# 1NC

### OFF

T-USFG

#### Topical affs must use the United States federal government – they use the USFG or United States Faceters Guild

Kratochvil no date Gary Kratochvil, Precision Faceter, No Date, Jewelcutter. com <http://www.jewelcutter.com/links.htm> - BS

The United States Faceters Guild

The USFG web site focuses on the art and skill of faceting gemstones. The USFG provides a wealth of faceting information for beginners and experts alike. Here you will find gateways to faceting tips and techniques, faceting diagrams, online discussions about faceting, upcoming faceting conferences and competitions, and much more.

#### Vote neg – they wreck predictable limits and avoid DA’s about the governmental action– AND vote neg on presumption – a faceter’s guild can’t change the criminal justice system.

### OFF

Next off is Extra-T

#### The aff is extra-topical:

#### 1. “Any”—the resolution specifies “anti-competitive business practices by the private sector”

#### a. the aff bans both procompetitive arrangements as well as anticompetitive ones

Koscher 9 (R. Justin Koscher-\* J.D. DePaul University College of Law; B.A., Illinois Wesleyan University. “SEMINAR ARTICLE: A PATENT POOL'S WHITE KNIGHT: INDIVIDUAL LICENSING AGREEMENTS AND THE PROCOMPETITIVE PRESUMPTION”, 20 DePaul J. Art Tech. & Intell. Prop. L. 53, 65-66. Fall 2009. Lexis accessed online via KU libraries, date accessed 1/8/22)

The Federal Circuit has recently questioned such blind adherence to a rule that advocates for the formation of pooling arrangements comprised strictly of complementary patents. 84 The court's decision in U.S. Philips Corporation works to emphasize the inherent procompetitive nature of patent licensing packages comprised of both essential and nonessential patents. 85 As distinguished from per se illegal product tying arrangements, the Federal Circuit determined that the package licensing of essential and nonessential patents was procompetitive. 86 The licensing arrangement was analogized to situations in which a licensor licenses only essential patents and announces that it does not intend to enforce its rights with respect to nonessential patents. 87 The obvious ideological gap discussed in the Federal Circuit's opinion underscores the present disagreement over the competitive realities concerning the structure of patent pools.

#### b. the aff bans patents held by public entities

Mortensen 11 (Peter S. Mortensen-Danish Centre for Studies in Research and Research Policy (CFA), University of Aarhus. “Patentometrics as Performance Indicators for Allocating Research Funding to Universities” CFA Working Paper 2011/1 ISBN 87-91527-76-7, <https://pure.au.dk/ws/files/39714215/WP2011_1_Patentometrics_as_performance_indicators.pdf> , June 2011, date accessed 1/8/22)

(14) Licensing public patents. The licensing of publicly owned patents has become a major goal for many universities, most having set up Knowledge or Technology transfer offices to promote this. Murray(2002) found in in-depth interviews that licensing is an important way of co-mingling between universities and companies and Thursby;Kemp(2002) found that there was an enormous increase in the licensing by US-universities in the 1990’s.

#### 2. “Eliminate”—the aff fiats solvency for patent-tying (rather that increasing prohibitions on patent-tying)

#### Luce advocates for none of these stipulations

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#### T-Congress

#### Expand requires a “change in the law”

Hatter 90 (HATTER, District Judge. Opinion in In re Eastport Associates, 114 BR 686 - Dist. Court, CD California 1990. Google scholar caselaw. Date accessed 7/12/21)

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal.App.3d 202, 211, 221 Cal.Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "[t]he bill would expand the definition of development moratorium." Senate Bill 186, Stats.1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App.3d 15, 22, 239 Cal.Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### That’s change must be a material modification of the language of the statute

Iowa Supreme Court 4 (CADY, Justice. Opinion in State v. Truesdell, 679 NW 2d 611 - Iowa: Supreme Court 2004. Google scholar caselaw, date accessed 9/13/21)

Generally, a material modification of the language of a statute gives rise to "a presumption that a change in the law was intended." Midwest Auto. III, LLC v. Iowa Dep't of Transp., 646 N.W.2d 417, 425 (Iowa 2002); see 1A Norman J. Singer, Statutes and Statutory Construction § 22.1, at 240-41 (6th ed.2002). The existence of this presumption is enhanced "when the amendment follows a contrary... judicial interpretation of an unambiguous statute." Midwest Auto. III, LLC, 646 N.W.2d at 425.

#### Antitrust laws are statutes

Kalbfleisch 61(KALBFLEISCH, District Judge. Opinion in Paul M. Harrod Company v. AB Dick Company, 194 F. Supp. 502 - Dist. Court, ND Ohio 1961. Google scholar caselaw, date accessed 9/11/21)

Defendant asserts that the term "antitrust laws," as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that "the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act." 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that "as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court." Plaintiff's Brief, p. 5.

In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed. 2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the "antitrust laws" defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that "the definition contained in § 1 of the Clayton Act is exclusive." Id., 355 U. S. at page 376, 78 S.Ct. at page 354.

The definition of "antitrust laws" in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term "antitrust laws" could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term "antitrust laws," as used in the statute, as to require no further discussion.

#### Courts cannot create “antitrust law” and cannot “increase prohibitions”

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

#### Violation---the aff isn’t Congress.

#### VOTE NEG:

#### First---Ground---Congressional change guarantees core DAs like horse-trading and politics, and have link uniqueness because of decades of Congressional inertia.

#### Second---Functional Limits---forces aff to have a comparative solvency advocate, which constrains aff choice. It’s try-or-die for an agential constraint because the topic is bidirectional and unlimited.

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#### ‘Antitrust law’ exclude IP.

Gavil ’17 [Andrew I, Jonathan B Baker, William Kovacic, and Joshua D Wright; Professor at the Howard University School of Law and Senior of Counsel at Crowell & Moring LLP; Professor at the George Mason University School of Law, a commissioner of the U.S. Federal Trade Commission from 2006 to 2011; Research Professor of Law at American University, former Director of the Bureau of Economics at the Federal Trade Commission; the Executive Director of the Global Antitrust Institute, professor of law at George Mason University, commissioner of the U.S. Federal Trade Commission from 2013 to 2015; third edition published 2017; Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy, “Defining Competition Policy for a Global Economy,” Ch. 1, p. 5]

At the outset, we raise a point of terminology. Our Casebook speaks of "antitrust law" or "antitrust policy" and "competition law" or "competition policy somewhat interchangeably. A North American practitioner in this field likely calls herself an "antitrust lawyer"—a habit that reflects the vocabulary used in the United States since the late nineteenth century. In the rest of the world, specialists say that they practice "competition law," a phrase rooted in the experience of Europeans under the Treaty on the Functioning of the European Union and in the laws of the European Union's member states.

These terms sometimes are synonyms, but they can have different meanings. The term "antitrust law and policy" sometimes refers to the enforcement of prohibitions against certain conduct by private firms. By contrast, "competition law and policy" tends to embrace a larger range of intervention and policy tools. Examples include scrutiny of public restrictions on entry into a market or the design of an intellectual property system, by which a jurisdiction can influence the level of innovation and competition within its borders. The policy instruments beyond law enforcement include regulations, guidelines, competition advocacy, and speeches by enforcement agency personnel, all of which can influence the direction of competition policy. This Casebook focuses heavily on law enforcement, but it also draws attention to the broader array of public interventions that affect competition and emphasizes measures beyond law enforcement that antitrust agencies use to implement competition policy.

#### Limits and ground---competition and antitrust law are separate literature bases---they double the topic and evade neg ground about business practices.

### 1NC

#### The United States federal government should expand the scope of its core antitrust laws by limiting patent control over living organisms and patent-tying arrangements involving seeds to instances in which the defendant can show the conduct achieves demonstrably procompetitive ends and that it is narrowly tailored to achieve those ends.

#### It’s a PIC out of per-se prohibitions---the counterplan competes by not prohibiting and solves via antitrust strict scrutiny

Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law (Donald, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality,” *Hastings Law Journal*, Lexis)

Since the earliest days of antitrust enforcement, courts have attempted to deal with the fact that certain types of behavior, on their face, present more of a threat to competition than others. This has unfortunately led to the development of a concept of per se illegality which addresses a genuine problem in an unrealistic way. The basic notion of per se illegality-that some types of behavior can be defined as always, or almost always, unjustifiable-is far too vulnerable to attack. In a field as complex as legal regulation of the competitive process, the development of counterexamples to refute any argument with such absolute pretensions is too easy. In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis. The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason." The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement. Strict antitrust scrutiny will not result in radical shifts in the outcome of antitrust cases. Recent per se analysis already contains the seeds of strict scrutiny. Indeed, strict scrutiny may be a better description of the reasoning actually underlying these cases than the term "per se." Little would be lost, apart from semantics, by the change to strict scrutiny. What would be gained would be a much more defensible and enduring standard of analysis for those who favor rigorous antitrust enforcement.

#### The counterplan is the ideal competitive balance and avoids the drawback of absolute prohibitions

Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law (Donald, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality,” *Hastings Law Journal*, Lexis)

The solution to this dilemma is to abandon the phrase "per se illegal," with its unrealistic connotations of absolute prohibition, yet retain a stringent test for particularly suspect activity. This new test must place a heavy burden of justification upon the defendant, yet not make justification impossible when the defendant's activity is clearly procompetitive. To abandon per se illegality with no alternative but rule of reason analysis would be to send an unwise message of government tolerance of practices threatening competition. But an alternative approach does exist. Rather than defend the absolutism of per se illegality, this Article argues that antitrust analysts should adopt a rule of strict antitrust scrutiny. Particular practices, including those currently subject to per se rules, should place the burden on the defendant to show first, that they were adopted to achieve demonstrable procompetitive ends and second, that they are narrowly tailored to achieve those ends. Unless the defendant can carry this burden, these practices should be declared illegal. Such an analysis preserves the valid insight of per se analysis that certain types of behavior are particularly suspicious without maintaining an indefensible attitude of absolutism with respect to those practices. This Article begins by sketching the history of the concept of per se illegality: its growth from 1940 until the mid-1970s, its retreat during the last decade, and the continuing attacks on it which threaten the existence of the concept as a form of analysis separate from rule of reason principles. The alternative approach of strict antitrust scrutiny will then be explained and the application of that concept to various types of antitrust behavior discussed. Strict antitrust scrutiny, it will be shown, is a far better way of approaching suspect anticompetitive conduct than either the lenient rule of reason or the unrealistically absolute concept of per se illegality.

#### New per se classifications destroy innovation

Schrepel 17, Ph.D. in international antitrust law. He has an LL.M. from Brooklyn Law School and a Master’s Degree from Paris Saclay in France (Thibault, “A New Structured Rule of Reason Approach for High-Tech Markets,” *SUFFOLK UNIVERSITY LAW REVIEW*, 103)

For more than thirty years, a new doctrinal trend has been developing that advocates for per se legality, particularly for all high-tech-market-related practices.10 Focusing on the New Economy, this Article demonstrates why both per se illegality and per se legality are not appropriate doctrines to apply in high-tech markets. Moreover, this Article explains how and under what circumstances monopolizations related to innovation should be judged under a more tailored and structured rule of reason. Courts must consider antitrust law standards and limitations in their judicial analyses. For instance, antitrust law constantly shifts as new technologies emerge, most notably with the sophistication of related analyses. These advances and changes are reshuffling the cards for judicial consideration. It is now necessary for courts to eliminate automaticity—and therefore, per se standards—from all their antitrust law analyses related to high-tech markets.11 In general, those supporting per se illegality often argue that this standard allows courts to issue rulings over a shorter time period, thereby saving parties money.12 On the other hand, per se illegality creates false positives and does not enable courts to apply progressive antitrust law, which is most important for innovation-related issues. Applying per se legal doctrines to innovation related issues can lead to drastically differing results. For instance, a practice formerly deemed anticompetitive could not be procompetitive under a strict per se doctrine analysis. This radical change from anticompetitive to procompetitive has to be avoided for innovation-related issues, primarily because some of these markets are a “winner-take-all” feature.13 Even though market shares are moving more quickly in high-tech markets than others, the judicial system must ensure that it is not creating winners by ruling unfairly.14 Furthermore, as Frank H. Easterbrook explained, a practice mistakenly condemned by a court is likely to be condemned in future cases, thus remaining illegal.15 The market, however, shows signs that it rather than the judiciary will eventually take charge of the illegal practices, similar to how a new rival takes down high prices.16 In other words, “the economic system corrects monopoly more readily than it corrects judicial errors.” 17 Therefore, per se illegality cannot be justified because, on balance, it creates more risk than benefits. Moreover, per se illegality has never proved to be efficient in regards to saving time and money. Those supporting per se legality essentially argue for the same benefits, adding that it makes provisions to avoid false positives.18 But what are the costs of such a policy? Can high-tech markets afford to legalize anticompetitive practices in the long run?

#### Pharma innovation is strong BUT dependent on regulatory certainty

Levit 7-13-202, JD, MA, Counsel and Co-Chair, Life Sciences Policy and Regulatory Group, DLA Piper (Geoffrey, Written testimony before the Subcommittee hearing: “A Prescription for Change: Cracking Down on Anticompetitive Conduct in Prescription Drug Markets”, pg. 6-7, Accessible at: https://www.judiciary.senate.gov/meetings/a-prescription-for-change-cracking-down-on-anticompetitive-conduct-in-prescription-drug-markets)

The competitive market with appropriate IP protections is the engine that drives the innovative biopharmaceutical R&D ecosystem. The dynamics of the private, market-based system in the U.S. promote incentives for continued innovation and increased patient access to needed medicines while leveraging competition to achieve cost containment.

The U.S. market is structured to take maximum advantage of savings from competition while ensuring Americans have access to innovative and life-saving treatments. Today, the U.S. is the global leader in R&D related to lifesaving 7 treatments and cures. There are nearly 8,000 medicines in development globally, more than half of which are in development in the U.S., including hundreds for conditions like cancer and Alzheimer’s disease.44 The U.S. develops more new medicines than the rest of the world combined,45 precisely because we reject government price setting and protect IP.

As a result, the U.S. biopharmaceutical sector serves as one of the biggest employers and investors in U.S. R&D, fueling the U.S. economy. Biopharmaceutical companies employ 800,000 Americans directly and support 4.7 million jobs nationwide.46 In 2018 alone, the biopharmaceutical industry invested an estimated $102 billion in R&D,47 more than any other industry.48 In fact, the biopharmaceutical industry invests on average six times more in R&D as a percentage of sales than manufacturing industries overall. 49 IP is designed to, and does, foster both innovation and competition. IP protections and regulatory incentives give innovator companies a degree of certainty that their IP is protected—fostering innovation—while at the same time, the specifics of the invention covered by patents are published so others can learn from it and use it as the foundation for future invention and discovery—promoting competition. This public disclosure of inventions spreads knowledge and encourages others (i.e., competitors) to invent around existing patents and find new and different ways to solve problems and develop competing products.

#### Antitrust fears cause pharma companies to abandon R&D

Portuese 21, Dr. Aurelien Portuese, director of The Schumpeter Project on Competition Policy and adjunct professor of law at the Global Antitrust Institute of George Mason University. (7-13-2021, "Blocking Pharma Mergers Will Reduce Drug Innovation and Harm Patients, Says ITIF", ITIF, <https://itif.org/publications/2021/07/13/blocking-pharma-mergers-will-reduce-drug-innovation-and-harm-patients-says>)

Blocking pharma mergers will not lower drug prices, but it could stifle innovation. More competition is generally good and incentivizes innovation, but too much competition has the opposite effect. Instead of thinking about creating new and innovative drugs, companies operating in those conditions will focus on cutting the prices of existing treatments in a bid to stay competitive in the near term. That dries up revenues they would otherwise use to make longer-term investments in new research and development.

This is not an outcome we want. If antitrust laws disincentivize innovation, patients will eventually stop benefitting from the innovative treatments they need.

#### Research counters inevitable outbreaks---those are bad.

McDole 21, \*Jaci McDole, JD, senior policy analyst covering IP and innovation policy at the ITIF. \*\*Stephen Ezell is vice president, global innovation policy, at the ITIF. (4-29-2021, "Ten Ways IP Has Enabled Innovations That Have Helped Sustain the World Through the Pandemic", *ITIF*, <https://itif.org/publications/2021/04/29/ten-ways-ip-has-enabled-innovations-have-helped-sustain-world-through>)

Innovation can—and does—happen anywhere and at any time. As society ground to a halt in 2020, innovators around the world worked tirelessly to develop treatments, vaccines, and solutions to COVID-19 pandemic-related challenges. From personal protective equipment (PPE) to treatments and vaccines to autonomous delivery robots to remote and social distancing solutions for the workplace, intellectual property (IP) played an indispensable role in enabling research, development, and commercialization of many of the innovations meeting the challenges of the pandemic. IP enables start-ups to gain access to much-needed capital. IP gives innovators the confidence to invest in research and development (R&D) and provides incentives for commercialization. Indeed, it is difficult to innovate without the protection of ideas.

Despite this, some—particularly anti-business IP opponents—have blamed IP rights for a host of problems, including limited access to therapeutics, vaccines, and biotechnology. They offer seemingly simple solutions—weaken or eliminate IP rights—and innovation will flow like manna from heaven. Eliminating IP rights might accelerate the diffusion of some pre-existing innovations, but it would absolutely limit future innovations. Innovators, a bit like Charlie Brown kicking the football held by Lucy, would be wary of trusting governments who might say, “Well, this time we won’t take away your IP rights, so go ahead and invest large amounts of time and money.” Given the nature of COVID-19, nations around the world cannot afford to take this risk. Future pandemics and other challenges for which we will need to rely on IP-protected innovations to overcome are near certain to arise.

### OFF

Patent law CP;

#### The United States federal government should amend the Patent Act of 1970 to prohibit the patenting or patent control of any living organism, including seeds.

#### The Supreme Court of the United States ought to rule that the patenting or patent control of any living organism, including seeds, is prohibited by the Patent Act of 1970.

#### The United States Patent and Trademark Office should

#### ---Create an internal memorandum that any future patent over living organisms should be refused

#### ---Issue an internal memorandum that any current patent over living organisms should not be renewed

#### ---Announce the aforementioned planks publicly and create binding enforcement mechanisms for said planks

#### Solves the aff best---Courts are hesitant to limit the scope of patents absent direct reformation of patent law.

Lemley ’7 [Mark; January; Law Professor at Stanford University; Boston College Law Review, “Ten Things to Do About Patent Holdup of Standards (And One Not To),” Vol. 47]

C. Antitrust Law Can't Solve the Holdup Problem

Note what is not on this list: antitrust law. I have made ten more or less radical proposals for doing something about patent holdup, and not one of them mentions antitrust, except to say antitrust law should get out of the way of SSOs. That's not an accident. I think antitrust law serves a valuable purpose, but where the holdup problem is concerned, it is a backstop. In this particular circumstance, it's a backstop that's going to apply only if private efforts in SSOs and IP law have already failed us.

Even then, it is not clear that antitrust law is up to the task of policing patent holdup. 88 Courts may be reluctant to second-guess what they see as the judgment of patent law to give certain rights to patent owners. 89 Certainly, some courts have shown undue deference to patents even in circumstances that more clearly violate the antitrust laws. 90 Further, proving an antitrust violation requires detailed evidence [\*168] of both causation and intent, something that may be difficult even when, as a policy matter, a patentee should not be permitted to extend its rights. 91 We have yet to see a successful contested prosecution of standard-setting abuse. 92 Antitrust law can play a role here in extreme cases, such as in In re Ramous, Inc. 93 But if we design the patent law and the SSO rules correctly, those cases should not arise.

CONCLUSION

Patents provide needed incentives. But in certain circumstances, they can give a patentee too much power to restrict an integrated product on the basis of a patent covering a minor component of that product. That fact, coupled with unscrupulous behavior of some patentees, creates serious problems in the IT industry in general and SSOs in particular. Patent law should seek to realign incentives so that the value any given patentee can capture bears a reasonable relationship to the contribution its invention makes. SSOs should be diligent in finding out what patents exist and what it will cost to license them. And antitrust law should facilitate rather than interfere with this process. If we can accomplish these changes, we can ensure that patent law serves its proper role in encouraging rather than stifling innovation.

### OFF

#### DOJ-Antitrust Division criminal enforcement of price-fixing generics is a sufficiently funded priority now.

Murphy 21, partner in the firm’s Regulatory Practice Group. A former federal prosecutor, Justin counsels and represents corporate and individual clients involved in government enforcement of complex antitrust, fraud and all phases of white-collar criminal and related civil matters, including internal corporate investigations, False Claims Act (FCA), Foreign Corrupt Practices Act (FCPA), e-discovery, data privacy, cybersecurity, securities enforcement, federal grand jury, inspector general investigations and trials and appeals (Justin, “Expect More Criminal Enforcement & What you Can do to Minimize Your Risk,” *The National Law Review*, <https://www.natlawreview.com/article/expect-more-criminal-enforcement-what-you-can-do-to-minimize-your-risk>)

Antitrust cartel and related collusive scheme enforcement is poised to increase. Several factors support this: (1) the Antitrust Division (the Division) has a 10% budget increase for Fiscal Year (FY) 2021; (2) proposed legislation that would increase its budget by $300 million; (3) Democratic administrations have traditionally been more aggressive in enforcing antitrust laws; (4) according to the US Department of Justice (DOJ), last year the Division opened the most grand jury investigations in almost 20 years and by the end of 2020 had the most open grand jury investigations in a decade; (5) increased coordination with international law enforcement agencies, including the Division recently signing a number of cross-border agreements, maintaining active memberships in multilateral organizations dedicated to cross-border antitrust enforcement cooperation and a DOJ official recently noting they have been working at strengthening their relationships with international law enforcement agencies during the pandemic and they expect this to benefit international coordination on investigations and (6) as pandemic limitations on in-person investigative tactics subside (including search warrants and knock and talk interviews, among others), expect a return to overt tactics related to open grand jury investigations. Historically, cartel enforcement has increased following economic downturns and substantial federal stimulus packages. For example, after the 2008 financial crisis and the 2009 Recovery Act, the DOJ filed 60% more criminal cases than in prior years. We expect this trend to continue in the wake of the unprecedented government stimulus packages passed in 2020 and 2021 and additional potential government spending on infrastructure. In addition to the increased resources, the Division has stepped up its criminal enforcement program with the creation and recent expansion of the Procurement Collusion Strike Force (PCSF), the expansion of criminal investigations and prosecutions into labor markets, higher expectations for corporate cooperators and new potential benefits for corporate entities with compliance programs addressing antitrust violations. Below we discuss the sectors most likely to be implicated by increased criminal antitrust enforcement, the PCSF and what steps can be taken to prepare and minimize risk in this environment. Based on the trends described above and our recent experience at the DOJ, we expect antitrust criminal enforcement to focus in at least the following industries: Healthcare – The DOJ remains active in this sector with its ongoing generics investigations and prosecutions and other cases relating to market allocation and labor markets. In fact, all of the charged labor market cases thus far have been in the healthcare industry. The DOJ has stated that investigations and prosecutions for violations in the healthcare sector remain its top focus and stimulus spending will likely serve to increase the DOJ’s attention to healthcare markets. Although healthcare compliance policies have often focused on other fraud and abuse issues, such as the Anti-Kickback Statute and Stark Law, compliance with antitrust laws – including for human resources – is now more critical than ever. In addition, the recently signed Competitive Health Insurance Reform Act significantly narrows the exemption for health and dental insurers from the federal antitrust laws.

#### New per se violations are policed by the criminal components of the Antitrust Division

Fishman 19 (Todd, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement,” *JD Supra*, <https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/>)

Under stated policy, the Antitrust Division does not criminally prosecute cases under the more permissive rule of reason standard, but reserves its discretion only to charge conduct considered to be per se illegal—that is, restraints of trade classified as unlawful without assessing potential precompetitive benefits and overall market impact. So a judicial finding that charged conduct comprises an offense that should be evaluated under the rule of reason effectively amounts to a dismissal. The trial court’s ruling in Kemp precluding antitrust prosecutors from proceeding on a per se theory, and the Tenth Circuit’s criticism of that ruling, provide unique insight into the modern use of the Sherman Act as a criminal statute. The Sherman Act, and in particular a per se violation of the Sherman Act, often functions as a blunt prosecutorial instrument. The Sherman Act tends to limit the per se rule of illegality to those restraints among horizontal competitors, with which courts have had considerable experience and where the restraints are deemed facially anticompetitive and lack any plausible business justification. But such condemnation is not static. The principles animating antitrust law have evolved with the century-old Sherman Act, dynamically moving from the formalistic approach towards horizontal price-fixing agreements applied in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), to the recognition that not all price-fixing arrangements unreasonably eliminate competition in Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1, 23 (1979), to more complex notions that emphasize economic realities of business relationships as set forth in Business Electronics v. Sharp Electronics, 485 U.S. 717, 726 (1988). As with antitrust doctrines themselves, the judgment that guides prosecutorial discretion should take into consideration the complexities and nuances of markets. This article reviews a series of criminal antitrust cases in which indicted defendants have challenged the application of the per se rule of illegality, with only a small degree of success. Still, to the extent the Sherman Act continues to be a weapon of choice for U.S. prosecutors, practitioners should consider whether the rule of reason can function as a useful tool in pre-charging discussions and, if need be, seeking dismissal of an indictment. Policy and Provenance The DOJ’s policy on prosecuting antitrust crimes focuses, as a matter of institutional discretion, on per se unlawful conduct. The current version of the U.S. Attorneys’ Antitrust Manual provides that “current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.” U.S. Dep’t of Justice, Antitrust Division, Manual at III-12 (5th ed. 2018). The Antitrust Manual, however, states that “[t]here are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate.” According to the Manual, those “situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.”

