## Tradeoff DA

#### 1. COVID enforcement is key to effective recovery.

OECD 20 (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the role of competition policy in promoting economic recovery. In this paper, we highlight some key steps that the Agencies have taken to respond to the present COVID-19 crisis in the United States and to help promote a rapid and sustained economic recovery. 2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that competition policy has an important role to play in the COVID-19 recovery process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers. 2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity 3. Deterrence of unlawful commercial activities has long been a key mission of the Agencies, rendered even more critical by the social and economic disruptions caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, crisis-related disruption increases the risk that some individuals will make unlawful windfall profits at the expense of public safety and the health and welfare of their fellow citizens.2 4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies. 2.1. COVID-19 Hoarding and Price Gouging Task Force 5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because health care products and markets are central in responding to the health care crisis and eventually to economic resilience and recovery, the Task Force focuses on protecting the availability of those products designated essential by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products. 6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior. 2.2. Procurement Collusion Strike Force 7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require substantial investment by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for fraud and collusion affecting government procurement and grant-making. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5 8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process. 9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come. 2.3. Protecting Competition in Labor Markets 10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8 11. Given the special impact of COVID-19 on medical staffing and employment, the Agencies are focused on preventing employers, including health care staffing companies and recruiters, from engaging in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10 2.4. Consumer Protection 12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic. 13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15 14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17 15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18 3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort 16. The FTC and DOJ also have shared their competition expertise with other international and federal agencies in order to facilitate COVID-19 response and recovery while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to maximize the effectiveness of the manufacture and distribution of critical healthcare resources nationwide to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below. 3.1. International Advocacy 17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation. 18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic. 19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19. 3.2. Doctrinal Responses 20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22 21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors. 3.3. Competition Advocacy 22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector. 23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages. 24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29 25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice. 26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event. 4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis 27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34 28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters: 1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35 2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36 3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and 4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws. 5. Revised Rules Regarding Merger Enforcement 30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41 31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact merger activity, which is why continuing to improve the Agencies’ approach to reviewing and remedying potentially anticompetitive mergers remains a priority.

#### 2. Plan causes a trade-off and devastates antitrust agency effectiveness

Sacher & Yun 19 (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will Strain Competition Agency Resources, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance. There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135 First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require significantly more active market supervision than is currently the case. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies. Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

#### 3. Failed COVID recovery triggers multiple hotspots

Wright 20 (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s perception now of America as inept and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as opportunities.” America faces threats from a spectrum of overseas adversaries, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be foreign actors, all the way from jihadists to state actors, that try to take advantage of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “sheer confusion” surrounding American politics in 2020 compounds the temptation of foreign actors to make moves, either for their own gains or to diminish America, Allen said. The most obvious perils are from the big powers, which may calculate that the White House will not counter their moves elsewhere in the world during such domestic turbulence, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir Putin could dig deeper into Ukraine, meddle in unstable Belarus, or test the strength of the Baltic states to resist. From China, President Xi Jinping could further threaten Taiwan, exert its claim to islands in the South China Sea by deploying equipment or personnel, or take more draconian actions in Hong Kong. Both countries have moved steadily to deepen their presence and influence across Asia and deep into the Middle East—with its access to the Mediterranean and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that foreign adversaries’ intelligence services have their collection systems turned up high so that they understand exactly how disruptive this pandemic is on our national-security structure,” the former C.I.A. director John Brennan said on CNN this week. North Korea and Iran may also try to exploit the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at lower levels through cyber or by proxies.”

#### 4. These all go nuclear

David Kampf 20, senior PhD fellow at the Center for Strategic Studies at The Fletcher School, “How COVID-19 Could Increase the Risk of War,” World Politics Review, 6-16-2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right. Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis. The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent. In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors. If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good. The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

## Clog DA

#### 1. Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs. Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact. In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party. Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm. Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best: A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time? [\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### 2. Efficient court review underpins patent-led innovation---that stops nuclear war and a range of existential threats

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.” Intellectual Property in “Interesting Times” It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative). The Changes In Intellectual Property Law Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy. Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws. What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.” Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States. Patents The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)). The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity. The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements. The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6. While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter). Copyrights The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection. Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged. For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections. Trademarks Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights. Trade Secrets As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws. The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations. There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts. Privacy Rights It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena. America’s Need For Strong Intellectual Property Protection The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations. Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison. All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee. Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country. It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved. In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements. Conclusion As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## Cap K

#### Link - Anti-trust pacifies the working class, buys time to mystify unsustainable accumulation, and maps competition onto subjectivity, devaluing life.

Lebow 19 [David Lebow – Lecturer on Social Studies at Harvard University and lawyer, “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal governmentality is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

Each device for upholding spending maintained the legitimacy of the depoliticized political economy, even as liberalization continued to strip the wage-dependent population of regulatory and redistributive safeguards. The end of the inflation era brought structural unemployment and weakened trade unions. The passing of the public debt regime meant cuts to social rights, privatization of social services, and a trimmed public sector. Growing private debt enabled people to hold on despite lost savings, and rising under- and unemployment. At every step, the neoliberal project was “dressed up” as a consumption project.19 Continuing consumption ensured legitimacy long enough to enact total transformation of the political economy.

The state could not buy time indefinitely. The 1970s had already witnessed the beginning of the transition from a manufacturing, production-oriented economy that exported surpluses to an import-based, finance and services economy focused on consumption. As the United States went from creditor to debtor, a system of “balanced disequilibrium” took hold.20 With impunity granted as the world’s reserve currency, the United States ran mounting budget and trade deficits. To finance them, it absorbed surplus capital from abroad, much of which wended its way to Wall Street. Banks used these profits to extend credit to the working- and middle- classes. Household debt funded consumption of imported goods, returning the surplus capital abroad, and completing the circuit of global trade. This system depended on the unsustainable condition of ever-increasing debt-based consumption. Consumption was notoriously reinforced by secondary markets in what was essentially private money (securitized derivatives and collateralized debt obligation) that was much riskier than assumed. Because increasingly irresponsible lending was integral to continuing the consumption that stabilized the macroeconomic system, it became a sort of vicious collective good that progressively magnified the scale of the inevitable crash.21 When in 2008 the debt finally proved unserviceable and the housing bubble burst, the private money disappeared and the disequilibrated global economic system fell into crisis.

Consumption based on private debt had provided an unstable bridge over the yawning inequality brought about by deregulation, financialization, globalization, and the diminished welfare state. When the 2008 crisis dried up credit, it revealed a divided “dual economy.”22 On one side is the primary sector of elite, highly-educated professionals who are collected in coastal urban centers and tied in to corporate management, technological innovation and oversight of global capital flows. On the other is the secondary sector of low-skilled workers primarily fixed in the heartland, for whom deregulated competition has brought under- or unemployment, job instability, depressed wages, exploding debt, and diminished prospects.

Unable to buy more time, the state’s breach of the postwar social contract has been exposed. The neoliberal system of capital accumulation was entrenched at the expense of broad and sustainable consumption. The results have been the politicization of defrauded citizens and a political economy plunged into legitimation crisis. Time has belied the premature conclusion that contradiction and crisis potential had been overcome by state capitalism. Contradiction was relocated into cross-cutting imperatives for the state to enable capital accumulation and distribute consumption. In hindsight, we find only a window of stabilization of an enduring crisis potential built into capitalist political economy. As Nancy Fraser puts it “on the one hand, legitimate, efficacious public power is a condition of possibility for sustained capital accumulation; on the other hand, capitalism’s drive to endless accumulations tends to destabilize the very public power on which it relies.”23 The political fallout from the 2008 crisis marks the end of the postwar social contract that had established conditions ensuring the continued coexistence of capitalism and democracy.

