action elements – with reective abilities being pivotal. In this knowledge, good professional practice involves making and reecting on the best judgements in specic contexts, for ethical as well as commercial considerations. Work is both site and instrument of evaluating such working knowledge. The business world and the corporate sector in particular now encourage new, even critical, ideas (Drucker 1995) (although thoroughgoing critique, we would argue, continues to be largely discouraged). If ‘working knowledge’ is to be a coherent construction and not just a fashionable description of particular elements of technological-age work, or a disguise for purely technical and financial interests, it should follow that adequate avenues for reexivity need to be built into its production. This is a key challenge for the action-oriented research approaches now favoured by many organizations. Transparency, openness, critical self-reection, highly developed systems that promote peer assessment and review, and the development of professional associations that have contact with the academic world would be among possible components of a new epistemological ‘infrastructure’ for working knowledge. And there are signs that such components are beginning to take shape. Government higher education policies across European Union member nations, the US, Canada and Australia are actively encouraging new university–industry partnering arrangements emphasizing collaborative research between faculties and particular companies and flexible and work-based (as distinct from classroom-based) approaches to learning. What is at stake is both the character of what we take knowledge to be and, even more seriously, the extent to which we are moving towards – or away from – a more open society. In a global world saturated by information available through the Internet, openness may turn out to be one pragmatic option. In the ‘knowledge society’, the issue arises as to where an organization is positioned in terms of knowledge – with which knowledge networks is it connected (Castells 1997)? Barnett expands on this ‘positioning’, pointing out that: We are seeing the rise of corporate universities – such as that in the UK spawned by British Aerospace – but they are not noted for their sponsorship among their employees of receptivity to Greek philosophy or the nineteenth century novel. A knowledge audit would reveal that they focus on technical and managerial knowledge; and, even there, will want to develop among their employees certain usable knowledges – and their associated skills – with likely productive value for the organization. (Barnett 2000: 20) Such developments are indicative of changes in knowledge that are brought about by the new role that corporations play in knowledge production. This new role, in turn, shapes the relationships that people can have with the corporations where they are employed and works to impose limits on the subjectivities available to them. Edwards and Tait (2000) argue that this ‘willing’ employee entails ‘an active subjectivity’ – aligned to organizational goals – producing what Casey (1995) terms ‘designer employees’. As we pointed out in our introduction, in the context of post-industrial work conditions, the epistemological location of ‘working knowledge’ is indeed problematic. The advent of ‘working knowledge’ demonstrates a pragmatic orientation to knowl- edge, where knowledge is not only in work; it is what works(Garrick and Rhodes 2000: 8). Based on such pragmatism, the ‘working’ in knowledge can become a way to dene workplace practices that seek to reinforce and privilege ways of being and knowing that are judged illegitimate if they do not reect commercial interests. The danger here is not that knowledge can be of value to commercial interests in itself, but rather that commerce becomes the sole criterion for judging knowledge. For instance, with modern information and communications technologies (and the call from shareholders for greater accountability), new possibilities for openness and mutual evaluation are being generated, but nonetheless commercial discourses certainly remain dominant. As such, Lyotard’s question: ‘who decides what knowledge is, and who knows what needs to be decided?’ (1984: 9) remains very pertinent to developing reexive approaches to knowledge work. Metaphors: signifying knowledge at work The very notion of ‘working knowledge’ is suggestive of a historicization that claims we have moved from an agrarian to an industrial and then, in the post-World War Two era, to a knowledge and information society. Hand in hand with the notion of the ‘knowledge society’ has come a new range of signiers used to dene people. Moving away from just referring to people as ‘workers’, ‘employees’ or ‘staff’, these new signiers rely heavily on terminology related to both economics and knowledge. One of the earliest examples of this was the idea of ‘human capital’ (Schultz 1961). Schultz’s argument was that much of what we call consumption constitutes investment in human capital – the productive capabilities of human beings. These capabilities, in Schultz’s human capital perspective, are acquired at a cost and, in turn, command a price in the labour market – the level of which depends on how useful they are in producing goods and services. Since then, there has been a proliferation of terms expanding on this basic premise to describe people in economic and/or knowledge terms. Such terms include ‘human resource development’ (HRD) and the related practices of ‘human resource management’ (HRM), ‘knowledge workers’, ‘intellectual capital’, ‘knowledge capital’ and, more recently, the managerial jargon of ‘employees are our greatest asset’. One common characteristic of this terminology is the use of economic metaphors such as capital, resources and assets to describe people at work. We believe that attention to the development of such metaphors is important as they provide valuable insights into life in commercial organizations. Palmer and Dunford (1996) also point out that some metaphors may be so embedded in particular contexts that they come to constitute an ‘authentic’ discourse that permits no flexibility or change in ways of looking at organizations and the people in them. Here attempts at introducing new ideas or metaphors might nd it hard not to be ‘colonized’ by existing dominant organizational metaphors. The notion of ‘human resources’ serves as a good example of part of such an ‘authentic discourse’ – one that has ‘graduated’ to now being a dead metaphor, that is, a metaphor whose metaphoricity is forgotten. The growth of the use of the term ‘human resources’ in popular management books, academic texts, management education subjects and the naming of functional departments in organizations has come to see the ‘human resource’ as being a dominant term used to refer to people in work organizations. The use of the term ‘resource’ to describe people here loses its metaphoric character and is readily seen as a literal term to describe people. The word ‘resource’, however, has a genealogy that relates back to the description of economic and nancial phenomena – where a resource refers to a means of producing wealth or property that can be converted into money. Here the use of the word ‘resource’ becomes a metaphor to describe people, but it is a metaphor borrowed from the corporate domain in which people are dened in terms of managerial prerogatives. Much of the terminology that has emerged to dene people in the postindustrial context uses this textual practice. Intellectual capital, knowledge capital and human capital are other prime illustrations, each working to dene people in terms of their central concept: capital itself. Capital is the wealth that is employed in order to produce goods and services, and people become linguistically subsumed as just another form of capital. The metaphor translates ‘being’ through the terminology of commerce – thus the cogito-economic subject.