#### That trades off. The criminal Antitrust Division has limited resources and will triage when faced with resource constraints

Powers 19, Acting Assistant Attorney General @ DOJ Antitrust Division (Richard, “Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the American Bar Association Public Contract Law Section's 2019 Procurement Symposium,” <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar>)

Instead, I will focus my comments on the criminal program. As the DAAG responsible for criminal enforcement, I supervise approximately 100 prosecutors who are located in Washington, DC, New York, Chicago, and San Francisco. Divided into five sections that are responsible for different regions of the country, these dedicated prosecutors conduct grand jury investigations into possible violations of antitrust laws and related criminal conduct, and prosecute resulting criminal cases in federal district courts across the nation. Much like our fellow prosecutors in other parts of the Department of Justice, we work with several law enforcement partners to investigate suspected criminal violations, including the Federal Bureau of Investigation and agents from the Offices of Inspector General from agencies like the Department of Defense, Postal Service, Department of Transportation, and Internal Revenue Service, among others. So that is who we are, and now I’ll turn briefly to what it is we do on the criminal side of antitrust law enforcement. In the words of a former Assistant Attorney General who headed the Division, Anne Bingaman, “[c]riminal enforcement against the most serious antitrust offenses is our core mission.” The heart of our criminal program is the 1890 Sherman Act, which provides that “[e]very . . . conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” In practice, we prosecute criminally only certain types of conspiracies to restrain trade. Specifically, we prosecute conspiracies between horizontal competitors to fix prices, rig bids, or allocate markets. These are the types of agreements the Supreme Court has recognized as categorically or “per se” illegal. And these are the types of agreements “that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system.” Over the years, we have found that the range of industries, products, and services affected by criminal antitrust conspiracies is as expansive as peoples’ temptation to cheat for profit. From conspiring to fix the prices of the canned tuna you buy in the grocery store, to rigging the bids for financial products, we have seen a lot in the history of the program. And our experience has taught us that this type of criminal behavior is not limited to commercial businesses that impact private consumers directly. Rather, we have seen—and continue to see—a large volume of cases affecting public procurement. Along with other forms of fraud and public corruption, criminal antitrust conspiracies pose a grave threat to the integrity of government procurement processes. From an enforcer’s standpoint, we care about criminal antitrust conduct in this area because of the harm it poses to government agencies, and by extension the taxpayers. (I’ll address that further in a moment.) But why should you care, as professionals involved in public procurement? I’ll tell you: because your employer or client could be subject to severe penalties for illegal conduct. Violations of criminal antitrust laws result in significant fines for companies and prison time for individuals. The maximum term of imprisonment is 10 years for individuals, and companies can face fines of up to $100 million or twice the gain or loss resulting from the conspiracy offense. To give you a recent example, just last month StarKist Co. was sentenced to pay a criminal fine of $100 million, the statutory maximum, for its role in a conspiracy to fix prices for canned tuna sold in the United States. And for individuals, the threat of jail time is real. To give another recent example, in June two executives were sentenced to 18 months and 15 months respectively for their role in an international freight forwarding price-fixing conspiracy. Moreover, in addition to criminal penalties, there are often other collateral effects, as well. Civil lawsuits often follow criminal investigations and can result in treble damages. And, importantly for those in the public procurement field, a criminal conviction nearly always leads to debarment. Having described the significant risks companies and individuals face when they collude to fix prices, rig bids, or allocate markets, I want to pause for a moment and highlight a unique enforcement tool used by the Antitrust Division that provides a significant incentive to self-report participation in these schemes. Under the Division’s Leniency Program, the first to self-report can receive a complete pass in return for cooperating with the Division’s investigation and meeting the Program’s other requirements. That means no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees. Moreover, companies that win the race to the door and receive leniency can achieve de-trebling and removal of joint and several liability under the Antitrust Criminal Penalty Enhancement and Reform Act for providing timely and satisfactory cooperation in any follow-on litigation. While the benefits of leniency speak for themselves, it’s worth considering the other side of the equation. For those who don’t win the race for leniency, the Division will pursue the prosecution of all remaining members of the conspiracy, especially the culpable executives. So, the choice is stark: a complete pass, or else face severe monetary penalties, potential criminal conviction, and the associated risks such as debarment, lengthy prison sentences for culpable executives, and substantial exposure in private litigation. The last point I want to make about our leniency program is our firm commitment to both the transparency of its application and the predictability of outcomes. To that end, our Division’s public website contains a number of documents relating to leniency, including the Corporate Leniency Policy, the Individual Leniency Policy, a set of frequently asked questions, and other helpful documents. Now that I’ve given you some background on who we are and what we do, I want to focus the rest of my remarks on the public procurement space and antitrust risks. Like any enforcer, the Antitrust Division’s criminal program must decide where to allocate limited resources. What should we prioritize, and why? I am an Infantry Officer by training, and one of the things I learned in the Army is that first you have to identify what the problem is before you can devise a plan to solve it. Having served as the DAAG for criminal enforcement for 18 months now, I have concluded that criminal antitrust conduct in the public procurement area is a distinct problem that demands attention. And I’m here to give you the message that we are giving a hard look at the public procurement space, and we will be devoting significant investigative resources to it going forward. Why? Our experience investigating antitrust conspiracies in various industries, along with plain common sense, tell us that the public procurement space is particularly vulnerable to collusion. Moreover, when antitrust violations do happen, they result in significant financial harm to American taxpayers, due to the dollar values involved. Let’s talk about vulnerabilities first. Bid rigging is the typical form of collusion we see in public contracting—that is, an agreement among competitors that limits competition in the bidding process. In a typical scenario, bidders agree among themselves who should win the contract and then arrange their bids in a way—such as through complementary bidding or bid rotation—to ensure the designated company wins the bid. Since such conspiracies often last for years, government purchasers—and ultimately, the taxpayers—pay more for goods or services than they otherwise would have in a truly competitive market. The bidding processes involved in public procurement make this area uniquely vulnerable to collusion for several reasons. For one, the sheer monetary value of government projects presents an enticing opportunity for greed to prevail over ethical conduct. Next, regulatory requirements governing procurement procedures can make the process predictable and thus subject to manipulation through collusion. Many agencies have repetitive or regularly scheduled purchases, for instance. Another factor that makes it easier for sellers to collude is that there are often relatively few qualified sellers for a given project, given that government agencies often require specialized goods and services. In addition, rush or emergency projects arise in government procurement, such as disaster-relief projects, and the exigency creates opportunities to cheat. Finally, the large volume of goods and services contracted by the government creates monitoring difficulties, even with the existence of 72 statutory Inspectors General across the U.S. federal government. Given the growth in government spending over time, it is difficult for audit and investigation resources within agencies to keep pace. So why do these vulnerabilities pose a problem? Setting aside the inherent importance of deterring, detecting, and prosecuting illegal conduct wherever it’s found, those of you in the audience today know that the sheer amount of money flowing from the government to contractors to purchase a broad array of goods and services makes any criminal conduct that cheats the taxpayer especially impactful. Let’s look at a current snapshot. Roughly one out of every ten dollars of federal government spending is allocated to government contracting. Following a brief downward trend between 2010 and 2015, federal contract spending rebounded and climbed from $440 billion in 2015, to $470 billion in 2016, to $510 billion in fiscal year 2017. The growth continues: in fiscal year 2018, the federal government spent more than $550 billion—or about 40% of all discretionary spending—on contracts for goods and services. This represents more than a $100 billion increase from 2015, largely due to defense spending. In 2018, the Department of Defense alone spent nearly $113 billion on procurement. Of course, federal money spent on goods and services is not confined to federal agencies. The 2018 federal budget included more than $696 billion in grants to state and local governments. While healthcare accounts for much of that total, more than $79 billion of this money went to fund major public physical capital investment. Since we are in California today, I’ll highlight that the state of California received approximately $84.6 billion in grants from the federal government in 2018, with about $21.9 billion for non-healthcare spending. With all of this money flowing to government contracts, therefore, even a small percentage lost to bid rigging or price fixing or other types of related criminal conduct inflicts great harm on the government and the taxpayers. So here is another eye-popping number: the Organisation for Economic Co-operation and Development (OECD) estimates that eliminating bid rigging could help reduce procurement costs by 20% or more. Twenty percent. While precise estimates are hard to come by, if OECD’s estimate is even half-way accurate, reducing illegal and anticompetitive collusion in procurement could save U.S. taxpayers tens of billions of dollars per year. In short, even the most conservative estimates of illegal conduct in the public procurement space lead one to the conclude that the aggregate harm to the public fisc is enormous. But let’s drill down past abstractions and generalities. We know collusion in public procurement is a problem. We know because “[w]hat’s past is prologue”: we have seen this conduct before, and we are seeing it now in our investigations. The Antitrust Division has a long history of prosecuting criminal antitrust conspiracies that target government contracts, ranging from construction and disaster recovery projects to food and hardware. Let me point you to just a few examples from over the last few decades: From the late 1970s into the 1980s, the Division prosecuted hundreds of corporations and individuals for bid rigging in road construction projects in multiple states around the country. In the early 1990s, we uncovered a decade-long conspiracy to rig bids on frozen seafood contracts awarded by a Department of Defense purchasing center and prosecuted the multiple individuals and companies responsible. After Typhoon Paka struck the island of Guam in December 1997 and caused hundreds of millions of dollars in damage, a government official conspired with contractors to award reconstruction projects through rigged bids and took bribes to line his pockets. As a result of our investigation, five individuals pled guilty to rigging bids for these emergency repair contracts, and that government official was convicted at trial and sentenced to 8 years in prison—one of the longest prison sentences ever imposed in an antitrust case. Moving to the early 2000s, we rooted out bid rigging in humanitarian aid water treatment construction projects in Egypt, which were funded by the U.S. Agency for International Development. The successful prosecution resulted in guilty pleas by four companies, fines of over $140 million, and a three-year prison sentence for a defendant who was convicted at trial. We uncovered yet more criminal conduct taking advantage of government aid programs in the mid-2000s, when the Division and our investigative partners prosecuted multiple individuals in multiple states for schemes to rig bids in connection with the E-Rate Program, which provides discounts to help schools and libraries in disadvantaged areas obtain internet access and telecommunication services. In one prominent case, a consultant was convicted at trial of 22 counts of bid rigging and fraud, sentenced to 7.5 years in prison, and debarred for 10 years. Which brings me to the present day. Recently, we prosecuted one of the more significant procurement-related cases in the Division’s history—one that has helped inform our renewed focus on this area. In November 2018 and March 2019, five South Korean oil companies agreed to plead guilty for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. In total, the companies have agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements. (These companion civil settlements are important for a reason to which I’ll return in a moment.) The Division also indicted seven individuals in this case for conspiring to rig bids and to defraud the government, and one executive was also charged with obstruction of justice. This investigation is the latest example of our commitment to holding corporations and individual executives accountable when they defraud the U.S. government, victimize taxpayers, and interfere with the integrity of our investigations. So, again, how do we know there’s a collusion problem in public procurement? Because we see the criminal conduct in this space. And common sense tells us there’s a lot more of it going on than we’ve detected. Right now, the Antitrust Division has over 100 open grand jury investigations—more than at any point since 2010. Of those, more than one third relate to public procurement or otherwise involve the government being victimized by criminal conduct. And we intend to take measures to increase our detection rate going forward. Having identified the problem as we see it, let me now turn to what the Antitrust Division is doing about it. The mission of our criminal program overall is to aggressively deter, detect, and prosecute individuals and organizations that collude and undermine competition. In the context of government procurement, specifically, our objective must be first to deter and prevent antitrust and related crimes on the front end of the procurement process. When crimes do happen, we must also effectively investigate and prosecute such conduct on the back end of the procurement process, both to punish the wrongdoers and deter others from following the same path. Deterrence must be a primary aim of any prosecuting agency for a reason that is obvious but bears repeating: prosecution can never fully un-do the harm of a crime, whether it be a murder or a financial crime. Enforcement through prosecution is, inherently, of limited remedial value because the money is already out the door. No matter how large the fine or restitution in a successful prosecution, it is impossible to reverse the harm that has been done by anticompetitive conduct and recover every cent on the dollar. There are many ways government enforcers can seek to deter bad conduct. I want to talk about three: First, one important way enforcers can deter crime is by giving clear notice of what conduct they will prioritize investigating and prosecuting. Through our public statements and actions, government enforcers should be as transparent as possible about our investigative priorities and the ways in which individuals and companies can steer clear of illegal conduct.

#### Generic price-fixing spikes drug costs

Mulcahy 19, Senior Policy Researcher @ RAND (Andrew, “Price-Fixing Case Reveals Vulnerability of Generic Drug Policies,” *RAND*, <https://www.rand.org/blog/2019/07/price-fixing-case-reveals-vulnerability-of-generic.html>)

A massive lawsuit (PDF) filed in May by 44 states accuses 20 major drug makers of colluding for years to inflate prices on more than 100 generic drugs, including those to treat HIV, cancer, and depression. If true, the alleged behavior is not just a violation of antitrust law, but also a betrayal of the government policies that created and defended the entire generic drug industry. Most prescriptions in the U.S. today—9 in 10—are filled with generics, which are just as safe and effective as their brand-name equivalent. And yet generics account for only 22 percent of U.S. prescription drug spending. These prices are so low because of competition between makers of different versions of the same generic drug. The more competing generic alternatives, the lower the price, theoretically right down to the marginal cost of manufacturing the pill. This success is the result of decades of careful federal and state policymaking, all geared towards introducing competition in prescription drug markets. The entire generic industry has its origins in the Hatch-Waxman Act of 1984. Prior to Hatch-Waxman, a company that wanted to sell a competing version of a drug whose patents had expired had to conduct lengthy and expensive clinical trials to get approval from the U.S. Food and Drug Administration. Hatch-Waxman established a quicker, less-expensive path to FDA approval that leans on the scientific research supporting the already approved brand-name drugs. Hatch-Waxman also created incentives for generic drug makers to challenge drug patents that prevent competition. Successful challengers win a 180-day period of exclusivity during which their generic is the only one allowed to compete with the brand-name drug. The floodgates open and additional competition pushes prices down further after the 180-day period. Other policies—public and private—evolved to promote generic competition. State laws allow generics to be freely substituted for brand-name drugs by pharmacists. Health plans aggressively push generics by offering higher dispensing fees to pharmacies and lower copays to patients. All these policies aim to promote competition in order to reduce how much Americans spend on drugs. Overall, they've succeeded. One estimate puts savings to patients and health plans from generic drugs at $265 billion (PDF) in 2018 alone. Lower prices also improve adherence to treatment regimens for chronic conditions, which helps avoid downstream health care costs. But where patients and health plans benefit the most from competition, the profit margins realized by generic drug makers are the slimmest. Margins can be razor thin or nonexistent for run-of-the-mill generic pills or capsules. Generic drug makers have always had an eye out for opportunities to widen those margins. In the past, for example, the profits realized during the 180-day exclusivity period were so comparatively enormous that generic companies camped out in FDA's parking lot to be the first to file a challenge. But then after a policy change allowed it, companies began to share exclusivity (thereby shrinking the incentive to be first) and generic drug makers increasingly settled patent litigation with brand-name drug makers rather than fight to a final decision. The settlements usually allow the generic drug maker to enter the market—just not immediately—in exchange for a large lump-sum payment. While brand-name and generic drug makers claim these “pay for delay” deals benefit everyone, the Federal Trade Commission disagrees. Patients, after all, are left paying brand-name prices for years. The FTC has waged a campaign against such settlements for nearly a decade. Eventually, for most blockbuster drugs, there are many competing generic versions and therefore lower prices. But competition is more anemic—and sometimes absent—in lower-volume corners of the prescription drug market. Shortages and price spikes are common when there are only one or two manufacturers. Drugs with complex manufacturing requirements, such as injected and infused drugs, also typically have fewer generic competitors and higher prices. Likewise, competition from “biosimilar” versions of biologic drugs (which, despite important differences with generics, also aim to lower prices through competition) has yet to take off as hoped and prices for biologics remain high. The U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes. In short, it's no secret that the U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes if policymakers choose to do so. The price-fixing allegations in the lawsuit, if correct, raise the level of concern. They suggest that failures of competition in the generic industry are more troubling—and more widespread—than anyone knew. If the alleged price increases—some up to 1000 percent—are true, patients and health plans have been overcharged to the tune of “many billions of dollars,” according to the lawsuit. The broader damage done to trust in generic drug makers may be irreparable. Especially as spending on prescriptions overall is increasing, the U.S. needs a fair, competitive generic drug industry. It shouldn't take more aggressive policing of antitrust laws to get one.

#### High drug costs lead to ABR

Duff-Brown 15 - communications manager for the Center for Health Policy/Center for Primary Care and Outcomes Research, citing peer reviewed Stanford research (Beth, “Out-of-pocket health costs tied to antimicrobial resistance,” https://med.stanford.edu/news/all-news/2015/07/out-of-pocket-health-costs-tied-to-antimicrobial-resistance.html)

The data set for the main analysis is from the first global report by the World Health Organization on antibiotic resistance. The report, which came out last year, indicates that antimicrobial resistance is a “serious, worldwide threat to public health.” And the Stanford researchers believe this is, in part, due to high out-of-pocket costs. “To our knowledge, we are the first to emphasize the idea that copayments imposed in the public sector of a health-care system lead to overuse of a medication or product in the private sector,” the authors wrote. “Conventional teaching in health economics — which focuses on their effect on the demand for care within a single insurance system — is that copayments tend to discourage use.” The most prominent and convincing evidence for this, the authors wrote, was the 15-year RAND health insurance experiment conducted in six U.S. cities on 2,000 households. That study found that the increase in copayments led to a significant decline in the use of antibiotics, “providing evidence that the demand for health care is not completely inelastic.” However, when the regulated public sector and unregulated private sector are selling the same or similar products, a price increase in one does not necessarily reduce the overall demand, the authors found. In fact, it may increase demand because higher dosages of drugs will be required to fight more resistant microbes, which are the result of poorly made and prescribed drugs in the private sector “Even if total consumption of antibiotics were unchanged, the shift of more patients to less-regulated providers could lead to more antibiotic resistance,” the authors wrote. Global health challenge “Antimicrobial resistance is a growing, global public health challenge that could undo decades of progress in declining morbidity and mortality from infectious diseases,” the authors wrote. “Common bacterial pathogens have increasingly developed resistance to most of the currently available antibiotics. This phenomenon, coupled with a dry antibiotic pipeline, has led the World Health Organization to warn of a ‘post-antibiotic era, in which common infections and minor injuries can kill.’”

#### AMR causes lots of people to die.

Silverman ’16 (Rachel Silverman – MPhil with Distinction in Public Health @ the University of Cambridge, Senior Policy Analyst and Assistant Director of Global Health Policy @ the Center for Global Development, focusing on global health financing and incentive structures, “Confronting Antimicrobial Resistance: Can We Get to Collective Action?” 19 April 2016, https://www.cgdev.org/blog/confronting-antimicrobial-resistance-can-we-get-collective-action)

Antimicrobial resistance is already causing huge harm – and the worst is yet to come.

To open the panel, Dr. Chan issued a serious warning about the size and scope of the AMR threat: “everyone will be affected if we do not address this problem.” AMR is already responsible for an estimated 700,000 global deaths each year, 50,000 of which take place in the US and Europe. Extensively drug-resistant (XDR) tuberculosis—cases where the most effective first- and second-line drugs are rendered useless—infected an estimated 47,000 people worldwide in 2014, only one ‘last-line’ antimicrobial is available to reliably treat gonorrhea, and few new antimicrobial drugs are in the development pipeline. According to the latest review, AMR could cause 10 million deaths each year by 2050, with knock-on effects draining many trillions from the global economy. Summers suggested that AMR and potential pandemics, alongside climate change and nuclear proliferation, represent the top three existential threats to life on earth as we know it. And as Dr. Chan explained, the worst-case scenario implies the end of modern medicine as we know it.

Even worse, Summers suggested that AMR seems like a “quintessential non-linear phenomenon, and therefore more dangerous.” Year by year the effects are small and mostly invisible. But at some point in the future they could suddenly become catastrophic, like a “levee that doesn’t hold and unleashes a flood.” Dr. Chan concurred that “the tipping point is not predictable because…microbes are invisible. We don’t even know when they’re going to make the switch” to become resistant to existing drugs.

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#### Text: The 50 United States and relevant subnational entities should interpret any patent control over living organisms as illegal per se – expanding the scope of their antitrust laws to eliminate patent-tying arrangements involving seeds.

#### State antitrust is enforceable and solvent.

Lange et al. 21, \*Perry A., JD, antitrust lawyer, vice-chair of the ABA Antitrust Section’s Joint Conduct Committee. \*Brian K. Mahanna, JD, former chief of staff and deputy attorney general in the Office of the New York State Attorney General, \*Nicole Callan, JD, vice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, \*Álvaro Mateo Alonso, LLM, Law Degree, antitrust lawyer. (3-5-2021, "Developments in Antitrust Law: Keep an Eye on New York", *WilmerHale*, Full report accessible at: https://www.wilmerhale.com/en/insights/client-alerts/20210305-developments-in-antitrust-law-keep-an-eye-on-new-york)

Although much attention recently has been focused upon debates in Congress, potential legislative changes to U.S. antitrust law are not limited to proposals at the federal level. Many states are considering changes to their own antitrust laws, which usually can be enforced by state attorneys general and private plaintiffs. Importantly, New York legislators have introduced two bills that propose sweeping changes to the State’s antitrust law, the Donnelly Act, building on measures introduced in New York’s last legislative session.

These proposals, if enacted, would make New York’s single firm conduct statutory provisions the most aggressive in the United States and would give the New York Attorney General a more prominent role in reviewing transactions—including by creating a first-of-its-kind state merger notification requirement. These changes would allow New York’s antitrust law to reach a range of conduct not actionable under any existing federal or state antitrust law, and would introduce European-style antitrust standards to New York. Accordingly, this reform would create considerable new compliance challenges and risk for companies potentially subject to New York antitrust law, whether or not those companies are located in New York.

Other U.S. states and territories are considering antitrust law changes, but the New York proposals are the most significant. Although much of the conversation concerning developments in antitrust law has focused on “Big Tech” companies, these proposals would affect businesses across all sectors of the economy. This alert discusses these legislative proposals and key implications for businesses.