#### Capitalism drives extinction and structural violence.

Allinson et al 21 [Jamie Allinson is Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Introduction. July 2021. Verso EBook. ISBN: 9781839762963 //shree]

This is the question that vexed us as we set out to write The Tragedy of the Worker. From the vantage point of the present, the history of capitalist development is, as Marx expected, the history of the development of a global working class, the proletarianisation of the majority of the world’s population. But the very same process of that development has brought us to the precipice of climate disaster. Our position, to recall Trotsky’s rationalisation of War Communism in 1920, is in the highest degree tragic.

It is now clear that we will pass what scientists have long warned will be a tipping point of global warming, accelerating the already catastrophic consequences of capitalist emissions. How do we imagine emancipation on an at best partially habitable planet? Where once communists imagined seizing the means of production, taking the unprecedented capacities of capitalist infrastructures and using them to build a world of plenty, what must we imagine after the apocalypse has befallen us? What does it mean that as capitalism has become truly global, the gravediggers it has created dig not only capitalism’s grave, but also that of much organic life on earth?

Our answers to these questions remain rooted in the politics of revolutionary communism. Our stance is not based on the fantasy of a homeostatic nature that must be defended but on the critique of the capitalist metabolism – the Stoffwechsel- that must be overthrown. Earth scientists are accustomed to speak in terms of ‘cycles’ by which substances circulate in different forms: the water cycle, the rock cycle, the nitrogen cycle, the glacial-interglacial cycle, the carbon cycle, and others. One way of registering the catastrophe of climate change is to see these cycles – most of all, but not solely, the carbon cycle – as disordered, under- or over-accumulating. But this is to ignore the more fundamental circuit of which these now form epicycles, like Ptolemy’s sub-orbits of the heavenly bodies: the circuit of capital accumulation, M-C-M′.

This circuit accumulates profit and produces death. Neither is accidental. It is for this reason that the debates that capitalist ruling classes permit among themselves on ‘adaptation’ versus ‘mitigation’ take place on false premises. What is to be mitigated is the impact of climate change on accumulation, rendered through the ideology of ‘growth’ as something that benefits everyone. What we are to adapt to are the parameters of accumulation, sacrificing just enough islands, eco-systems, indigenous – and non-indigenous – cultures to maintain its imperatives for a period of time until new thresholds must be crossed, and new life sacrificed to the pagan idol of capital. Already, capitalist petro-modernity builds a certain quantum of acceptable death into its predicates: at the very least, the 8.7 million killed by fossil fuels each year according to Harvard University are considered a price worth paying for the stupendous advantages of fossil capital. And the sky can only keep going up, as deforestation, polar melt, ocean acidification, soil de-fertilisation and more intense wildfires and storms tear the web of life into patches. If the necropolitical calculus of the Covid-19 pandemic appears crass, just wait until its premises are applied to climate catastrophe

#### The impact is mass violence and extinction – the system is unsustainable and attempting to reform it results in fascist control of populations

**Robinson 14** (William I., Prof. of Sociology, Global and International Studies, and Latin American Studies, @ UC-Santa Barbara, “Global Capitalism: Crisis of Humanity and the Specter of 21st Century Fascism” The World Financial Review, citing: Sing C. Chew - Professor of Sociology at the CSU-Humboldt, Senior Research Scientist at Helmholtz Centre for Environmental Research–UFZ, numerous publications of the history of ecological degradation over the past 5,000 years AND Elizabeth Kolbert's 2015 Pulitzer Prize winning publication “The Sixth Extinction” – Kolbert is a writer for The New Yorker with multiple awards for environmental journalism pieces)

Cyclical, Structural, and Systemic Crises Most commentators on the contemporary crisis refer to the “Great Recession” of 2008 and its aftermath. Yet the causal origins of global crisis are to be found in over-accumulation and also in contradictions of state power, or in what Marxists call the internal contradictions of the capitalist system. Moreover, because the system is now global, crisis in any one place tends to represent crisis for the system as a whole. The system cannot expand because the marginalisation of a significant portion of humanity from direct productive participation, the downward pressure on wages and popular consumption worldwide, and the polarisation of income, has reduced the ability of the world market to absorb world output. At the same time, given the particular configuration of social and class forces and the correlation of these forces worldwide, national states are hard-pressed to regulate transnational circuits of accumulation and offset the explosive contradictions built into the system. Is this crisis cyclical, structural, or systemic? Cyclical crises are recurrent to capitalism about once every 10 years and involve recessions that act as self-correcting mechanisms without any major restructuring of the system. The recessions of the early 1980s, the early 1990s, and of 2001 were cyclical crises. In contrast, the 2008 crisis signaled the slide into a structural crisis. Structural crises reflect deeper contra- dictions that can only be resolved by a major restructuring of the system. The structural crisis of the 1970s was resolved through capitalist globalisation. Prior to that, the structural crisis of the 1930s was resolved through the creation of a new model of redistributive capitalism, and prior to that the struc- tural crisis of the 1870s resulted in the development of corpo- rate capitalism. A systemic crisis involves the replacement of a system by an entirely new system or by an outright collapse. A structural crisis opens up the possibility for a systemic crisis. But if it actually snowballs into a systemic crisis – in this case, if it gives way either to capitalism being superseded or to a breakdown of global civilisation – is not predetermined and depends entirely on the response of social and political forces to the crisis and on historical contingencies that are not easy to forecast. This is an historic moment of extreme uncertainty, in which collective responses from distinct social and class forces to the crisis are in great flux. Hence my concept of global crisis is broader than financial. There are multiple and mutually constitutive dimensions – economic, social, political, cultural, ideological and ecological, not to mention the existential crisis of our consciousness, values and very being. There is a crisis of social polarisation, that is, of social reproduction. The system cannot meet the needs or assure the survival of millions of people, perhaps a majority of humanity. There are crises of state legitimacy and political authority, or of hegemony and domination. National states face spiraling crises of legitimacy as they fail to meet the social grievances of local working and popular classes experiencing downward mobility, unemployment, heightened insecurity and greater hardships. The legitimacy of the system has increasingly been called into question by millions, perhaps even billions, of people around the world, and is facing expanded counter-hegemonic challenges. Global elites have been unable counter this erosion of the system’s authority in the face of worldwide pressures for a global moral economy. And a canopy that envelops all these dimensions is a crisis of sustainability rooted in an ecological holocaust that has already begun, expressed in climate change and the impending collapse of centralised agricultural systems in several regions of the world, among other indicators. By a crisis of humanity I mean a crisis that is approaching systemic proportions, threatening the ability of billions of people to survive, and raising the specter of a collapse of world civilisation and degeneration into a new “Dark Ages.”2 This crisis of humanity shares a number of aspects with earlier structural crises but there are also several features unique to the present: 1. The system is fast reaching the ecological limits of its reproduction. Global capitalism now couples human and natural history in such a way as to threaten to bring about what would be the sixth mass extinction in the known history of life on earth.3 This mass extinction would be caused not by a natural catastrophe such as a meteor impact or by evolutionary changes such as the end of an ice age but by purposive human activity. According to leading environmental scientists there are nine “planetary boundaries” crucial to maintaining an earth system environment in which humans can exist, four of which are experiencing at this time the onset of irreversible environmental degradation and three of which (climate change, the nitrogen cycle, and biodiversity loss) are at “tipping points,” meaning that these processes have already crossed their planetary boundaries. 2. The magnitude of the means of violence and social control is unprecedented, as is the concentration of the means of global communication and symbolic production and circulation in the hands of a very few powerful groups. Computerised wars, drones, bunker-buster bombs, star wars, and so forth, have changed the face of warfare. Warfare has become normalised and sanitised for those not directly at the receiving end of armed aggression. At the same time we have arrived at the panoptical surveillance society and the age of thought control by those who control global flows of communication, images and symbolic production. The world of Edward Snowden is the world of George Orwell; 1984 has arrived; 3. Capitalism is reaching apparent limits to its extensive expansion. There are no longer any new territories of significance that can be integrated into world capitalism, de-ruralisation is now well advanced, and the commodification of the countryside and of pre- and non-capitalist spaces has intensified, that is, converted in hot-house fashion into spaces of capital, so that intensive expansion is reaching depths never before seen. Capitalism must continually expand or collapse. How or where will it now expand? 4. There is the rise of a vast surplus population inhabiting a “planet of slums,”4 alienated from the productive economy, thrown into the margins, and subject to sophisticated systems of social control and to destruction - to a mortal cycle of dispossession-exploitation-exclusion. This includes prison-industrial and immigrant-detention complexes, omnipresent policing, militarised gentrification, and so on; 5. There is a disjuncture between a globalising economy and a nation-state based system of political authority. Transnational state apparatuses are incipient and have not been able to play the role of what social scientists refer to as a “hegemon,” or a leading nation-state that has enough power and authority to organise and stabilise the system. The spread of weapons of mass destruction and the unprecedented militarisation of social life and conflict across the globe makes it hard to imagine that the system can come under any stable political authority that assures its reproduction. Global Police State How have social and political forces worldwide responded to crisis? The crisis has resulted in a rapid political polarisation in global society. Both right and left-wing forces are ascendant. Three responses seem to be in dispute. One is what we could call “reformism from above.” This elite reformism is aimed at stabilising the system, at saving the system from itself and from more radical re- sponses from below. Nonetheless, in the years following the 2008 collapse of the global financial system it seems these reformers are unable (or unwilling) to prevail over the power of transnational financial capital. A second response is popular, grassroots and leftist resistance from below. As social and political conflict escalates around the world there appears to be a mounting global revolt. While such resistance appears insurgent in the wake of 2008 it is spread very unevenly across countries and regions and facing many problems and challenges. Yet another response is that I term 21st century fascism.5 The ultra-right is an insurgent force in many countries. In broad strokes, this project seeks to fuse reactionary political power with transnational capital and to organise a mass base among historically privileged sectors of the global working class – such as white workers in the North and middle layers in the South – that are now experiencing heightened insecurity and the specter of downward mobility. It involves militarism, extreme masculinisation, homophobia, racism and racist mobilisations, including the search for scapegoats, such as immigrant workers and, in the West, Muslims. Twenty-first century fascism evokes mystifying ideologies, often involving race/culture supremacy and xenophobia, embracing an idealised and mythical past. Neo-fascist culture normalises and glamorises warfare and social violence, indeed, generates a fascination with domination that is portrayed even as heroic.