The use of such metaphors to drive representations of people at work is a way of exerting control over the identities of those people. Defining people in particular terms and using particular metaphors foregrounds certain ways of understanding people and backgrounds others (Rhodes 2000) – in the case described here, the economic metaphors do this too, they draw attention to people as economic subjects (capital, assets, resources) that are inputs into an organizational system. This is a profound example of the politics of representation at work where overtly benign descriptions enact powerful controls over the subject positions open to people in particular social contexts. As Cooper puts it:

Technologies of representation convert the inaccessible, unknown and private into the accessible, known and public; they convert the deferred and faraway into the instantaneous and immediate; and their portability and mobility makes them easy to manipulate and control. (Cooper 1992: 267)

In terms of commercial organizations, Deetz has suggested that the development of industrialization replaced a set of representations based on ‘intrinsic’ values with one based on a system of exchange values represented by money. It is here that ‘labour became articulated as a “cost” to the organization’ (1995: 228). Deetz goes on to argue that, for the modern corporation, the reason for working is to make money and any alternative motives are considered only in terms of their effect on commitment, productivity and sales as translated in monetary terms. This is a privileging of a monetary code as a representation practice in which everything is economic: everything including people. Such privileging serves to enact a form of control through which economic subjects emerge out of the very interests that seek to define people in those (economic) terms.

In contemporary organization and management studies literature, definitions of people in economic terms have taken a further turn from that described by Deetz. The use of language such as ‘working knowledge’, ‘intellectual capital’, ‘knowledge assets’ and so forth takes the use of economic metaphor and adds to it another powerful linguistic substitution. The first turn is to use economic metaphor to describe people; the second turn is to introduce the synecdoche of knowledge and intellect. Synecdoche works in this way to use a part of something to describe the whole – it is people’s intellectual capacity and their knowledge that is used to describe their ‘whole’. The result is the creation of a disembodied subjectivity that defines people economically and focuses their ‘value’ in terms of their intellectual capacity – again as cogito-economic subjects. For instance, an economic person might be one whose person is knowledge. Deetz argues that such practices create a ‘closed politics . . . owing to a variety of practices which produce and privilege certain interests – principally managerial – in both public decision making and in the production of the type of person that exists in modern organizations and society’ (1995: 215). Our concern is that an arena is constructed where the only legitimate knowledge might be that which is deemed economically viable and the only legitimate subjectivity is one where people are defined in these terms.

Enter Jacques

Usure

In order to explore further how this play of metaphor works, this section of the paper will use Derrida’s (1982) discussion of the use of metaphor in philosophy to review analogously the use of cogito-economic metaphors to define selves. Derrida (1982) uses the term ‘usure’ to examine the use of metaphor in philosophy. He uses this term in relation to its double meaning in the French language – usure as usury (i.e. the acquisition of too much interest) and usure as using up or the deterioration through usage. The usure of metaphor, therefore, is simultaneously the rubbing away of the original and the creation of ‘linguistic surplus value’. A metaphor such as the ‘human resource’ can be used to illustrate this. In the metaphorical term ‘resource’ there is a suggestion that human resources were something else prior to the ‘resource’ metaphor being applied and becoming commonplace. It implies an original, concrete figure of a pre-economic subject, equivalent to what might have been considered the literal meaning of ‘being human’. The first move of the usure of metaphor, then, is to wear out an ‘original meaning’; for the metaphor to no longer be noticed and to be taken for the ‘proper’ meaning.1 The metaphor is used, ‘human resources’ is worn out as its apparent metaphoricity is suspended. People are no longer seen as resources but are resources.