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#### Per se violations make the action criminally illegal

Fishman 19 (Todd, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement,” *JD Supra*, <https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/>)

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#### Criminal law upholds a system of genocide against marginalized communities – the alternative is a rejection of criminal violations and an affirmation of abolitionist politics

Rodríguez 8 (Dylan, Professor of the Department of Ethnic Studies at UC Riverside, “Warfare and Terms of Engagement,” *ABOLITION NOW! Ten Years of Strategy and Struggle Against the Prison Industrial Complex*, pg. 91-101 http://criticalresistance.org/wp-content/uploads/2012/06/Critical-Resistance-Abolition-Now-Ten-Years-of-Strategy-and-Struggle-against-the-Prison-Industrial-Complex.pdf)

Behind the din of progressive and liberal reformist struggles over public policy, civil liberties, and law, and beneath the infrequent mobilizations of activity to defend against the next onslaught of racist, classist, ageist, and misogynist criminalization, there is an unspoken politics of assumption that takes for granted the mystified permanence of domestic warfare as a constant production of targeted and massive suffering, guided by the logic of Black, brown, and indigenous subjection to the expediencies and essential violence of the American (global) nation-building project. To put it differently: despite the unprecedented forms of imprisonment, social and political repression, and violent policing that compose the mosaic of our historical time, the establishment left (within and perhaps beyond the US) does not care to envision, much less politically prioritize, the *abolition of* *US* *domestic warfare* and its structuring white supremacist social logic as its most urgent task of the present and future. Our non-profit left, in particular, seems content to engage in desperate (and usually well-intentioned) attempts to manage the casualties of domestic warfare, foregoing the urgency of an abolitionist praxis that openly, critically, and radically addresses the moral, cultural, and political premises of these wars. Not long from now, generations will emerge from the organic accumulation of rage, suffering, social alienation, and (we hope) politically principled rebellion against this living apocalypse and pose to us some rudimentary questions of radical accountability: How were we able to accommodate, and even culturally and politically *normalize* the strategic, explicit, and openly racist technologies of state violence that effectively socially neutralized and frequently liquidated entire *nearby* populations of our people, given that ours are the very same populations that have historically struggled to survive and overthrow such "classical" structures of dominance as colonialism, frontier conquest, racial slavery, and other genocides? In a somewhat more intimate sense, *how could we live with ourselves* in this domestic state of emergency, and why did we seem to generally forfeit the creative possibilities of radically challenging, dislodging, and transforming the *ideological and institutional premises* of this condition of domestic warfare in favor of short-term, "winnable" policy reforms? (For example, why did we choose to formulate and tolerate a "progressive" political language that reinforced dominant racist notions of "criminality" in the process of trying to discredit the legal basis of "Three Strikes" laws?) What were the fundamental concerns of our progressive organizations and movements during this time, and were they willing to comprehend and galvanize an effective, or even viable opposition to the white supremacist state's terms of engagement (that is, warfare)? This radical accountability reflects a variation on anticolonial liberation theorist Frantz Fanon's memorable statement to his own peers, comrades, and nemeses: Each generation must discover its mission, fulfill it or betray it, in relative opacity. In the underdeveloped countries preceding generations have simultaneously resisted the insidious agenda of colonialism and paved the way for the emergence of the current struggles. Now that we are in the heat of combat, we must shed the habit of decrying the efforts of our forefathers or feigning incomprehension at their silence or passiveness. Lest we fall victim to a certain political nostalgia that is often induced by such illuminating Fanonist exhortations, we ought to clarify the premises of the social "mission" that our generation of US based progressive organizing has undertaken. In the vicinity of the constantly retrenching social welfare apparatuses of the US state, much of the most urgent and immediate work of community-based organizing has revolved around service provision. Importantly, this pragmatic focus also builds a certain progressive ethic of voluntarism that constructs the model activist as a variation on older liberal notions of the "good citizen." Following Fanon, the question is whether and how this mission ought to be fulfilled or betrayed. I believe that to respond to this political problem requires an analysis and conceptualization of "the state" that is far more complex and laborious than we usually allow in our ordinary rush of obligations to build campaigns, organize communities, and write grant proposals. In fact, I think one pragmatic step toward an abolitionist politics involves the development of grassroots pedagogies (such as reading groups, in-home workshops, inter-organization and inter-movement critical dialogues) that will compel us to teach ourselves about the different ways that the state works in the context of domestic warfare, so that we no longer treat it simplistically. We require, in other words, a *scholarly* activist framework to understand that the state can and must be radically confronted on multiple fronts by *an abolitionist politics*. In so many ways, the US progressive/left establishment is filling the void created by what Ruthie Gilmore has called the violent "abandonments" of the state, which forfeits and implodes its own social welfare capacities (which were already insufficient at best) while transforming and (productively) exploding its domestic warmaking functionalities (guided by a " frightening willingness to engage in human sacrifice"). Yet, at the same time that the state has been openly galvanizing itself to declare and wage violent struggle against strategically targeted local populations, the establishment left remains relatively unwilling and therefore institutionally unable to address the questions of social survival,

grassroots mobilization, radical social justice, and social transformation *on the concrete and everyday terms of the very domestic war(s) that the state has so openly and repeatedly declared as the premises of its own coherence*. PITFALLS OF THE PEDAGOGICAL STATE We can broadly understand that "the state" is in many ways a conceptual term that refers to a mind-boggling array of geographic, political, and institutional relations of power and domination. It is, in that sense, a term of abstraction: certainly the state is "real," but it is so massive and institutionally stretched that it simply cannot be understood and "seen" in its totality. The way we come to comprehend the state's realness-or differently put, the way the state makes itself comprehensible, intelligible, and materially identifiable to ordinary people-is through its own self narrations and institutional mobilizations. Consider the narrative and institutional dimensions of the "war on drugs," for example. New York City mayor Edward Koch, in a gesture of masculine challenge to the Reagan-era Feds, offers a prime example of such a narration in a 1986 op-ed piece published on the widely-read pages of The New York Times: I propose the following steps as a coordinated Federal response to [the war on drugs]: Use the full resources of the military for drug interdiction. The Posse Comitatus doctrine, which restricts participation of the military in civilian law enforcement, must be modified so that the military can be used for narcotics control ... Enact a Federal death penalty for drug wholesalers. Life sentences, harsh fines, forfeitures of assets, billions spent on education and therapy all have failed to deter the drug wholesaler. The death penalty would. Capital punishment is an extraordinary remedy, but we are facing an extraordinary peril ... Designate United States narcotics prisons. The Bureau of Prisons should designate separate facilities for drug offenders. Segregating such prisoners from others, preferably in remote locations such as the Yukon or desert areas, might motivate drug offenders to abandon their trade. Enhance the Federal agencies combating the drug problem. The Attorney General should greatly increase the number of drug enforcement agents in New York and other cities. He should direct the Federal Bureau of Investigation to devote substantial manpower against the cocaine trade and should see to it that the Immigration and Naturalization Service is capable of detecting and deporting aliens convicted of drug crimes in far better numbers than it now does. Enact the state and local narcotics control assistance act of 1986. This bill provides $750 million annually for five years to assist state and local jurisdictions increase their capacities for enforcement, corrections, education and prosecution. These proposals offer no certainty for success in the fight against drugs, of course. If we are to succeed, however, it is essential that we persuade the Federal Government to recognize its responsibility to lead the way. Edward Koch's manifesto reflects an important dimension of the broader institutional, cultural, and political activities that build the state as a mechanism of self-legitimating violence: the state (here momentarily manifest in the person of the New York City Mayor) constantly *tells stories about itself*, facilitated by a politically willing and accomplice corporate media. This storytelling-which through repetition and saturation assembles the popular "common sense" of domestic warfare-is inseparable from the on-the-ground shifting, rearranging, and recommitting of resources and institutional power that we witness in the everyday mobilizations of a state waging intense, localized, militarized struggle against its declared internal enemies. Consider, for example, how pronouncements like those of Koch, Reagan, and Bratton seem to always be accompanied by the operational innovation of different varieties of covert ops, urban guerilla war, and counterintelligence warfare that specifically emerge through the state's declared domestic wars on crime/drugs/gangs/etc. Hence, it is no coincidence that Mayor Koch's editorial makes the stunning appeal to withdraw ("modify") the Posse Comitatus principle, to allow the Federal government's formal mobilization of its global war apparatus for battle in the homeland neighborhoods of the war on drugs. To reference our example even more closely, we can begin to see how the ramped-up policing and massive imprisonment of Black and Latino youth in Koch's 1980s New York were enabled and normalized by his and others' attempts to story tell the legal empowerment and cultural valorization of the police, such that the nuts-and-bolts operation of the prison industrial complex was lubricated by the multiple moral parables of domestic warfare. This process of producing the state as an active, tangible, and identifiable structure of power and dominance, through the work of self-narration and concrete mobilizations of institutional capacity, is what some scholars call "statecraft." Generally, the state materializes and becomes comprehensible to us through these definitive moments of crafting: that is, we come to identify the state as a series of active political and institutional *projects*. So, if the state's self-narration inundates us with depictions of its policing and juridical arms as the righteously punitive and justifiably violent front lines of an overlapping series of comprehensive, militarized, and culturally valorized domestic wars-for my generation, the "war on drugs," the generation prior, the "war on crime," and the current generation, localized "wars on gangs" and their planetary rearticulation in the "war on terror"-then it is the *material processes of war*, from the writing of public policy to the hyper-weaponization of the police, that commonly represents the existence of the state as we come to normally "know" it. Given that domestic warfare composes both the common narrative language and concrete material production of the state, the question remains as to why the establishment left has not confronted this statecraft with the degree of absolute emergency that the condition implies (war!). Perhaps it is because we are underestimating the skill and reach of the state as a pedagogical (teaching) apparatus, replete with room for contradiction and relatively sanctioned spaces for " dissent" and counter-state organizing. Italian political prisoner Antonio Gramsci's thoughts on the formation of the contemporary pedagogical state are instructive here: The State does have and request consent, but it also "educates" this consent, by means of the political and syndical associations; these, however, are private organisms, left to the private initiative of the ruling class. Although Gramsci was writing these words in the early 1900s, he had already identified the institutional symbiosis that would eventually produce the non-profit industrial complex. The historical record of the last three decades shows that liberal foundations such as the Ford, Mellon, Rockefeller, Soros and other financial entities have become politically central to "the private initiative of the ruling class" and have in fact funded a breath-taking number of organizations, grassroots campaigns, and progressive political interests. The questions I wish to insert here, however, are whether the financially enabling gestures of foundations also 1) exert a politically disciplinary or repressive force on contemporary social movements and community based organizations, while 2) nurturing an ideological and structural *allegiance to the state* that preempts a more creative, radical, abolitionist politics. Several social movement scholars have argued that the "channeling mechanisms" of the non-profit industrial complex "may now far outweigh the effect of direct social control by states in explaining the ... orthodox tactics, and moderate goals of much collective action in modern America." The non-profit apparatus and its symbiotic relationship to the state amount to a sophisticated technology of political repression and social control, *accompanying and facilitating the ideological and institutional mobilizations of a domestic war waging state*. Avowedly progressive, radical, leftist, and even some misnamed "revolutionary" groups find it opportune to assimilate into this state-sanctioned organizational paradigm, as it simultaneously allows them to establish a relatively stable financial and operational infrastructure while avoiding the transience, messiness, and possible legal complication of working under decentralized, informal, or even "underground" auspices. Thus, the aforementioned authors suggest that the emergence of the state-proctored non-profit industry "suggests a historical movement away from direct, cruder forms [of state repression], toward more subtle forms of state social control of social movements." The regularity with which progressive organizations immediately forfeit the crucial political and conceptual possibilities of abolishing domestic warfare is a direct reflection of the extent to which domestic war has been fashioned into the *everyday, "normal" reality of the state*. By extension, the non-profit industrial complex, which is fundamentally guided by the logic of being state-sanctioned (and often state-funded), also reflects this common reality: the operative assumptions of domestic warfare are *taken for granted because they form and inform the popular consensus*. Effectively contradicting, decentering, and transforming the popular consensus (for example, destabilizing assertive assumptions common to progressive movements and organizations such as "we have to control/get rid of gangs," "we need prisons," or "we want better police") is, in this context, dangerously difficult work. Although, the truth of the matter is that the establishment US left, in ways both spoken and presumed, may actually agree with the political, moral, and ideological premises of domestic warfare. Leaders as well as rank-and-file members in avowedly progressive organizations can and must reflect on how they might actually be supporting and reproducing existing forms of racism, white supremacy, state violence, and domestic warfare in the process of throwing their resources behind what they perceive as "winnable victories," in the lexicon of venerable community organizer Saul Alinsky. Our historical moment suggests the need for a principled political rupturing of existing techniques and strategies that fetishize and fixate on the negotiation, massaging, and management of the worst outcomes of domestic warfare. One political move long overdue is toward grassroots pedagogies of radical *dis-identification* with the state, in the trajectory of an anti-nationalism or anti-patriotism, that reorients a progressive *identification* with the creative possibilities of insurgency (this is to consider "insurgency" as a politics that pushes beyond the defensive maneuvering of "resistance"). Reading a few a few lines down from our first invoking of Fanon's call to collective, liberatory action is clarifying here: "For us who are determined to break the back of colonialism, our historic mission is to authorize every revolt, every desperate act, and every attack aborted or drowned in blood." While there are rare groups in existence that offer this kind of nourishing political space (from the L.A.-based Youth Justice Coalition to the national organization INCITE! Women of Color Against Violence), they are often forced to expend far too much energy challenging both the parochialisms of the hegemonic non-profit apparatus and the sometimes narrow politics of the progressive US left. CONCLUSION: ABOLITION AND RADICAL POLITICAL VISION I have become somewhat obsessed with amplifying the need for a dramatic, even spectacular political shift that pushes against and reaches beyond the implicit prostate politics of left progressivism. Most importantly, I am convinced that the abolition of domestic warfare, not unlike precedent (and ongoing) struggles to abolish colonialism, slavery, and programmatic genocide, necessitates a rigorous theoretical and pragmatic approach to a counter- and anti-state radicalism that attempts to fracture the foundations of the existing US social form-because after all, there is truly nothing to be redeemed of a society produced through such terror-inspiring structures of dominance. This political shift requires a sustained labor of radical vision, and in the most crucial ways is actually anchored to "progressive" notions of life, freedom, community, and collective/personal security (including safety from racist policing/criminalization and the most localized brutalities of neoliberal or global capitalism).

### Advantage

#### 1---Do not solve---their solvency ev is about Columbia---there is no brink for the point at which they have solved their impact, and every country is an alt cause.

Escobar 16

Laura. 2016. The Political Ontology Of Seeds: Seed Sovereignty Struggles In An Indigenous Resguardo In Colombia. Chapter 2 (p. 14-18) [https://doi.org/10.17615/4k8s-t747 //](https://doi.org/10.17615/4k8s-t747%20//) zh

4.2. Seed Political Economies The expansion of GM maize in Natagaima, Riosucio, Campoalegre, and other communities in Colombia, has brought a new round of enclosures, not only of land, but also of seeds. Rather than commons or public goods, seeds are increasingly conceived, produced, and managed as human-made –that is, scientifically redesigned– commodities available for private property. The enclosure of seeds, as one of the few means of production that remained largely under the control of farmers, is the result of the increased corporatization of global agri-food systems under neoliberalism. Following Friedmann and McMichael (1989) and McMichael (2009)– I refer to a ‘Corporate Seed Regime’, or a complex set of structures, norms and practices of seed governance and political economy, at play in Colombia. Its main institutions and practices include IPRs, biotechnology, the corporatization of plant science research, biosafety protocols, seed contracts and certification, seed banks, and bioprospecting. 12 The commodification and enclosure of seed commons –and life itself– is sustained by a form of **(bio)hegemony** or the “acceptance of a ‘natural’ order of capitalist relations of agrarian production” that takes for granted the commodification of life (Valdivia, 2010; Newell, 2009). Regarding agricultural biotechnology, such ‘natural order’ is based on a double reductionism – both genetic and economic– that furthers “the extension of the commodity realm to the molecular level” (McAfee, 2003: 209) In this way, seeds become a collection of genes that can be precisely and safely decoded, manipulated, moved across different species, and switched on and off to “devise super crops that will bring about the end of hunger” (McAffe, 2003: 205). In turn these “new commodity fictions” cannot only be privately owned, but also “quantified, priced and traded” in global stock markets (Sullivan, 2010: 114-116) One dimension of seed conflicts in Colombia is then related to the struggle to maintain seed sovereignty or the autonomous control of communities over seed reproduction and development. Among seed saving networks in Colombia, there is the defense of seeds as commons which is not necessarily antithetical, but rather, redefines markets (Colloredo and Antrosio, 2009). There are efforts to create alternative markets in order to exchange seeds through barter and reciprocity, but also to set fair prices for seeds. These initiatives are framed within initiatives towards what Gibson-Graham (2008) called a ‘community economy’ that includes, from my perspective, not only human, but multispecies practices of care and affects (Bellacasa, forthcoming; Bird Rose, 2012).

#### 2---Plan can only topically apply to “private sector” --- Public sector is an alt cause

CFS 01 --- Center for food safety, “DEVELOPMENT OF THE SEED PATENT SYSTEM” https://www.centerforfoodsafety.org/issues/303/seeds/development-of-the-seed-patent-system

With the view that government seed programs constrained potential profits, the nascent seed industry aimed to shift seed breeding and development away from government programs toward private, commercial entities. Through lobbying and other means of influence in the last several decades, industry has steadily established intellectual property rights (IPR) and patent regimes of exclusivity through legal and policy instruments. These include the following:

1930: The Plant Patent Act (PPA) allowed asexually reproduced plants, excluding tuber-propagated plants, to receive patent protection.

1970: The Plant Variety Protection Act (PVPA) gave plant breeders 25 years exclusive IPR via a Certificate for a newly developed plant variety, including sexually reproduced plants and tuber-propagated plant varieties. However, the PVPA granted exemptions to allow researchers and farmers to save seed.

1980: Diamond v. Chakrabartyawarded the first patent on life – a utility patent – for a genetically engineered (GE) bacterium.

1980: The Bayh-Dole Act allowed public institutions to obtain patents on publicly funded research and spurred the initiation of public-private partnerships, where industry funds public research to advance their own goals and often appropriates the resulting technology.

#### 3---Courts circumvent.

Newman 19, University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division. (John, 4-5-2019, "What Democratic Contenders Are Missing in the Race to Revive Antitrust", *Atlantic*, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/)

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions. But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well. No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area. Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades. But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up. Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it. If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench. Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power. Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing. And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017. Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench. Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system. There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

#### 4---Courts will interpret “living organisms” in the plantext as excluding seeds. The plan only prohibits tying, so they leave untied patents of seeds untouched.

Carrie P. Smith 2k , COMMENT: Patenting Life: The Potential and the Pitfalls of Using the WTO to Globalize Intellectual Property Rights, 26 N.C.J. Int'l L. & Com. Reg. 143, Fall, 2000, Lexis, accessed online via KU libraries, date accessed 11/7/21

In addition to differing on the general applicability of IPRs, developed and developing nations clash over the appropriateness of creating private property protection in sensitive subject areas such as biotechnology. 23 Biotechnology involves both living organisms and non-living biological material. 24 [[BEGIN FOOTNOTE 24]] See World Intellectual Prop. Org., Introduction to Intellectual Prop. Theory and Practice P 33.20 (1997). "Living organisms" refers to plants, animals, and microorganisms. Id. Non-living biological material refers to seeds, cells, enzymes, and plasmids. Id. [[END FOOTNOTE 24]] Biotechnological innovations also encompass the development of processes which create or modify living organisms or biological material, the products of those processes, or the subsequent use of those products. 25 Despite the widespread use of biotechnology in medicine, energy, and agriculture, there is substantial international variation in the protection afforded these innovations. 26 These [\*147] differences stem primarily from perceptions of this type of innovation as either a scientific discovery or an invention. 27 Additionally, commentators have debated whether biotechnological innovations meet the standard patentability requirements of novelty 28 and non-obviousness 29 and the common registration requirements 30 of describability and reproducability. 31 Thus, differences between nations on IPR issues encompass cultural, economic, and administrative concerns not easily harmonized through one international agreement. 32

#### 5---“Patent-tying” in the plan doesn’t make sense:

#### a. as a *legal* matter, it’s already per-se illegal

#### b. but as a *factual* matter, the court in Scruggs found that Monsanto didn’t constitute a tying arrangement—the plan does nothing to change factual interpretations—only legal ones

Mayer et al 2k6 (Opinion by: MAYER. Opinion in Monsanto Co. v. Scruggs, 459 F.3d 1328, 1338-1341, 2006 U.S. App. LEXIS 20914, \*21-29, 79 U.S.P.Q.2D (BNA) 1813, 1819-1821, 2006-2 Trade Cas. (CCH) P75,376 (Fed. Cir. August 16, 2006). Lexis, accessed online via KU libraries, date accessed 1/9/22)

Under section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is [] declared to be illegal." Tying arrangements fall under section 1 of the Sherman Act. "A tying arrangement is the sale or lease of one product on the condition that the buyer or lessee purchase a second product." Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc., 21 F.3d 83, 85 (5th Cir. 1994). To prove that a tying arrangement exists, the plaintiff must show: (1) the involvement of two separate products or services; (2) the sale of one product or service is conditioned on the purchase of another; (3) the seller has market power in the tying product; and (4) the amount of interstate commerce in the tied product is not insubstantial. Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

Under section 2 of the Sherman Act, unlawful monopolization is prohibited. To establish a section 2 violation, one must prove that the party charged had monopoly power in a relevant market and acquired or maintained that power by anti-competitive practices instead of by competition on the merits. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985).

Patent misuse may be found even where there is no antitrust violation, because "[p]atent misuse is . . . a broader wrong than [an] antitrust violation." C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998). The "policy of the patent misuse doctrine is 'to prevent a patentee from using the patent to obtain market benefit beyond that which inures in the statutory patent right.'" Monsanto Co. v. McFarling, 363 F.3d 1336, 1341 (Fed. Cir. 2004) (quoting Mallinckrodt, 976 F.2d at 704 ("Monsanto II"). In order for competitive behavior to amount to patent misuse, one must "impermissibly broaden[] the scope of the patent grant with anticompetitive effect." Id. Thus, "[i]n the cases in which the restriction is reasonably within the patent grant, the patent misuse defense can never succeed." Id. Moreover, "[n]o patent owner otherwise entitled to relief . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent . . . ." 35 U.S.C. § 271(d).

At trial, Scruggs asserted that Monsanto's commercial practices violate federal and state antitrust laws, and constitute patent misuse. The specific practices it attacked were Monsanto's seed grower incentive programs, its seed partner license agreements, its grower license agreements, and its alleged refusal to sell Roundup Ready (R) cotton seeds without the Bollgard trait. Monsanto's grower license agreements include an exclusivity provision, a no replant policy, a no research policy, and the payment of a technology fee. Additionally, its grower license agreements between 1996 and 1998 stated that if a grower chose to use glyphosate herbicide in connection with Roundup Ready (R) seeds, then the grower must use Roundup ("1996 Roundup restriction"). At that time, Roundup was the only glyphosate herbicide approved by the Environmental Protection Agency for use with Roundup Ready (R) seeds. Monsanto's grower incentive agreements give participating seed growers additional voluntary benefits if they choose to use Roundup herbicide exclusively on crops containing Monsanto's Roundup technology. Monsanto's seed partner agreements require seed growers who choose to use a glyphosate herbicide to use Roundup. The trial court stated that Monsanto's no replant policy was not subject to challenge under the antitrust laws because the identical policy had been found valid and within its rights under the patent laws in Monsanto Co. v. McFarling, 363 F.3d 1336, 1343 (Fed. Cir. 2004). The court also found that the technology fees imposed by Monsanto were within the scope of its patent rights. Finally, the court found that the no research policy and Monsanto's refusal to allow seed partners to stack the Roundup Ready (R) trait with transgenic traits developed by competitors to be "field of use restrictions which fall within the scope of the patent monopoly [that] are, therefore, lawful." Summary Judgment II, 342 F. Supp. 2d at 575.

The trial court specifically addressed Scruggs' antitrust claims under section 1 of the Sherman Act, applying both per se and rule of reason analyses. In its per se analysis, the court found that the 1996 Roundup restriction did not constitute per se illegal tying; Roundup was the only EPA-approved product for use over the top of the Roundup seeds from 1996 to 1998, and only the licenses taken out during those years had the Roundup herbicide restriction. The court also found Monsanto's grower incentive agreements to be legal restraints because they simply give growers an incentive to choose Roundup herbicide and do not coerce them into purchasing it. Next, the court found that Scruggs failed to demonstrate that Monsanto forced seed partners to buy Roundup in order to obtain a license. The court stated that if the seed partner agreements did amount to a tie, per se treatment was not appropriate. Finally, it found that Scruggs failed to prove Monsanto illegally tied the Roundup Ready (R) trait to the Bollgard trait in cotton. The court stated that the record did not support the claim that Monsanto "engineered a shortage of single trait cotton seed which 'forced' growers to buy stacked trait seed . . . ." Id. at 579.

Under its rule of reason analysis, the trial court also found the evidence Scruggs presented with respect to the tying claims insufficient. Scruggs argued that Monsanto's binding of dealers in downstream markets to the same restrictions it imposes on its seed partners (in a "third party clause") was a violation of section 1 of the Sherman Act, as were the grower incentive agreements. The court found that the third party clause was a valid restriction because limited use licenses are valid, and the third party clause simply amounted to a limited use. Additionally, the court held that the grower incentive agreements were valid; the provisions were merely financial incentives and "d[id] not foreclose competition in a substantial share of the relevant product market(s)." Id. at 581.

The trial court also found that: (1) Scruggs' evidence was insufficient with respect to proving a violation of section 2 of the Sherman Act for unlawful monopolization or attempted monopolization; (2) because there was no federal antitrust violation, the alleged state antitrust violations could also be dismissed on summary judgment; and (3) patent misuse was inapplicable because Monsanto did not use its patents to impermissibly broaden the scope of its patent grant.

On appeal, Scruggs reasserts that the exclusivity provision, no replant policy, and technology fee payments required by Monsanto's licensing agreements with seed growers are illegal anticompetitive practices. Monsanto has a right to exclude others from making, using, or selling its patented plant technology, see Brulotte, 379 U.S. at 29-30, and its no replant policy simply prevents purchasers of the seeds from using the patented biotechnology when that biotechnology makes a copy of itself. This restriction therefore is a valid exercise of its rights under the patent laws. Furthermore, 04-1532, Monsanto's uniform technology fee is essentially a royalty fee, the charging of which is also within the scope of the patent grant. Lastly, the no research policy is a field of use restriction and is also within the protection of the patent laws.

Scruggs also argues on appeal that Monsanto ties the purchase of its seed to the purchase of Roundup through grower license restrictions, grower incentive agreements, and seed partner agreements. It asserts that Monsanto unlawfully ties the Roundup Ready trait to the Bollgard trait in cotton seeds. It does not point to sufficient evidence to establish that Monsanto's behavior constitutes illegal tying. The grower incentive program was optional, not coerced. Additionally, Monsanto's seed partners were not forced to buy Roundup under the seed partner agreements. Furthermore, there is no merit to the argument that Monsanto illegally tied the sale of cotton containing the Roundup Ready (R) gene to the sale containing the Bollard trait; Monsanto sells cotton without the Bollgard trait and there is no evidence that Monsanto engineered a shortage of Roundup Ready (R) cotton.

#### 6---Use consequentialism---evaluating causal outcomes is most ethical. “You link, you lose” diverts political responsibility for atrocity---which turns the alternative.

Zanotti 17, \*Laura Zanotti, Associate Professor Department of Political Science, Virginia Tech, (January 13th, 2017, “Reorienting IR: Ontological Entanglement, Agency, and Ethics,” International Studies Review)

Furthermore, if we accept Barad’s position that we are “of the world” and not above the world, theorizing looks more like a practice endowed with performative political effects than a quest for the discovery of the “true nature” of what exists. Therefore, intellectual undertakings are a form of political agency and come with great responsibility. Such responsibility requires the need for exercising prudence in making truth statements about what is universally good or naturally inevitable. Assumptions about linearity of causal relations, universal laws of history, or ontological properties of entities yield two problematic effects. On the one hand, they may stifle political imagination; on the other hand, they could encourage actions based upon abstract prescriptions rather than upon careful diagnosis of the forces that obtain in the situation at hand. In an entangled world, there are no externalities. Arguments that divert responsibility by basing political choices upon abstract principles or aspirations and, as a result, that treat what happens on the ground as “unintended consequences” or “collateral damage,” are ethically thin and politically dangerous.