#### The alternative is to affirm the communist hypothesis - reconceptualizing communism to foster political organization that can sustain current revolts against capitalism is essential

**Walker 14** – (Gavin, Assistant Professor of History and East Asian Studies at McGill University, “The Reinvention of Communism: Politics, History, Globality,” The South Atlantic Quarterly 113:4, Fall 2014)

Since the turn of the twenty-first century, the term communism has returned to the theoretical and historical agenda with a striking force and a surprising novelty. 1 In a wide range of fields of knowledge, the questions of the actuality and the history of the world communist movement, the theoretical tendencies of communist thought, and the current political possibilities of new developments of communism have been revisited and addressed anew. In the social movements that have sprung up in nations around the world—from Spain to Greece to Quebec, throughout Latin America, Asia, Africa, and beyond—-the word communism has again acquired a critical force, not a force of nostalgia or simple retrospection, but a new and creative force. We can only be struck by the degree to which it now seems that communism, far from the dead end of the twentieth century it was long assumed to be, may be something profoundly of the twenty-first century, an idea and field of concepts whose time has come. When Antonio Negri emphasizes that the communists today are “alone and potent,” he alerts us to a crucial point that I want to highlight, from two divergent directions, in the following essay. Rather than see the contemporary communist moment simply as a “return,” implying a transposition of the same forces, forms, and contents, this moment indicates instead an open field for the reinvention of communism. The earlier modality of twentieth-century communism, linked above all to the existence and continuity established by the Soviet Union, no longer exists. No longer is there a national form or federated space that would serve as a “bulwark” of the communist project. In this sense, the communists today are alone. Yet Negri insists that the communists are alone and potent. This potency is derived, not as in the previous arrangement, from a site of institutional force that could be treated as a model of explanation, but from this fact of being alone, untethered, unguaranteed, not beholden to a specific historical telos. In this sense, the communists today are potent because they are alone. What does this new political solitude mean for the concepts and contents of communism in our contemporary moment? Two distinct trends emerge in this development of communism in our global present. One is the great historic movement that has transferred the center of gravity of a reinvented communist politics to the exterior of the West, taken in the broadest sense. This globality of communism is in essence a fulfillment of a promise rather than a historical accident, the fulfillment of a politics that from the outset sought a new theoretical and political destiny beyond the horizon of the national and local. The second is the striking link between this return—and reinvention—of communism and its site of return, one of which is without doubt the field of “critical theory.” What makes this site peculiar is that it too, like the political potential of communism itself, has been in a long retreat since the 1980s in the fields of knowledge production around the world. Theory’s originary impulse toward the politicization of knowledge, the immanent critique of the university, and its globality, the fact that theory has long provided a common language beyond the regime of national language, has been the target of an intense revanchist attack by institutional neoliberalism, conservative politics, and positivist knowledge work. But new experiences have emerged in recent years to produce a situation in which these two developments—one linked to the practical social movements and reinventions of political organization and the other linked to the crystallization of a new trend in theory—are experiencing complex and volatile articulations and points of contact. What we are seeing today is perhaps the first emergence of a new direction and politicization of theory itself, the first stirrings of a communist critical theory. Politics: Persistence and Scission One distinguishing feature of the current discussions of the “communist hypothesis” (Badiou), the “actuality of communism” (Bosteels), and “the communist horizon” (Dean) is a renewal of an insistence on the primacy of politics over the mere presupposition of a politics derived from the structural analysis of global capitalism’s current tendencies, level of technical composition, and scale of development of the productive forces. These thinkers maintain a conception of politics that upholds its rarity, its intermittent or hazardous quality. Rather than accept the given character of politics, in which it would become a figure of ubiquity or immanence (the banal argument that “everything is political”), the rethinking of the question of communism has also insisted on a divergent genealogy of what is and what is not political. Rather than a constantly presupposed undercurrent, this figure of politics would instead be, for instance, in Alain Badiou (2001), the rare event that grounds a political sequence and convokes a subject through a fidelity, or in Jacques Ranciere’s (1999) terms, the egalitarian proposal that suspends the representations possible in the dominant order (“the police”).2 This concept of politics is, above all, linked to new attempts to think the place of the subject of politics, and it is this point that provides an entry into the critical dimensions of this “communist hypothesis” within the theoretical field. The rethinking of communism today has distinguished itself as a trend in insisting on antagonism, contradiction, the subject, politics, and organization; it refuses gestures of diffusion, multiplicity as such, focusing on the dialectical conditions of the possible rather than the immanent conditions of the impossible. There is here a reaction to the monopoly held by a very specific register—the Derridean register of defeat and withdrawal, the Deleuzian register of immanence and multiplicity—within the broadly left trends of thought and knowledge production. Metapolitically speaking, we can observe within the works associated with this “communist hypothesis” a rebirth of simple, seemingly “obvious” concepts: truth, justice, fidelity, struggle, honor, courage, and so forth, concepts largely derided in the postdeconstruction trends of thought and relegated to the realm of the “popular,” avoided as vulgarities too “earnest” for the field of so-called theory. Instead, detachment, irony, withdrawal, defeat, finitude, the impossibility of presence, the impossibility of naming, the impossibility of an affirmative creation, and the impossibility of an interventionist politics proper often constitute the typical terms of theoretical work. There is thus in the recent communist current a refusal to accept this by-now rigid division of labor, one that has decisive consequences for both politics and critical theory itself. What lies behind this new vocabulary and new set of gestures? Above all, it is the insistence on a link between the internal dynamics of theory and the external situation, in particular, on the question of organization. Let us consider a few short texts that might be taken as a “pre-history” of this notion, a polemical period of Badiou’s work that expresses the essence of the overall problem: how to develop and conceptualize a theory of politics that is not simply a reflection or proof of a structural or given feature of the situation in which we find ourselves, a theory of politics that is not beholden to concepts of historical necessity. Behind this thesis lies a resistance to the notion that politics is involved in a flattening of phenomena, a fear of antagonism, the preference for holism over division, the emphasis on consensus, on “friendship,” against contestation. In 1977 Badiou launched a frontal attack against Gilles Deleuze and Felix Guattari’s work for its implied political pitfalls. This attack on their “fascism of the potato” is excessive, dogmatic, beyond the demands of the political conjuncture (going so far as to identify them as “prefascist ideologues”). But it also contains an extremely important point for the paradox of organization within politics, perhaps the key kernel of the new trend inaugurated in theoretical work by the hypothesis of communism. In this text, Badiou (2012:199-200) reacts against Deleuze and Guattari’s celebration of multiplicity, appeals to escape, to flight, to becoming-multiple, becomingschizophrenic, becoming-minor, and so forth,3 by intersecting this theoretical work with the concrete terms of the political situation: We have seen this in May ’68: If you have the mass revolt, but not the proletarian antagonism, you obtain the victory of the bourgeois antagonism (of bourgeois politics). If you have ideas that are just, but not Marxism, you obtain the return to power of the bourgeois reformists of the Parti Socialiste. If you have the objective forces, but neither the programme nor the party, you obtain the revenge of Pompidou’s parliamentarianism, you obtain the return to the scene of the PCF and the unions. Badiou argues that Deleuze and Guattari fail to carry through the very ideas that found their major theoretical concepts. They support the mass revolt, but lack the antagonism between “friends” and “enemies” of the people; they have “just ideas”—freedom, the overturning of injustice, the defense of the workers, the