At the same time as the wearing out occurs, the metaphor is also producing a surplus value – a ‘tropic supplementarity’ (Derrida 1982: 210): ‘The supplementary product of a capital, the exchange which far from losing the original investment would fructify its initial wealth, would increase its return in the form of revenue, additional interest, linguistic surplus value’ (1982: 210).

Here the distinction between the two parts of the word ‘usure’ is indistinguishable. There is a proliferation of the signifier that is created, as meaning is displaced from one term to another – for example from worker to resource. Describing people as workers focuses on their activity; as resource it focuses on their value to the enterprise. The usure of the metaphor thus creates a surplus of meaning. This is a supplement – a substitutive signification – ‘which could only come forth in a chain of differential references, the “real” supervening, and being added only while taking on meaning from a trace and from an invocation of the supplement’ (Derrida 1976: 7). Metaphor then creates surplus as one signier is replaced by another – in this case through the metaphor of person as signied as a ‘resource’: as well as what a person might have been before, now there is more; now a person is also a resource. The adoption of a new use of language to describe people is therefore not innocent. It is not just about using different words to signify the same thing. Rather, translating concepts from one signier to another (in our illustration from ‘person’ to ‘resource’) cannot be pure, transparent or unequivocal. Paraphrasing Derrida (1996), the meaning of a concept is not separable from the process of passage or from the signifying operation. The translation to the new signifier is generative – it is a supplement that does not just substitute for a signied or a previous signifier, but rather it emerges as something new. Describing people in cogito-economic terms therefore does not reflect the ‘reality’ of what it means to be a person, but rather it generates and potentially attempts to finalize that reality in a particular way.

We are not suggesting that the metaphor is ‘concrete’ so that it can be traced to its origins, for instance, to get at the true meaning of being a ‘person’. Our point, rather, is that the economic metaphor does work by producing and supplementing. But it does not replace a pre-metaphoric reality where people (subjects) were literal rather than gurative. Nor are we writing nostalgically; there is no turning back from the usure of metaphor. It follows that ‘working knowledge’ cannot be brought into question because it uses gurative language; but it can be questioned in terms of how it uses gurative language.

Scraped again

As we discussed earlier, post-industrial conditions and the so-called ‘information economy’ have further developed the economic metaphor by adding to it a knowledge element. This is a double substitution where an increasingly dominant way of looking at people is as cogito-economic subjects. The creation of the cogito-economic subject is the result of metaphor, but it is a metaphor without literal origin – a subject that cannot transcend its signiers. The debate then turns not to a longing for authentic experience, but to a discussion of the effects of the usure.

This effect is what Derrida describes (metaphorically) as a ‘palimpsest’. Palimpsest comes from the Greek meaning ‘scraped again’, and refers to a parchment, papyrus or other writing material where the original text has been removed so that it can be reused. Before paper became an easily available and inexpensive commodity, this common practice involved old surfaces being scrubbed so that they could be written on multiple times (Murn and Ray 1998). Despite this, even though the original text was scraped off, the older text is still recoverable by the use of means such as ultraviolet light. To consider a word a palimpsest draws attention to the multiple levels of signication that exist in that word. Despite the ‘scrubbing of meaning’ and its metaphorical replacement, a trace of what has been replaced always exists, ‘inscribed in white ink’. This is not to suggest that the meaning that has been replaced was in some way ‘original’ or non-metaphorical. Rather, one sign has been used to designate another in a chain of signification where new signs work to erode, rub out and use up the signs that they replace.

Working knowledge and the cogito-economic subject

Our argument is that contemporary times are seeing the cogito-economic subject emerging through a discourse that uses commercial language to re-write the palimpsest of the self. Indeed, the processes of industrialism have generated dominant discourses on selfhood that both ‘shape the character of the modern self throughout modern industrialism and delimit the context of our thinking on self’ (Casey 1995: 50). It is here that discursive processes of work shape industrial selves through a ‘hidden curriculum’ that produces ‘acculturated employees’(1995: 78). This type of economicself is constructed as desirable in the contemporary work order. Such a self is dened not as an autonomous object, but rather as a subject dened positionally and relationally. The question then changes from: ‘Who denes the terms of the organization to who is dened by them and how these denitions determine organizational identity?’(Baack and Prasch 1997: 136).

The cogito-economic self then exists in a discourse that works to define people in such terms and simultaneously rub out other forms of self, supplementing them with terms that resonate with organizational imperatives. In this way a discourse becomes powerful. When its metaphor is used up, people must contend with the emergent (powerful) discourse in terms of how they define themselves and are defined by others.