In fact, unintended consequences may well be the result of irresponsible political decision-making that does not include a competent assessment of the practical configurations that constitute the context of action and the means necessary to achieve stated goals. Such attitudes, Amoureux and Steele (2014) have suggested, have led to disastrous initiatives, such as the Bush administration’s invasion of Iraq. Likewise, Kennedy (2006) has shown that the bland rhetoric of jus in bello that provides standardized criteria regarding the number of acceptable civilian casualties (conveniently called collateral damage) produces the effect of diverting responsibility from those who conduct war while assuaging their consciences concerning the injuries and deaths their choices are inflicting. Kennedy (2004) has also shown that as a result of the preference for universal normativity, the human rights profession (which he calls “the invisible college”) is more concerned with protecting abstract norms than with acting politically so as to devise viable solutions to specific problems.

Universal norms and bureaucratic routines play a major role in prescribing and justifying UN peacekeeping interventions. As Jean Marie Guehe ́nno argued more than a decade ago, strategies of international intervention based upon assumptions of causal linearity and invariance may amount to hubris. Norms and rules can also offer grounds for appeasement. The massacres that occurred in Rwanda and Srebrenica in the 1990s provide examples of how, by uncritically following institutionalized rules, United Nations peacekeepers permitted atrocities. UN employees are not cold-blooded monsters or extremely callous individuals. They follow norms and rules, key examples of which include the principle of “impartiality,” Security Council mandates, and “rules of engagement.” By doing so, however, they have often fallen short of considering the possible consequences of decisions in specific situations. The United Nations’ failure to take action to prevent the Rwanda and Srebrenica genocide testifies to the fact that following universal norms (i.e., the imperative to preserve impartiality) and bureaucratic reasoning (i.e., the rules of engagement prescribing not to intervene to disarm any party of the conflict) set the stage for avoiding a careful assessment of what was at stake on the eve of the massacres. These ways of reasoning also appeased consciences for not making decisions accountable to the people in danger (Zanotti 2014).

# 2NC

## Patent CP

### 2NC---Top

#### The Luce evidence is the only card in the 1AC about antitrust---it just says that antitrust can be used to prove patent misuse---the counterplan precedes that by ruling and establishing that this just isn’t patentable in the first place.

#### Their Shiva evidence---their impact and internal link card---just says that patents are bad. The counterplan solves.

Shiva 16

(Vandana – physicist, world-renowned environmental thinker and activist, Biopiracy: The Plunder of Nature and Knowledge, p. vii-xviii, shae)

I wrote Biopiracy to explore the ethical, ecological, and economic consequences of patents on life. There were no biopiracy cases yet, but it was evident that when everything is patentable, the biodiversity and indigenous knowledge of countries of the South will also be patented. The door to patents on seed and patents on life was opened by genetic engineering. By adding just one new gene to the cell of a plant, corporations claimed they had invented and created the seed, the plant, and all future seeds, which are now their property. In other words, GMO meant "God/Move Over:' Big Biotech claimed legal personhood and the role of creator. They have declared seed to be their "invention,” their patented property. A patent is an exclusive right granted for an "invention,” which allows the patent holder to exclude everyone else from making, selling, distributing, and using the patented product. With patents on seed, this implies that the farmers' rights to save and share seed-something farmers have done for millennia-is now defined as "**theft**,” an "intellectual property crime.” In defining seed as their creation and invention, corporations like Monsanto shaped the Global Intellectual Property and Patent Laws so that they could legally prevent farmers from saving and sharing seeds. This is how the Trade-Related Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization was born. Article 27.3(b) of the TRIPS Agreement states: "Parties may exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, parties shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof." This misnamed "protection of plant varieties" is precisely what prohibits the free exchange of seeds between farmers, threatening their subsistence and ability to save and exchange seeds amongst one another. The TRIPS clause on patents on life was due for a mandatory review in 1999. In its submission, India stated, "Clearly, there is a case for re-examining the need to grant patents on lifeforms anywhere in the world. Until such systems are in place, it may be advisable to ... exclude patents on all lifeforms:' The African group added: The African Group maintains its reservations about patenting any life forms as explained on previous occasions by the Group and several other delegations. In this regard, the Group proposes that Article 27.3(b) be revised to prohibit patents on plants, animals, micro-organisms, essentially biological processes for the production of plants or animals, and non-biological and microbiological processes for the production of plants or animals. For plant varieties to be protected under the TRIPS Agreement, the protection must clearly, and not just implicitly or by way of exception, strike a good balance with the interests of the community as a whole and protect farmers' rights and traditional knowledge, and ensure the preservation of biological diversity. Life forms, plants, and seeds are all evolving, self-organized, sovereign beings. They have intrinsic worth, value, and standing. Owning life by claiming it to be a corporate invention is ethically and legally wrong. Patents on seeds are legally wrong because seeds are not an invention. Patents on seeds are ethically wrong because seeds are life forms; they are our kin, members of our earth family. Life is Not an Invention IPRs expanded to cover living systems and organisms is a distortion of "innovation'' and "invention.” This distortion was introduced by corporations such as Monsanto in the TRIPS (Trade-Related Intellectual Property Rights) Agreement of the WTO. Corporate influence on patent law began with the drafting of the TRIPS Agreement of the WTO by the Intellectual Property Committee (IPC) of multilateral corporations. As I have written in Biopiracy, James Enyart of Monsanto is on record illustrating just how deeply the TRIPS agreement is aligned to corporate interest and against the interests of nations and their citizens: Once created, the first task of the IPC was to repeat the missionary work we did in the U.S. in the early days, this time with the industrial associations of Europe and Japan to convince them that a code was possible .... Besides selling our concepts at home, we went to Geneva where [we] presented [our] document to the staff of the GATT Secretariat. We also took the opportunity to present it to the Geneva-based representatives of a large number of countries ... What I have described to you is absolutely unprecedented in GATT. Industry has identified a major problem for international trade. It crafted a solution, reduced it to a concrete proposal, and sold it to our own and other governments ... The industries and traders of world commerce have played simultaneously the role of patients, the diagnosticians, and the prescribing physicians. Intellectual Property Rights are defined as property in the "products of the mind,” including patents. Over the last two decades, under the influence of corporations, patent laws have taken a different direction-from protecting the interests of genuine inventions and ideas to ownership of life and control over survival essentials like seed and medicine. Such monopolies violate article 21 of the Indian constitution, which guarantees all citizens the right to life. The first case in the WTO was initiated by the U.S. to force India to change its patent laws. Methods of agriculture and plants were excluded from patentability in the Indian patent act to ensure that seed, the first link in the food chain, was held as a common property resource in the public domain and that farmers' inalienable right to save, exchange, and improve seed was not violated. Only process patents were allowed in medicine. The pharmaceutical corporations, which are the same as the biotechnology corporations, are seeking absolute monopolies on seed and medicine through patents. I worked closely with the government and Indian parliament to ensure that farmers' rights and the integrity oflife forms were respected in Indian law. When India amended her patent acts, safeguards consistent with TRIPS were introduced. Article 3 defines what is not patentable subject matter. Article 3(d) excludes as inventions "the mere discovery of any new property or new use for a known substance.” This was the article under which Novartis's patent claim to a known cancer drug was rejected. This is the article that Novartis tried to challenge in the Supreme court and lost. Article 3(j) excludes from patentability "plants and animals in whole or in any part thereof other than microorganisms; but including seeds, varieties, and species, and essentially biological processes for production or propagation of plants and animals.” This was the article used by the Indian patent office to reject a Monsanto patent on climate-resilient seeds. While the Indian patent office rejected a Monsanto patent, the U.S. Supreme Court ruled on behalf of Monsanto against a farmer called Bowman who had not bought seeds from Monsanto but instead purchased soybeans from an Indiana grain elevator. The U.S. Supreme court ruling creates intellectual property in future generations of a grain or seed. This is biologically and intellectually incorrect because all that Monsanto has done is add a gene for resistance to its proprietary herbicide Roundup, to 1) claim ownership of any plant/animal that gene finds its way into and 2) to enforce a Roundup **monopoly**. Adding a gene of Roundup resistance does not amount to "inventing" or "creating" a soya bean seed, its future generations, and the species the gene pollutes. India's law titled Plant Variety Protection and Farmers' Rights Act 2001 has a clause on farmers' rights. I was appointed to be a member of the expert group that drafted the rules. A farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act. There is no such protection for citizens and farmers in the U.S. U.S. citizens are not only being denied their right to know what they are eating, but are now being denied their right and duty to save and exchange seed. The Seed Laws of 2004 have been used in Pennsylvania, Maryland, and, now, Minnesota to shut down seed libraries. Biopiracy is Not "Innovation'' Over the past decade, corporations have gained control over the diversity of life on earth and people's indigenous knowledge through new property rights. There is no innovation involved in these cases; they are instruments of monopoly control over life itself. Patents on living resources and indigenous knowledge are an enclosure of the biological and intellectual commons. Life forms have been redefined as "manufacture" and "machines,” robbing life of its integrity and self-organization. Traditional knowledge is **being pirated and patented, unleashing a new epidemic of biopiracy.** • Patenting of Neem The patenting of the fungicidal properties of Neem was a blatant example of biopiracy and indigenous knowledge. On May 10, the European Patent Office (EPO) revoked the patent (0436257 Bl) granted to the United States Department of Agriculture and the multinational corporation W. R. Grace for a method of controlling fungi on plants by the aid of an extract of seeds from the Neem tree. The challenge to the patent of Neem was made at the Munich Office of the EPO by three entities- the European Parliament's Green Party, Dr. Vandana Shiva of RFSTE, and the International Federation of Organic Agriculture-and challenged it on the grounds of "lack of novelty and inventive step:' They demanded the invalidation of the patent ( among others) on the grounds that the fungicide qualities of the Neem and its use has been lmown in India for over 2,000 years and used to make insect repellents, soaps, cosmetics, and contraceptives. The Neem patent was finally revoked. • Biopiracy of Basmati On July 8, 1994, Rice Tee Inc., a Texas-based company, filed a generic patent (Patent No. 5663484) on basmati rice lines and grains in the United States Patent and Trademark Office (USP TO) with 20 broad claims designed to create a complete rice monopoly patent, which included planting, harvesting, collecting, and even cooking. Though Rice Tee claimed to have "invented" Basmati rice, they accepted the fact that it has been derived from several rice accessions from India. Rice Tee had claimed a patent for inventing novel Basmati lines and grains. After protests and the case in the Supreme Court of lndia, the U.S. Patent and Trademark Office struck down most sections of the Basmati patent. • Syngenta's Attempt at Biopiracy of India's Rice Diversity Syngenta, the biotech giant, tried to grab the precious collections of 22,972 varieties of paddy, India's rice diversity, from Chattisgarh in India. It had signed a MoU with the - Indira Gandhi Agricultural University (IGAU) for access to Dr. Richharia's priceless collection of rice diversity, which he had looked after as if the rice varieties were his own children. The mass agitation by the peoples' organization, farmers' unions, civil liberty groups, women's groups, students' groups, and biodiversity conservation movements against Syngenta and IGAU bore results, and Syngenta called off the deal. • Monsanto's Biopiracy of Indian Wheat European Patent Office in Munich revoked Monsanto’s patent on the Indian wheat variety called Nap Hal. Monsanto, the biggest seed corporation, was assigned the patent (No. EP 0445929 Bl) on wheat on May 21, 2003, by the EPO under the simple title, "plants:' On January 27, 2004, The Research Foundation for Science, Technology and Ecology along with Greenpeace and Bharat Krishak Samaha filed a petition at the EPO challenging the patent rights given to Monsanto that led to the patent being revoked. • ConAgra's Bio piracy Claim on Atta (Wheat flour) Atta, a staple food and ingredient within India, is currently under threat from the corporation ConAgra, who filed a "novel" patent (patent No. 6,098,905) claiming the rights to an atta processing method, and was granted the patent on August 8, 2000. The method that ConAgra is claiming to be novel has been used throughout South Asia by thousands of atta chakkis, and so cannot justly be claimed as a novel patent. • Monsanto's Biopiracy of Indian Melons In May 2011, the U.S. company Monsanto was awarded a European patent on conventionally bred melons (EP 1 962 578). These melons, which originally stem from India, have a natural resistance to certain plant viruses. Using conventional breeding methods, this type of resistance was introduced to other melons and is now patented as a Monsanto "invention:' The actual plant disease, Cucurbit yellow stunting disorder virus (CYSDV), has been spreading through North America, Europe, and North Africa for several years. The Indian melon, which confers resistance to this virus, is registered in international seed banks as PI 313970. With the new patent, Monsanto can now block access to all breeding material inheriting the resistance derived from the Indian melon. The patent might discourage future breeding efforts and the development of new melon varieties. Melon breeders and farmers could be severely restricted by the patent. At the same time, it is already known that further breeding will be necessary to produce melons that are actually protected against the plant virus. DeRuiter, a well-known seed company in the Netherlands, originally developed the melons. DeRuiter used a nonsweet melon from India designated as PI 313970. Monsanto acquired DeRuiter in 2008 and now owns the· patent. The patent was opposed by several organizations in 2012. • Biopiracy of Brinjal The development of Bt brinjal by Monsanto and its Indian partner Mahyco is another classic example for biopiracy. The company has accessed nine Indian varieties of brinjal to develop their genetically modified vegetable without prior permission from the NBA or the relevant State and local boards. This is a violation of the Biological Diversity Act 2002, according to the Environmental Support Group (ESG), which lodged the formal complaint with the Karnataka Biodiversity Board on February 15, 2010, soon after the government put a moratorium on Bt brinjal on health and safety grounds (Priscila Jebaraj, Development of Bt brinjal a case of biopiracy: The Hindu, August 10, 2011). • Monsanto's Biopiracy of BT for Bt Cotton The Andhra Pradesh Biodiversity Board, a statutory body setup under the Biological Diversity Act 2002 by the Union government of India, is demanding royalty payments from Monsanto India Ltd. to the tune of 2% of the corporation's sales revenue. The Biodiversity Board argues that the Bt patent on Monsanto's Bt cotton is biopiracy-Monsanto India has "stolen'' genetic information from Bacillus thuringiensis (Bt) bacteria found in the soils of Mahanandi village -in the Kurnool district of Andhra Pradesh. This bacteria strain, the board claims, was then used to develop the genetically modified bollworm-resistant Bt cotton seeds that Monsanto sells in India. The six gene giants-Monsanto, Syngenta, Dupont, Dow, Bayer, and BASF-that take patents on seeds and biodiversity are also pushing genetically engineered seeds, such as Monsanto's Bt cotton. Genetically engineered crops are contaminating and polluting biodiversity, destroying the integrity of genetic resources; e.g., the corn in Mexico's center of genetic diversity has been found to be contaminated by Bt corn. New IPR laws are creating monopolies over seeds and plant genetic resources. Under pressure from World Bank, the Seed Policy of 1998 started to dismantle-India's robust public sector seed supply system. Monsanto has pushed its Bt cotton into Indian agriculture through corruption and fraud at every step. Bt cotton was commercialized in India during April 2002, with Monsanto being the major technology provider and operating through 60 regional biotech companies holding Bt licenses. Under international agreement, Monsanto/Mahyco can charge a royalty of 20% for three years and 5% for another three years. Even though Monsanto does not have a patent on Bt cotton in India, it collects royalties as fees for trait value. During 2004, the farmer had to pay Rs 1,600 for a single 450 gm packet of Bt cotton seeds, which included· a technology fee component of Rs 725. The intervention of state governments forced the company to slash the seed price. However, Monsanto still makes about Rs 34 billion per year from Indian farmers. A comparison of organic and Bt cotton seed prices during the last two decades will be relevant in this context. During the 1990s, the local seed cost was around Rs 9 per Kg. By 2004, the cost skyrocketed to Rs 1,650 and then to Rs 1,800 for less than half a kilogram (450 gm). At present, the seed cost is Rs '650 to Rs 920 for 450 gm. However, the current price still exhibits a disproportional increase when compared to the cost of seed (Rs 9) before the introduction of Bt. Other mandated inputs like fertilizers, pesticides, and utilities like water and electricity also saw a big rise in cost from the mid to late 1990s. The rising input costs have forced farmers into a debt trap. The states under the cotton belt have the highest number of farmer suicides due to agricultural indebtedness. From 1995 to 2015, more than 300,000 farmers have been driven to suicide. Most of them were located in the Bt cotton belt. • Monsanto's Biopiracy of Climate Resilience For millennia, farmers have innovated and evolved varieties with unique properties. Farmers' innovation focuses on breeding for climate resilience and for conservation of biodiversity. Giant corporations, which have destroyed biodiversity by promoting monocultures and uniformity, are now using biopiracy patents to claim farmers' collective, cumulative innovation as their "invention.” The latest in such biopiracy is the patenting of climate-resilient traits. At Navdanya, our community seed banks have been conserving climate-resilient crops since 1987, allowing us to distribute open-pollinated climate-resilient seeds in the aftermath of extreme climate events. The corporations are pirating the collective innovation of farmers in breeding crops that are resilient to droughts, floods, and salinity. The biotechnology industry is spreading the misconception that without genetic engineering, **we will not be able to evolve crops with** climate **resilience**. Farmers' varieties have high grain yields and high straw yields, which help to further increase soil fertility as well as its capacity for retaining moisture, either as green manure or as fodder for cattle, which in turn produce manure for the soil. In addition, farmers' varieties have been selected for their long-term ability to withstand several stresses and yet produce consistent yields. Thus farmers' varieties are ecologically sound varieties as well as food security-sound varieties. The resilience and wide adaptability of farmers' varieties is clear from the fact that while commercial and public sector varieties of salinity-resistant rice failed to rehabilitate agriculture in Ersama, Orissa in the aftermath of the super cyclone and floods of 1999, a farmers' variety from the Navdanya Project in West Bengal proved extremely successful, and is in high demand today. Farmers have developed and have been using these varieties for over hundreds of years; genetic engineers like Monsanto are just waking up to their potential. Corporations have taken out 1,500 patents on climate-resilient crops. The climate-resilient traits will become increasingly important in times of climate instability. Along coastal areas, farmers have evolved flood-tolerant and salt-tolerant varieties of rice such as Bhundi, Kalambank, Lunabakada, Sankarchin, Nalidhulia, Ravana, Seulapuni, and Dhosarakhuda. Crops such as millet have been selected for drought tolerance and provide food security in water-scarce regions and water-scarce years. Monsanto applied for blanket patents for "Methods of enhancing stress tolerance in plants and methods thereof.' (The title of the patent was later amended to “A method of producing a transgenic plant, with increasing heat tolerance, salt tolerance, or drought tolerance.”) These traits have been selected over millennia by our farmers, who have applied their knowledge of breeding. On July 5, 2013, Hon Justice Prabha Sridevi, Chair of the Intellectual Property Appellate Board of India, and Hon Shri DPS Parmar, technical member, dismissed Monsanto's appeal against the rejection of these patents that claim Monsanto has invented all resilience. **The patenting of seeds and life can only lead to biopiracy.** Just as the jurisprudence of Terra Nullius-which was used to colonize non-European peoples-defined the land as empty and allowed the takeover of territories by the European colonies, the jurisprudence of intellectual property rights related to life forms is in fact a jurisprudence of **Bio Nullius-life empty of intelligence**. The Earth is defined by her colonizers as dead matter, deemed unable to create, and farmers (lacking the lab coats we see in toothpaste commercials) are deemed to have empty heads that cannot innovate. The worldview of **Bio Nullius**-empty life-**does violence** and injustice **to the earth**, to farmers, and to all citizens. This violence of the Earth is **rooted in the denial of the creativity and rights of the Earth** as well as in the displacement of diversity. Every seed is an embodiment of millennia of nature's evolution and centuries of farmers' breeding. It is the distilled expression of the intelligence of the Earth and of farming communities. Farmers have bred seeds for diversity, resilience, taste, nutrition, health, and adaptation to local agro-ecosystems. Industrial breeding treats nature's contributions and farmers' contributions as nothing. My life has been dedicated to protecting the integrity of life, biodiversity, and indigenous knowledge. Seed saving is the foundation of Swaraj in our times. It is vital to our ability to address hunger and malnutrition and to bring back taste, nutrition, and quality in our food. Without conservation and evolution of the biodiversity of our seeds, we will not be able to adapt to climate change. Creating community seed banks is a significant step toward creatively resisting patents on life. Refusing to let our minds and lives be colonized by corporate constructions like patents on life is at the heart of freedom in our times.

### AT: Diamond vs Chakrabarty

#### Congressional revision of statute overrides Chakrabarty.

Marya Breznay et al 1981, report sanctioned by Congress, published by a team of researchers from multiple federal research institutes and universities, 1981, “Chapter 12: Patenting Living Organisms,” https://www.princeton.edu/~ota/disk3/1981/8115/811514.PDF

Congressional action to clarify these issues would provide direction for industry and the Patent Office, and it would obviate the need for a resolution through costly, time-consuming litigation. Lessening the chances of litigation or the chances of a patent being declared invalid will provide some stimulation for innovation by lessening the risks in commercial development. In addition, Congress could determine that the plant protection Acts could be better administered by one agency or should be incorporated under the more general provisions of the patent law; if so, some administrative expenses probably could be saved. C: Congress could mandate a study of the plant protection Acts. Two statutes, the Plant Patent Act of 1930 and the Plant Variety Protection Act of 1970, grant ownership rights to plant breeders who develop new and distinct varieties of plants. They could serve as a model for studying the broader, long-term potential impacts of patenting living organisms. An empirical study of the impacts of the plant protection laws has not been done. Such a study would be timely, not Ch. 12—Patenting Living Organisms . 253 only because of the Chakrabarty decision, but also because of allegations that the Acts have encouraged the planting of uniform varieties, loss of germplasm resources, and increased concentration in the plant breeding industry. In addition, information about the Acts’ affect on innovation and competition in the breeding industry would be relevant to this aspect of the biotechnology industry. However, it may be extremely difficult to isolate the effects of these laws from the effects of other factors. D: Congress could prohibit patents on any living organism or on organisms other than those already subject to the plant protection Acts. By prohibiting patents on any living organisms, Congress would be accepting the arguments of those who consider ownership rights in living organisms to be immoral, or who are concerned about other potentially adverse impacts of such patents. Some of the claimed impacts are: 1) patents would stimulate the development of molecular genetic techniques, which will eventually lead to human genetic engineering; 2) patents contribute to an atmosphere of increasing interest in commercialization, which will discourage the open exchange of information crucial to scientific research; and 3) plant patents and protection certificates have encouraged the planting of uniform varieties, loss of germplasm resources, and increasing concentration in the plant breeding industry. Also, by repealing the plant Acts, Congress would be reversing the policy determination it made in 1930 and in 1970 that ownership rights in novel varieties of plants would stimulate plant breeding and agricultural innovation. A prohibitory statute would have to deal with those organisms at the edge of life, such as viruses. Although there are uncertainties and disagreements in classifying some entities as living or nonliving, Congress could be arbitrary in its inclusions and exclusions, so long as it clearly dealt with all of the difficult cases. This statute by itself would slow but not stop the < development of molecular genetic techniques and the biotechnology industry because there are several good alternatives for maintaining exclusive control of biological inventions: maintaining organisms as trade secrets; patenting microbiological processes and their products; and patenting the inanimate components of a genetically engineered micro-organism, such as plasmids, which are the crucial elements of the technique anyway. The development would be slowed primarily because information that might otherwise become public would be kept as trade secrets. A major consequence would be that desirable products would take longer to reach the market. Also, certain organisms or products that might be marginally profitable yet beneficial to society, such as some vaccines, would be less likely to be developed. In such cases, the recovery of development costs would be less likely without a patent to assure exclusive marketing rights. Alternatively, Congress could overrule the Chakrabarty decision by amending the patent law to prohibit patents on organisms other than the plants covered by the two statutes mentioned in option C. This would demonstrate congressional intent that living organisms could be patented only by specific statute and alleviate concerns of those who fear the “slippery slope. ”

#### The counterplan effectively has the Court overturn Chakrabaty by reversing it’s ruling---it just does this on the ground of the patent act instead of on the grounds of antitrust law.

Busch 95 (Nathan A. Busch-J.D. candidate, University of Minnesota Law School, 2002. B.S. Chemical Engineering, Purdue University, 1978. Ph. D. Biomedical Engineering, Louisiana Tech University, 1984. Ph. D. Chemical Engineering, Rutgers University, 1995. ARTICLE: Jack and the Beanstalk: Property Rights in Genetically Modified Plants, 3 Minn. Intell. Prop. Rev. 1, 80-85. Lexis, date accessed 1/9/22)

Section 101 of Title 35 of the United States Code defines patentable subject matter. The Supreme Court stated in Chakrabarty 364 [[BEGIN FOOTNOTE 364]] 364 Diamond v. Chakrabarty, 447 U.S. 303, 310 (1980). [[END FOOTNOTE 364]] that statutory subject matter "included anything under the sun that is made by man" including man-made life forms. Living organisms are considered patentable because they are either articles of manufacture or compositions of matter. 365 [[BEGIN FOOTNOTE 365]] 365 See id. at 309-10 (quoting Hantranft v. Wiegmann, 121 U.S. 609, 615 (1887)). [[END FOOTNOTE 365]] The Board of Patent Appeals and Interferences addressed the question of whether either the Plant Patent Act of 1930 366 or the Plant Variety Protection Act of 1970 367 were the exclusive forms of protection for plants, or whether protection could be afforded by 35 U. S. C. 101 in addition to either the Plant Patent Act or the Plant Variety Protection Act. 368 Based on the analysis set forth in Chakrabarty, the Board found that neither the Plant Patent Act nor the Plant Variety Protection Act narrowed the scope of patentable subject matter under 35 U. S. C. 101. While the question was not directly before the Board in the case, the Board stated that genetically modified plants, seeds, and plant tissue are patentable 369 under the principles set forth in Chakrabarty. The Court of Appeals for the Federal Circuit in Pioneer Hi Bred International, Inc. v. J.E.M. Ag Supply, Inc. 370 clearly stated 371 that a novel plant variety might be protected under both Title 35, Section 101 of the United States Code and the Plant Variety Protection Act. Thus, a seed manufacturer may obtain a patent on a variety of genetically modified seed as well as certification under the Plant Variety Protection Act. Furthermore, the case history indicates that a particular variety of plant may be protected under both Section 101 and Section 161 of Title 35. 372 Because Section 161 of Title 35 relates to asexually reproduced plants while the Plant Variety Protection Act relates to sexually reproduced plants, and since "variety" is defined differently under each statute, a plant cannot be protected under both the Plant Patent Act and the Plant Variety Protection Act.