poor, the targets of a vicious imperialism in and out of the metropole—but no structural features link the situation of domination with an affirmative politics of inversion; they include the objective forces of the masses in social motion, but lack direction, a concrete framework within which the mass movement can orient itself. Badiou argues that these elements finally invert into their opposites: the victory of bourgeois politics, reformism, parliamentarism, and so forth. But what is behind this charge, this accusation? Two elements subtend this polemic whose compositional elements are returning today to the theoretical scene through the return to the communist hypothesis, namely, persistence and scission. Badiou charges Deleuze and Guattari with the production of a theoretical system that is itself in a constant process of diverting, redirecting, and moving sideways to avoid “capture.” Such a politics cannot sustain the forces it unleashes; it can initiate moments of dissensus within the dominant order, but it cannot persist in a full overturning of their foundations or proceed from this moment of dissensus to a new hegemony over the situation. Such a mode of thought poses questions, identifies structural injustices, and marks points of rupture, but it nevertheless chooses, at the final moment, to refuse to uphold a strong division, a strong break, an insistence on one side over another, one line over another. Badiou (2012:199-200) puts this point in a dense and powerful formulation: “To think the multiple outside the two, outside scission, amounts to practicing in exteriority the dictatorship of the One.” If you think the multiple, you can expose the One to its internal disunity, the false impression of substantiality. But merely pointing to the multiple character of a social and political situation is not in itself a bridge to a politics. Remarking on the multivocal character of what appears as a unity is in no way a critique, much less an intervention, within this situation. Instead, the multivocal reality of the unitary image can always be recuperated precisely in the service of the One. In a circumstance of social struggle, it is never enough to point to the heterogeneous composition of all positions—“the police are also drawn from the lower stratum of society,” “their pensions are also being cut back by the state,” “within the ranks of the workers are some with terrible ideas,” “the activists are not as upstanding as they say they are,” and so on—and thereby to end in the original abstentionist position: “It’s all so complicated, it’s not just one thing and another.” This type of analysis, which always underscores the hybridity and mutual complicity of political scenarios, itself participates in the naive fantasy of imagining that exposing this multiplicity allows one out of the practice of partisanship. In such an optic, you can go on multiplying the options, always finding yet another option, always finding a “third way,” always insisting on escape from the binary, escape from the pressure of limited choices, always demanding an evacuation of responsibility, of having to uphold the consequences of a choice. To force a cut in the situation is to assert that the One is forever split, that there is a two-line struggle in every social and political scenario, that politics proper consists in this scission itself: the formation of an antagonism where previously there was only a semblance of unity. This is why Badiou emphasizes the Two—when you choose to say, “I don’t want either side, they’re all bad, we don’t have to make a choice, we don’t have to have just one thing,” what is installed in theory and in practice is not a splitting or splintering of the One into its infinitely heterogeneous elements (the thesis of multiplicity) but a withdrawal that allows the One to remain intact. This is precisely what Badiou calls, in the above formulation, “practicing in exteriority the dictatorship of the One.” By choosing flight or escape, the status quo (i.e., the One) reasserts itself, this time stronger than before, bolstered by the experience of finding in its own image of multiplicity a renewed unity. What remains a true politics is the courage to choose, to insist on the Two, to not fear division, separation, scission. To accept the responsibility of the choice, to accept that there is no way to opt out—that the act of a supposed withdrawal is in fact a refusal to countenance real movement, real overturning of the situation, a break that has to be sustained—is to accept the responsibility to uphold the choice despite the fact that there is no going back. What does this argument contain for the current rethinking of communism? Above all, it holds that politics is contained not in overturning the system of social binaries, or in finding a “third way,” or in escapism, defeatism, or abstention. A common thread today, in all the thinkers reinventing the term communism, is a long and arduous struggle for hegemony in the world of thought, a world devoted to concepts of the “death of the subject,” the refusal of binaries, the emphasis on incessant multiplicity, and so forth. This struggle for a new politics recognizes the dead end of these “philosophies of defeat,” in Bruno Bosteels’s terms. It recognizes that a new communist development will come, not from the endless work of withdrawal and negation as such, but from the affirmative and interventionist declaration that politics is possible and the status quo can be permanently fractured. And this fracture produces the need for a persistence, the ability to carry through the full consequences of the initial break.

## States CP

#### The 50 state governments territories should expand the scope of antitrust laws to cover the National College Athletics Association, removing the amateurism exemption.

#### 2. State action is effective in every type of antitrust action

Ron Knox 21, Senior Researcher and Writer for the Independent Business Initiative, “State Attorneys General”, Institute for Local Self-Reliance, https://ilsr.org/fighting-monopoly-power/state-attorneys-general/

What State Attorneys General Can Do to Fix America’s Monopoly Problem

State attorneys general can play a crucial role in reversing the rise of concentrated corporate power and its impact on our economy and democracy. They can investigate corporations for abusing their market power, and they have the power to stop harmful actions or break up companies. They can sue to stop corporate mergers that would undermine competition, harming workers, suppliers, rivals, or consumers. But it is more important than ever that they have the tools and resources they need to do that crucial job. The following enumerates both the specific antitrust powers that state attorneys general currently hold and the resources they need to leverage that power more aggressively. Initiate More Investigations and Actions to Stop Monopoly Conduct States have the power to win a myriad of concessions from corporations that break the law and hurt competition. They can recover damages suffered on behalf of their residents. They can also use their power to stop anticompetitive conduct and even break up monopolies that harm residents and competition in their state, using both state and federal antitrust laws. State enforcers can also band together to carry out broad investigations of monopolies nationwide.[12] This has been crucial work, historically and today. In the monopoly case against Microsoft, state enforcers maintained their case long after the federal agencies dropped theirs, effectively opening markets to new, innovative companies. And today, dozens of state AGs are using their investigative powers to examine whether tech monopolies Google and Facebook have abused their monopoly power over online search and the flow of news and information.[13] State attorneys general have also used the antitrust laws to protect the rights of workers. More than a dozen states joined forces to stop fast-food chains, including Arby’s and Dunkin’ Donuts, from imposing no-poach and non-compete contracts on their low-wage employees. These clauses prevented workers from starting a competing business, or from quitting their jobs to work for a rival chain.[14] And a group of state attorneys general have organized to push the federal enforcers to follow their lead and protect workers from the unfair practices of their bosses.[15] Block Mergers that Threaten Local Markets Historically and today, a core role of the states in antitrust enforcement has been to stop harmful mergers. Under state and federal antitrust laws, state attorneys general can sue to block a merger if they believe it will undermine competition to the detriment of producers, workers, or consumers. Over the past 40 years, they’ve done so — sometimes alongside the federal antitrust agencies, and sometimes on their own. While some state-level merger challenges have entailed broad, multi-state coalitions, most involve one or two state attorneys general stepping in to protect competition.[16] Evidence of states’ importance in merger cases is abundant. Three years ago, the California Attorney General sued to stop the takeover of two oil terminals by Valero Energy, the world’s largest independent petroleum refiner, after finding Valero would be able to raise prices for oil after the merger. The FTC had reviewed the deal and declined to intervene. The companies abandoned it in the face of state scrutiny.[17] And in Colorado, the attorney general moved to alter a health care merger that would have stopped local Medicare patients from accessing doctors — a concern the federal antitrust agencies did nothing to address in their review of the deal.[18]

## Solvency

#### 1. Resources are thin – expanding the scope of antitrust trades off with SQ efforts and makes the agencies look weak – creating a vicious cycle of more litigation and overstretch

Lachapelle 21 [Tara, opinion columnist for Bloomberg, “Wall Street Is Ready to Put Lina Khan’s FTC to the Test,” *Washington Post*, 08/26/21, <https://www.washingtonpost.com/business/wall-street-is-ready-to-put-lina-khans-ftc-to-the-test/2021/08/25/cb55d2c2-059c-11ec-b3c4-c462b1edcfc8_story.html>, accessed 09/01/21, JCR]

An overburdened U.S. Federal Trade Commission [FTC] is warning acquirers that if they get impatient and close any deals without the agency’s permission, it just might slap them with a lawsuit. Dealmakers won’t hold their breath. As President Joe Biden pushes for more aggressive antitrust enforcement — an effort spearheaded by legal scholar Lina Khan, his controversial pick to lead the FTC — the agency is running up against practical limitations. It’s working with very limited resources for a very large number of deals. How large? So far this year, nearly 10,000 U.S. companies agreed to be acquired for a combined deal value of $1.25 trillion, data compiled by Bloomberg show. That’s already surpassed last year’s sum and may even be on track for a record. Not all of those tie-ups will require regulatory approval but in July alone, 343 transactions filed premerger notifications and are awaiting review, compared with 112 in July 2020, according to the FTC. These filings start a 30-day clock for regulators to decide whether to further investigate a deal. If that waiting period expires without any action, a company would typically take that to mean that it’s free to complete the transaction. But now the FTC says it can’t get to its backlog fast enough and that inaction on its part doesn’t signal permission to proceed. In warning letters sent to filers this month, the agency said companies that go ahead anyway do so at their own risk because the FTC might later decide a deal violates antitrust laws and sue to undo it — and what a mess that would create for buyers and sellers. And yet, if the agency thought such an aggressive move might discourage mergers, it was wrong. “To my mind, it is a completely hollow threat and makes the agency look weak,” Joel Mitnick, a partner in the antitrust and global litigation groups at law firm Cadwalader, Wickersham & Taft LLP, said in a phone interview. “They’re saying they’re going to ignore the statutory time limits on them whenever they feel like it and continue to investigate transactions until they’re satisfied. But it’s very difficult for the agency to sue to unwind the transaction once the eggs are scrambled.” Merger reviews traditionally involve some give and take. Companies will often give regulators more time if they think it will increase the odds of winning approval. If that cooperative attitude is being tossed out the window, though, dealmakers are ready to reassess and embrace a more adversarial process. For M&A lawyers, it’s a disturbance to an equilibrium that existed under other administrations, and they fear a reversion to the merger-hostile environment of the 1960s. Of course, folks in Khan’s camp would say it wasn’t an equilibrium at all, but rather an often overly cozy relationship between regulators and companies that were given too much leeway in recent years. In any case, businesses are understandably frustrated by what would seem to be an unreasonable ask. Waiting indefinitely to close a deal is costly and full of risks. At least one acquirer isn’t having it. Last week, Illumina Inc. finalized an $8 billion purchase of cancer-testing startup Grail even though U.S. and European authorities haven’t completed their probes. Even as the FTC began this week its attempt to unwind the deal, other dealmakers may decide they like their chances, too. The FTC “better be ready to litigate,” said David Wales, a partner in the antitrust and competition group at law firm Skadden, Arps, Slate, Meagher & Flom LLP and former acting director of the agency’s Bureau of Competition. “I’ve seen first-hand the resource constraints at the FTC,” he said. “They can’t sue everybody. They can’t block every deal. They will have to be strategic about it.” Already, regulators have two major cases sucking up resources. The FTC last week refiled its monopoly lawsuit against Facebook Inc., alleging its takeovers of Instagram and WhatsApp violated antitrust laws. (Its deal last year for Giphy also employed a sneaky maneuver to avoid showing up on regulators’ radars, and now they’re looking to close that loophole.) The Justice Department is pursuing its own case against Google. And what was initially seen as a narrow effort to reel in dominant technology companies has since expanded to other industries in light of a sweeping executive order from President Biden. Even more obscure areas such as ocean shipping are facing new scrutiny. M&A reviews had already become more of a slog in recent years. Dechert LLP’s Antitrust Merger Investigation Timing Tracker — aptly nicknamed the DAMITT report — shows how investigations that once took an average of eight months now stretch into a year or longer: Just because the FTC threatens a drawn-out legal process doesn’t mean a court will take its side in the end. Even as some politicians and antitrust officials look to toughen up M&A laws, judges still rely on precedent, which can be favorable to merging companies (it was for AT&T Inc. in its giant takeover of Time Warner, for instance). An ambitious agenda without the financial resources to match it will also be of less service to consumers than if regulators pick their battles. As it stands now, Khan’s FTC looks like it’s biting off more than it can chew, and its threats aren’t having the intended effect.

#### 2. Plan will push Khan’s credibility over the brink – leads to defunding and regulatory rollback

CQ News 21 [Congressional Quarterly News, “FTC Chair Khan's rapid pace seen risking overreach, congressional backlash,” 08/06/21, lexis, JCR]