#### They are also just wrong---Myriad overturned Diamond v Chakrabarty by holding that DNA and living matter is not patent eligible.

Gene Quinn 13, Patent Attorney and Editor and President & CEO of [IP](http://www.ipwatchdog.com/) Watchdog, JD and LLM from the Franklin Pierce Law Center, July 2013, “Why SCOTUS Myriad Ruling Overrules Chakrabarty,” https://www.ipwatchdog.com/2013/07/14/why-scotus-myriad-ruling-overrules-chakrabarty/id=43249/

There are a great many people inside the patent industry that are working hard to convince themselves that the Supreme Court decision in [Association of Molecular Pathology v. Myriad Genetics](http://www.supremecourt.gov/opinions/12pdf/12-398_1b7d.pdf) is not so bad. The argument goes that the Supreme Court explicitly stated that cDNA is patent eligible and that Chakrabarty remains good law. The trouble with both rationales is that they are incorrect. It seems to me that anyone who tries to convince themselves that Myriad is anything other than a disaster is just fooling themselves. It does no good to put our heads in the sand and ignore what the Supreme Court said as if by doing so it will make a difference. Anyone who is honest with themselves knows how the district courts will interpret Myriad, and it will not be in a patentee friendly manner. But before going to far, let me conclusively demonstrate with the Supreme Court’s own explicit language why those who are trying to convince themselves, and others, that the decision is workable are wrong. [Bio-Pharma] First, with respect to cDNA, it has been widely reported and believed that the Supreme Court said cDNA is patent eligible. In fact, what the Supreme Court said is that some cDNA is specifically not patent eligible, which is a far cry from the blanket statement that some suggest is found in the decision. For example, the Supreme Court wrote: cDNA is not a “product of nature” and is patent eligible under §101, except insofar as very short series of DNA may have no intervening introns to remove when creating cDNA. In that situation, a short strand of cDNA may be indistinguishable from natural DNA. This clearly and unambiguously means that short strands of cDNA are not patent eligible. So can we please dispense with the inaccurate and rather ridiculous interpretation of this case as being a blanket endorsement of cDNA as patent eligible? Clearly that is not what the Supreme Court said. The opinion goes to great length to explain that cDNA is nonnaturally occurring, is not a product of nature, but still some cDNA sequences that are created by man are not going to be patent eligible if they are “indistinguishable from natural DNA.” This also offers our first clue as to why the Myriad decision overrules Chakrabarty. In [Diamond v. Chakrabarty](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=447&invol=303) the Supreme Court held that living matter is patentable eligible if it is created by man. The Supreme Court in Chakrabarty explained: [R]espondent’s micro-organism plainly qualifies as patentable subject matter. His claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter – a product of human ingenuity… (emphasis added). The Chakrabarty decision revolutionized the biotechnology industry in the United States. Chakrabarty was quite clearly the turning point for the biotech industry. The fact that the biotech industry has flourished in the United States and languished elsewhere shows the importance of an expansive view of what is patentable subject matter. But in Myriad the Supreme Court turned their back on the fundamental holding in Chakrabarty. This is objectively and quite clearly true because Justice Thomas, writing for a unanimous Court, explained that the isolated DNA claimed by Myriad was nonnaturally occurring. Justice Thomas wrote: Nor are Myriad’s claims saved by the fact that isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule. (emphasis added). Thus, the Supreme Court quite directly contradicts the reasoning of Chakrabarty in Myriad. Thomas explains that it is a fact that isolated DNA is nonnaturally occurring, but still nevertheless not patent eligible. Whether we like it or not, the very foundation of the Supreme Court’s decision in Chakrabarty has been overruled, or at the very least significantly cut back. Arguments to the contrary are simply wishful thinking and ignore the explicit language of the Myriad decision. I think anyone who is honest knows how this passage will be used by defendants and challengers at the USPTO and in the district courts. If the PTAB decision on covered business methods is any indication the PTAB is quite anti-patent. *See* [***Did the PTAB Kill Software?***](http://www.ipwatchdog.com/2013/06/12/did-the-ptab-just-kill-software-patents/id=41693/) We also know that many, if not a majority, of district court judges are anti-patent. We also know that many judges on the CAFC are increasingly taking anti-patent positions. *See, for example,* [***Federal Circuit Nightmare in CLS Bank***](http://www.ipwatchdog.com/2013/05/10/federal-circuit-nightmare-in-cls-bank-v-alice-corp/id=40230/). This will be offered by challengers and accepted by judges who do not like patents as meaning that something that is nonnaturally occurring and man-made is not necessary patent eligible. That fundamentally undercuts the ruling in *Chakrabarty*. Soon we will see these arguments made and adopted. So patent owners had better figure out a response. It won’t be persuasive in court to simply pretend the Supreme Court didn’t say what they clearly said, or that such a viewpoint is “the sky is falling” paranoid nonsense. Likewise, it will not be persuasive to attempt to distinguish these cases based on the fact that *Chakrabarty* related to a genetically modified bacteria and *Myriad* related to isolated DNA. The fundamental holding in *Chakrabarty* was that if what is claimed is nonnaturally occurring it is patent eligible. After *Myriad* the fact that it is nonnaturally occurring does not mean that what is claimed is patent eligible. Thus, there must be more than something that is nonnaturally occurring to be patent eligible. Patent attorneys and clients need to wake up and stop fooling themselves. The landscape has significantly changed. Wishing things were different and pretending that the *Myriad* ruling doesn’t say things that are clearly stated is not a winning strategy. A winning strategy is to engage. That means pushing forward and forcing the discussion both with Members of Congress and with the Courts. That means engaging in lobbying efforts and filing amicus briefs. If you pretend that nothing has changed eventually you will wake up one day and very little will be patent eligible. So who is fooling who exactly? In the meantime, strategies need to be designed to put applications in the most favorable light. That means that claims need to closely track the language of 35 USC 101, which means that for software you need to claim “a machine comprising…” and for biotechnology innovations such as isolated DNA you must claim the invention as “a composition of matter comprising…” Additionally, a variety of claiming techniques can and should be used. We can’t know where the law is ultimately going to wind up, and by the time that we do know it will be to late to go back and add disclosure and vary the claims. The pendulum will likely swing back at some point because if it does not there will be nothing left to the patent system. Interpreted to the extreme the Supreme Court’s decisions in *Mayo* and *Myriad* render a great many things patent ineligible. If that message didn’t get driven home by the PTAB’s decision in the first ever covered business method decision I don’t know what else could possibly cut through to prove the point. All is not well, the erosion of patent rights continues, and we do no favors by trying to tell clients everything is fine. We need to enlist clients, explain to them that it is unfathomable that at the end of the day these decisions will be interpreted as they are actually written, but that in the meantime we must engage on a variety of fronts, both at the USPTO, in the halls of Congress and by speaking up and participating in important litigations and appeals even when our own patents are not at stake.

#### 1NC text fiated that Courts uphold statutory revision---that solves and will be universally followed.

Grove ’18 [Tara; 2018; Professor of Law at the College of William & Mary; New York University Law Review, “The Power of ‘So-Called Judges’,” vol. 93]

The Strength of the Norm at the Federal Level

Since the civil rights era, federal executive officials have consistently complied with federal court orders.22 One of the most instructive examples is the George W. Bush administration’s obedience in the wake of the September 11 terrorist attacks. The Bush administration made bold claims about the scope of executive authority in the war on terror—leading some scholars to worry that the administration might not obey a judicial order restricting its power.23 Yet when the Supreme Court held that Guantanamo Bay detainees could file federal habeas corpus petitions to challenge their confinement,24 President Bush announced: “We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.”25

Recent episodes, however, raise questions about the continuing adherence to this convention. One cause for concern is President Trump’s rhetoric denouncing federal judges that interfere with his travel ban. Although other presidents have criticized the judiciary, most have not mounted seemingly personal attacks against specific judges.26 Another worrisome sign is the pardon of former Arizona Sherriff Joe Arpaio. In 2016, Arpaio was convicted of criminal contempt for violating a federal court order, which restricted his authority to arrest and detain undocumented immigrants.27 On August 25, 2017, President Trump pardoned Arpaio28—a move that could be seen as an endorsement of not only the sheriff’s aggressive law enforcement tactics but also his defiance of the federal court.

Nevertheless, I believe there are good reasons to expect continued compliance by the executive branch, at least for the foreseeable future. Several factors serve to reinforce the convention requiring obedience to all federal court orders. The first is the fact that both Republican and Democratic presidential administrations have consistently complied from the 1970s to the present day.29 That historical record alone places some pressure on current executive officials to continue to adhere to federal court decrees.

### AT: Perm do CP

Severs

#### The “core antitrust laws” means Sherman, Clayton, and FTC---the counterplan doesn’t touch those.

**FTC ND**. “The Antitrust Laws.” 2013. Federal Trade Commission. June 11, 2013. https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

#### More ev.

Lisa Kimmel 20, Senior Counsel at Crowell & Moring, LLP in Washington, D.C., twenty years of experience as an antitrust lawyer and holds a Ph.D. in economics from the University of California at Berkeley; and Eric Fanchiang, associate in Crowell & Moring’s Irvine, CA office and a member of the firm’s antitrust and commercial litigation groups, 2020, “Antitrust and Intellectual Property Licensing,” in 2020 Licensing Update, Wolters Kluwer Legal & Regulatory U.S., https://www.crowell.com/files/20200401-Licensing-Update-Chapter-13.pdf

U.S. antitrust law is defined by federal and state statutes, as interpreted by the courts. The core federal statutes are the Sherman Act,1 passed by Congress in 1890, and the Federal Trade Commission2 and Clayton Acts,3 both passed in 1914. The United States Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC” or “Commission”) (together the “agencies”) share enforcement of most areas of federal antitrust law but with some differences in the scope of their authority. The FTC has sole authority to enforce Section 5 of FTC Act, which prohibits (1) unfair methods of competition and (2) unfair or deceptive acts or practices. The FTC almost always pursues claims for anticompetitive conduct as unfair methods of competition and reserves charges of unfair or deceptive acts or practices for consumer protection violations. Though the FTC's authority to challenge unfair methods of competition goes beyond conduct prohibited by the Sherman and Clayton Acts, in practice the FTC brings most unfair methods of competition cases under the same standards that courts apply to Sherman Act claims. The most prominent exception is the invitation to collude offense, which falls outside the scope of the Sherman Act (if the invitation is not accepted, there is no agreement). The FTC challenges invitations to collude as so-called “standalone” violations of Section 5.4 The DOJ has sole authority to pursue criminal violations of the antitrust laws. Most states have their own state antitrust and unfair competition statutes. State law follows federal law to some extent, though as discussed below, may differ from federal law in meaningful ways that vary state to state. State attorneys general and private parties can also typically file suit to enforce both federal and state antitrust law.

Philippon 19 (Thomas Philippon is the Max L. Heine Professor of Finance at New York University, Stern School of Business. Philippon was named one of the “top 25 economists under 45” by the IMF in 2014. He has won the 2013 Bernácer Prize for Best European Economist under 40, the 2010 Michael Brennan & BlackRock Award, the 2009 Prize for Best Young French Economist, and the 2008 Brattle Prize for the best paper in Corporate Finance. “Glossary” From the book *The Great Reversal,* <https://www.degruyter.com/document/doi/10.4159/9780674243095-020/pdf> , date accessed 9/4/21)

antitrust laws: The federal and state laws that promote competition and pre-vent monopolization. In the late nineteenth century, large companies organized as “trusts” to stifle competition. Antitrust deals mainly with mergers, cartels (price-fixing), and restrictive agreements (such as tie-ins or exclusive contracts). The three core antitrust laws in the US are the Sherman Act (1890), the Federal Trade Commission Act (1914), and the Clayton Act (1914). They are usually called competition laws or anti-monopoly laws outside of the US.

Feldman ev on T is not responsive

Baer 14 (BILL BAER-Assistant Attorney General, Antitrust Division. U.S. Department of Justice “Connecting the Antitrust Dots: In Praise of Herb Hovenkamp” , Remarks as Prepared for the University of Iowa Law Review Centennial Symposium Honoring the Work of Professor Herbert Hovenkamp, *Department of Justice*, <https://www.justice.gov/atr/file/517731/download> , October 23, 2014, date accessed 9/3/21)

In enacting our core antitrust statutes, Congress set forth broad principles, leaving most of the details to be sorted out by the courts over time. As Diane Wood, Chief Judge of the Seventh Circuit has explained, “[f]rom the time the Sherman Act was passed in 1890, it has been understood as a ‘common law’ type of statute, a statute setting forth very general propositions, that the Judges in common law fashion would implement and develop on a case by case basis.”3 The Supreme Court similarly described the Federal Trade Commission Act’s ban on “unfair methods of competition,” as a phrase that “does not admit of precise definition,” and reasoned that it was enacted with the expectation that “the meaning and application [would] be arrived at by ... the gradual process of judicial inclusion and exclusion."4 While the Clayton Act – the third core antitrust law of the land – does proscribe specified practices, it too uses language that requires ongoing interpretation – as in Section 7’s ban on anticompetitive acquisitions only where the effect “may be substantially to lessen competition.” As one court explained more than 50 years ago, the Clayton Act “was deliberately couched in general and flexible terms” and that it was incumbent on the judiciary to fashion “a coherent body of substantive law out of the Congressional policy and language.”5

Katz and Melamed 20 (Michael L. Katz is the Sarin Chair Emeritus in Strategy and Leadership at the Haas School of Business and Professor Emeritus in the Department of Economics at the University of California, Berkeley. Katz served as the government’s economic expert in United States v. American Express, which is how the case was captioned in the lower courts. A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School, Stanford University. “COMPETITION LAW AS COMMON LAW: AMERICAN EXPRESS AND THE EVOLUTION OF ANTITRUST” , University of Pennsylvania Law Review, Vol. 168: 2061, 2020, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9720&context=penn_law_review> , date accessed 9/4/21)

“[N]o statute,” Justice Scalia observed, “can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.”1 This is particularly true of antitrust law because the core antitrust statutes are very brief and imprecise.2 [[BEGIN FOOTNOTE 2]] 2 In pertinent part, the Sherman Act prohibits agreements “in restraint of trade,” 15 U.S.C. § 1 (2018), and “monopoliz[ing]” or “attempt[ing] to monopolize any part of trade or commerce,” 15 U.S.C. § 2 (2018); the Clayton Act prohibits mergers whose effect “may be substantially to lessen competition,” 15 U.S.C. § 18 (2018); and the Federal Trade Commission Act prohibits “unfair methods of competition,” 15 U.S.C. § 45 (2018). None of those terms is defined in the statutes. Because it enables flexibility, the imprecision of the statutes is probably a good thing. The antitrust laws apply to almost all commercial conduct that affects interstate commerce. Those laws must, therefore, be suitable for a vast and ever-changing array of conduct and circumstances, the effects of which might be discernable only after extensive, detailed, and case-specific factual inquiry.[[END FOOTNOTE 2]] Indeed, as the Supreme Court explained in National Society of Professional Engineers, “[t]he legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common law tradition.”3 Accordingly, “[f]rom the beginning the Court has treated the Sherman Act as a common-law statute.”4 In effect, Congress has delegated to the courts the fleshing out of both the normative standards to be applied in assessing conduct and the process by which courts determine whether these standards are violated. This delegation “permits the law to adapt to new learning.”5

#### The reason I’m reading so much ev is because they can really only go for the perm since they chose to read an aff with zero antitrust key warrant.

#### The distinction between the CP and plan is significant---it’s the antirtust topic and they do not have a defense of why using anatitrust is key to the aff---the logic of the perm would let any team ban literally any behavior via antitust statute and go for the perm against a CP that used a different statute, making the topic bigger than CJR and Executive authority combined.

### AT: Aff Enforced by PTO

#### The aff is enforced by antitrust agencies.

FTC No Date, Official Website of the Federal Trade Commission, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers

Both the FTC and the [U.S. Department of Justice (DOJ) Antitrust Division](http://www.usdoj.gov/atr/index.html) enforce the federal antitrust laws. In some respects their authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts. In this guide, "the agency" means either the FTC or DOJ, whichever is conducting the antitrust investigation.

#### Aff can’t be the patent office

Wasserman 2013 (Melissa F. Wasserman, Assistant Professor of Law and Richard W. and Marie L. Corman Scholar, University of Illinois College of Law. J.D., New York University School of Law, Ph.D., Princeton University, 2013, William & Mary Law Review, Vol 54 Issue 6, “The Changing Guard of Patent Law: Chevron Deference for the PTO” https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3489&context=wmlr)

The PTO, however, has not historically possessed the authority to engage in formal adjudication or rule making—the two formal procedures that Mead indicates would likely warrant deference.56 Although Mead explicitly leaves open the possibility that Chevron deference could apply to agency actions that are informal in nature,57 this Section purports to establish only that the PTO has not traditionally engaged in the formal procedures that denote the most straightforward cases under Mead. Unlike most notable agencies, the PTO lacks significant substantive rule-making authority. Federal statutes give the Agency the authority to make rules that “govern the conduct of proceedings in the Office.”58 The Federal Circuit has repeatedly interpreted this grant as primarily enabling the PTO to make rules on a variety of procedural matters.59 Thus, the Agency does not possess the power to issue binding rules that carry the force of law on the core issues of patentability, like obviousness or novelty.

#### FTC and DOJ enforce antitrust, even when it relates to IP law.

Hayslett 96 (Thomas L. Hayslett III-JD University of Georgia (1997), “1995 ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY: HARMONIZING THE COMMERCIAL USE OF LEGAL MONOPOLIES WITH THE PROHIBITIONS OF ANTITRUST LAW” , *Journal of Intellectual Property law*, Volume 3, Issue 2 March 1996 , <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1117&context=jipl> , date accessed 9/8/21)

The 1995 Guidelines appear to be an attempt by the FTC and the DOJ to temper the extreme stances of these two preceding eras. The Guidelines attempt to strike a balance between the overly suspicious antitrust enforcement of the 1960's and 1970's and the hands-off enforcement of the 1980's.3 9 By extending a plan for cooperative efforts between antitrust prohibitions and intellectual property protections, the FTC and DOJ hope to effectively enforce antitrust principles where necessary while simultaneously allowing intellectual property protection to serve its public purpose

### AT: Tying Thing

#### Mergers are an alt cause---they can’t solve

Prause et al, 2020 (Louisa – Department of Agriculture and Food Policy, Research Group BioMaterialities, Humboldt-Universität Zu Berlin, Sarah Hackfort – Department of Agriculture and Food Policy, Research Group BioMaterialities, Humboldt-Universität Zu Berlin, and Margit Lindgren – Department of Agriculture and Food Policy, Research Group BioMaterialities, Humboldt-Universität Zu Berlin, “Digitalization and the Third Food Regime”, *Agriculture and Human Values* 38.3, September, shae)

Conclusion Our analysis has shown that the digitalization of food production is a phenomenon along the entire commodity chain. To understand the impacts of digitalization on the organization of the agri-food system, we believe it is crucial to overcome the current debate’s tendency to focus on digitalization at the input and farm level. One reason why such a broader approach is largely missing might be that digitalization along the food commodity chain seems to be discussed under different terms and in different strands of the literature. Genome editing is generally discussed as biotechnology; automation, robotics, IoT, AI and digitalization in the food processing and packaging sector are referred to as industry 4.0; while similar technologies at the farm level are referred to as smart farming or agriculture 4.0. Bringing these three strands of the literature together might be a first step in furthering inquiries into the future of food production. Using the third food regime as our analytical lens shows that claims about a new revolution in agriculture and food production are exaggerated. If we look at the organizing principles of the third food regime, we can see that many have been kept in place. Supermarkets are intensifying their control over food producers and commodity chains, for instance via digital supply chain technologies. Green narratives are still used by retailers to market their products, and they are now supported through, and used to legitimize, digital technologies, by stressing their alleged contribution to environmental sustainability across the commodity chain, not least as a selling point to attract consumers. This focus on environmental sustainability constitutes a residual feature of the third food regime, yet it is increasingly combined with a focus on digital technologies in the notion of ‘climate-smart agriculture.’ Financialization has been discussed as another key trait of the third food regime. Financial investors are driving the development of many digital technologies through large investments in digital agriculture start-ups. Furthermore, financial capital facilitates vertical integration and mergers, and the takeover by large agri-food and tech companies of smaller companies offering digital technologies such as farm management platforms. Finally, agri-food companies are increasingly adopting the logic of finance capital to establish venture capital arms of their own to invest in promising start-ups. We therefore found that the close ties between financialization and corporate control over food production also hold true for the development and use of new digital technologies. As our analysis shows, big tech and major agri-food companies dominate the technologies along the entire food commodity chain, from intellectual property rights for a new generation of GMO seeds, through farm management platforms, to the establishment of automated warehouses and consumption solutions. Thus, there is very little to indicate that digitalization will bring about profound changes in the dominant model of food production or the functioning and distribution of profits along global commodity chains. Since many of the digital technologies we analyzed were capital-intensive and often targeted at large-scale agriculture, we believe furthermore that the opposition between small-scale agro-ecological farming and large-scale industrial farming will be fortified by digitalization.

#### The aff does not displace Market agrarianism---or lead to indigenous farming---too many barriers

Thomas W. Gray, PhD and Charles A. Kraenzle, PhD, 02. Researchers at the U.S. Department of Agriculture’s Rural Business-Cooperative Service. “Problems and Issues Facing Farmer Cooperatives.” U.S. Department of Agriculture Rural Development Rural Business-Cooperative Service Research Report 192. September 2002. <https://www.rd.usda.gov/files/RR192.pdf>

The responses from cooperatives primarily dealt with two aspects of the agricultural economy, the survival of farmers and farms, and the survival of cooperatives. The differences between “past year” responses and the “near future” primarily dealt with emphasis. “Past year” responses cited immediate difficulties, while future responses focused more on larger structural issues. Survival of farmers and farms reflected various influences that affected producer profitability. Low commodity prices were understood as pervasive both in the past and expected in the future and partly due to excess supply, driven by expansion of domestic commodities in some regions, as well as an increase in the importation of cheaply produced foreign goods. Producers were faced with low commodity prices, and with increasing costs of fertilizers, energy sources, and labor in some instances. In some regions, weather conditions reduced local volumes. Under such conditions producer profitability drops, and survival becomes more difficult. Poor earnings forced some farmers to discontinue operations. Others quit due to retirement, urbanization, and health problems. Some developed strategies to stay in business. Many sought greater volumes by expanding both vertically and horizontally. Some engaged in contract production or used other practices (Internet purchases and sales) to improve the overall farm efficiency. Many of these dynamics have direct impact on cooperative survivability. Fewer farmers can result in reductions in local volumes, commodities sold, and supplies and services purchased. Larger farmers with greater volumes may also bypass local cooperatives and go direct to terminals. Others that do not bypass the local may want better deals from their cooperatives. Those who contract with investor-owned firms (IOFs) drain volume from cooperatives. Cooperatives themselves, must operate in an environment of increasing costs coupled with reduced volumes, low prices, and increased costs, each contributing to low margins.