Federal Trade Commission Chair Lina Khan is risking the perception of overreach as she tries to make dramatic changes at the agency amid an ongoing public debate and internal clashes, observers said. Some of her recent moves, which are already raising questions on Capitol Hill among Republicans, could complicate the outlook for measures to beef up the FTC's authority. "She has to be careful about going too far so that she doesn't lose her support and embolden the critics of the FTC in Congress," Seth Bloom, president and founder of Bloom Strategic Counsel PLLC and a former Democratic aide for the Senate Judiciary's Antitrust Subcommittee, told CQ Roll Call. Khan, who is viewed as one of the most progressive FTC chairs in decades, was sworn in on June 15. Since then, the commission has voted on sweeping changes, including the repeal of a major competition policy statement that was put in place on a bipartisan basis during the Obama administration. Critics, including the commission's Republicans, are voicing concerns that Khan is dismantling old policies at an alarming rate, while ignoring traditional agency procedures along the way. "I think it is the stifling of staff perspectives that is most dramatic," Republican Commissioner Christine Wilson said in an interview. "Under prior chairs, dating back for decades, commissioners have been able to get comprehensive, detailed analysis from staff about every recommendation that is coming before the commission and about every matter on which the commission votes. The flow of information has been dialed back to zero under Chair Khan." The public tension at the FTC is at odds with the agency's decades-long tradition of avoiding open political battles and working behind the scenes to achieve consensus on most matters, according to observers. "I think it's fair to say the FTC has operated as a bipartisan, consensus-based agency pretty much for the last 40 years," said Stephen Calkins, a law professor at Wayne State University in Michigan and a former FTC general counsel in the Clinton administration. "The current chair and majority would probably say the commission has been making mistakes and doing the wrong things for those 40 years." In contrast with the approach taken in recent weeks, the FTC normally takes time in its decision making, with a significant amount of internal deliberation, according to James Fishkin, an antitrust partner at Dechert LLP. "In reality, there's a lot of back and forth and internal discussion going on behind the scenes," said Fishkin, who previously worked as a staff attorney in the FTC's Competition Bureau. The commission has five seats: three for the majority party and two for the minority. Besides Khan, the current Democrats are Rebecca Slaughter and Rohit Chopra, who has been nominated by President Joe Biden to become head of the Consumer Financial Protection Bureau and is expected to leave. Wilson's Republican colleague is Noah Phillips. Much of the agency's day-to-day work is handled by career staff, most notably in the bureaus of Consumer Protection and Competition. Shortly after Khan took over, the FTC launched a series of open meetings, with the goal of making the agency more transparent. Previously, the commission voted on policy items behind closed doors. While Khan has been praised for seeking to open up the work of the commission to the public, some have criticized the way the meetings have been conducted. So far, two such meetings have been held virtually. In both cases, commissioners were asked to vote on major items with little advanced notice or planning, according to Wilson. She also said the meetings lacked any meaningful dialogue. Staff was excluded and commissioners took turns reading prepared statements. The first meeting, on July 1, included a vote to rescind a 2015 policy statement that restricted the agency's authority to prohibit unfair methods of competition under Section 5 of the FTC Act. It was a 3-2 vote, with Wilson and Phillips dissenting. On July 21, the commission voted, also along party lines, to rescind a merger policy statement from the Clinton administration. The 1995 policy had ended the practice of routinely requiring companies to obtain prior approval for acquisitions in certain cases. "The rescission of these statements without providing guidance about where the commission will head provides an irresponsible lack of clarity to the business community about the types of conduct that are lawful and unlawful," Wilson told CQ Roll Call. Bipartisan pledge Last week, during her first appearance on Capitol Hill as FTC chair, Khan pledged to work with her fellow commissioners in a bipartisan fashion. "I think this is a really fascinating moment for a new, emerging bipartisan consensus, especially around some of the concerns relating to concentration of economic power in the digital markets," she said at the hearing, which was convened by the House Energy and Commerce Subcommittee on Consumer Protection and Commerce. "I'm always keen to find areas of shared agreement with my colleagues." She said the new open meetings are "still very early in the process," and the agency is "always thinking about ways that we can improve our processes going forward." The hearing included testimony from all five commissioners. Republicans used it as an opportunity to air some of their grievances over how the agency is currently being run, with Wilson calling it an "abrupt departure from regular order." Similar concerns were raised by GOP members of the subcommitee. Five Senate Republicans have written to Khan, asking her to respond to several questions about recent events at the FTC. The senators, including Marsha Blackburn of Tennessee and John Cornyn of Texas, said they were concerned about the level of openness and transparency at the agency. "In particular, it appears that unprecedented steps have been taken to empower the office of the FTC chair at the expense of the bipartisan, consensus-based decision-making that characterized the FTC under prior administrations," they said. The lawmakers asked Khan to explain why the commission voted to rescind the 2015 policy statement without a public comment period. They also asked her to address a report that her chief of staff, Jen Howard, has internally issued a moratorium on public events and press outreach -- ostensibly, so that staff can focus on the agency's heavy workload. The revelation has triggered concerns that staff is being silenced amid a period of turmoil at the agency. The scrutiny comes as Khan seeks increased resources and new authorities from Congress that can help her to carry out an aggressive agenda. One of the agency's most urgent priorities is getting Congress to restore its ability to obtain monetary restitution for victims of consumer protection and antitrust violations, which was struck down by a U.S. Supreme Court ruling. On July 20, the House narrowly passed a bill (HR 2668) that would give the commission explicit monetary restitution authority. Republicans said the measure, which received only two votes from their side of the aisle, lacked provisions to prevent regulatory overreach. The legislation now awaits action in the Senate, where more Republican support will be needed to reach the 60-vote threshold for overcoming a filibuster threat. "I think Chair Khan risks losing support in the Senate if Republicans perceive her as overly aggressive and if they're uncomfortable with the kind of reforms that she's pushing through," Bloom said. While public disagreement at the FTC isn't unprecedented, the current situation is one of the most extreme examples in modern history, according to observers. "You have go back 40 years to when Ronald Reagan became president," Calkins said. "There was a pretty sharp change in the doctrinal views of the commission under its new chair, Jim Miller, compared with Michael Pertschuk, the previous chair." Pertschuk was one of the most liberal chairs in FTC history, and Miller was one of the most conservative, according to Calkins. When Miller arrived, Pertschuk stayed on as a commissioner, serving in the minority. The two constantly clashed. Miller's agenda was consistent with the overall de-regulatory focus of the Reagan administration. It also followed a period when the FTC came under fire for what was perceived on Capitol Hill as excessive regulatory activity. The agency's powers were curbed by Congress as a result.

#### 3. Kahn is pushing the limits of FTC authority- the question is how far it will go- we are at the brink

Wright 21 [Joshua, Executive Dir of the Global Antitrust Institute, Univ Prof at George Mason, FTC commissioner under the Obama admin, “Lina Khan Is Icarus at the FTC,” *Wall Street Journal*, 07/13/21, <https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008>, accessed 09/01/21, JCR]

It’s a touch ominous when a bureaucrat begins her tenure by sending bipartisan procedural safeguards to the paper shredder. Federal Trade Commission Chairman Lina Khan wasted no time making confetti of the guardrails at the FTC, including the Obama administration policy statement placing minimal limits on how the agency could use its theretofore undefined power to police “unfair methods of competition.” Shredding the statement clears the way for Ms. Khan’s attempt to remake antitrust law in her image (“Lina Khan’s Power Grab at the FTC,” Review & Outlook, July 6). With the announcement of a global gag order on FTC staff, Ms. Khan has made it clear the FTC will now speak with one voice—hers. All that has been overshadowed by an executive order aimed at competition and loaded with goodies, good intentions, new regulatory regimes and a blissful ignorance of unintended consequences (“Joe Biden, 20th Century Trustbuster,” Review & Outlook, July 10). Some of its pronouncements, like occupational-licensing reform, are to the good. But the FTC’s competition authority is about to become a free-for-all for the Biden administration to reshape the economy. One wonders how the Republicans going along with all this to “get Big Tech” are feeling right now; I’m guessing “played.” If not, they’ll catch up soon enough. Imagining the FTC as Icarus flying without the constraints of history, economics or law is a fun thought experiment, but we’ve been here before. Ms. Khan’s initial steps are indicative of a regulatory overreach that will end with the FTC’s wings melting in the courts. This path does not lead to incremental, much less radical, change. I predict early headlines that appease a rabid base, frustration for FTC staff and a new, volatile partisanship at the agency, but actual results that leave unsatisfied the progressives aching for radical change.

**Courts Rollback:**

#### 4. Courts will rollback

Steuer 12

(Richard M Steuer. Served as Chair of the ABA Section of Antitrust Law from 2011-2012. Previously, he served as the Section’s Delegate to the ABA House of Delegates and as Editorial Chair of the Section’s Antitrust magazine. For three years he also served as Chair of the Antitrust Committee of the New York City Bar Association. The Simplicity of Anti-Trust Law. University of Pennsylvania Journal of Business Law. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163690>. February 8 2012. Accessed August 30, 2021. AR😊)

Fortunately, the growing sophistication of antitrust analysis, both legal and economic, has made decision-makers better equipped to reach the right determinations—if they can maintain the right focus. **The cause of rogue decisions seldom has been defective rules or tools, but rather a misunderstanding of the principles behind the rules**. If judges, enforcement officials, and lawyers confine their focus to unilateral and collective activity that threatens serious harm to competition, the proper application of the legal and economic principles and tools will become clearer. **To a large degree, the backlash against antitrust enforcement is in reaction to the complexity, and resulting confusion, that has fostered bad policy decisions, bad enforcement decisions, and bad judicial decisions.** **Once antitrust becomes too complicated to explain on an elevator ride, it is in danger of being misinterpreted by courts and losing widespread support.** How does one reconcile the benefits of greater sophistication against the capacity to foster confusion and chaos? **There is no need to rewrite the laws, which are simple enough.** **There generally is no need to rewrite the many guidelines either**, although several might benefit from some clarification. It would suffice for counselors, enforcers, and judges to understand that the beacon of antitrust and competition law is not just maximizing consumer welfare and economic efficiency, but achieving that goal by confining enforcement to preventing bullying and ganging up that seriously threatens competition. **When decision-makers train the weapons of the antitrust arsenal on other practices, they run the risk of both reaching the wrong results and losing public support.** When their aim is true, everyone is better off.

#### 5. Can’t Solve Judicial Discretion – That’s the main contributor to failures in Practice

Woodcock, Ramsi, How Antitrust Really Works: A Theory of Input Control and Discriminatory Supply (February 28, 2021). Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business & Economics. <https://poseidon01.ssrn.com/delivery.php?ID=549006098115007001122082114121104064018071056080004037007126082119094122077087127004037020023014049096033102024086121011024100020055059047019086089110088093001022064048036095029011097082096030020018094113127072119082108006100003111127065080067093115022&EXT=pdf&INDEX=TRUE>, AYOKAIU21.

There is very little in antitrust doctrine or antitrust economics that provides guidance about when an antitrust case can be brought or when it will be won. In the area of single-firm conduct, for example, the only definitive guidance from the courts is that (1) willful acquisition or maintenance of (2) monopoly power is illegal.1 But what is willful acquisition? Antitrust economists answer that it is conduct that reduces consumer welfare, that incalculable quantity that can be imagined only by shoehorning market reality into curves of supply and demand and then pretending that nothing else matters. The shortcomings of doctrine and economics are not, however, the shortcomings of actual practice, in which can be spied a structure in factpatterns and outcomes not reflected in either the law or the economics of the field. The structure has two pillars. The first is that control over an input essential to production is the ultimate source of all commercial power and the core interest of the antitrust laws. Indeed, antitrust can be divided into two main preoccupations, which do not split neatly along the lines of the Sherman Act’s distinction between concerted conduct (Section 1) and solitary conduct (Section 2): regulation of the acquisition of power through centralization of control over an input and regulation of the exercise of power through discrimination in the manner of supply of that input to downstream firms.3 A taste of the utility of this approach may be had in the answer it provides to the question what constitutes willful acquisition of power. The answer is that it is discrimination—facial or by disparate impact—in input supply: the favoring of some downstream firms over others. Discrimination results in a substitution of the input controller’s discretion over how the final product sold to consumers is to be made for the discretion of consumers themselves, for it is consumers who otherwise determine which firms get the inputs by using their purchases to strengthen those who use the inputs better. In substituting seller control for buyer control, discrimination undermines the consumer sovereignty that is the value proposition of the free market and therefore attracts antitrust’s gaze. The second pillar is what I call innovation primacy: the observation that courts do not condemn either the acquisition or exercise of power when there is a plausible case to be made that the conduct improves the end product sold to consumers, regardless what effects the conduct has on competition.4 These two pillars explain outcomes in a broad range of major cases, for in each the plaintiff’s case can be summed up as either an objection to centralization of control over inputs or to their discriminatory supply, and the case outcome can be shown to turn on whether the court ultimately thought the conduct made the product better. This analysis shows that latent in antitrust there is a coherent and, importantly, a judicially-administrable system in which judges rely ultimately on intuition to pick winners whenever it appears that a firm is about to cement control over an input or use pre-existing control to impose its will on the supply chain regarding how a product is to be made. The judge steps in and substitutes his own view for that of the firm regarding what makes a better product. If this makes antitrust sound radically interventionist, that is because antitrust is radically interventionist. Power is an essential part of all production, because one of the things consumers want from a market is the luxury of not deciding in full how a product is to be made, and so sellers must decide how at least part of every product is assembled. Antitrust cannot therefore apply the neutral principle that all power is to be eliminated. And so antitrust can act only by deciding between good acquisitions or exercises of power—good product choices—and bad acquisitions or exercises of power—bad product choices. Judges often hide behind economic expertise in making these determinations, but at the end of the day no one knows what makes a better product: it is a value judgment the ultimate responsibility for which lies with the court.

#### CX Proves

Students will negotiate salaries

## Adv 1: Stolen Wealth

#### Turn - most NCAA programs are not profitable, NCAA assistance funds improve outcomes for poor athletes – Ending these scholarships turns the aff

US News, Horace Mitchell wrote in Jan. 6, 2014, “Close up detail of football referee's legs after a yellow penalty flag has been thrown,” Students Are Not Professional Athletes College athletics are a vehicle for receiving an education.

http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid

Let's be clear about the context within which this question usually arises. It usually does not come up at those NCAA Division I institutions that struggle to fund their athletic programs or in Division II or Division III. There is a misconception that athletic programs in general are profitable and institutions are making money hand-over-fist. The truth is that only a fraction of the programs are profitable while most operate at a cost to the institution. The question of pay arises primarily in reference to student-athletes in the sports of football and basketball at Division I institutions with high-profile, high-income athletics programs. The argument is that since such institutions receive millions of dollars from the performance, the student-athletes should be paid.

Students are not professional athletes who are paid salaries and incentives for a career in sports. They are students receiving access to a college education through their participation in sports, for which they earn scholarships to pay tuition, fees, room and board, and other allowable expenses. Collegiate sports is not a career or profession. It is the students' vehicle to a higher education degree. This access is contingent upon continued enrollment, participation in the sport for which they received the scholarship, and academic eligibility. The NCAA Student Assistance Fund can be used to help those student-athletes who have unusual needs in excess of the usual cost of attendance. A high percentage of student-athletes graduate without the burden of student loans, which most other students accumulate.

[Read Marc Edelman: NCAA College Athletes Should Be Paid]

Student-athletes are amateurs who choose to participate in intercollegiate athletics as a part of their educational experience, thus maintaining a distinction between student-athletes who participate in the collegiate model and professional athletes who are also students.

A fundamental NCAA commitment under the collegiate model is to student-athlete well-being, where institutions have the responsibility to establish and maintain an environment in which student-athletes' activities are conducted to encourage academic success and individual development as an integral part of the educational experience. Another commitment is to sound academic standards. Intercollegiate athletic programs should be maintained as an important component of educational programs, and student-athletes should be an integral part of the student body. Each institution's admissions and academic standards for student-athletes should be designed to promote academic progress and graduation and be consistent with the student body in general.

[Check out 2013: The Year in Cartoons.]

It is clear that, in addition to their academic course loads, student-athletes' physical conditioning, practice and competition schedules make it difficult for many of them to take on part-time employment to supplement their institutional aid. So, perhaps the question should be whether it is reasonable that student-athletes should have additional resources typical for full-time students who work during the academic year, since scholarships do not cover all living expenses and many student-athletes do not have the opportunity to earn income to cover those expenses or to afford simple social outings with friends, an important component of college life, well-being and holistic development.

There is discussion in the NCAA about increasing financial aid to allow student-athletes to have funds typical of working full-time students at their institutions. Paramount in those discussions are the well-being of the student and the ethics of amateur sports.

#### NCAA maintains amateurism – it’s the only way to prevent exploitation of student athletes

NCAA Brief O'Bannon Case 9th Circuit 2015

C. The Benefits Of The NCAA’s Commitment To Amateurism

As just noted, the NCAA’s commitment to amateurism is intended to integrate student-athletes into the broader student body and to clearly demarcate the line between college and professional sports. These goals have important benefits.

Integrating student-athletes into the academic community improves their educational experience. Full participation in that experience—not just meeting academic requirements, but also studying, interacting with faculty and diverse classmates, and receiving academic support such as tutoring and mentoring— generally leads student-athletes, especially those from disadvantaged backgrounds, to reap more from their education, including enjoying higher graduation rates and better job prospects. ER352-368, ER370-394, ER400, ER404-405, ER433-435, ER464-465, ER510-512, ER544-548; see also ER94 (“The evidence ... suggests that integrating student-athletes into the academic communities at their schools improves the quality of the educational services that they receive.”).

Paying student-athletes for their play is at odds with NCAA schools’ educational mission. The commitment to amateurism is essential to achieving integration of student-athletes into the educational community because if they were paid for their athletic play or otherwise exploited commercially, they might be less likely to take full advantage of their scholastic obligations and opportunities. ER350, ER361-368, ER395-398, ER403-407, ER426-431, ER442-443, ER464- 467, ER505-507, ER547-550. Such payments might also “create a wedge” between them and their classmates. ER403-407; see also ER361-368, ER426-431, ER464-467, ER507-508. The NCAA’s strategy has been successful; for example, most FBS football players and Division I men’s basketball players see themselves as part of their school’s educational community. See ER496, ER607.

Critically (given the antitrust context here), maintaining a clear line between college and professional sports also “widen[s] consumer choice—not only the choices available to sports fans but also those available to athletes.” Board of Regents, 468 U.S. at 102. Intercollegiate sports involve contests between amateur student representatives of competing schools, not contestants playing as a job, i.e., professionals. The NCAA’s commitment to collegiate athletics as an amateur endeavor creates a distinct game that many fans enjoy as such. ER335-341, ER453-460, ER483, ER514-515, ER518-543, ER552-559. It also creates a unique experience that many young men and women seek—one that combines athletics, academics, and a shared sense of tradition, community, and mission. See ER15-20 (“None” of the “potential substitutes ... provides the same combination of goods and services offered by FBS football and Division I basketball schools.”).

#### Turn – the aff crushes college athletics, reducing education opportunities, reducing competition and functionally increasing exploitation

**The Hill 2021**, James J. Heckman is the Henry Schultz Distinguished Service professor of Economics and Public Policy and director of the Center for the Economics of Human Development at the University of Chicago. Heckman received the Nobel Prize in Economics, the Dan David Prize and the Chinese Government Friendship Award, among other recognitions. Colleen Loughlin, Ph.D is an economist and executive vice president at Compass Lexecon. Greg Curtner is a lawyer with Riley Safer Holmes & Cancila who has represented the NCAA in many antitrust cases. All authors have done professional work for the NCAA. The views expressed are those only of the authors. “Ending amateurism would be disastrous for student-athletes”

https://thehill.com/opinion/education/542471-ending-amateurism-would-be-disastrous-for-student-athletes

On March 31, just days before the NCAA Final Four weekend, the United States Supreme Court will hear arguments on a matter with substantial ramifications for higher education in this country. The case asks whether antitrust laws mandate that colleges and universities, acting through the NCAA, abandon amateurism — the central tenet of intercollegiate athletics since the founding of the NCAA in 1905 — and instead allow each school or conference to pay student-athletes to play sports so long as the pay can be somehow tied to their education.

In other words, must higher education adopt pay for play instead of treating athletes as students, whose most important activity on campus is obtaining a college education? Very few college athletes, less than two percent in football and basketball players, go on to play professionally. Their actual campus focus is in obtaining education, training, mentoring and social interactions that are the essence of their college experience and provide lifetime benefits.

A Supreme Court decision effectively ending amateurism will have wide-ranging policy implications for higher education, shifting incentives, raising costs, reallocating resources, threatening college sports offerings of all kinds and taking a toll on a valuable tool for social mobility. Therefore, the full context of the issues before the Court and before Congress, should be carefully considered.

The core issue is whether intercollegiate athletics does harm or good to the players. Critics of the NCAA argue that student-athletes are exploited, poorly paid and poorly educated performers who earn enormous revenue for their schools, coaches and athletic departments. Defenders of the NCAA argue that the amateur collegiate model provides opportunities and real education with lifelong benefits to the athletes and their communities consistent with the schools’ vital educational missions.

Are these student-athletes exploited, or do they benefit? This question is better settled by hard empirical evidence than by anecdotes and polemics.

Our empirical research on student-athletes, based on extensive data collected by the Department of Education, finds that athletes receive substantial benefits from the current amateur sports model. Our team analyzed datasets tracking over 20,000 students from high school until their early 20s and found that student-athletes finished high school at higher rates, attended college at higher rates, graduated college at the same or higher rates, and were earning as much or more than otherwise comparable non-athletes.

This analysis accounts for the effect of other characteristics, like disadvantaged backgrounds, cognitive factors (e.g., high school test scores) and non-cognitive factors (e.g., motivation, self-control, school suspensions), which enable like-for-like comparisons. Detractors of the amateur model often compare graduation rates for football players from disadvantaged backgrounds to rates in the general college population, where more students are affluent. But this comparison does not take into account other important factors that are determinants of success, such as the individual backgrounds of the student-athletes. It also may obscure the positive impact of athletics for these students as compared with non-athlete peers from similar backgrounds.

In true like-for-like comparisons we found that Black student-athletes in Division I schools do not have a statistically significantly different likelihood of graduating than comparable other Black students, other athletes, or non-Black non-athletes. Moreover, we found that Black former student-athletes earn the same or higher early career wages than other students, which translates into higher lifetime earnings. These persuasive results are particularly significant for disadvantaged groups: our rigorous analysis shows that college athletics is a powerful vehicle for social mobility and delivers substantial benefits to student-athletes.

In addition to debt-free college, which is worth hundreds of thousands of dollars, student-athletes receive coaching and counseling that pays off throughout life. The economics literature recognizes that even a year of college has measurable benefits. Student-athletes learn the valuable life skills of discipline and teamwork. They learn to cooperate with people of diverse backgrounds. These activities shape character, with lifetime consequences. In addition, college athletics is a platform connecting students, academics, alums and fans more generally. This network has far-reaching benefits. Together, these are lifetime 'game changers.'

What are the risks of a Supreme Court ruling that effectively professionalizes college sports? It will shift incentives for more student-athletes away from studies and toward the lottery ticket of the pro leagues. It jeopardizes these lifelong benefits and not just for those playing the professionalized version of college sports. Cash-strapped colleges will divert funding to cover the salaries of student pros and away from individual and so-called Olympic sports like swimming, wrestling, gymnastics, fencing and volleyball. These sports and scholarships for these activities will likely be reduced or eliminated, with some potential student-athletes losing their college education opportunity and the associated benefits of collegiate athletics.

Professionalizing college sports also raises questions about the use of taxpayer funds (for state schools) on speculative, unlimited funding packages for high school star players whose incentives would be skewed toward athletics and not education. Some stars will get big pay packages, while others will be less likely to attend or stay in school. With only a handful of colleges with profitable athletic programs even today, the dominant football and basketball programs with current money to spend will become even more entrenched, leading to reduced competitive balance and fan support — the opposite of what antitrust policy is designed to target. Substantial risk of reduced output and reduced educational benefit will result from substituting a hypothetical and untested professional system for an established amateur system with a proven track record.

When we use evidence-based policy analysis to examine the current system, we can see that it provides substantial benefit and little harm. What about the proposed replacement? Congress, like the courts, should consider the consequences of rulings and laws that professionalize college sports because they risk destroying the substantial, lifelong benefits the current system provides. Changes in policies can have dramatic changes in outcomes. All the benefits will not remain the same if college sports are professionalized. The issues in this case are primarily educational, not matters of antitrust.

Colleges and universities pursue their educational missions within the NCAA joint venture framework to help ensure the health, safety and educational focus of student-athletes. Professional sports have their place and are successful. Our colleges and universities should continue to play in a different league.

## Adv 3: Framing

CX proves, thousands effected at best. Prefer our concerns about the environment, nuclear war, mass extinction, over the few thousand lives.