#### Sixteen alt causes to low co-op strength besides ag consolidation

Thomas W. **Gray**, PhD **and** Charles A. **Kraenzle**, PhD, **02**. Researchers at the U.S. Department of Agriculture’s Rural Business-Cooperative Service. “Problems and Issues Facing Farmer Cooperatives.” U.S. Department of Agriculture Rural Development Rural Business-Cooperative Service Research Report 192. September 2002. <https://www.rd.usda.gov/files/RR192.pdf>

These responses were reviewed and a classification scheme was developed to summarize like responses. If a cooperative reported more than one problem, up to three were classified. As a result, the number of responses exceeded the number of cooperatives responding. A total of 1,496 responses were recorded for the current year and 1,565 responses for the near future. More problems or issues were identified for the future by fewer cooperatives. Seventeen problem areas or classifications were identified. Here are the classifications used in the study with some examples of problems reported by cooperatives: Accounts Receivable—Includes high and/or overdue “accounts receivable,” “customers inability to pay accounts,” “credit,” and “cash flow” problems. Agricultural Economy—Includes “changes in agriculture structure,” “depressed farm economy,” “declining number of farmers,” “decrease in production,” “losing the small family farms,” “encroachment from development,” and “declining net income of farmers. It puts pressure on them to cut back on input usage.” Competition—Includes cooperatives “competing with large co-ops and processors,” “competing with suppliers,” “competition from Internet vendors,” “competition from large national dealers in the retail business,” “contract selling by producers,” “direct sell1 ing of ag products to farmers,” “market for our product,” “fewer customers,” “price competition,” and “worldwide excess inventory. Consolidation—Includes “consolidation and integration of markets,” “consolidation of agriculture,” “consolidation and regional ownership of locals,” “retail consolidation,” and “mergers.” Technology—Involves “changing technology in farming,” “adapting to Internet trading,” “concern over e-business,” “brokers putting bids on internet and by-passing the local co-op,” “dealing with Internet trading,” “speed of changing technologies,” “transition to computer age,” and “meeting the demands of newer technologies to service our customer.” Genetically Modified Crops—considers “biotechnology,” “GMO (genetically modified organisms) grains,” “Starlink corn,” “biotech grain,” “Non-GMO vs GMO grain,” “segregating grains,” “marketing bio-tech grain and dealing with buyer’s call programs,” and “consumer acceptance of GMO grain.” Government regulation—covers “Government regulations,” “compliance issues,” “more Government intervention,” “fuel regulations,” “air pollution control issues,” “EPA-DEO-OSHA,” “safety issues, EPA,” and “keeping abreast of Government regulations.” Government programs—includes problems such as “a farm program that detours sales of farm inputs,” “drop in volume due to CRP (Conservation Reserve Program),” “loss of sales due to Federal Crop Insurance program,” “conserving the tobacco program,” “U.S. sugar policy,” “Government programs that idle agricultural land use,” and “farm policy for the farm bill of 2002.” Increasing costs—covers “high costs of fuels,” “rising labor costs,” “rising expenses,” “higher input costs,” “prices causing cash flow problems,” and “expense control.” Labor—includes problems associated with “hiring employees,” “attracting and retaining quality personnel,” “employee issues,” “finding competent labor,” “labor availability,” “labor costs,” “good quality employees who want to work the hours required,” and “personnel problems.” Low commodity prices—includes problems such as “low commodity prices,” “cheap grain prices,” “low milk prices,” “low prices for fresh fruits,” “low sugar prices,” “low farm prices,” “volatile prices,” and “sustainability in the face of depressed prices”. Operational—views a wide variety of problems associated with the internal operations of a cooperative. Included are such items as “business survival and profitability,” “cash flow,” “financing,” “debt management,” “equity management,” “getting more efficient,” “keeping co-op solvent,” “lack of income producing sales,” “survival,” “working through merger,” and “focus on direction for the future.” Other—includes responses such as “No,” “none,” “unknown,” “no major problems,” and “read annual report.” Transportation—considers “transportation issues,” “truck shortage and high fuel costs,” “adequate number of rail cars to ship grain,” “railroad abandonment,” and “timeliness of rail service.” Weather—includes problems related to “drought,” “crop failure due to drought,” “lack of moisture,” “quality of produce,” and “poor quality grain due to wet weather conditions.” Members—problems associated with “membership retention,” “attracting new members,” “lack of participation,” “non-loyalty of members,” “loss of members,” “smaller membership,” and “poor membership support.” Low margins—Involves problems and issues such as “cash flow,” “declining margins,” ”profitability,” “availability of funds,” “generating net income,” “lack of earnings in the agricultural industry,” and “getting through another year with minimum losses financially.”

## Case

### 2NC---Alt Causes

### 2NC---AT: Dalley

#### 3---Dally is wrong – native subjectivity’s not immutable

Alex Trimble Young & Lorenzo Veracini 17. Alex Trimble Young is an honors faculty fellow in the Barrett Honors College at Arizona State University. He serves on the editorial collective of the interdisciplinary journal Settler Colonial Studies. Lorenzo Veracini is at the Swinburne University of Technology in Melbourne, Australia. His research focuses on the comparative history of colonial systems. He has authored Israel and Settler Society (2006), Settler Colonialism: A Theoretical Overview (2010), and The Settler Colonial Present (2015). Lorenzo is coeditor of The Routledge Handbook of the History of Settler Colonialism (2016) and editor in chief of Settler Colonial Studies. 2017. “‘If I Am Native to Anything’: Settler Colonial Studies and Western American Literature.” Western American Literature, vol. 52, no. 1, pp. 1–23.

Apprehending this history as what Jodi Byrd has called the “transit” over which the international “postwestern” cityscape of Las Vegas is realized leads us into a reading of a very different type of frontier than the one memorialized on Fremont Street (Transit xv). Read this way, as a site of Indigenous dispossession, the West cannot be seen as a dynamic site of pure possibility, as Gilles Deleuze and Félix Guattari have represented it, as “a rhizomatic West, with its Indians without ancestry, its ever- receding limit, its shifting and displaced frontiers” (19). The repetitive revisitation of frontier tropes recalls what critic Hamish Dalley calls “the frozen temporality of settler- colonial narrative,” which, “fixated on the moment of the frontier, recalls nothing so much as Freud’s description of the ‘repetition compulsion’ attending trauma” (Dalley). The “hyperreal West” in this context emerges as a fantasy (Lewis 194), in the sense that theorist Jacqueline Rose describes in her work on Israel/Palestine. “Never completely losing its grip, fantasy is always heading for the world it only appears to have left behind” (3).5 Of course settler colonialism is but one of the “secret histories of Las Vegas” that underwrite the postmodern wonderland visitors fi nd on Fremont Street and the strip, and but one of many structures of violence that shape life in the contemporary western United States.6 Nonetheless, it remains a structure central to the consideration of “westness.” As the postwestern critics argue, “westness” is neither contained by geography (as the popularity of the Western genre internationally attests), nor necessarily representative of cultural production being produced within the western United States (Kollin x– xi). When we speak of a cultural production as “Western,” we are speaking of a work that addresses the process and consequences of settler conquest, whether we are discussing a California memoir, an Australian novel, or an Italian fi lm.7 This is not to say that Western cultural production is always a result of settler colonial ideology, but rather that it is engaged with questions pertaining to it. Th e problem of the West is, in a crucial sense, the problem of settler colonialism. Imagining postwestern futures thus requires a critical outlook that is more than just inclusive in its politics, transnational in its scope, and poststructuralist in its methodology. Our movement toward the “post” in the conceptual space of the Western must be decolonial in its orientation. Such a critique would abandon unilateral settler attempts at postnational place-making in order to critique settler colonial structures of violence. Such a critique would not work to reify these structures as permanent or inevitable, but rather to probe their contradictions, and to promote the Indigenous intellectual traditions that have long been at work critiquing the settler colonial present in order to shape a decolonial future.8 We hope that this special issue of Western American Literature, which features critical readings of western American film and literature by three scholars from different fields and national backgrounds, can contribute toward this effort.

#### 4---relies on psychoanalsysis, because it asserts that you can know what drives our desire to avert catastrophe---that’s unfalsifiable---prefer social science because it can explain patterns between causal factors

Brian McConachie 7, Chair of Theatre Arts at the University of Pittsburgh, "Falsifiable Theories for Theatre and Performance Studies", Theatre Journal 59.4 (2007), 553-577, MUSE

Can the master theorists in our critical theory consensus make the same claim? All scientific assertions are potentially falsifiable through the use of the scientific method, but what experiments or logics would the master theorists accept as a basis for the falsifiability of their ideas? Looking at the theorists featured in Critical Theory and Performance, one might say that they represent a range of approaches that admit of greater or lesser degrees of falsifiability. At one end of the continuum, the theories of Bourdieu, Habermas, Gramsci, and Williams generally work within the falsifiability protocols of social science, which (though open to dispute) have been fairly well established for fifty years. When Raymond Williams's version of Gramsci's hegemony theory was gaining a curious audience among historians, its potential falsifiability was widely discussed.46 While social scientists, including historians, cannot apply falsifiability to their work with the same rigor as scientists who work with nonhuman subjects, their standards concerning evidence, economy, and consistency are high.47 Somewhere in the middle of the continuum of falsifiability, perhaps, are the psychoanalytic theories of Freud, their synthesis with semiotics in Lacan, and the many theorists who build their own ideas on some version of a psychoanalytic base. Their advocates often claim scientific validity for these theories. Most psychologists, however, have rejected psychoanalysis and its spin-offs as unfalsifiable. In her Psychoanalysis and Cognitive Science, for example, Wilma Bucci concludes that Freud's meta-psychology has not "been subject to the empirical evaluation and theory development that is necessary for a scientific field." Specifically, the type of systematic inference that is applied in cognitive science and in all modern science requires explicit definitions that limit the meaning of the concepts, correspondence rules mapping hypothetical constructs and intervening variables onto observable events, and means of assessing reliability of observation. Each of the indicators that analysts rely on to make inferences about the conscious and unconscious states of other persons (as [End Page 571] about one's own conscious states) must itself be independently validated as having the implications that are assumed.48 In defense, Freudians and Lacanians often claim that their theories are consonant with good science because their concepts have been scientifically validated in therapeutic sessions.49 But clinical success, however it is measured, is not the same as empirical verification. Just because "the talking cure" has been effective in some cases does not mean that Freud's or Lacan's explanation for why it worked is valid. Humans have had many explanations for fire over the centuries, but understanding why and how combustion really works must rely on recent physics and chemistry. At the other end of the continuum are theorists such as Baudrillard, Derrida, Féral, and other poststructuralists, whose radical skepticism challenges the ability of science or any other discourse to provide a valid standard of falsifiability. The relativism of poststructuralism, including its challenges to empirical verification, defies any protocols that might stabilize knowledge based on the slippery signifiers provided by language. Despite what they take to be the inherent contradictions of textual assertions, poststructuralists from Lyotard to Derrida rely chiefly on logic and argumentation rather than scientific or historical evidence. Within the assumptions of poststructuralism, Derrida's gnomic remark, "There is nothing beyond the text," is simply unfalsifiable. The critic who wishes to rely on what Derrida might have meant in that statement, however, will have to ignore a great deal of good science in linguistics and evolutionary psychology to be able to assess the probable truth of Derrida's assertion.50 Brian Vickers challenges the weak scientific credentials of several of the master theorists that many humanist academics have embraced. As he points out with acerbity: Freud's work is notoriously speculative, a vast theoretical edifice elaborated with a mere pretense of corroboration, citing "clinical observations" which turn out to be false, with contrary evidence suppressed, data manipulated, building up over a forty-year period a self-obscuring, self-protective mythology. The system of Derrida, although disavowing systematicity, is based on several unproven theses about the nature of language which are supported by a vast expanding web of idiosyncratic terminology. . . . Lacan's system, even more vastly elaborated . . . is a series of devices for evading accountability. . . . Foucault places himself above criticism.51 Whether all of Vickers's charges are valid may be less important than his general point: he presents suggestive evidence that these master theorists tried to place their ideas beyond the protocols of falsifiability.

#### 5---Representing catastrophe unsettles the present by highlighting the violence of the settler state.

Joseph J. Z. **Weiss 15**. Ph.D. candidate, Anthropology, University of Chicago. December 2015. “Unsettling Futures: Haida Future-Making, Politics and Mobility in the Settler Colonial Present.” p.216-232, https://knowledge.uchicago.edu/bitstream/handle/11417/1121/Weiss\_uchicago\_0330D\_13139.pdf?sequence=1&isAllowed=y

Conclusion: “What’s next? Just guess.” Signs of the Future One of the more recent additions to the socio-landscape of Old Massett, which I noticed on a return visit in 2014, was a series of blue signs that had appeared in many of the lawns on reserve and a good few uptown. The sign was a good two feet high and emblazoned with capitalized text: UNITED AGAINST ENBRIDGE. Below the text was a picture of a salmon. The salmon and the first word, “UNITED,” were in stark, attention-grabbing white, while the other text was in black. The signs, I later discovered, were distributed for five dollars each by the “Friends of Wild Salmon,” a coalition of northern British Columbia residents – including both First Nations and non-First Nations members – working together to oppose the Enbridge Gateway Pipeline Project.1 Perhaps appropriately, then, I noticed the sign on the lawns of both Haida and non-Haida, in Old Massett, (New) Masset, and out by Towtown. The signs may have been new, but their message is one that should have become familiar to us at this point: The people of Haida Gwaii oppose “Enbridge;” that is, The Enbridge Northern Gateway Pipelines Project. The project, first proposed in the mid-2000s, seeks to construct two pipelines to transport crude oil and condensate from northern Alberta to Kitimat on the coast of British Columbia.2 The oil would then be transported via “super-tanker” from the coast, through the Hecate Straight that passes between the west coast and the islands of Haida Gwaii before being exported to other nations (particularly China). Enbridge has received heavy support for the project from Canada’s current Conservative government, headed by Prime Minister Stephen Harper, and in 2013 the Enbridge Joint-Review Panel – despite the words of hippies and Haida alike, alongside fierce opposition from all over the northwest coast - approved the pipelines, albeit with 209 required conditions.3 As a partnership between Canadian federal and corporate interests, the Enbridge Pipelines Project promises a future horizon of economic prosperity, one that unequivocally justifies any environmental risk in the present. On Haida Gwaii, Enbridge presages a rather different future, one in which the unpredictable waters of the Hecade Straight all but guarantee a tanker spill. Such a spill would devastate the waters and lands of the islands and the neighbouring coastline of British Columbia, destroying the fish and poisoning the plants that currently draw on ocean waters and the animals that feed thereon. Neither eagles nor ravens could survive, living as they do on a diet that consists primarily of marine life, a fact which all but guarantees the disappearance of Eagles and Ravens, the Haida people whose lifeways as such are so fundamentally tied to the islands of Haida Gwaii. Haida Gwaii could no longer be home. A song recorded in protest again Enbridge by Aboriginal artist Kinnie Starr and animated as a music video by Haidawood, a team of Haida and non-Haida stop-motion artists and animators, makes this threat explicit, asking in its opening lines “Who will save these waters, save them for our great granddaughters, save them for our great grand-daughter’s sons, […] save them before all is dead and gone?”4 This nightmare future, this future that is no future, is one that looms large over the whole of this dissertation. It is familiar because it is a reiteration of the horror of ecological cataclysm that the CHN formed itself in opposition against, that the “hippies” risk metonymically bringing about by taking from the lands and waters without respect. But it is also familiar because in a broader sense it is the future that settler colonialism attempted to give to Native peoples; indeed, to render as their already given destiny. This is the future of indigenous erasure, of ultimate disappearance, of a closed temporality which can only end in “all dead and gone.” As I have also hopefully shown in each of my chapters, however, the future of “no future” is never taken as inevitable or already determined by Haida people. The work of future-making instead always acts to ward off the nightmare future of Haida erasure, always puts in its place instead multiple possible futures in which Haida people continue. Take the blue signs on the lawns of the Masset(t)s, Old and New, implicitly answering Kinnie Starr’s question with the bold declaration that the islands (will) stand “UNITED” against Enbridge. But the social significances of these futures are never encompassed solely by the ways in which they respond to the threat of nightmare futures. As we saw in Chapter 3, for instance, the production of a future of Haida and non-Haida unity is considerably more complicated than the declaration of shared solidarity, speaking back to a particular history of Haida and settler relations and fantasy schemas, looking forward towards finding productive ways in which non-Haida can be integrated into Haida systems of sociality and responsibility. To speak of a future united against Enbridge is thus necessarily to speak of many other things, just as it is the case when speaking of a future of Haida return, a future of care-full leadership, or a future of traditional authority. Larger social worlds unfold out of the constitution of particular futures. This is why, more than anything, I want to make clear in the final, concluding chapter of this dissertation that the political (if not the existential) significance of Haida future-making does not lie simply in the specific ways in which individual futures respond to particular dilemmas of the settler colonial present. Rather, what is most crucial about future-making as a way of thinking out from within the temporal brackets of settler colonialism’s deferred erasure is simply the fact of future-making itself. What matters the most is the capacity to say, as Haida rapper Ja$e ElNino does in a guest appearance in Starr’s song, “Now expect the best from the northwest/ What’s next? Just guess.” ElNino asserts the openness of the future, challenging his listeners to even attempt to predict the field of possibilities still to come. This does not mean, though, that this openness is unmoored. Quite the opposite, ElNino asks us to “expect the best of the northwest,” in response to the threat of Enbridge and, I think, more generally. In this spirit, in what follows I highlight the significance of location to indigenous futurity, exploring how Old Massett, its neighbouring communities along Masset Inlet, and the lands and waters of Haida Gwaii act as locations around which the very openness of Haida futures can be articulated. My discussion will be largely synthetic, reading together my previous chapters to attempt to arrive at a few conclusions for this dissertation at a whole. I begin with a discussion of Haida Gwaii, once again, as “home,” asking what it means to consider the islands as a Haida homeland (and one that requires “care” as such) in the light of the futures I have sketched out. I then draw on this to pose a few suggestions for the political anthropology of indigenous peoples and its abiding contemporary concern with sovereign rights and territoriality. Finally, I conclude by drawing out the multiple meanings of my titular phrase, “unsettling futures,” in the context of Haida futuremaking. Homeland Haida Gwaii is in at least some sense at the center of each of the futures I have discussed in this dissertation. It is the home to which Haida are expected (and expect) to return, the “cornucopia” of off-the-grid fantasy, the ongoing historical space of complex social and material relations that these fantasies elide, the perpetually at risk ecological landscape which demands (and authorizes) the CHN’s care and respect. And, as we have seen, these various futures for the islands are not isolated from one another. Quite the opposite, futures proliferate in response to each other. The potential for non-Haida homing necessitates strategic forms of future-oriented social integration to bring these new arrivals into respectful relations with the Haida world, the nightmare non-future of ecological collapse is warded off by the attempt to constitute care-full futures under Haida control. What all these Haida futures have in common – at least as they relate to the islands - is that they work to preserve Haida Gwaii, and the community of Old Massett in particular, as spaces in which Haida futures remain possible. This fact, as I have already begun to suggest in Chapter 2, might help us to resolve some of James Clifford’s dilemmas in relation to indigenous mobility. As I pointed towards then, the notion that “place” is significant to indigenous peoples – politically, socially, affectively, culturally – has become one of the essential components of how “indigeneity” is understood as a global phenomenon and a strategic identity from which rights claims can be advanced. Take Article 25 of the Universal Declaration of the Rights of Indigenous Peoples: Indigenous peoples have the right to maintain and strengthen their *distinctive spiritual relationship* with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (Assembly 2007:10, emphasis mine). But what precisely does it mean to have a “distinctive, spiritual relationship” to a place, and who determines what might constitute that relationship? Here one of the perils of Povinelli’s “cunning of recognition,” as indigenous rights to territory become conflated with - and evaluated against - essentialized settler notions of Native ecological spirituality and/or emplacedness (cf: Raibmon 2005; Nadasdy 2003). If indigeneity thereby takes on the significance of being “rooted” in a particular place, of having certain identifiably “distinctive” cultural relationships to that place that others might lack, then the fact of indigenous mobility would indeed pose a profound dilemma for the category of indigeneity on the one hand and the capacity to make claims to territorial rights *qua* one’s indigeneity on the other. But there is a remarkable temporal shallowness to all this. To give a representative example, the Australian state criteria for what constitutes “cultural rights to territory” that Povinelli interrogates function solely in the past and the present, mandating that Aboriginal people show continuity of occupation and of the cultural practices associated with “Aboriginal occupation” in the mind of the court in order to be recognized as possessing a rightful claim to their home territories (Povinelli 2002). Erased in this is the possibility that a territory could be the site of departure and return, that it could have a future horizon that is flexible, subject to transformation alongside the transformations of the people(s) who call it home, without thereby necessarily losing its integrity as a rightful space of indigenous occupation. Such a possibility is not controversial for my Haida interlocutors. Rather, it has the status of an already-given certainty, community common sense - though there is without doubt much social work that goes into the production of that certainty. What makes indigenous mobility fraught, then, might have rather more to do with the constitution of settler polities than it does with the actual practices of indigenous peoples. Consider the various ways in which we have already seen colonial authorities attempt to control Haida movement, from the forced expulsions of 19th century Victoria to the removal of Haida children from the islands for residential schools less than a century later. Consider too the manufacture of the reserves themselves, the fixing of two Haida “Bands” with their own federally determined territories, beyond which Haida people could claim no rights over land, waters, or resources (cf: Harris 2002). This is a logic of containment, of isolation. In leaving their assigned spaces, Native peoples were assumed by colonial authorities to be leaving the space of their Nativeness behind, assimilating into settler society on its terms. Indeed, this was the motivating logic of the residential schools program, which took as its premise the idea that “Indians” could always “backslide” into “savage customs” as long as they remained in their homes and with their families. Aboriginal children thus had to be brought somewhere else to learn how to join “civilized,” that is, white Christian, society (Miller 1996). Reserves could thus be rendered as the last bastions of a “weird and waning race,” to quote Scott, their inhabitants temporally foreclosed and spatially fixed. The notion that indigenous people could move without ceasing to be (or ceasing to fight for their rights to self-determination and Title to their lands) unsettles this narrative, just as does the intertwined possibility of indigenous futurity. The relationship to Haida Gwaii that we’ve seen sketched out by the Haida futures explored in this dissertation does not preclude the possibility of “distinctive spiritual relationships” between Haida and their home territories. Quite the opposite, the ineffable quality of homing alone suggests that many of my interlocutors feel a connection to their home that goes beyond the kinds of practices that are only possible on the islands, their beauty or their history. Indeed, when considered as home, when considered as a site that requires care, there is little doubt that Haida Gwaii can encompass a wide range of phenomenological, affective, social, and cultural ways of relating to its lands and waters by Haida people (and their neighbours, at times for good, at times for ill). But it is not these relations as such that encompass the totality of Haida Gwaii’s significance. Rather, what is of greatest concern to my interlocutors is the continuing future possibility that relations like that *could be* formed, that people *could continue* to be called home to Haida Gwaii once they’ve fully explored the world off-island, that the qualities that precisely *make* Haida Gwaii home *could* be preserved. This is what it means, I think, to “take care” of Haida Gwaii, to allow it to continue as a homeland for uncounted future generations. Though they certainly emphasize the need for Haida Gwaii to be maintained as a location for Haida futurity, this does not mean that the futures we have seen expend all the possible ways in which such future forms of Haida social, material, ecological, and relational life could be formed. Recall Ja$e ElNino’s challenge of a future so open that its possible contents can only be guessed at. What Haida future-making demonstrates is that there are a set of potentialities which are worth protecting so that Haida people can continue to access them, to come home to them, even as continuing forms of mobility and political processes can also shape and reshape Haida social and cultural life on and off the islands. Homeland is not a regimented place where Haida people *must* always live in order to be authentically Haida. Rather, it is a location where they should always be able to, in their own (necessarily multiple, often contested, sometimes even contradictory) terms. Sovereignty At the same time, there is an inescapably political dimension to the attempt to render Haida Gwaii as the homeland of a still open Haida future. The assertion of the (located) openness of the future does not necessarily make it so. As I noted in the first part of this dissertation, the flow of Haida departures and returns unfold in the broader context of the settler, capitalist state; indeed, they are made necessary in part by the current absence of economic opportunity on island, just as the arrival of potentially threatening strangers is a result of their privileged position in the very capitalist economy they seek to escape. Constituting futures in which Haida people have the freedom to engage with that economy (and settler society more generally) as they see fit while retaining the capacity to come home (complicated as that process might be) also reiterates the inescapability of some form of engagement with that socio-economy. Likewise, the notion of Haida Gwaii as Haida homeland cannot be separated from current Haida struggles to assert their rights to the lands and waters of Haida Gwaii, the resources found therein, and their sovereign capacity to govern themselves and the islands in the ways they find appropriate. This is, recall, the very crux of the CHN’s own commitment to the assurance of futurity, as it is only by positioning itself as the rightful, sovereign government of the Haida Nation and its homeland of Haida Gwaii that it can adequately care for the islands and protect them from external threat. And the continuing advance of the Enbridge project despite fierce opposition from CHN, the Old Massett Village Council, their Haida constituents, and the non-Haida actors with whom they are “united against Enbridge” (and this alongside protest all over the northwest coast) gives the nightmare futures of environmental collapse – pushed through by corporate interests and Canadian politicians - a frightening immanence. The assertion of the openness of the future is made, in short, in (and against) a context in which closures remain endemic. And yet, something has changed in this landscape from the initial erasures of Native futurity we drew out in the first chapter. In the narratives of colonial actors like Duncan Campbell Scott, it was absolutely clear that “Indians” were disappearing because their social worlds were being superseded by more “civilized” ways of living and being, ones that these Native subjects would also, inevitably, in the end, adopt (or failing that, perish outright). There was a future. It was simply a settler one. But the nightmare futures of that my Haida interlocutors ward against in their own future-making reach beyond Haida life alone. Environmental collapse, most dramatically, threatens the sustainability of all life; toxins in the land and the waters threaten human lives regardless of their relative indigeneity, race, or gender (e.g. Choy 2011; Crate 2011). Put another way, the impetus for non-Haida (and non-First Nations subjects more generally) to be “united against Enbridge” with their indigenous neighbours comes in no small part because an oil spill also profoundly threatens the lives and livelihoods of non-Aboriginal coastal residents, a fact which Masa Takei, among others, made clear in Chapter 3. Nor is the anxiety that young people might abandon their small town to pursue economic and educational advantage in an urban context limited to reserve communities. Instead, the compulsions of capitalist economic life compel such migrations throughout the globe. The nightmare futures that Haida people constitute alternative futures to ward against are not just future of indigenous erasure under settler colonialism. They are erasures of settler society itself. There is thus an extraordinary political claim embedded in Haida future-making, a claim which gains its power precisely *because* Haida future-making as we have seen it does not (perhaps cannot) escape from the larger field of settler-colonial determination. Instead, in Haida future-making we find the implicit assertion that Haida people can make futures that address the dilemmas of Haida *and* settler life alike, ones that can at least “navigate,” to borrow Appadurai’s phrasing, towards possible futures that do not end in absolute erasure. If Povinelli and Byrd are correct and settler liberal governance makes itself possible and legitimate through a perpetual deferral of the problems of the present, then part of the power of Haida future-making is to expose the threatening non-futures that might emerge out of this bracketed present, to expose as lie the liberal promise of a good life always yet to come and to attempt to constitute alternatives. It is no coincidence that we find this in the midst of a struggle over sovereignty. And this not just in the sense of the Council of the Haida Nation’s ongoing assertion of its sovereign right to govern the lands and waters of Haida Gwaii on behalf of all Haida people, as we saw in Chapter 5. Rather, as Joanne Barker has argued, over the course of the latter half of the twentieth century sovereignty has emerged as a: particularly valued term within indigenous scholarship and social movements and through the media of cultural production. It [is] a term around which analyses of indigenous histories and cultures were organized and whereby indigenous activists articulate their agendas for social change (Barker 2005:18). Through the assertion of sovereignty, indigenous political leaders, activists and scholars refute “the dominant notion that indigenous people [are] merely one among many ‘minority groups’ under the administration of state social service and welfare programs.” Instead, “sovereignty defines indigenous people with concrete rights to self-government, territorial integrity, and cultural autonomy under international law” (18). The trouble is, of course, that indigenous claims to sovereignty are always made within the context of colonial nation-states, ones whose own legitimacy is put at considerably risk both by the prospect of self-determining indigenous Nations (re)-emerging within their boundaries and the troubling of their own historical narratives of sovereign rights (cf: Comaroff and Comaroff 2003b). (One of these narratives, which reinterpreted indigenous lands as *terra nullius* and thus open to occupation, we’ve encountered already in Chapter 3). Thus, while sovereignty might indeed “define” indigenous peoples with concrete rights to territorial Title and self-determination, in theory equal under international law to the states who also lay claim to their territories, that definition does not in and of itself make possible the *practice* of this sovereignty. In this regard settler states such as Canada have shifted in their response to First Peoples’ sovereignty claims from outright rejection to a set of policies of selective recognition,5 but even the latter still positions Native nations as being subject to the authority and oversight (if not the structural forms) of the state. This means, as we have seen in Chapter 5, that indigenous governments such as the Council of the Haida Nation are in a precarious position, attempting to constitute their own sovereign authority without access to many of the conventional means of sovereignty in Western political thought – e.g., the monopoly on legitimate violence (Weber 1946), decisive authority to make and enact law (Schmitt 2005), or exclusive territorial control (Brown 2010; cf: Hobbes 1994). Alongside this precarity is the equally anxious question of whether or not sovereignty is even an appropriate analytical to center indigenous rights around precisely because it is historically a Western concept, one that had been drawn on to dispossess indigenous peoples over the course of settler colonial history (Barker 2005:18–19). (Indeed, the very next essay in Barker’s edited volume, by Mohawk scholar Taiake Alfred, categorically rejects sovereignty as an inappropriate tool for indigenous political assertions for these reasons and, also, because it draws attention away from developing and furthering “genuinely” Aboriginal political modes of thought (Alfred 2005; cf: Alfred 2009). The fact that sovereignty remains such a preeminent concept in the struggle for indigenous rights even though it is both epistemologically problematic and politically constrained has meant that there has been a recent push in both anthropology and indigenous studies to “widen” the definition of sovereignty, so that it might encompass multiple forms of indigenous social, political and legal practice outside of the conventional purview of “sovereign power” (e.g. Cattelino 2008; Richland 2011; Simpson 2000; Simpson 2014). Or, as Joanne Barker puts it: There is no fixed meaning for what *sovereignty* is – what it means by definition, what it implies in public debate, or how it has been conceptualized in international, nation, or indigenous law. Sovereignty – and its related histories, perspectives, and identities – is embedded within the specific social relations in which it is invoked and given meaning. How and when it emerges and functions are determined by the “located” political agendas and cultural perspectives of those who rearticulate it into public debate or political document to do a specific work of opposition, invitation, or accommodation. It is no more possible to stabilize what *sovereignty* means and how it matters to those who invoke it than it is to forget the historical and cultural embeddedness of indigenous peoples’ multiple and contradictory political perspectives and agendas for empowerment, decolonization, and social justice (Barker 2005:21, emphasis original). The opening up of sovereignty as flexible, multiple, and subject to all manner of diverse rearticulations carries particular weight (and, perhaps, ambiguity) since, as a historical concept in Western political theory, sovereignty was overwhelmingly concerned with closure. As Wendy Brown argues in her Walled States, Waning Sovereignty, the classic vision of sovereign power rests in the capacity to divide the inside from the outside, to make borders around a people – a “nation” – and separate that people from those outside it. Thus Schmitt’s “friend-enemy” distinction, for instance, or even John Locke’s consistent preoccupation with fences as a way of marking the existence of territory (Brown 2010; cf: Schmitt 1996; Locke 1988). The historical conditions of indigenous sovereignty claims in the context of settler colonialism make such absolute closures impossible for indigenous peoples. We might add, though, that their persistent presence also challenges the closure of the settler nation-state. Indeed, this is part of Brown’s point. The very fact that we see ever more spectacular performances of sovereign power on the part of contemporary nation-states – e.g., the titular “walls” that are being constructed along the borders of an increasing number of states - is a sign of the very insecurity of their political authority (Brown 2010).6 The conditions of settler colonial sovereignty, in other words, may be rather more “open,” and thus closer to those of indigenous “nation-within-nations,” then they may at first appear. If this means, in turn, that the future of settler political life is becoming as uncertain as the future for indigenous life has always been since the advent of settlement, then this means only what we have already begun to see: the dilemmas that Haida people confront in their future-making practices are also the dilemmas facing settler society. Take Chapter 4, in which the absence of any “one” definitive governing entity compels the constitution of an aspirational framework of accountability which could, were it realized, render navigable Haida relations to the many governments that claim their loyalties. As I hinted at there, such dilemmas are not restricted to the Haida sociopolitical world; rather, they may in fact be endemic to contemporary democratic societies and the multiple forms of governance (licit and otherwise) that emerge therein. In suggesting that there are Haida ways of refiguring a shared Haida-settler set of contemporary problematics, we might think of Haida future-making as simultaneously an instantiation of the multiple, flexible and always contingently located practices of sovereignty to which Barker points and a different way of thinking about indigenous political potentiality. In the former sense, Haida future-making is without doubt concerned with carving out spaces in which Haida existence can continue, expand, and change without losing the capacity to reproduce itself as, precisely, Haida existence. Thus the processes of homecoming we explored in Chapter 2, or Chapter 5’s explicitly political attempts to establish control over the islands for future generations. If the absence of indigenous sovereignty is the absence of the capacity of an indigenous people to (self)-determine their own futures, then the constitution of Haida futures can be seen exactly as sovereign work, whether in the overt sense of the Council of the Haida Nation’s assertions or the somewhat more implicit mode of Alice Stevens’ proposed mass adoptions. Significant here, though, is the fact that these acts of future-making carry meanings beyond their status as “responses” to the social and political dilemmas of contemporary Haida life. Thus Alice Stevens’ adoptions bring “hippie” children into the framework of Haida kinship relations, in one sense neutralizing their potential threat, but also constituting a complex new network of social relations between Haida and non-Haida whose potential significances go well beyond the protection of Haida territory and resources; thus the Council of the Haida Nation emerges as a “state-like” governing entity through its authorizing promise to “take care” of the islands, but in so doing takes on a series of new roles in Haida political life whose full consequences remain to be seen. If it is a sovereign action to envision an opening of possible futures for Haida people, then this very openness might also exceed the boundaries of sovereignty as a problematic for indigenous people even as it responds to them. Which is also, perhaps, why Haida futures seem so consistently to sketch out social, ecological, and political fields that encompass non-Haida; more, that are futures for Canada as well as for the Haida people living within the nation-state’s borders. Or, at least, futures that have the capacity to be so. What would it mean to figure an indigenous sovereignty that speaks beyond itself, one that promises to invert the order of settler domination through reconfiguring the shared futures of indigenous and settler peoples? This would not be a sovereignty premised on territorial closure, or even absolute political autonomy. It would, however, decisively overturn any settler colonial anticipations of the inevitable erasure of Native peoples. Quite the opposite, it would position indigenous practices of anticipation, aspiration, certainty, and anxiety at the forefront of contemporary modes of political imagination. Unsettling Futures A question remains, however. Could such a refiguring of the temporal and political horizon of settler and indigenous relationships remain possible even if the futures that indigenous people work to constitute remain unrealized in the settler colonial present? Or, put another way, we must always be careful not to conflate a capacity *to* form new futures for settler nation-states with the actual materializations of these futures. The Haida futures that I have discussed, even as they promise possible ways of navigating – of restructuring, even – the settler-Haida present, remain firmly bound by the colonial constraints of this present. But perhaps the stakes here have never been about overthrowing the Canadian colonial order outright. Rather, what I hope this dissertation has shown is that Haida future-making has the capacity to *unsettle* the settler colonial present, to challenge its received categories and demonstrate how, slowly, gradually, Haida people are reconfiguring its terms through the work of producing the future. Certainly, the sheer fact of Haida futurity should put to the lie any further notion that Haida people exist only to replicate their past or live only in the deferral of their eventual disappearance. The future is alive and well in Old Massett, although this does not meant that it is not also a site of profound anxieties. In working to ward off those anxieties through the juxtaposition of nightmare futures against their more desirable alternatives, then, Haida people unsettle the epistemological foundations of the forms of settler colonialism and liberalism against which Byrd and Povinelli write. At the same time (if you’ll pardon the pun), I think we can see the social work that futuremaking does iteratively, as a gradual reshaping of the actual conditions of Canadian society. Here I borrow Judith Butler’s suggestion, following Foucault, that the regulatory norms of society function only through their consistent and unstable reiteration (and materialization) in everyday social life.7 From this perspective, the ways in which Haida people work within and even reiterate the constraints and demands of Canadian settler mainstream society can also slowly and strategically *shift* those very constraints and demands, materializing a HaidaCanadian future that might in fact be quite different from the present even as it does not ever fully “escape” from its dilemmas. Perhaps the most unsettling potential of all here lies simply in the ways in which Haida people incorporate the conditions of the settler colonial present as being paths towards Haida futures. Not vanished, or vanquished. Ongoing.

#### 6---even if---Apocalyptic images challenges settler-colonialism by contesting the implausibility that inequitable structures can produce catastrophe

Hurley 17

Jessica Hurley 17, Assistant Professor in the Humanities at the University of Chicago, “Impossible Futures: Fictions of Risk in the Longue Durée”, Duke University Press, https://read.dukeupress.edu/american-literature/article/89/4/761/132823/Impossible-Futures-Fictions-of-Risk-in-the-Longue

If contemporary ecocriticism has a shared premise about environmental risk it is that genre is the key to both perceiving and, possibly, correcting ecological crisis. Frederick Buell’s 2003 From Apocalypse to Way of Life: Environmental Crisis in the American Century has established one of the most central oppositions of this paradigm. As his title suggests, Buell tells the story of a discourse that began in the apocalyptic mode in the 1960s and 70s, when discussions of “the immanent end of nature” most commonly took the form of “prophecy, revelation, climax, and extermination” before turning away from apocalypse when the prophesied ends failed to arrive (112, 78). Buell offers his suggestion for the appropriate literary mode for life lived within a crisis that is both unceasing and inescapable: new voices, “if wise enough….will abandon apocalypse for a sadder realism that looks closely at social and environmental changes in process and recognizes crisis as a place where people dwell” (202-3). In a world of threat, Buell demands a realism that might help us see risks more clearly and aid our survival.¶ Buell’s argument has become a broadly held view in contemporary risk theory and ecocriticism, overlapping fields in the social sciences and humanities that address the foundational question of second modernity: “how do you live when you are at such risk?” (Woodward 2009, 205).1 Such an assertion, however, assumes both that realism is a neutral descriptive practice and that apocalypse is not something that is happening now in places that we might not see, or cannot hear. This essay argues for the continuing importance of apocalyptic narrative forms in representations of environmental risk to disrupt conservative realisms that maintain the status quo. Taking the ecological disaster of nuclear waste as my case study, I examine two fictional treatments of nuclear waste dumps that create different temporal structures within which the colonial history of the United States plays out. The first, a set of Department of Energy documents that use statistical modeling and fictional description to predict a set of realistic futures for the site of the Waste Isolation Pilot Plant in New Mexico (1991), creates a present that is fully knowable and a future that is fully predictable. Such an approach, I suggest, perpetuates the state logics of implausibility that have long undergirded settler colonialism in the United States. In contrast, Leslie Marmon Silko’s contemporaneous novel Almanac of the Dead (1991) uses its apocalyptic form to deconstruct the claims to verisimilitude that undergird state realism, transforming nuclear waste into a prophecy of the end of the United States rather than a means for imagining its continuation. In Almanac of the Dead, the presence of nuclear waste introjects a deep-time perspective into contemporary America, transforming the present into a speculative space where environmental catastrophe produces not only unevenly distributed damage but also revolutionary forms of social justice that insist on a truth that probability modeling cannot contain: that the future will be unimaginably different from the present, while the present, too, might yet be utterly different from the real that we think we know.¶ Nuclear waste is rarely treated in ecocriticism or risk theory, for several reasons: it is too manmade to be ecological; its catastrophes are ongoing, intentionally produced situations rather than sudden disasters; and it does not support the narrative that subtends ecocritical accounts of risk perception in which the nuclear threat gives rise to an awareness of other kinds of threat before reaching the end of its relevance at the end of the Cold War.2 In what follows, I argue that the failure of nuclear waste to fit into the critical frames created by ecocriticism and risk theory to date offers an opportunity to expand those frames and overcome some of their limitations, especially the impulse towards a paranoid, totalizing realism that Peter van Wyck (2005) has described as central to ecocriticism in the risk society. Nuclear waste has durational forms that dwarf the human. It therefore dwells less in the economy of risk as it is currently conceptualized and more in the blown-out realm of deep time. Inhabiting the temporal scale that has recently been christened the Anthropocene, the geological era defined by the impact of human activities on the world’s geology and climate, nuclear waste unsettles any attempt at realist description, unveiling the limits of human imagination at every turn.3 By analyzing risk society through a heuristic of nuclear waste, this essay offers a critique of nuclear colonialism and environmental racism. At the same time, it shows how the apocalyptic mode in deep time allows narratives of environmental harm and danger to move beyond the paranoid logic of risk. In the world of deep time, all that might come to pass will come to pass, sooner or later. The endless maybes of risk become certainties. The impossibilities of our own deaths and the deaths of everything else will come. But so too will other impossibilities: talking macaws and alien visitors; the end of the colonial occupation of North America, perhaps, or a sudden human determination to let the world live. The end of capitalism may yet become more thinkable than the end of the world. Just wait long enough. Stranger things will happen.¶ Realism and Risk in the Longue Durée¶ The nature of risk, as Ulrich Beck notes in his foundational Risk Society (1986, 72), is fundamentally anti-realist; in the risk society, “dangerous, hostile substances lie concealed behind the harmless façades. Everything must be viewed with a double gaze, and can only be correctly understood and judged through this doubling. The world of the visible must be investigated, relativized and evaluated with respect to a second reality, only existent in thought and yet concealed in the world.” The traumatic nature of living in a world of risk, exemplified in the canonical toxic-world novels White Noise (Don DeLillo, 1985) and Gain (Richard Powers, 1998), lies in the way that the real world is no longer accessible to perception.4 Risks become perceptible only when they are already no longer threats but events, a condition that makes risk itself appear in a fundamentally literary mode; as Susan Mizruchi (2010, 119) writes, “when improbable risks are actualized in catastrophe, the familiar becomes the uncanny.” What Mizruchi calls the uncanny, Laurence Buell (2001) describes as the gothic; in both cases, Beck’s description of a second, real-er world beneath the phenomenological one finds a strong descriptor and a place in literary history as critics connect risk fiction to more established genres that account for what we cannot perceive and cannot understand. No longer haunted by falling helmets or animate dolls, the risk novel tries instead to theorize the connections between tumors and the factory that closed down two generations ago, between what we know of bioaccumulation and what we feel when we look at a carrot.¶ For many critics, as for F. Buell, the gothic terror of a world of risk produces apocalypticism as a symptom and realism as a solution. 5 Even when apocalypse is recognized as a potentially valuable tool for approaching risk, as in Ursula K. Heise’s insight that in a world of world-threatening danger “apocalyptic narrative….can appropriately be understood as a form of risk perception” (2008, 141), the potential benefit of apocalypse is as the most realistic genre for representing a scenario that is genuinely apocalyptic (as in the exponentially increasing flood of contemporary apocalypse novels depicting climate change, for example).6 As Peter van Wyck has argued, however, the realist commitment to describing the totality of the world’s relations produces its own set of epistemic anxieties in a world defined by risk: contemporary ecological threats can come to make ecological thought itself look like a particularly advanced form of cultural paranoia. I mean this in the sense that once we say that everything is connected in this fashion, we mean that everything is, if not already, then at least potentially integrated into a framework of understanding. And it isn’t. To make everything connected is to see the fissures and cracks rendered by ecological threats—whether the threats posed by wastes or the threats retroactively discovered through accidents— as a kind of recompense for a failure to have properly understood the connections. The real punishing the epistemic for its sins of omission. (ix) Realism, in van Wyck’s account, becomes visible as itself a symptom of the paranoid mindset that the risk society tends to produce, a mindset that insists, as Eve Sedgwick writes concurrently with van Wyck, that “there must be no bad surprises” (2003, 130). In such a mode, comfort comes not from ameliorating the danger that produced the original discomfort, but rather from constructing a model of the world that can give an illusion of totality (ibid. 133-6). A realist approach to representing risk thus has real-world consequences in second modernity, “blotting out any sense of the possibility of alternative ways of understanding or things to understand” (131). Such consequences can be seen nowhere more clearly than in the government experiment with realism that goes by the unglamorous name of the Waste Isolation Pilot Plant (WIPP), where the realism is that of the settler colonial state and the alternative ways of understanding are those of the Native nations who are most vulnerable to the site’s dangers.7

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## DA

### Impact

#### Drug price gouging disproportionately impacts indigenous people

Protect Our Care 2021 (organization founded to reduce drug prices, chaired by Leslie Dach who served in the Obama Administration as Senior Counselor to the Secretary of the Department of Health and Human Services and as the Department’s global Ebola coordinator, July 2021, https://www.protectourcare.org/wp-content/uploads/2021/07/How-High-Drug-Costs-Hurt-AIAN-Report.pdf)

● American Indians and Alaska Natives are disproportionately harmed by income and health inequity. American Indians and Alaska Natives are more likely to have a lower median income compared with their white counterparts. This disparity has profound impacts on health outcomes for American Indians and Alaska Natives that can result in reduced ability to access lifesaving drugs and a decrease in life expectancy. ● American Indians and Alaska Natives are regularly forced to navigate chronic health conditions with reduced access to needed drugs. Compounding social, economic, and political forces make American Indians and Alaska Natives more likely to suffer from ongoing health issues and be faced with outrageous medication prices. Inequitable drug access due to cost creates additional medical problems that disproportionately impact American Indians and Alaska Natives. ● Drug pricing reform is crucial to addressing racial health disparities. American Indians and Alaska Natives are significantly more likely to be uninsured than their white counterparts, pushing up the cost of prescription drugs in a country that is already paying nearly three times what individuals in other countries are spending on the same drugs. Wealth and health disparities perpetuated by systemic racism increase the strain of drug costs for American Indians and Alaska Natives. Income And Health Coverage Inequity Disproportionately Harm American Indians and Alaska Natives Income Inequity Pushes Lifesaving Drugs Out Of Reach For Many American Indians and Alaska Natives. The wealth gap between white and American Indians and Alaska Natives is staggering. According to data from the US Census Bureau, in 2016, the annual median household income for white Americans was nearly $30,000 higher compared to American Indian and Alaska Native households. More than one in four American Indians and Alaska Natives live below the federal poverty line, the highest rate for any racial group. A prescription price increase of just $10 can result in reduced ability to access prescription drugs, often with fatal consequences. Limited Health Coverage Access Disproportionately Impacts American Indians and Alaska Natives. American Indians and Alaska Natives are significantly more likely to be uninsured than their white counterparts. In 2019, 60 percent of people in the Medicaid expansion gap were people of color, stressing long-standing racial and ethnic disparities in health care access. Medicaid expansion has demonstrated the ability to improve racial health equity outcomes, particularly disease-specific diagnosis and treatment. Many American Indians and Alaska Natives live in one of the 13 states that have not implemented Medicaid expansion. Patient Assistance Programs Are Inaccessible For Many American Indians and Alaska Natives. Many pharmaceutical corporations fund independent drug assistance programs. These deceptive programs function under the guise of providing needed medications, but in reality, tend to cover expensive, brand name drugs, even when cost-effective generic alternatives are available. Even more shocking is that 97 percent refused assistance to those who needed it most, individuals without insurance, who are disproportionately American Indians and Alaska Natives. American Indians and Alaska Natives Are Regularly Forced To Navigate Chronic Health Conditions With Reduced Access To Lifesaving Drugs Systemic Racism Places Additional Medication Burdens On American Indians and Alaska Natives. Due to socio-economic and political circumstances contributing to systemic racism, American Indians and Alaska Natives are more likely to suffer from chronic health issues and experience greater difficulty accessing medications for conditions such as diabetes, cancer, hepatitis C, COVID-19, and high blood pressure. Diabetes. 34.2 million Americans, more than 10 percent of the population, have diabetes. American Indians and Alaska Natives have the highest rate of diabetes of any racial group in the country, with more than 16 percent having received a diabetes diagnosis. American Indians and Alaska Natives are also more than twice as likely to die from the disease than their white counterparts. The cost of the four most popular types of insulin have tripled in the past 10 years, with the average monthly price rising to $450 in 2016. As many as one in four of the 7.5 million Americans dependent on insulin are skipping or skimping on doses, which can lead to death. Cancer. American Indians and Alaska Natives experience cancer at an unprecedented rate with American Indian and Alaska Native women more than twice as likely to have and die from liver and IBD cancers than white women. American Indian and Alaska Native men are 40 percent more likely to have stomach cancer and twice as likely to die from the disease than white men. The average estimated out-of-pocket cost for the top speciality cancer medications for Medicare beneficiaries is more than $8,000 annually. Hepatitis C. American Indians and Alaska Natives are more than 2.5 times more likely to die from hepatitis C than their white counterparts. The drugs available to treat the disease, Sovaldi and Harvoni, cost $84,000 and $94,500 respectively, for a complete round of treatment lasting 12 weeks. The approximate cost for a single pill of either of these medications is more than $1,000. COVID-19. The COVID pandemic has disproportionately impacted American Indians and Alaska Natives across the country. American Indians and Alaska Natives are more likely to become infected with COVID, and nearly 2.5 times more likely to die from the virus. In late 2020, American Indians and Alaska Natives represented a disproportionate share of COVID cases in 17 of 37 states. COVID complications can result in damage to major organs such as the heart, kidneys, and lungs. While the full scope of these complications is yet to be known, groups with the highest infection rates will also be most likely to suffer from the long-term health and financial consequences of the virus. High Blood Pressure. Half of American adults, approximately 116 million people, have high blood pressure with the vast majority, 91.7 million, receiving a recommendation to treat the condition with prescription medication. American Indians and Alaska Natives are 10 percent more likely to have high blood pressure than their white counterparts. Drugs to treat high blood pressure can be cost prohibitive. An AARP report found that the cost of a medication used to treat high blood pressure, Bystolic, increased by 41 percent between 2015 and 2020, with an annual cost of $1,747.

#### High prices cause medicine rationing with disastrous health outcomes for black, indigenous, and Latinx patients

​​​​​​BP-Weeks 20, Co-Executive Director of ACRE. He works with community organizations and labor unions on campaigns to create equitable communities by dismantling systems of wealth extraction that target Black and Brown communities. (​​​​​​​Maurice, 8-21-2020, "Racial Health Disparities Are Fueled by Big Pharma's Patent Monopolies", *Color Lines*, <https://www.colorlines.com/articles/racial-health-disparities-are-fueled-big-pharmas-patent-monopolies-op-ed>)

We’re still in the thick of a global pandemic, and racial disparities in our healthcare system have never been more apparent. Usually, when we talk about the high cost of health care, we focus on the greedy executives behind our for-profit insurance system. But there’s another insidious factor at play that we must expose: big pharma’s drug pricing.

To dismantle racism in our healthcare system, we must address outrageous drug pricing by pharmaceutical companies, which is extracting health and wealth from Black and Brown folks. We must hold Wall Street and elected leaders accountable, and work to undo the systems that allow them to exploit our communities.

Time after time, Black and Brown people pay the price—either with our lives or through pain and suffering—because of systemic racial discrimination and the continued extraction of dollars from us. Nothing illustrates this truth more than COVID-19, which has been killing Black, Latinx and Indigenous people disproportionately because of lack of access to healthcare, safe housing and overrepresentation in what is now recognized as “essential work.”

As researchers race to find potential cures for COVID-19, it’s already becoming clear that yet again, only certain people will have access to them. Before it even hits the market, Gilead Science set a heinous price for proposed COVID-19 treatment Remdesivir—over $3,000 per patient. This is just one example of the myriad of life-saving medication which Black and Brown people are denied via pricing.

A new report, “Poi$on,” shows that Black folks have twice the rate of hypertension, and twice the mortality rate for diabetes compared to white people. Additionally, Latinx people also have twice the rate of diabetes and are more likely to experience preventable diabetes-related kidney failure and vision loss.

On top of this already glaring health disparity, the report finds that Black and Latinx people are more likely to ration medication due to cost, which causes a slew of other issues including heart disease, strokes, and kidney disease. Often, diabetic patients who ration medication have to undergo amputations that are completely preventable with reliable access to affordable medication, leading to what ProPublica has deemed an “epidemic of amputations” in Black communities.

The high cost of medication is not a coincidence. It’s the result of pharmaceutical companies having total control over their pricing. Of course, in the capitalist hellscape we live in, they always choose to put profits over people without oversight from our government.

“Poi$on” also finds that there are some clearly identifiable bad actors here. Eli Lilly hiked the price of its insulin, Humalog, 30 times in just 20 years, including a 585 percent increase between 2001 and 2005. After buying the patent rights to two blood pressure drugs, Nitropress and Isuprel, Valeant Pharmaceutical immediately raised their prices by 212 percent and 525 percent, respectively. A Valeant spokesperson referred to its duty to “maximize the value” for shareholders as justification for this egregious and arbitrary leap in price.

If it seems bananas that they’re able to do this, it is. The reason why? These pharmaceutical corporations have the authority to monopolize patents, and then do everything they can to abuse them. With no oversight on drug pricing, greedy pharma executives can gouge prices on a whim, willfully killing countless Black and Brown people in the name of profit.

On top of abusing an already corrupt patent system, pharmaceutical companies assemble tangled webs of intellectual property protection that stifle truly innovative medical research, while keeping already hyper-inflated drug prices high.

It hasn’t always been this way. Patent monopolies giving pharmaceutical companies control over pricing weren’t introduced until the 1960s, when right-wingers worked to empower corporations and wealthy investors by weakening public-sector regulations and consumer protections.

### UX

#### The DOJ is focused on criminal antitrust litigation over price-fixing--

Stargard 2-2-2021, JD, analyst @ ME(Andreas, “Why antitrust enforcement will matter to your practice in 2021 and beyond,” Medical Economics, <https://www.medicaleconomics.com/view/why-antitrust-enforcement-will-matter-to-your-practice-in-2021-and-beyond>)

Undertaking regular compliance check-ups is as advisable, of course, as a patient’s routine annual blood panel – but with healthcare likely topping President Biden’s antitrust enforcement agenda (perhaps only paralleled in importance by its focus on “big tech”), it will be of particular relevance this year. Let me briefly explain in 5 bullet points why I believe this to be the case. First, it is a given that the topic of “healthcare reform” sits atop the political and social-discourse agenda. One of the key tools the Biden administration has in its arsenal to achieve the desired changes – such as lowering costs, breaking up dominant players and preventing the further agglomeration of market power resulting from M&A deals, ensuring fairness in insurance and pharmaceutical pricing, and generally enhancing consumer access to healthcare across the country – will be its use of the antitrust laws (which are elsewhere more aptly named “competition laws”). Quite literally, the Sherman Act (and its little sibling, the Clayton Act) was made for achieving all of the examples given in the preceding sentence. Second, it strongly appears that Mr. Biden and Ms. Harris will generally take a keener interest in strictly objective antitrust enforcement than Mr. Trump, under whom the DOJ’s merger enforcement was frequently considered to be merely a tool for achieving ulterior objectives that were politically expedient (the DOJ’s objection to the AT&T/TimeWarner/CNN deal comes to mind). There is also the increased experience level of the incoming White House team: I once had the honor of being on the opposite side of VP Harris, acting in her role as California Attorney General, in a price-fixing cartel case. I can speak from experience that she is a determined litigator, seasoned in the often-complex specialty of law & antitrust economics. In addition, there is word in D.C. that the White House is considering the creation of a new “antitrust czar” advisory position within the executive. Taken together, it all points to increased action at the FTC and DOJ’s in-house competition “shops.” (I note that, while both agencies technically have jurisdiction over healthcare antitrust matters, based on a 2002 memorandum of understanding between the agencies, the FTC has historically focused on hospitals, professional services, medical equipment, and medical devices, whereas the DOJ investigated health insurance cases as well as all criminal antitrust proceedings, such as price-fixing cartels or competitors’ no-poach agreements).

#### Price-fixing generics will be a primary target

Lynch 20, partner in the Global Antitrust & Competition Practice at Latham & Watkins LLP. A former prosecutor and assistant chief in the San Francisco Field Office for the Antitrust Division of the US Department of Justice, Lynch has deep experience in cartel matters, representing companies and individuals defending criminal and civil price-fixing investigations and litigations in the US and abroad. (Niall, “Antitrust Enforcement In Health Care: A Risky And Evolving Landscape,” et al, https://www.lw.com/thoughtLeadership/antitrust-enforcement-health-care)

As recent criminal case filings reflect, the DOJ is now aggressively using its criminal enforcement authority to root out and prosecute so-called ‘hard-core’ antitrust violations in the health care industry. The first wave of the Division’s criminal enforcement efforts in health care markets started with several criminal actions involving price-fixing of generic pharmaceuticals. In December 2016, the DOJ charged two pharmaceutical executives with antitrust violations. They entered guilty pleas in January 2017. Then in May 2019, Heritage Pharmaceuticals Inc. entered into a deferred prosecution agreement (DPA) after being charged with fixing prices, rigging bids, and allocating customers for a medicine used to treat diabetes. In a separate civil action, Heritage agreed to pay $7.1m to resolve allegations under the False Claims Act related to the price-fixing conspiracy. Since then, the DOJ has charged several other pharmaceutical companies and four current and former executives as part of the same investigation of the generic drug market.

#### The DOJ will focus on price-fixing now

Love 6-7-2021 (Bruce, “Why Antitrust Health Care Lawyers Are Set for a Big Year,” *Law*, <https://www.law.com/nationallawjournal/2021/06/07/why-antitrust-health-care-lawyers-are-set-for-a-big-year/?slreturn=20210927181323>)

Health care companies can expect more antitrust enforcement activity in the next few years, and law firms will be increasingly called on to represent them, according to Andre Geverola, a former Justice Department attorney who moved to Arnold & Porter Kaye Scholer on Monday. Geverola was the director of criminal litigation in the Justice Department’s antitrust division until June 4. He has joined Arnold & Porter’s antitrust and competition practice group as a partner. At the firm, Geverola will lead the firm’s cartel investigations practice, focusing on the criminal aspects of antitrust practices, such as price-fixing, bid-rigging and forms of market allocation. He said the Justice Department has in the last few years initiated several investigations and prosecutions in new markets and industries. And there has been a particular focus on the health care industry, which is set to continue, said Geverola. “One area of focus has been allocation of resources in the labor market,” he said. “The division has recently brought criminal cases for no-poach conduct, which is when companies agree not to poach each other’s employees.” For instance, there is currently a case pending against a subsidiary of the UnitedHealth Group in the Northern District of Texas, which is the first criminal no-poach case filed by the Justice Departments’ antitrust division. A number of other cases have since been brought against other companies and individuals in the health care market, he said. “The government is very active in the health care space in a number of areas of antitrust law,” Geverola said. Last August, multinational drug company Teva Pharmaceuticals USA was charged with conspiring to fix prices, rig bids and allocate customers for generic drugs. It was the second company indicted and the seventh generic drug manufacturer charged in an ongoing investigation. Antitrust enforcement in general appears set to rise sharply, according to many lawyers in the field. By April, President Joe Biden had already signaled a tightening of antitrust policy, wrote Dawn Yamane Hewett, a partner at Quinn Emanuel Urquhart & Sullivan in a comment piece for The National Law Journal. Hewett observed that advocate of aggressive enforcement Tim Wu has joined the National Economic Council to work on technology and competition policy, and progressive antitrust critic Lina Khan had been tapped for the Federal Trade Commission (she has since sailed through Senate appointment hearings with bipartisan support). Locally, an increased focus on antitrust has already begun. Last month, the District of Columbia’s attorney general revealed he was filing an antitrust lawsuit against tech giant Amazon. Geverola said he left the Justice Department after 14 years—which spanned multiple Democratic and Republican administrations—because he wanted to use his criminal and antitrust experience in private practice. “Antitrust is in the news more than I have ever seen in my entire 14-year career at the DOJ, and that attention translates to enforcement,” he said. “It’s going to be very active area under the Biden’s administration, and I wanted to use my DOJ experience in a dynamic and exciting environment with other leading professionals in the field.”

#### There are tons of ongoing generics criminal price-fixing cases

Mucchetti 21, JD, specializes in antitrust litigation matters. He has more than two decades of antitrust litigation, investigations and merger clearance experience, with expertise in the healthcare, paper and lumber products, and consumer goods and retail sectors (Peter, “Time for a Check-Up: the U.S. Healthcare Industry Remains Subject to Aggressive Criminal Antitrust Enforcement,” *Corporate Counsel Business Journal*, <https://ccbjournal.com/articles/time-for-a-check-up-the-u-s-healthcare-industry-remains-subject-to-aggressive-criminal-antitrust-enforcement>)

In the last 22 months, the DOJ has charged seven generic drug manufacturers with "per se" criminal violations including conspiring to fix prices, rig bids, and allocate customers for generic drugs between May 2013 and December 2015. Five of the companies resolved the charges via DPAs (set forth below), paying a combined total of more than $426 million in criminal antitrust penalties. Two additional companies await trial.[4] In addition, four senior executives have been indicted on criminal antitrust charges, with three entering plea agreements, averting prison sentences of up to 10 years each provided that they continue to cooperate with the government. They will be sentenced once the government closes its investigation. Based on the offense levels and the DOJ's Sentencing Guidelines, the sentences could range anywhere between 15 and 96 months. One executive continues to await trial.

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#### That means the aff forces the DOJ to create a new monitoring agency to prosecute the per se violation

Kovacic 21, \*Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, Dickson Poon School of Law, King’s College London; Non-Executive Director, United Kingdom Competition and Markets Authority (William, “THE FUTURE ADAPTATION OF THE PER SE RULE OF ILLEGALITY IN U.S. ANTITRUST LAW,” Columbia Business Law Review, Lexis)

In a significant number of cases, judicial interpretation of § 1 of the Sherman Act1 has prohibited certain forms of conduct with rules of per se illegality.

Start FN 2

The Supreme Court first used this terminology in United States v. Socony-Vacuum Oil Co., when it held: “Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.” 310 U.S. 150, 223 (1940). In a footnote, the Court added an important qualification: Under this indictment proof that prices in the MidWestern area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction . . . . But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. Id. at 224 n.59. By this observation, the Court indicated that the bell of illegality rings at the moment the actors form an illicit agreement, without regard to its actual market impact.

End FN 2

Per se illegality has powerful consequences in the U.S. antitrust regime. Per se rules underpin the criminal prosecution program of the Department of Justice, Antitrust Division (DOJ)3 and often give decisive advantages to plaintiffs in civil antitrust matters.4

#### The DOJ Antitrust Division is responsible for enforcement of per se violations

Henry 21, solo practitioner of antitrust law focusing on consulting, compliance, monitoring, opinions and representing individuals. A former Chair of the Antitrust Section of the American Bar Association, she has handled all aspects of competition law, including criminal defense, treble damage litigation, compliance advice, and merger and other civil investigations and, as lead counsel, won a rare corporate criminal antitrust jury acquittal. Her expertise and accomplishments have received repeated recognition, including by Chambers, Global Competition Review (Leading Attorney and Thought Leader), National Law Journal (M&A Antitrust Trailblazer Awards), Legal 500, and Best Lawyers in America (including Washington DC’s Top 50 Women Lawyers). She has practiced criminal antitrust defense for over forty years. (Roxann, “PER SE ANTITRUST PRESUMPTIONS IN CRIMINAL CASES,” Columbia Business Law Review, Lexis)

The Department of Justice, Antitrust Division is responsible for criminal antitrust prosecutions.

Start FN 118

Justice Manual Title 7: Antitrust, supra note 11 (“To ensure a consistent national, Department-wide policy on antitrust questions, the Assistant Attorney General for the Antitrust Division is responsible for supervising all federal antitrust investigations[.]”).

End FN 118

Like the other branches of government, the executive branch recognizes the lack of clarity in the Act,119 as well as the difficulty of distinguishing its criminal from its civil enforcement.120 It further recognizes that the per se concept rests on savings of “time and expense”121 and creates the potential for overenforcement that chills procompetitive conduct.122 Nevertheless, the DOJ uses per se concepts in its exercise of prosecutorial discretion but also weaponizes per se case law to deprive the defense of evidence at trial and to direct the jury to presume illegality conclusively.

### IL---Resources Limited

#### DOJ Antitrust Division has limited resources---they’ll kick cases if crunched

Harrington 15, Professor of Business Economics and Public Policy at Wharton (Joseph, “The Comity-Deterrence Tradeoff and the FTAIA: Motorola Mobility Revisited,” CPI Antitrust Chronicle January 2015 (2)

The preceding analysis was predicated on the critical assumption that the government prosecutes the cartel, but this may not occur for two reasons. First, the government may be unaware of the cartel’s existence. Lacking the right to bring a private case, cartels are less likely to be discovered because those harmed have weaker incentives to monitor for collusion. Nevertheless, they still do have some incentive to monitor and report a suspected cartel to the government in order to disrupt the harm that is being inflicted upon them. It is then unclear whether the loss of antitrust standing will substantively weaken the incentive to monitor to the point that it warrants interfering with comity. Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but chooses not to litigate. The Antitrust Division of the U.S. Department of Justice (“DOJ”) has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ’s caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a per se offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is per se unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion. While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:17 The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.

### IL---Price-Fixing Bad---Health Care Costs

#### Competitively priced generics are vital to low health care costs

Attorney’s General 19, Attorney’s General of 44 states suing various members of the pharmaceutical industry for generic price-fixing (IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, <https://portal.ct.gov/-/media/AG/Downloads/GDMS-Complaint-51019-FINAL-REDACTED-PUBLIC-VERSIONpdf>)

Like their branded counterparts, generic drugs are used in the diagnosis, cure, mitigation, treatment or prevention of disease and, thus, are integral components in modern healthcare, improving health and quality of life for nearly all people in the United States. In 2015, sales of generic drugs in the United States were estimated at $74.5 billion dollars. Today, the generic pharmaceutical industry accounts for nearly 90% of all prescriptions written in the United States. 73. A branded drug manufacturer that develops an innovative drug can be rewarded with a patent granting a period of exclusive rights to market and sell the drug. During this period of patent protection, the manufacturer typically markets and sells its drug under a brand name, and the lack of competition can permit the manufacturer to set its prices extremely high. 74. Once the brand-name drug’s exclusivity period ends, additional firms that receive FDA approval are permitted to manufacture and sell “generic” versions of the brand-name drug. As generic drugs enter the market, competition typically leads to dramatic reductions in price. Generic versions of brand name drugs are priced lower than the brand-name versions. Under most state laws, generic substitution occurs automatically, unless the prescriber indicates on the prescription that the branded drug must be "dispensed as written." 75. As additional manufacturers enter a particular drug market, competition pushes the price down much more dramatically. Often, the price of a generic drug will end up as low as 20% of the branded price or even lower. For this reason, generic drugs have long been referred to as one of the few "bargains" in the United States healthcare system. Experts have stated that 22 the substantial cost savings gained from the growing number of generic drugs have played a major role in keeping health care costs from increasing more dramatically. 76. Where there is genuine competition, the savings offered by generics drugs over their brand-name equivalents provide tremendous benefits to consumers and health care payors. Patients typically see lower out of pocket expenses, while lower costs for payors and insurers can lead to lower premiums for those who pay for health insurance, and lower costs to government health care programs like Medicare and Medicaid mean greater value for taxpayers.

#### Generic price-fixing distorts care and insurance markets. Causes skyrocketing costs.

Gunasekera 10-5-2021, et al, FORMER DOJ SENIOR COUNSEL FOR HEALTH CARE FRAUD, NOW REPRESENTING WHISTLEBLOWERS Former Senior Counsel for Health Care Fraud at the U.S. Department of Justice (DOJ) (Eva, “Nothing Generic about Generic Pharma Fraud,” *National Law Review*, <https://www.natlawreview.com/article/nothing-generic-about-generic-pharma-fraud>)

According to the allegations, the generic pharmaceutical manufacturers Taro Pharmaceuticals U.S.A., Inc., Sandoz Inc., and Apotex Corporation conspired to control the market for certain generic medications, resulting in government-funded healthcare programs paying improper prices for certain medications. Additionally, the pharmaceutical companies paid each other in exchange for their “alleged arrangements on price, supply, and allocation of customers” in violation of the Anti-Kickback Statute. In other words, the three companies allegedly traded insider information regarding and controlled the supply of the generic medications they manufactured. Between 2013 and 2015, these companies attempted to manipulate the markets for generic hypertension medication, skin condition drugs, an anti-inflammatory, and a cholesterol-lowering drug. Compounding the alleged price-fixing, claims were submitted to Medicare, Medicaid, TRICARE, and other government-funded health care programs for these medications, thus causing the government to pay fraudulent prices for these medications.

Choosing generics instead of brand-name drugs is one of the easiest and lowest-cost ways to save on medication, especially for beneficiaries of government-funded health care programs. Pharmaceutical manufacturers who seek to make a profit by manipulating the generic drug market are hurting vulnerable, ill patients who may not be able to afford artificially inflated medications. When care and medication costs rise, insurers respond by raising premiums and deductibles, and taxpayers pay more for government-funded health care programs. These pharmaceutical companies’ collusion not only harms patients trying to fill medications at pharmacies but also ultimately impacts taxpayers.

#### Price-fixing dramatically increases health care costs---up-front and downstream

Mulcahy 19, Senior Policy Researcher @ RAND (Andrew, “Price-Fixing Case Reveals Vulnerability of Generic Drug Policies,” *RAND*, <https://www.rand.org/blog/2019/07/price-fixing-case-reveals-vulnerability-of-generic.html>)

A massive lawsuit (PDF) filed in May by 44 states accuses 20 major drug makers of colluding for years to inflate prices on more than 100 generic drugs, including those to treat HIV, cancer, and depression. If true, the alleged behavior is not just a violation of antitrust law, but also a betrayal of the government policies that created and defended the entire generic drug industry. Most prescriptions in the U.S. today—9 in 10—are filled with generics, which are just as safe and effective as their brand-name equivalent. And yet generics account for only 22 percent of U.S. prescription drug spending. These prices are so low because of competition between makers of different versions of the same generic drug. The more competing generic alternatives, the lower the price, theoretically right down to the marginal cost of manufacturing the pill. This success is the result of decades of careful federal and state policymaking, all geared towards introducing competition in prescription drug markets. The entire generic industry has its origins in the Hatch-Waxman Act of 1984. Prior to Hatch-Waxman, a company that wanted to sell a competing version of a drug whose patents had expired had to conduct lengthy and expensive clinical trials to get approval from the U.S. Food and Drug Administration. Hatch-Waxman established a quicker, less-expensive path to FDA approval that leans on the scientific research supporting the already approved brand-name drugs. Hatch-Waxman also created incentives for generic drug makers to challenge drug patents that prevent competition. Successful challengers win a 180-day period of exclusivity during which their generic is the only one allowed to compete with the brand-name drug. The floodgates open and additional competition pushes prices down further after the 180-day period. Other policies—public and private—evolved to promote generic competition. State laws allow generics to be freely substituted for brand-name drugs by pharmacists. Health plans aggressively push generics by offering higher dispensing fees to pharmacies and lower copays to patients. All these policies aim to promote competition in order to reduce how much Americans spend on drugs. Overall, they've succeeded. One estimate puts savings to patients and health plans from generic drugs at $265 billion (PDF) in 2018 alone. Lower prices also improve adherence to treatment regimens for chronic conditions, which helps avoid downstream health care costs. But where patients and health plans benefit the most from competition, the profit margins realized by generic drug makers are the slimmest. Margins can be razor thin or nonexistent for run-of-the-mill generic pills or capsules. Generic drug makers have always had an eye out for opportunities to widen those margins. In the past, for example, the profits realized during the 180-day exclusivity period were so comparatively enormous that generic companies camped out in FDA's parking lot to be the first to file a challenge. But then after a policy change allowed it, companies began to share exclusivity (thereby shrinking the incentive to be first) and generic drug makers increasingly settled patent litigation with brand-name drug makers rather than fight to a final decision. The settlements usually allow the generic drug maker to enter the market—just not immediately—in exchange for a large lump-sum payment. While brand-name and generic drug makers claim these “pay for delay” deals benefit everyone, the Federal Trade Commission disagrees. Patients, after all, are left paying brand-name prices for years. The FTC has waged a campaign against such settlements for nearly a decade. Eventually, for most blockbuster drugs, there are many competing generic versions and therefore lower prices. But competition is more anemic—and sometimes absent—in lower-volume corners of the prescription drug market. Shortages and price spikes are common when there are only one or two manufacturers. Drugs with complex manufacturing requirements, such as injected and infused drugs, also typically have fewer generic competitors and higher prices. Likewise, competition from “biosimilar” versions of biologic drugs (which, despite important differences with generics, also aim to lower prices through competition) has yet to take off as hoped and prices for biologics remain high. The U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes. In short, it's no secret that the U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes if policymakers choose to do so. The price-fixing allegations in the lawsuit, if correct, raise the level of concern. They suggest that failures of competition in the generic industry are more troubling—and more widespread—than anyone knew. If the alleged price increases—some up to 1000 percent—are true, patients and health plans have been overcharged to the tune of “many billions of dollars,” according to the lawsuit. The broader damage done to trust in generic drug makers may be irreparable. Especially as spending on prescriptions overall is increasing, the U.S. needs a fair, competitive generic drug industry. It shouldn't take more aggressive policing of antitrust laws to get one.

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#### The DOJ Antitrust Division has limited resources---overload causes cuts to current priorities

Rosenberg 20, Chuck Rosenberg is a former U.S. attorney, senior FBI official and chief of the Drug Enforcement Administration. (Chuck, “Why the Attorney General's Meddling on Antitrust Issues Matters,” <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>)

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted, [a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices. There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

#### DOJ can’t do it all

**Palko** & Rand **19**, \*David, associate in Womble Bond Dickinson. \*\*Ripley, associate, one of the President’s United States Attorneys in North Carolina. (8/9/19, "Year One of Trump’s DOJ: An Overview of the Four Major Categories of Offenders", *JD Supra*, https://www.jdsupra.com/legalnews/year-one-of-trump-s-doj-an-overview-of-53913/)

Some of this decrease in the number of drug offenders can be attributed to the **zero-sum nature of DOJ resources** – the direction of **increased** **effort** toward offenses in **one** category will result in **fewer offenses** being prosecuted in **other categories**. But a part of this decrease is likely due to an increase in strategic prosecution of certain drug offenses in state court. In contrast to immigration offenses, which are crimes of exclusive federal jurisdiction, drug offenses are crimes of concurrent jurisdiction – they can be prosecuted either in state court or in federal court. In determining whether to prosecute a drug offense, federal prosecutors look at many factors, including whether the offense would likely be punished more seriously in state court or in federal court. Some state laws provide for harsher punishment for certain drug offenses than federal law does. For example, someone in North Carolina with no criminal record who possesses 28 grams of heroin is looking at a mandatory sentence under North Carolina law of 225-282 months in prison. In North Carolina’s federal courts, the guideline range for the same person with the same amount of heroin starts at 21-27 months. On the other hand, a person who has the highest level criminal record provided for under North Carolina law and who is in possession of 28 grams of crack cocaine is looking at a mandatory sentence under North Carolina law of 35-51 months in prison; the same person with the same amount of crack cocaine is looking at a federal advisory guideline range starting at 100-125 months.

#### Forced choices regarding prosecutors and resources are controlling DOJ efforts

Hudak 18 – PhD in Political Science @ Vandy, deputy director of the Center for Effective Public Management and a senior fellow in Governance Studies. His research examines questions of presidential power in the contexts of administration, personnel, and public policy (John, Brookings Institute, https://www.brookings.edu/blog/fixgov/2018/01/04/why-sessions-is-wrong-to-reverse-federal-marijuana-policy/)

As I have noted previously on the Fresh Toast, the Attorney General does not have unlimited resources to enforce federal law. Every day federal prosecutors make choices about which crimes and cases to pursue. Chasing after the thousands of legal marijuana growers, processers, and dispensaries and the tens of thousands of people they employ will cost DEA significant amounts of federal tax dollars. Add to that the costs US Attorneys will incur prosecuting those individuals and representing the government on appeals. That very quickly eats into the same Department of Justice budget that could be spent fighting terrorism, combating cybercrime, dealing with the opioid epidemic, eradicating MS-13 or dozens of other federal law enforcement priorities. These are the choices the Attorney General has to make. It is clear the public would rather dollars be spent on other priorities, but budgets are limited and the rescission of Cole complicates that.

#### New demands require cuts elsewhere.

Dafny 21, Professor of Business Administration at the Harvard Business School and the John F. Kennedy School of Government, and former Deputy Director for Healthcare and Antitrust in the Bureau of Economics at the Federal Trade Commission. Professor Dafny’s research focuses on competition in health care markets, and the intersection of industry and public policy. (Leemore, “The Covid-19 Pandemic Should Not Delay Actions to Prevent Anticompetitive Consolidation in US Health Care Markets,” *Pro Market*, <https://promarket.org/2021/06/10/covid-pandemic-consolidation-pandemic-monopoly/>)

Antitrust enforcement vis-a-vis horizontal transactions among health care providers or payers is active, although enforcers do not have sufficient resources to be as active as needed. In the past few years, the DOJ, together with state plaintiffs, successfully blocked two proposed mega-mergers of large health insurers. In the past decade, the FTC and DOJ have successfully challenged over a dozen hospital mergers and a number of mergers among other health care providers, including matters settled with consent decrees requiring divestitures to preserve competition and matters the parties abandoned in the face of agency opposition. However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts. To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses. The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices.