# 1AC – ADA

## Plan – 1AC

The United States federal government should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws to prohibit arbitration agreements that operate as a prospective waiver of a party’s right to prove statutory remedies.

## Private Antitrust – 1AC

Advantage One is Private Antitrust.

#### Arbitration devastates enforcement and structurally incentivizes collusion.

Elhauge ’15 [Einer; 2015; Petrie Professor of Law at Harvard Law School, Founding Director of the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics, former Chairman of the Antitrust Advisory Committee to the Obama Campaign; Fordham International Law Journal, “How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration,” vol. 38]

The same problem infects consents to arbitration clauses that waive the right to effective vindication of antitrust law. If buyers acted together, then they would only consent if those waivers made them better off. But acting individually, each buyer has incentives to consent in exchange for a trivial discount from the inflated market-wide prices that will result when all buyers consent to effectively immunizing antitrust violations against them. It takes only a trivial discount because each buyer knows that their individual decision whether to consent has little effect on whether the market-wide harm from immunizing antitrust violations occurs.

To put it another way, competitive markets are a public good, from which each buyer in a market benefits, whether or not that buyer contributes to the creation of that public good by rejecting conduct or agreements that keep that market competitive. Thus, buyers inevitably have incentives not to contribute; instead they will predictably consent to conduct and arbitration waivers that result in uncompetitive markets.

The future implications are alarming. Given the Italian Colors decision, it is hard to see why all businesses would not at least insert arbitration clauses into their contracts that preclude class arbitration. Given the limited nature of discovery in arbitration, that alone will bring US private enforcement largely into convergence with Europe, and perhaps will leave US private enforcement even less effective than the European Union in the future if the new EU directive leads to stronger national rules on discovery and class actions.

Businesses are likely to go even further given the Supreme Court’s logic that arbitration provisions are permissible whenever they eliminate only the right to prove a claim, rather than the right to pursue it. Under this logic, parties could adopt arbitration provisions eliminating the ability to introduce economic expert testimony altogether, even though that would effectively preclude not only class suits but also suits by corporate plaintiffs that might have large enough stakes to fund an expert. The Court offered two responses to this possibility. First, it said, “it is not a given that such a clause would constitute an impermissible waiver,”12 which alarmingly suggests this possibility might well be in our future. Second, the Court said that this possibility would be different because “such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim.”13 But that rationale conflicts with the Court’s logic that the difference is between being able to pursue a claim and prove it, and disturbingly suggests the Court is resting instead on a hostility to class actions over corporate suits.

Moreover, the Court’s logic would also seem to permit many other possible ways of gutting antitrust enforcement that the Court did not address. Parties could adopt provisions that preclude discovery even more than it is already limited in arbitration, say by barring any discovery into market definition, power, or anticompetitive effects. Indeed, the Court’s distinction between barring proof versus barring pursuit of a claim would even suggest that arbitration clauses could baldly prohibit offering any proof in arbitration on market definition, power, or anticompetitive effects, because that would go simply to the right to prove the claim. This would leave private enforcement by US buyers even less effective than in Europe.

This development would immunize businesses against US federal antitrust enforcement by anyone who contracts with them, which is almost any private party who can sue given that federal antitrust law largely limits antitrust enforcement to direct purchasers. The main exception would be antitrust suits by rivals excluded by exclusionary conduct, who may have no contract with the defendant and thus no arbitration provision. But that is hardly an adequate substitute because:

[A]ny rival claim will be limited to the competitive profits the rival could have earned on some share of the market in the but-for world. A monopolist will generally find it profitable to pay such low competitive profits on a smaller market share out of the monopoly profits it gains on its monopoly market share.14

Further, “it is too easy to cut side deals with rivals through settlements that may satisfy the financial interests of the rivals but fail to fix (or even worsen) the anticompetitive problem.”15 Indeed, the Italian Colors decision creates incentives for them to cut side deals that include arbitration provisions that bar effective antitrust enforcement between them. And given that the Italian Colors decision allows each business to use arbitration clauses that effectively immunize them against their buyers, businesses might not have much incentive to even try to exclude each other since it is more profitable to instead collude and jointly exploit their buyers.

#### Anticompetitive effects of AI are nascent but enabled by government inflexibility and arbitration---facilitating private litigation solves.

Banicevic et al. ’18 [Anita, Gabrielle Kohlmeier, Dajena Pechersky, and Ashley Howlett; Fall 2018; Coalition of attorneys working under the technology compliance working group, including legal experts from Davies Ward Phillips & Vineberg LLP, and the working group chair; Compliance and Ethics Spotlight, “Algorithms: Challenges and Opportunities for Antitrust Compliance,” p. 8-12]

III. Anticompetitive Effects of Algorithms

Although algorithms provide significant competitive benefits for firms and consumers, they present novel challenges for competition authorities—and by extension, compliance teams. In particular, there is a rising concern that algorithms increase the potential for both tacit and overt collusion.29

Collusion occurs when competing firms coordinate or act in a manner to set prices above the market equilibrium with the objective of increasing profits. While this may result in short-term profits to the market actors involved in the arrangement, collusion harms consumers, is anticompetitive, and leads to poor long-term economic outcomes.30

There are two forms of collusion, overt and tacit. In a free market, firms are free to act to maximize their profits, as long as they are acting independently. Overt collusion refers to anticompetitive conduct that is facilitated through explicit agreements, written or oral. It is illegal in most jurisdictions around the world. Tacit collusion, also known as conscious parallelism, refers to anticompetitive conduct that can be achieved without explicit coordination between competing firms. Although competing firms decide their profit-maximizing strategies independently, they are able to arrive at and maintain a noncompetitive outcome. Conscious parallelism is generally not illegal because there is no underlying illegal behavior or action to sanction.31

Algorithms that facilitate overt collusion present no real new legal challenges to competition authorities. If a firm is found to have coordinated with other market actors through algorithms, provided there is evidence of direct or indirect contact showing there to be an explicit agreement between market actors, competition authorities have the necessary tools to discipline the actors involved in the arrangement.32

The challenge lies with tacit algorithmic collusion. Some scholars believe that algorithms could become capable of facilitating collusion without the need for any communication or coordination between market actors. Dynamic pricing algorithms, for instance, can assess and adjust prices for thousands of products and services in milliseconds in response to changes in competitor prices. The concern is that, as a result, firms might choose not to discount products and services if they perceive the benefit to be short-lived. Some have argued that this leads to tacit collusion since firms are seen as able to “set” and maintain market prices through algorithms without explicitly coordinating.33

In most algorithms, market actors can input the general rules that map inputs to outputs or they can at least decrypt the algorithm to understand why an algorithm behaves a certain way. Some academics have argued that deep learning algorithms create further issues for competition authorities. They have posited that the development of deep learning algorithms means that market actors may not necessarily know how or why a particular algorithm arrives at particular outputs as such algorithms would essentially act autonomously towards potentially anticompetitive outcomes.34

The concept of tacit algorithmic collusion is disputed, however, with prominent scholars presenting data showing that, currently, such collusion is no more than an unproven theory.35 Professor Salil Mehra commented before the Federal Trade Commission (FTC) that “[t]here has been scaremongering based on fears that artificial intelligence will somehow destroy competition as we know it.” In his view, “these fears are premature . . . because technological development is still far from creating some sort of autonomous algorithmic cartel robot.”

As economist Ai Deng explains, although some algorithms may do a better job than humans at establishing cooperative relationships, a number of assumptions underlying antitrust fears about algorithms have little, if any, empirical support.36 Real world competitive decisions are highly complex, presenting significant computational and technical challenges, and current research shows that designing algorithms capable of learning to cooperate in such an environment is very difficult. In fact, a growing body of theoretical and experimental economic literature posits that algorithms have to learn to communicate with one another and react to communications to achieve a collusive outcome in a market with more than two market actors. Although this may be theoretically possible, the development of algorithms that are able to communicate in this way is still in its very early stages.37

The debate on whether tacit algorithmic collusion is a possibility is far from settled. However, the existence of that debate does not detract from the fact that algorithms have arrived and have materially influenced the way in which market actors execute their functions.

IV. Algorithms and Antitrust Compliance in the United States

A. Collusion

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits all agreements that unreasonably restrain trade. When discussing the application of the traditional analysis of illegal collusion in the algorithmic pricing context, U.S. antitrust officials have emphasized the importance of the existence of an agreement, which is often missing or harder to detect when algorithms are used. As Maureen Ohlhausen has explained, “[t]he type of technology used to communicate with competitors is wholly irrelevant to the legal analysis. Whether it is phone calls, text messages, algorithms or Morse code, the underlying legal rule is the same—agreements to set prices among competitors are always unlawful.”38

The U.S. Supreme Court has defined an agreement as “a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.” 39 This broad definition includes not only explicit agreements to set prices collusively, but also exchanges of competitively sensitive, nonpublic information between competitors for anticompetitive purposes. The antitrust laws do not, however, prohibit companies from engaging in conscious parallelism or interdependent pricing, where an agreement is not present.40 The mere fact that competitors monitor, and even match, each other’s public pricing information is not sufficient to establish a Section 1 violation.

During a hearing before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights on October 3, 2018, Assistant Attorney General Makan Delrahim stated that the use of algorithms to create anticompetitive effects is an “important issue” that antitrust enforcers are struggling with both in the U.S. and in Europe.41 For the most part, antitrust enforcers in the U.S. agree that allegations of collusion involving algorithms should be analyzed under the same legal standards as any other collusive conduct.42 Barry Nigro, a deputy assistant attorney general in the Antitrust Division of the Department of Justice (DOJ), has reportedly stated that “when analyzing whether conduct constitutes collusion, an observer should ‘take out’ the fact that an algorithm was involved[.]”43 Nonetheless, some officials have noted that while U.S. antitrust laws generally provide the tools necessary to address anticompetitive conduct facilitated by algorithms, the use of algorithms may make it harder to identify collusion and may require antitrust enforcers to employ new investigative techniques.44 With respect to the difficulty of detecting algorithm-enabled collusion, Maureen Ohlhausen, former Acting Chairman of the FTC, has commented that, as with other types of price-fixing conduct, the DOJ’s leniency program and the threat of criminal penalties should incentivize self-detection and cooperation with enforcers where external detection is not enough.45

The DOJ and private plaintiffs have brought cases involving price-fixing using algorithms or other nontraditional electronic tools. For example, in U.S. v. Topkins, 46 the first antitrust e-commerce criminal prosecution, DOJ charged David Topkins and his coconspirators with using pricing algorithms to engage in a conspiracy to fix the prices of posters sold in the Amazon Marketplace. Specifically, the conspirators “agreed to adopt specific pricing algorithms for the sale of the agreed upon posters with the goal of coordinating changes to their respective prices.”47 Topkins pleaded guilty to price fixing in violation of Section 1 and agreed to pay a $20,000 criminal fine.

In Meyer v. Kalnick, 48 private plaintiffs alleged that drivers agree with Uber to charge certain fares with the understanding that all other Uber drivers are agreeing to charge the same fares. They further alleged that this agreement is facilitated by Uber’s pricing algorithm, which all drivers use to set their fares. The plaintiffs alleged that this arrangement amounted to a hub-and-spoke conspiracy in violation of Section 1.49 The court denied the defendant’s motion to dismiss, but Uber subsequently moved the matter to arbitration.

In October 2018, Assistant Attorney General Makan Delrahim stated that the DOJ had a criminal case that he expected would come to a conclusion in the next two weeks related to the use of search algorithms by competitors to effectuate price fixing, which he added would be the “first of its kind.” 50 Further details on the case that he was referring to have not yet been released.

B. Price Discrimination

Pricing algorithms can be used to discriminate among buyers. For example, a seller may use an algorithm to charge different prices or offer different discounts to customers located in different states. The DOJ and FTC have said that algorithmic price discrimination should be analyzed using the same legal framework as price discrimination in other contexts, and “[a]lgorithmic pricing that leads to price discrimination—without incorporating competitor data—is unlikely to raise competition concerns.”51

A seller who charges competing buyers different prices for the same product may be liable for price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a). The U.S. antitrust agencies have not actively enforced the act in decades.52 Some enforcers have noted, however, that algorithmic pricing may lead to new and more sophisticated methods of price discrimination.53 Private parties continue to sue under the act’s provisions.54 Companies using algorithmic pricing may face litigation from private plaintiffs if the algorithm facilitates actionable price discrimination.

As algorithms are increasingly used by businesses to narrowly target specific types of customers, their use might enhance the risk of a merger challenge where markets can be defined by differential pricing. The 2010 Horizontal Merger Guidelines55 authorize the agencies to challenge a proposed merger if it is likely to be anticompetitive in any relevant market, no matter how small. The Merger Guidelines instruct that the antitrust agencies will evaluate the possibility of price discrimination against targeted customers and further provide that “[w]hen discrimination is reasonably likely, the agencies may evaluate competitive effects separately by type of customer.”56

Businesses are empowered by sophisticated pricing algorithms to process large amounts of data and analyze more granular data regarding consumer characteristics than was previously possible. Algorithms enable sellers to segment their customers into smaller and smaller groups and engage in more targeted price discrimination methods.57 The more differentiated the algorithmic pricing program is, the narrower the antitrust agencies may define the relevant markets for purposes of evaluating the competitive effects of a potential merger.58 A proposed merger that has no anticompetitive effects in one market segment may thus be found to substantially decrease competition in a smaller “price discrimination market.”

#### Government agencies will overlook AI monopolization, risking dystopia.

Chakravorti ’21 [Bhaskar; July 27; Dean of Global Business in the Fletcher School at Tufts University, Ph.D. in Economics from the University of Rochester; Wired, “Biden’s ‘Antitrust Revolution’ Overlooks AI—at Americans’ Peril,” <https://www.wired.com/story/opinion-bidens-antitrust-revolution-overlooks-ai-at-americans-peril/>]

Despite the executive orders and congressional hearings of the “Biden antitrust revolution,” the most profound anti-competitive shift is happening under policymakers’ noses: the cornering of artificial intelligence and automation by a handful of tech companies. This needs to change.

There is little doubt that the impact of AI will be widely felt. It is shaping product innovations, creating new research, discovery, and development pathways, and reinventing business models. AI is making inroads in the development of [autonomous vehicles](https://www.ft.com/content/46ff4fe4-0ae6-4f68-902c-3fd14d294d72), which may eventually improve road safety, reduce urban congestion, and help drivers make better use of their time. AI recently predicted the molecular structure of almost every protein in the human body, and it helped develop and roll out a Covid [vaccine in record time](https://www.wsj.com/articles/how-ai-played-a-role-in-pfizers-covid-19-vaccine-rollout-11617313126). The pandemic itself may have accelerated AI’s incursion—in emergency rooms for [triage](https://www.technologyreview.com/2020/04/23/1000410/ai-triage-covid-19-patients-health-care/); in airports, where [robots spray](https://www.latimes.com/politics/story/2021-05-04/covid-automation-robots-trends-effects-on-workers) disinfecting chemicals; in increasingly automated [warehouses](https://www.uschamber.com/co/good-company/launch-pad/warehouse-robotic-automation-coronavirus-pandemic) and [meatpacking plants](https://www.wsj.com/articles/meatpackers-covid-safety-automation-robots-coronavirus-11594303535); and in our remote workdays, with the growing presence of chatbots, speech recognition, and email systems that get better at completing our sentences.

Exactly how AI will affect the future of human work, wages, or productivity overall remains unclear. Though service and blue-collar wages have lately [been on the rise](https://www.cnbc.com/2021/07/17/why-the-biggest-job-wage-boom-is-blue-collar-.html), they’ve stagnated for three decades. According to MIT’s Daron Acemoglu and Boston University’s Pascual Restrepo, [50 to 70 percent](https://www.nber.org/papers/w28920) of this languishing can be attributed to the loss of mostly routine jobs to automation. [White-collar occupations](https://www.brookings.edu/wp-content/uploads/2019/11/2019.11.20_BrookingsMetro_What-jobs-are-affected-by-AI_Report_Muro-Whiton-Maxim.pdf) are also at risk as machine learning and smart technologies take on complex functions. According to [McKinsey](https://hai.stanford.edu/ai-future-work-conference), while only about 10 percent of these jobs could disappear altogether, 60 percent of them may see at least a third of their tasks subsumed by machines and algorithms. [Some](https://siepr.stanford.edu/system/files/Artificial%20Intelligence%20and%20the%20Modern%20Productivity%20Paradox-%20A%20Clash%20of%20Expectations%20and%20Statistics.pdf) researchers argue that while AI’s overall productivity impact has been so far disappointing, it will improve; [others](http://bostonreview.net/forum/science-nature/daron-acemoglu-redesigning-ai) are less sanguine. Despite these uncertainties, most [expert](https://www.gsb.stanford.edu/insights/misplaced-fear-job-stealing-robots)s agree that on net, AI will “become more of a challenge to the workforce,” and we should anticipate a [flat to slightly negative impact](https://www.mckinsey.com/featured-insights/artificial-intelligence/notes-from-the-ai-frontier-modeling-the-impact-of-ai-on-the-world-economy) on jobs by 2030.

Without intervention, AI could also help undermine democracy–through amplifying misinformation or enabling mass surveillance. The past year and a half has also underscored the impact of algorithmically powered social media, not just on the health of democracy, but on health care itself.

The overall direction and net impact of AI sits on a knife's edge, unless AI R&D and applications are appropriately channeled with wider societal and economic benefits in mind. How can we ensure that?

A handful of US tech companies, including Amazon, Alibaba, Alphabet, Facebook, and Netflix, along with Chinese mega-players such as Baidu, are responsible for $2 of every $3 spent globally on AI. They’re also among the top AI patent holders. Not only do their outsize budgets for AI dwarf others’, including the [federal government](https://www.nationaldefensemagazine.org/articles/2021/2/10/federal-ai-spending-to-top-$6-billion)’s, they also emphasize building internally rather than buying AI. Even though they buy comparatively little, they’ve still cornered the AI [startup](https://www.cbinsights.com/research/report/ai-in-numbers-q1-2020/) acquisition market. Many of these are [early-stage](https://www.bloomberg.com/news/articles/2020-03-16/big-tech-swallows-most-of-the-hot-ai-startups) acquisitions, meaning the tech giants integrate the products from these companies into their own portfolios or take IP off the market if it doesn’t suit their strategic purposes and redeploy the talent. According to research from my [Digital Planet](https://sites.tufts.edu/digitalplanet/the-shifting-geography-of-talent/) team, US AI talent is intensely concentrated. The median number of AI employees in the field’s top five employers—Amazon, Google, Microsoft, Facebook, and Apple—is some 18,000, while the median for companies six to 24 is about 2,500—and it drops significantly from there. Moreover, these companies have near-monopolies of data on key behavioral areas. And they are setting the stage to become the primary suppliers of AI-based products and services to the rest of the world.

Each key player has areas of [focus](https://www.manceps.com/ai-examples) consistent with its business interests: Google/Alphabet spends disproportionately on natural language and image processing and on optical character, speech, and facial recognition. Amazon does the same on supply chain management and logistics, robotics, and speech recognition. Many of these investments will yield socially beneficial applications, while others, such as [IBM’s Watson](https://www.nytimes.com/2021/07/16/technology/what-ever-happened-to-ibms-watson.html?action=click&module=In%20Other%20News&pgtype=Homepage)—which aspired to become the go-to digital decision tool in fields as diverse as health care, law, and climate action—may not deliver on initial promises, or may fail altogether. Moonshot projects, such as level 4 driverless cars, may have an excessive amount of investment put against them simply because the Big Tech players choose to champion them. Failures, disappointments, and pivots are natural to developing any new technology. We should, however, worry about the concentration of investments in a technology so fundamental and ask how investments are being allocated overall. AI, arguably, could have more profound impact than social media, online retail, or app stores—the current targets of antitrust. Google CEO Sundar Pichai may have been a tad overdramatic when he declared that AI will have [more impact on humanity than fire](https://www.marketwatch.com/story/artificial-intelligence-is-more-profound-than-fire-electricity-or-the-internet-says-google-boss-11626202566), but that alone ought to light a fire under the policy establishment to pay closer attention.

Biden's antitrust revolutionaries need a four-step plan to confront the AI revolution.

Antitrust authorities must first be forward-looking. They must recognize that the AI chess pieces being moved today will shape tomorrow’s endgame–particularly in a tech industry with high barriers to entry and early moves that are hard to reverse after scale. Tech antitrust action often occurs after it’s too late. Policymakers should also trace the outlines of multiple future AI scenarios, including a dystopian one. They must imagine, for example, a society that suffers from “algorithmic poverty,” in which users generate data as unpaid “labor,” which is used to train algorithms that in turn displace wage-producing labor.

#### Dystopia outweighs everything.

Harel and Brownsword, 19—law professor at the Hebrew University of Jerusalem AND Professor in Law at King's College London (Alon and Roger, “Law, liberty and technology: criminal justice in the context of smart machines,” International Journal of Law in Context, Volume 15, Special Issue 2, June 2019, pp. 107-125, dml) [language modifications denoted by brackets]

Famously, Stephen Hawking (2018, p. 188) remarked that ‘the advent of super-intelligent AI would be either the best or the worst thing ever to happen to humanity’. At best, smart machines, smart policing and smart cities of the kind contemplated by Elizabeth Joh might signal the end of crime; but, at worst, we can imagine various dystopian futures where the existential and agential threats presented by AI have been realised. Given, in James Bridle's (2018, p. 2) words, that our technologies are complicit in ‘an out-of-control economic system that immiserates many and continues to widen the gap between rich and poor; the collapse of political and societal consensus across the globe resulting in increasing nationalisms, social divisions, ethnic conflicts and shadow wars; and a warming climate, which existentially threatens us all’, then Vincent Chiao might well be right in claiming that the turn to smart technology might not be the smartest [best] way of trying to achieve the end of crime.

In this collection, our contributors have not highlighted concerns of an existential nature. Nevertheless, we might fear that, in our quest for crime-free societies, for greater safety and well-being, we will develop and embed ever more intelligent devices to the point that there is a risk of the extinction of humans – or, if not that, then a risk of humanity surviving ‘in some highly suboptimal state or in which a large portion of our potential for desirable development is irreversibly squandered’ (Bostrom, 2014, p. 281, note 1; see also Ford, 2015). Our contributors have not yet recommended that we should follow the example of Samuel Butler's Erewhonians who, fearful for their liberty, destroyed their machines (Butler, 1872) – and who also, of course, inverted conventional wisdom by punishing those who fell ill while, by contrast, treating in hospital and sympathising with those who committed crimes such as forging cheques, setting property on fire or robbing with violence. Yet, the beauty of Erewhon is that, to some present-day readers – particularly readers who are familiar with, say, Harari's Homo Deus (2016) 15 or Häggerström's Here be Dragons (2016) – the practices of the Erewhonians might seem to be anything but benighted. Is it so ridiculous to think that, with the acceleration in technological development, machines might become much smaller and smarter, capable of reproducing themselves, communicating with one another and displaying various degrees of intelligence (if not consciousness as humans experience it) and agency? Most importantly, which policy would be the more crazy [imprudent]: to disregard machines as a threat to the human condition or to treat the threat as sufficiently serious to warrant at least some precautionary measures – albeit perhaps not precaution on the scale exercised by the Erewhonians, who destroyed ‘all the inventions that had been discovered for the preceding 271 years’ (Butler, 1872, p. 260)?

Such, however, are not the most explicit concerns of our contributors. Rather, the concerns expressed by Bowling and Iyer, by Lynskey and by Macdonald, Correia and Watkin relate to our agential interests and, in particular to our interests in privacy, in the fair collection and processing of our personal data and in access to (and the integrity of) the informational eco-system. Increasingly, it is being recognised that such interests are ‘contextual’ not only in the sense that their demands might vary from one context to another, but in the more fundamental sense that we have a common interest in a context that enables our self-development (Hu, 2017; Brincker, 2017). This is nicely expressed in a paper (discussing data governance) from the Royal Society and British Academy:

‘Future concerns will likely relate to the freedom and capacity to create conditions in which we can flourish as individuals; governance will determine the social, political, legal and moral infrastructure that gives each person a sphere of protection through which they can explore who they are, with whom they want to relate and how they want to understand themselves, free from intrusion or limitation of choice.’ (Royal Society and British Academy, 2016, p. 5)

With data being gathered, in both the public and the private sector, on an unprecedented scale (Vaidhyanathan, 2011; Galloway, 2017), we might treat such dataveillance as compromising the conditions for self-development and agency (Pasquale, 2015). Moreover, we might fear that, where data are used to train smart machines that sift and sort citizens (as mooted by the Chinese social credit system) (Chen and Cheung, 2017), then, in Glen Greenwald's (2014, p. 6) words, this could be the precursor to a truly dystopian ‘system of omnipresent monitoring and control’.

Finally, there is the subtle and insidious way in which smart machines might compromise the conditions for moral development. If we accept that the fundamental aspiration of any moral community is that its members should try to do the right thing, then this presupposes a process of moral reflection and action that accords with one's moral judgment. Of course, this does not imply that each agent will make the same moral judgment or apply the same reasons. A utilitarian community is very different to a Kantian community; but, in both cases, these are moral communities and it is their shared aspiration to do the right thing that is the lowest common denominator (Brownsword, 2013; 2018a). Arguably, liberty – in the sense of having the practical option of doing both the right thing and the wrong thing – is critical to moral community. On the East coast, where crime is rife and where prudential reasoning dominates, the moral project is poorly realised; but it is at least a community with moral possibilities and with room for moral improvement. By contrast, in the well-ordered technologically managed West coast, if the possibility of moral community is lost, then, as Beyleveld and Brownsword emphasise, this should certainly give us pause about the direction of travel in the criminal justice system.

The ability to do the right thing also hinges not only on individual deliberation, but also on public moral deliberation. The automated processes designed to disable crime also typically mute and disable public moral deliberation. If behaviour that previously was condemned and prohibited has become impossible to engage in (due to technological innovations), we are less likely to debate its justifiability. We will never know whether speed limits are justified unless some people violate them; we can never know whether certain restrictions on movement promote the public interest if such restrictions are enforced perfectly by using technological innovations. In other words, automated processes do not only erode individual moral sensibilities; they also erode public moral deliberation.

#### Harmonizing US antitrust policy with AI powers enables international norm-setting with buy-in capable of limiting unregulated AI.

Ernst ’20 [Dieter; October 22; senior fellow at CIGI; Center for International Governance Innovation, “AI Research and Governance Are at a Crossroads, https://www.cigionline.org/articles/ai-research-and-governance-are-crossroads/]

A second, equally important task of AI governance is to develop institutions and regulations not only to reduce the negative impacts of AI — which could undermine inclusive growth, sustainable development, human-centred values and fairness — but also to increase transparency, security and safety, and accountability.

With regard to these two fundamental objectives of AI governance, current initiatives are primarily concerned with laying out basic definitions and legal frameworks. Europe’s General Data Protection Regulation (GDPR) is different — this law has codified new standards for data privacy and security. But it remains to be seen whether the GDPR regulations can be implemented effectively, and whether this uniquely European approach will be accepted by others. In fact, while China has indicated that it considers the GDPR to be a useful trial benchmark, the American information technology industry remains vehemently opposed to it.

This brings us to a third important task of AI governance: to ensure that national AI policies facilitate rather than constrain international cooperation, through knowledge sharing and harmonization of national AI governance standards. There is every reason to avoid a worst-case scenario where national governments would pursue their own AI governance in isolation, as this would quite seriously limit progress in AI research.

Nations Differ in Their AI Research Trajectories

Success in AI research and applications requires a set of extremely demanding capabilities and assets. Nations differ in their mastery of these success factors, and hence they pursue distinct AI research strategies. Vast data sets and sophisticated algorithms are two essential prerequisites. But equally important is a third component: advanced specialized AI chips are needed to both increase computing power and storage and decrease energy consumption. Companies that have access to leading-edge AI chips are essentially in the express lane, where improvements continue to be rapid and mutually reinforcing.

This leads us to the fourth task for AI research. Well-coordinated efforts to improve the quality of data through standardization and enhanced capabilities for data analytics are essential to success for those engaged in AI development.

A fifth critically important objective is the securing of a large pool of highly educated and experienced AI researchers and engineers who can in turn foster and draw on the talents of students from all over the world. Restrictions to their free movement across borders is anathema to progress in AI research.

Finally, to improve the speed of data transmission for the training of algorithms, a successful transition to fifth-generation telecommunications infrastructure is necessary. If data cannot move where it is needed, it is useless.

Debates on AI governance need to keep in mind that countries differ in their AI research trajectories. Take the United States, for example: apart from data and algorithms, America’s AI leadership is based primarily on advanced, specialized AI chips. The markets for leading-edge AI chips are tight oligopolies, controlled by a handful of US companies. Equally important, US companies control the software for integrated circuit design (called Electronic Design Automation/EDA tools), and are (with the important exception of ASML, a Dutch company) the lead players in semiconductor production equipment. In light of such an extremely unequal distribution of market power, a handful of US market leaders can shape technology trajectories, standards and pricing strategies for AI chips.

Both Europe and China are way behind the United States in the critically important AI chip ecosystem. The real challenge for Europe is to define a handful of AI niches that require domain knowledge for specific applications like health or transportation systems. Aggressive competition policy helps, as do regulatory frameworks such as the GDPR and the forthcoming Digital Services Act, which will set new rules regarding digital platforms’ responsibility for illegal content and disinformation online. AI standardization is another area where the European Union should have some leverage. However, all of these regulatory efforts need to be supported by joint efforts to strengthen domestic technological and management capabilities.

Catching Up in a Technology War: China's Challenge in Artificial Intelligence

In China, public research institutions conduct AI research into both neural networks and symbolic AI (some of it at the frontier). Interactions with industry, however, remain limited, as industry’s primary concern is to forge ahead in China’s rapidly growing mass market for AI applications. China’s AI strategy has emphasized data as a primary advantage. With fewer obstacles to data collection and use, China has amassed huge data sets, the likes of which do not exist in other countries. It was assumed that China could always purchase the necessary AI chips from global semiconductor industry leaders. Until recently, AI applications run by leading-edge major Chinese technology firms were powered by foreign chips, mostly designed by a small group of top US semiconductor firms. However, this global knowledge sourcing was not supported by a robust body of domestic research. With the escalation of the US-China technology war, this lack of research has become a major vulnerability for China’s AI industry. China’s reliance on global knowledge sourcing was actually in line with the “gains from trade” globalization doctrine that was widely shared before the outbreak of trade and technology wars and the coronavirus pandemic and argued by, for example, Paul Romer in 1994, with his insights more recently popularized by Richard Baldwin in widely disseminated policy prescriptions.

In short, there is no “one best way” to approach AI research and deployment. China, Europe and the United States can only play the cards they have, and diversity will continue to shape their unique AI development trajectories. And, as theories of innovation and complexity have shown (see, for example, Robert Axelrod and Michael D. Cohen’s Harnessing Complexity: Organizational Implications of a Scientific Frontier and Cristiano Antonelli’s Handbook on the Economic Complexity of Technological Change), diversity can facilitate knowledge exchange and cooperation.

What Scope Is There for Cooperation?

This persistent diversity of national AI research trajectories indicates that resolving AI governance challenges through cooperation will not be easy. The Brookings Forum on Cooperation on AI can play an important trailblazer role.

It makes sense to start with a plurilateral approach, focusing on collaboration between Australia, the European Union, Japan, the United Kingdom and the United States — countries who share at least some common values and institutional histories. But at some stage, the Brookings Forum on Cooperation on AI needs to lay out a longer-term strategy that defines interactions with other countries, such as China, India, South Korea and Taiwan, Province of China. These countries already play an important role in the development of AI research, patents and standards. Freezing out China from global AI governance would cause irreparable collateral damage to all members of the global AI community.

But more fundamental issues are at stake. Due to the US-China technology war, international governance of AI that is based on state representation has ceased to be effective. Gideon Rachman’s September 21 contribution to The Financial Times said it well: “A rules-based order is giving way to something that feels more like 19th-century imperialism.” As for the US government, it is further expanding the exterritorial reach of US law through its Clean Network initiative, while neglecting UN organizations. China, on the other hand, has successfully occupied the levers of command and control in the International Telecommunication Union and other UN organizations. The spread of technology warfare is severely handicapping current efforts to develop international standards for AI. As established rules of trade are broken, mutual distrust and rising uncertainty are disrupting international trade, investment and knowledge exchange, especially in high-tech industries such as AI. In addition, policies to control and slow down the spread of COVID-19 through border closings have further increased barriers to global knowledge sharing.

As a result, international AI standardization based on state representation is no longer able to keep pace with the breathtaking speed of AI research and applications. Geopolitical antagonisms threaten to politicize the work of technical committees. Gone are the days when international technical standardization was all about a cooperative search for technical solutions to benefit transnational corporations, trade and technological innovation. Alternative approaches are emerging. For example, the Institute of Electrical and Electronics Engineers’ global governance model seeks to establish a technical, merit-based, one-entity-one-vote standardization approach, while trying to bypass constraints by local laws. But overall, search and experimentation still dominate these new initiatives.

At the same time, open-source platforms and communities play an increasingly active role in AI standardization. Technical standard setting is painfully slow, while open-source projects tend to happen amazingly fast. In response, many AI tools have shifted toward open-source environments to provide software-based interoperability. In addition, open-source communities tend to avoid traditional fora out of fear that geopolitics may trump ethical and moral principles. For instance, at the recent Spark + AI Summit 2020, Databricks announced that its open-source machine-learning platform MLflow is becoming a Linux Foundation project.

For many AI research groups, an important motivation for relying on open-source platforms is protection against the exterritorial reach of US technology export restrictions. Here is a good example, provided by the Linux Foundation: “Open source technologies that are published and made publicly available to the world are not subject to US export restrictions. Therefore, open source remains one of the most accessible models for global collaboration.”

Everywhere, companies and research labs, as well as university researchers and students, are using this open-source model of collaborating in AI research and technology development. The rapid expansion of open-source platforms and communities is already transforming the organization of AI research and governance. It is high time to systematically explore how these new hybrid forms of cooperation work, and what needs to be done to improve access for smaller companies and research labs across the globe.

There is no guarantee that open-source platforms on their own will improve the distribution of AI research capabilities and assets. As highlighted in the State of AI Report 2020, only 15 percent of AI research papers publish their code, and these are predominantly from academic groups. Global platform leaders typically embed their code in their proprietary frameworks that cannot be released. New approaches to AI governance are needed to address this important, unresolved issue.

Overall, however, there is reason for cautious optimism. Despite the disruptions caused by technology war and the global pandemic, the inherent vitality of global AI research and development communities keeps finding ways to overcome the barriers that are currently suffocating government-to-government cooperation. These new forms of informal cooperation will exert pressure on policy makers to create new regulatory frameworks for strengthening the role of open-source platforms and communities.

## Class Action – 1AC

Advantage Two is Class Action.

#### Class action filings are rising in every sector.

Atwood ’21 [Pierce Atwood LLP; March 9; Multiservice regional law firm comprised of 150 top-ranked, responsive, creative, collaborative, and hard-working professionals; Pierce Atwood, “Class Action Litigation Related to COVID-19: Filed and Anticipated Cases in 2020,” <https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases-2020>]

When the COVID-19 pandemic began unfolding in March 2020, the Pierce Atwood Class Action Defense Group began tracking an emerging wave of class actions related to the coronavirus. Despite unprecedented court closures and changing procedural rules, COVID-19 class actions steadily proliferated across industries, jurisdictions, and areas of law. The impact of COVID-19 on business operations, consumer activity, and economic forecasts made clear that the filings to date are only an early indication of what is to come as the effects of the pandemic continue to reverberate throughout all sectors and regions of the country. Litigation related to COVID-19 executive orders, reopening plans, and relief legislation will also continue to develop as governmental actions continue into the future.

The following is a categorized summary of more than 1,400 coronavirus-related class action complaints filed in 2020, highlighting the core allegations of each complaint. We note that significant litigation is ongoing and anticipated to continue throughout 2021.

Although Pierce Atwood will continue monitoring new class action filings, this will be our final update to this tracker. For more information on class action litigation related to COVID-19, please contact the attorneys in Pierce Atwood’s [Class Action Defense](https://www.pierceatwood.com/practice-areas/class-action-defense) group. Other guidance and information related to the COVID-19 pandemic is available on the firm’s [directory](https://www.pierceatwood.com/covid-19-updates-resources-and-attorney-directory) of COVID-19 resources.

#### Compulsory arbitration immunizes corporations from liability.

Newton ’20 [Dawn; October 26; Business attorney who focuses on franchise law, intellectual property, and data privacy, J.D. from the Hastings College of the Law at the University of California; Donahue Fitzgerald, “Avoid Class Action Suits by Using Arbitration Agreements,” <https://donahue.com/resources/publications/avoid-class-action-suits-using-arbitration-agreements-2/>]

The U.S. Supreme Court paved the way for businesses to avoid class actions by using arbitration agreements.

On April 27, 2011, the U.S. Supreme Court issued a ruling in AT&T Mobility LLC v. Vincent Concepcion that barred a consumer class action and overturned prior California law that prohibited class action waivers in arbitration agreements. In doing so, the Court created a mechanism by which savvy businesses can avoid class actions in a number of different contexts, which may, in turn, dramatically impact the way companies resolve disputes with their customers, employees and contractors.

Underlying Facts and Procedure

In 2002, in response to a promotional advertisement, the plaintiffs in the case, Vincent and Liza Concepcion, entered into a cell phone contract with AT&T (Cingular Wireless at the time) that entitled them to two “free” phones. After the Concepcions signed the company’s mobile service agreement, they discovered that although AT&T’s advertisement promised that they would receive the phones for free, they were charged $30.22 as tax on the phones’ retail value.

In March 2006, the Concepcions sued AT&T in the United States District Court in the Southern District of California, alleging that it engaged in false advertising and fraud. The District Court later consolidated the case into a class action lawsuit.

AT&T challenged the lawsuit, arguing that its standard mobile service contract, signed by the Concepcions and all other customers, precluded a class action because of two key provisions in the agreement: a mandatory arbitration clause and a class action waiver that required consumers to bring claims only in their individual capacity. AT&T asked the court to send the matter to arbitration in each plaintiff’s individual capacity as was required by the contracts.

The plaintiffs opposed AT&T’s request, arguing that a well-established decision by the California Supreme Court–Discover Bank v. Superior Court, 36 Cal.4th 148 (2005)–had already determined that class action waivers in consumer contracts were unreasonable, or “unconscionable,” and therefore unenforceable. The District Court agreed with the Concepcions and denied AT&T’s request to compel arbitration, and the Ninth Circuit Court of Appeals affirmed that decision. Critical to the decisions of both the District Court and the Ninth Circuit Court of Appeals was the determination that the Federal Arbitration Act (“FAA”), the purpose of which is to ensure the enforcement of arbitration agreements according to their terms, did not override, or “preempt,” the California Supreme Court’s decision in Discover Bank.

The Supreme Court Ruling

In a remarkably broad 5-4 ruling, divided along ideological lines, the Supreme Court reversed the Ninth Circuit, holding that the Discover Bank rule is inconsistent with the FAA and is therefore preempted.

Writing for the majority, Justice Antonin Scalia stated that the purpose of the FAA was twofold: to ensure the enforcement of private agreements to arbitrate and to make dispute resolution more efficient. By essentially allowing the parties to re-write arbitration agreements after the fact, Scalia explained, the rule in Discover Bank “stands as an obstacle to the accomplishment and execution” of Congress’s purpose and objective in enacting the FAA.

Specifically, the Court found that allowing class arbitration under the Discover Bank rule is inconsistent with the FAA for three reasons: 1) when compared with two-party arbitration, class arbitration makes the process slow, expensive and procedurally difficult; 2) class arbitration requires a formality that was not envisioned by Congress when the FAA was passed; and 3) class arbitration greatly increases the risk to defendants because a single mistake by the arbitrator, multiplied by thousands of class members, could result in a “devastating loss.” As a result, according to the Court, the rule in Discover Bank is likely to dissuade companies from using arbitration as a means of resolving disputes, thereby undermining the FAA.

Implications

The implications of the ruling in AT&T Mobility are significant. Indeed, the ruling comes only a year after the Supreme Court’s decision in Stolt-Neilsen S.A. v. Animalfeeds International, Corp., 130 S. Ct. 1758 (2010), in which the Court held that if parties to an arbitration agreement did not intend to allow class claims, arbitrators have no power to impose class-wide arbitrations under agreements that are merely “silent” on the issue. Both decisions further the Court’s clear directive that the FAA, and its liberal policy favoring arbitration, should be given full effect.

Given the ubiquity of arbitration clauses in everything from cell phone plans to franchise agreements to employment contracts, the potential ramifications of the Court’s decision in AT&T Mobility are sweeping.

Impact on Franchisors & Distributors

Many franchisors with arbitration provisions in their franchise agreements have felt insulated from the threat of class-action suits since last year’s Stolt-Nielsen decision. However, some lingering doubt remained, since some California courts had allowed franchisee attempts to either avoid arbitration or force a class certification since Discover Bank was decided, citing that case as authority. The AT&T Mobility decision puts an end to this argument.

Franchisors or distributors that draft consumer contracts for use by others in their distribution chain should also pay close attention to this decision. By incorporating arbitration clauses into those consumer agreements, they can eliminate the threat of class actions, provided that the terms for the individual arbitration are not unfair. The majority opinion noted that AT&T’s arbitration policy prevented AT&T from seeking its own attorney’s fees if it prevailed in arbitration, but provided for payment of twice the plaintiff’s attorney’s fees if AT&T lost. In addition AT&T’s policy agreed to pay an additional $7,500 to any plaintiff who obtained a better arbitration award than AT&T’s last settlement offer. While the opinion does not require a consumer arbitration clause to match these terms, the FAA would not require the enforcement of an obviously unfair arbitration provision.

Impact on Employers

The Supreme Court’s ruling is also certain to have far-reaching consequences for employers that use arbitration agreements with their employees. In particular, it could dramatically change wage and hour litigation, which often relies on class actions as a vehicle to redress relatively small individual losses. Without being able to consolidate these claims into a large class action, it will likely become increasingly difficult for individual employees to secure legal representation. Indeed, if an employer’s arbitration agreement is drafted correctly, because of the ruling in AT&T Mobility, it can potentially eliminate the risks to employers of facing a wage and hour class action (or any other employment-based class actions).

#### It's a shield against antitrust lawsuits AND increasing.

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

I. Introduction

Access to arbitration provides a simple, expeditious, and “feasible form of fairness in adjudication.”1 In avoiding the typically tedious and strenuous litigation procedures, arbitration remains “a vital part of the litigation alternatives in the [United States] legal system.”2 However, what happens when one side, particularly the poorer and weaker party, unwillingly or unknowingly submits to an alternative legal path that hinders their chances of success, fairness, or justice?

Class action procedures allow courts to manage lawsuits that would otherwise be impossible or improbable if each class member were required to join as an individually named plaintiff.3 The process “enables vindication of claims that otherwise could never be litigated, no matter how meritorious.”4 Antitrust lawsuits, for example, typically provide access to class actions for consumers or employees, and represent the primary way to compensate victims who suffer a loss, while subsequently providing a strong deterrent to future illicit behavior.5 In the age of global marketing, communication, and access to information, “it is not uncommon for many individuals to be harmed in essentially identical ways by mass-produced products or standard corporate practices.”6 Class actions attempt to level the playing field for those groups otherwise economically disadvantaged or lacking access to the justice system.7

Over the years, however, large corporations have begun to routinely opt to use arbitration agreements to prevent class action lawsuits through class action “waivers” imbedded in their contractual agreements.8 These waivers too often remain hidden or unseen to the final user of the product or employee of the company until after they have already agreed to the contract. 9 Accordingly, parties seeking a cause of action are not only forced to arbitrate any dispute, but also are prevented from certifying the lawsuit in a class action proceeding.10

Footnote 8:

8 See Megan Leonhardt, Lawmakers want to give Americans back their right to sue companies, CNBC (Sept. 10, 2019, 5:32 PM), https://www.cnbc.com/2019/09/10/lawmakers-want-to-give-americans-backtheir-right-to-sue-companies.html (“A recent academic study found that 81 of the biggest 100 companies in America have put legal clauses in the fine print of their customer agreements that bar consumers from suing them in federal court…”).

End of footnote 8.

This article discusses class action waivers in mandatory arbitration agreements and examines their possible impact on access to antitrust violation claims. Part II introduces the recent history of class action waivers and the United State Supreme Court’s continued enforcement of such waivers. Part III addresses the impact of case law on antitrust laws and procedures. Finally, Part IV concludes with recent developments, and what the near future might look like for mandatory arbitration agreements and class action waivers.

II. The Supreme Court and Class Action Waivers

Arbitration settles legal disputes in a functional, flexible procedure, avoiding the unneeded expenses and delays of a common judiciary. 11 On a macro level, arbitration represents a justifiable avenue to not only avoid backing up the court system with claims, but also expediates the process for legitimate parties seeking relief.12 From this perspective, the goals of arbitration inherently seek to support litigants who do not have the time or money to compete with a powerful opposition. However, as the Supreme Court, as well as the legislature, increasingly relies on the enforcement of arbitration agreements, the bigger, stronger parties strategically use customized adhesive arbitration contracts and class-action waivers as a protective shield to further benefit themselves and effectively limit any future liabilities.13

#### Private, class action suits deter cartelization—overwhelming empirical and statistical data.

Lande ’16 [Robert; Spring 2016; Venable Professor of Law at the University of Baltimore School of Law, Director of the American Antitrust Institute; Antitrust, “Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence,” vol. 30]

Our recent empirical studies demonstrate five reasons why antitrust class action cases are essential: (1) class actions are virtually the only way for most victims of antitrust violations to receive compensation; (2) most successful class actions involve collusion that was anticompetitive; (3) class victims’ compensation has been modest, generally less than their damages; (4) class actions deter significant amounts of collusion and other anticompetitive behavior; and (5) anticompetitive collusion is underdeterred, a problem that would be exacerbated without class actions.

Recent court decisions undermine class action cases, thus preventing much effective and important antitrust enforcement.1

Class Actions Are Virtually the Only Way for Most Victims of Federal Antitrust Violations to Receive Compensation

The antitrust statutes provide that violations result in automatic treble damages for the victims.2 The legislative history 3 and case law indicate that compensation of victims is a goal, perhaps the dominant goal, of antitrust law’s damages remedy.4 Class actions play an essential role in ensuring that the treble damages remedy serves its intended function of “protecting consumers from overcharges resulting from price fixing.”5 As the Supreme Court noted, “[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”6 Accordingly, “courts have repeatedly found antitrust claims to be particularly well suited for class actions . . . .”7

Without class actions, cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble damages remedy. This is because, as a practical matter, class action cases are virtually the only way for most victims of anticompetitive behavior to receive compensation.8 A 2013 study that Professor Joshua Davis and I conducted documents the benefits of private enforcement by analyzing 60 of the largest recent successful private U.S. antitrust cases (defined as suits resolved since 1990 that recovered at least $50 million in cash for the victims9 ). These actions returned a total of $33.8–$35.8 billion in cash to victims of anticompetitive behavior.10 These figures do not include products, discounts, coupons, or the value of injunctive relief or precedent—only cash.11 Consequently, these totals significantly understate the actual benefits of this litigation to the victims involved. And, of course, this study covered only 60 suits (albeit 60 of the largest private recoveries) out of the many hundreds of private cases filed in the United States during this period.

Of these 60 large private cases, 49 were class action suits.12 These cases recovered a total of $19.4–$21.0 billion—the majority of the amount analyzed in our study.13 Since these were among the largest private actions ever filed, specific conclusions based upon these results may not generalize perfectly to all class action cases. They do suggest, however, that without class action cases, effective and significant victim compensation would be reduced dramatically.

Most Successful Class Actions Involve Collusion that Was Anticompetitive

Almost every private antitrust case that results in a remedy does so through a settlement,14 so the underlying merits of the plaintiffs’ claims usually have not been definitively assessed by a court or jury. Critics sometimes use this fact to support assertions that class actions usually are meritless, that plaintiffs often receive huge sums from cases not involving anticompetitive conduct, and that private antitrust actions often amount to legalized blackmail or extortion.15

Antitrust class actions arise in widely varied market and factual settings, and views about the merits of specific cases and the litigation risks involved vary as well. This makes it extremely difficult to draw objective conclusions about the merits of settlements.

Nevertheless, there are good reasons to believe that the vast majority of class action cases in the Davis/Lande study involved legitimate claims. Forty-one of the 49 class actions involved allegations of collusion,16 and the same conduct supporting the settlements gave rise to criminal penalties in 20 cases; to civil relief by the FTC or DOJ in 8 cases; to civil relief by a state or other governmental unit in 9 cases; to a trial that the defendants lost and that was not overturned on appeal in 7 cases; to a class being certified in 22 cases; and to plaintiffs surviving or prevailing at summary judgment in 12 cases.17 Overall, 44 of the 49 class action suits (90 percent) exhibited at least one of these forms of legal validation as to their merits. (The 5 actions that did not have at least one of these indicia settled too early for a substantive evaluation of their merits).18

These results are broadly consistent with a finding that Professor John Connor derived from an analysis of 130 private recoveries worldwide in international cartel cases for which he could obtain the necessary data.19 He found that of the 50 largest worldwide settlements, measured by their monetary recoveries in constant dollars, 49 had been filed against international cartels.20 Of these, 51 percent were follow-ups to successful DOJ prosecutions, and another 8 percent were filed after fines by the EC or other non-U.S. antitrust authorities.21 Using a different data set, Connor and I found that 36 of 71 (also 51 percent) successful U.S. class action recoveries followed successful DOJ criminal cases.22

This data does not prove that these or any other specific class action cases involved anticompetitive conduct. But critics who assert that most antitrust class actions are little more than legalized blackmail rely only on anecdotes, hypotheticals, and opinions (often of defendants in the cases), without support from studies, and with no reliable empirical evidence that the actions lack merit or that settlement amounts are excessive compared to the anticompetitive harm.23 To be fair, one should compare the above indicia of validity to the absence of any systematic evidence underpinning the critics’ charges.

#### Cartelization causally increases inequality while dampening global growth.

Aghion et al. ’21 [Philippe, Reda Cherif, and Fuad Hasanov; March 19; Economist and Professor at the London School of Economics and College de France; Senior Economist at the International Monetary Fund; Adjunct Professor of Economics at Georgetown University and Senior Economist; IMF Working Paper, “Competition, Innovation, and Inclusive Growth,” p. 1-28]

The recent decades have witnessed an erosion of competition in many countries with important implications for inclusive growth. This decline in competition intensity can be seen in the increase of market concentration as well as the ability of firms to influence prices, or market power. It is also seen in the decreasing level of business dynamism, that is, the rate at which new firms enter and old ones exit the market. Evidence shows that this process is taking place in both advanced and developing economies and over a large array of sectors. The economic literature suggests that less competition disproportionately hurts the poor, especially in developing economies, and that it contributes to rising inequalities and less inclusive growth. Moreover, business dynamism is important for innovation and economic growth to lift people out of poverty.

This paper reviews the different perspectives on how competition, innovation, and their interrelation affect inclusive growth in various ways. Achieving sustained broad-based growth, that is, growth that is shared by a majority, is paramount to tackle poverty. While in many cases more competition would help generate better growth outcomes, there are also contexts where limiting competition could be desirable. For instance, resource misallocation among firms as a result of barriers to entry or the ability of underperforming firms to survive can inflict a large cost on the economy in terms of productivity growth. In contrast, some monopoly power, in the form of patents, could be potentially needed to give enough incentives for firms to take the risky investment for innovation, which in turn would lead to growth. Moreover, taxation for redistribution in a country could reduce inequality. However, it could potentially accelerate the brain drain (see Akcigit, Baslandze, and Stantcheva 2016 for the top 1 percent of inventors), especially in developing economies, and limit the country’s ability to innovate, compete, and achieve broad-based growth. At the same time, without redistribution, high inequality would make it difficult for potential inventors from the bottom part of the income distribution to undertake such careers, which would lead to entrenched inequalities and less innovation and growth.

There are also tradeoffs between market concentration and efficiency. Large firms, holding a large share of the market, are able to take advantage of economies of scale and access sufficient resources to incur R&D fixed costs. But not all large firms are equal in terms of the provision of employment, good jobs, and their contribution to growth and equity. Moreover, they could also erect barriers to entry to reap their monopoly rents, further stifling competition and inclusive growth.

The relationship between competition and innovation and growth policies to achieve inclusiveness is also multifaceted. The consensus has been that the state should focus on providing an enabling environment, which includes a legal framework, infrastructure, skills and fair competition. However, the existence of externalities may lead to suboptimal outcomes, requiring state intervention to alter the allocation of resources. Some state interventions, such as past import-substitution policies, curtail international and domestic competition to tackle those externalities and may be counterproductive in the medium to long-run. In general, policymakers should be cognizant of the differential impact of state interventions.

The recent rise in market power has renewed policymakers’ focus on competition policy. Although competition policies in many countries may not necessarily be weak, they may need to be revamped to address not only consumer welfare but also inclusiveness, monopsony powers, and potential effects on innovation and knowledge diffusion. Examining the impact of the market power and overcharging on the bottom income quintiles may help the poor more. Leveling the playing field for workers and suppliers bargaining with large firms or digital platforms could be beneficial. Antitrust policies dealing with intellectual property rights of Big Tech could also be an important instrument in fighting market power, especially when network effects are present and breaking off large firms is difficult.

In this paper, we explore the debate in the literature on the interaction of innovation and competition with inclusive growth. We suggest that theory and evidence show that innovation, as exemplified by Schumpeterian creative destruction, may lead to higher inequality at the top although it may also help raise wages of workers in innovative firms. Competition, an important ingredient of these growth models, is a key to keeping the corporate power in check, which if left uncontrolled, tends to reduce innovation and broad-based growth and increase inequality.

II. The Rise of Market Power

Competition, market power, and inclusive growth in advanced and developing countries

Competition plays a key role in determining market outcomes, and it affects inclusiveness in multiple ways. It not only matters for driving growth but also can affect the distribution of profits among firms and ultimately the distribution of earnings among their workers. It can also affect the bargaining power of workers in the labor market as well as of firms in the supply chain. It can also affect the relative prices of certain goods hurting disproportionately the poor (e.g., food and communication). Competition can also affect income and productivity growth through its effect on the production structure of the economy as well as incentives or disincentives to invest and innovate (e.g., intellectual property). In addition, as discussed in the previous section, competition is one of the key elements needed to support high sustained broad-based growth, an important precursor for inclusive growth.

To measure the level of competition in a market, economists rely on the concept of market power, which is understood as the ability of a firm to influence the market for its product. It is usually measured in terms of deviation from the theoretical case of perfect competition where firms are assumed to be price takers. The intensity of competition, and ability of firm to influence the market, is difficult to measure directly. Instead, the literature relies on indirect measures such as concentration indexes (e.g., Herfindahl index of market shares) or price markups. Market concentration is an intuitive measure; however, it is not necessarily indicative of market power (Syverson 2019). 2 Moreover, in many developing economies a comprehensive census of firms, including their market shares, is difficult to obtain. In recent literature, price markups, the gap between the price charged and an estimate of the marginal cost, are the measure chosen to estimate market power. It is particularly useful for developing economies as survey information may suffice for the calculations. In practice, it can be proxied by the ratio of sales or revenue to a measure of variable cost, which is closely related to profitability.

Using a large sample of firms from developing economies, IMF (2019a) finds large markups in sub-Saharan Africa compared to other developing economies. Notwithstanding potential measurement issues and bias, it finds that sub-Saharan African economies have greater average markups compared to other developing and emerging economies in most sectors, and the gap is especially big in non-tradable industries (Figure 1). It also finds that average markups in non-tradable sectors in developing countries could be greater than in tradable industries, and in particular manufacturing. Using firm-level data, it shows that greater markups are associated with lower labor share as well as lower investment, productivity growth and exports. These channels all point to an effect that is detrimental to the effort to decrease poverty and inequality.

[Figure 1 omitted].

There is also strong evidence of sizable and increasing market power in advanced economies (Figure 2). There is no corresponding rise in market power in emerging economies, although this does not preclude higher market power in these economies than that in advanced countries (IMF 2019b). De Loecker and Eeckhout (2020) document the rise in market power and profitability in the U.S. over the last decades and relate it to salient macroeconomic trends such as the decline in the labor income share and the decrease in labor market dynamics. Philippon (2019) argues that there exist extraordinary monopoly and oligopoly rents that are particularly detrimental to the interest of the poorest. In particular, he compares the U.S. to the EU, which have similar technologies. The dramatic change in communication costs in France after the entry of one additional operator (Free) in 2011 is a salient example. While costs were lower in the U.S. until 2011, they fell in relative terms by 40 percent within two years in France. Rising costs of communication, which represent a non-negligible share of the consumption basket (about 2 percent in the US average) and is nowadays akin to a necessity, would hurt more the poor. A similar pattern would have an even stronger effect in developing economies.

[Figure 2 omitted].

The direct cost of anti-competitive behavior is high. Many studies estimate this cost by implied price overcharge, typically stemming from identified cartels. A common approach to estimating the price overcharge consists in applying a difference-in-difference technique, that is, by comparing prices in a market before and after an infringement was identified (e.g., a cartel) to a “counterfactual” market in a different location or product market where no infringement was identified.3 The estimated price overcharges in advanced economies are found to be large on average, ranging from 15 to about 50 percent. Ivaldi et al. (2017) extends these estimations to 20 developing economies, using a database of over 200 major cartel episodes over 1995–2013. They estimate that the harm to the economy in terms of excess profits resulting from price overcharges could reach about 4 percent of GDP, accounting for the probability of undetected cartels. The cost of cartels could extend to overcharges in intermediate goods, ultimately affecting finished products, as well as procurement of public goods, or it could also affect the economy through a reduction in output (World Bank-OECD 2017). Even without cartels, anti-competitive behavior would result in higher prices and lower production.

There is also growing evidence that the lack of competition not only affects more strongly the poorest countries but also hurts the poor more in each country. Higher market power in food, beverages and medicines was shown to be regressive, that is, they hurt more the poorest, as shown using Mexican data (Urzua 2013). Similar results exist in the context of advanced countries (e.g., Creedy and Dixon 1998 and 2000). There is also evidence that prices in sub-Saharan Africa are higher than in other developing regions, controlling for income and other factors. The extra cost of living in this region is negatively correlated with aggregate measures of competition (IMF 2019a). OECD (2017), using a calibrated model on a selected group of advanced countries, finds that market power could be responsible for a sizable increase in the wealth of the richest 10 percent and a large reduction in the income of the poorest 20 percent.

The decline in the labor share has also been interpreted as a sign of rising market power. Labor share has been decreasing in the U.S. and other advanced economies (IMF 2019b). This decline in labor share could be explained to a large extent as a result of the Information Technology (IT) revolution as argued by Aghion and others (2019). This revolution allowed superstar firms to expand into many sectors of the economy. As these firms have higher markups and lower labor shares than non-superstar firms, the decline in aggregate labor share and corresponding increase in aggregate markups reflect a “composition effect”. In other words, it is not the result of a within-firm increase in markup or a decline in labor share. Evidence of the predominance of a “between-firm” (or “composition”) effect over a “within-firm” effect is provided by De Locker and Eeckout (2019) and Baqaae and Farhi (2019). IMF (2019b) shows that the “reallocation” effect is pronounced in the U.S. but less so in other advanced countries. The long-term effect of this increasing hegemony of superstar firms has been to discourage innovation and entry by non-superstar firms, thereby leading to a decrease in aggregate productivity growth, broad-based growth, and business dynamism. This increasing hegemony, in turn, has been facilitated by an insufficient regulation of mergers and acquisitions, in other words by a competition policy, which has not adapted to the digital economy.

Tycoons and Big Firms: The good and the bad

Economic theory does not rule out situations where high concentration, and the associated high returns have benefits for society at large. In situations where there are economies of scale, concentration would lead to an overall increase in productivity. Alternatively, the hope of extracting monopoly rents from a dominant position, thanks to a patent for example, justifies the risk taken by innovators. In turn innovation would help increase productivity. Some argue that the rise of market concentration over the last decades in advanced countries reflects both the innovations and early investment in information technologies and the implied productivity gains (e.g., Bessen 2017, Aghion and others 2019). If this is indeed the case, innovative firms should be investing more, and eventually other firms would use the same innovative processes and infrastructure. In turn, at the aggregate level, productivity and investment rates should be rising.

On a global level, domestic large firms in sophisticated sectors play a critical role in taking advantage of economies of scale and concentrating resources to absorb both frontier managerial and technological processes, especially when competing on international export markets (see Chandler 1990 and Cherif and Hasanov 2019). The sophisticated sectors are defined as highly R&D intensive such as advanced manufacturing and high-tech services (Cherif and Hasanov 2019). These firms provide directly a large number of good paying jobs, but also support productivity gains and growth through their critical contribution to exports and spillovers (see Freund et al. 2016). Their success does not stem from generating rents from commodities or non-tradables, rather from producing and exporting. High broad-b as e d growth helps achieve improvements in the living standards of workers in the rest of the economy, including non-tradable services. Samsung and Hyundai are very large and profitable firms relative to the Korean market. This success comes as a result of fierce competition on international markets in sophisticated sectors, requiring taking risks and investing substantially in both physical and human capital. They also employ a significant share of skilled and unskilled Korean workers at relatively high wages. More important, their success on international markets, representing more than a third of total exports, results in total productivity gains and rising incomes. This largely contributes to the difference in living standards between, for example, a taxi driver in Korea compared to the same in developing countries, although they provide exactly the same service with the broadly same productivity.

However, as observed by Baker (2019) and others, these developments have failed to show up in the aggregate investment and productivity numbers, at least in the U.S. context, and the above explanation is only part of the story. It is also likely that the same dynamics are at work in many other advanced nations. In addition, a myriad of stylized facts, broadly described by the lack of business dynamism such as a decrease in the rate of creation of new enterprises, point to the other plausible reason for the rise of market concentration—a n increase in market power as a result of hidden and explicit barriers to entry. These barriers could also be related to regulations, which could be partially encouraged by the same firms benefitting from them. The typical examples of a barrier to entry would be wireless phone licenses or zoning policies. Zoning policies limit the supply of housing in cities, leading to a rapid increase in the existing real estate assets as well as high returns for the few developers who have access to land (see Furman and Orszag 2015). This has implications on inequality on several levels. It prices out families with modest means, known as gentrification with its many social and psychological negative effects, and prevents others to move from less dynamic to more dynamic cities, where social lifts are more effective (see Hsieh and Moretti 2019).

A large firm dominating a domestic market in a developing economy, thanks to tariffs and other explicit or implicit barriers to entry, would be detrimental to both growth and its inclusiveness. Typically, large firms in low-income countries or resource-dependent ones would dominate a non-tradable service sector, such as telecommunication, construction or banking, without yielding significant employment, spillovers or productivity gains. The additional price they impose, and lower levels of investment, would lead to a bad quality of services as well as higher prices, directly harming the society’s welfare. Higher prices could also harm international competitiveness and in turn keep the real exchange rate overvalued, reducing the prospects of improvements in living standards of workers.

#### Failed recovery snowballs into depression—causes great power wars.

Engelke ’20 [Peter and Matthew Burrows; July 2020; Deputy Director and Senior Fellow within the Atlantic Council’s Scowcroft Center for Strategy and Security, Ph.D. in History from Georgetown University, M.A. from the Walsh School of Foreign Service; Director of the Atlantic Council’s Strategic Foresight Initiative, Ph.D. in European History from the University of Cambridge; Atlantic Council, “What World Post-COVID-19?” <https://www.atlanticcouncil.org/wp-content/uploads/2020/07/What-World-Post-COVID-19.pdf>]

The developing world is even more hard hit economically despite the fact that the worst forecasts of large-scale deaths in Africa and Latin America never come true. Death tolls resemble those in the West. The virus weakened as its moved south and the youthful populations—many of whom suffered minor symptoms— diminished the contagion. With the major economic powers hard hit, recovery is extremely difficult. Commodity prices remain low, hurting those developing countries that are dependent on the export of minerals, oil, etc. Chinese investments help, but CPC leaders are wary of providing much assistance largesse for fear the Chinese public is angered while conditions remain hard at home. Popular discontent against the CPC rises with China’s faltering domestic economy.

As during the Great Depression, there are many false starts, giving the illusion that the corner is about to be turned, justifying governments’ stubbornness in persevering with failing policies. Unlike in the 1930s, there is enough of a social safety net that discontent is contained despite slowly sinking standards of living in much of the world. The other is always to blame. Sino-American tensions escalate to an all-time high. The United States takes strong protectionist measures against China and Russia for their “disinformation,” deciding finally to erect a firewall against the two. Observers think the United States is preparing for a cyber war against China and Russia.

By the mid-2020s, deglobalization is speeding up, yielding slow economic growth everywhere. Poverty levels are rising in the developing world and there is the potential for open conflict between the United States and a China-Russia alliance.

#### Those wars will be nuclear—and cause mass repression.

Lichterman, 18—Senior Research Analyst at the Western States Legal Foundation (Andrew, “Rethinking the Military-Industrial Complex,” <http://wslfweb.org/docs/RethinkingtheMilitaryIndustrialComplexWSLF2018.pdf>, dml)

The acuteness of this danger is open to debate. Both Russia and China face daunting obstacles in their own development paths, including unprecedented problems posed by global resource limits and ecological decline. This may mean that military and political leadership in the United States will see the challenges they pose as less pressing, containable with relatively cautious policies. But it also raises the risk of a fatal collision, particularly in the event of another global economic downturn that might tempt all their leaderships to deploy nationalist and militarist strategies that once again displace blame outward, justify repression, and place masses of discontented young people under military discipline.

The work of understanding today’s military-industrial complex is only beginning, and must be undertaken with an eye to informing the strategies we need. Much is different from the Cold War moment, but certain grim similarities remain. We must recognize that preventing catastrophic war once again must be our main priority. Trump’s ascendance has served only to remind us of the peril we face. The central unchanging reality of military industrial complexes is permanent mobilization for war of potentially civilization-destroying magnitude. As both Thompson and C. Wright Mills told us long ago, “’the immediate cause of World War III is the preparation of it.’” 18 Not one more nickel needs be spent on bases, forces, or modernized nuclear weapons to put in place the mechanism for our collective annihilation; it is already there.

#### Nuclear war makes the everyday apocalypse worse by intensifying physical and psychic suffering.

ICRC ’18 [International Committee of the Red Cross; August 7; Humanitarian institution based in Geneva, Switzerland and funded by voluntary donations; ICRC, “Nuclear weapons - an intolerable threat to humanity,” <https://www.icrc.org/en/nuclear-weapons-a-threat-to-humanity>]

The most terrifying weapon ever invented

Nuclear weapons are the most terrifying weapon ever invented: no weapon is more destructive; no weapon causes such unspeakable human suffering; and there is no way to control how far the radioactive fallout will spread or how long the effects will last.

A nuclear bomb detonated in a city would immediately kill tens of thousands of people, and tens of thousands more would suffer horrific injuries and later die from radiation exposure.

In addition to the immense short-term loss of life, a nuclear war could cause long-term damage to our planet. It could severely disrupt the earth's ecosystem and reduce global temperatures, resulting in food shortages around the world.

Think nuclear weapons will never be used again? Think again.

The very existence of nuclear weapons is a threat to future generations, and indeed to the survival of humanity.

What's more, given the current regional and international tensions, the risk of nuclear weapons being used is the highest it's been since the Cold War. Nuclear-armed States are modernizing their arsenals, and their command and control systems are becoming more vulnerable to cyber attacks. There is plenty of cause for alarm about the danger we all face.

No adequate humanitarian response

What would humanitarian organizations do in the event of a nuclear attack? The hard truth is that no State or organization could deal with the catastrophic consequences of a nuclear bomb.

The Red Cross' first-hand experience

In August 1945, in the aftermath of the atomic bombings of Hiroshima and Nagasaki, the Japanese Red Cross, supported by the ICRC, attempted to bring relief to the many thousands of dying and injured. The magnitude of the needs made us feel helpless and the International Red Cross and Red Crescent Movement has been a strong advocate for a world free of nuclear weapons ever since.

“Thousands of human beings in the streets and gardens in the town centre, struck by a wave of intense heat, died like flies. Others lay writhing like worms, atrociously burned. All private houses, warehouses, etc., disappeared as if swept away by a supernatural power. Trains were flung off the rails (...). Every living thing was petrified in an attitude of acute pain.”

- Dr Marcel Junod, an ICRC delegate and the first foreign doctor in Hiroshima in 1945 to assess the effects of the atomic bombing and to assist its victims.

#### Removing barriers to private, class action litigation is crucial to deter anticompetitive conduct by cartels and monopolists.

AAI ’21 [American Antitrust Institute; August 4; Washington, D.C.-based non-profit education, research, and advocacy organization, citing research conducted by Professor John Davis at the University of San Francisco School of Law; American Antitrust Institute, “The Critical Role of Private Antitrust Enforcement in the United States,” <https://www.antitrustinstitute.org/wp-content/uploads/2021/08/Huntington-Report-FINAL-1.pdf>]

I. Introduction

With all of the attention currently focused on public enforcement and legislative reform of the antitrust laws, less attention is being paid to private enforcement.1 But Congress considered private antitrust enforcement indispensable for promoting competition. The judiciary has so recognized time and time again. In California v. American Stores Co., for example, the Supreme Court proclaimed, “Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”2

Private enforcement is not a substitute for vigorous public enforcement. Both are necessary to foster competition. But private enforcement plays an important part, one that becomes more significant when public enforcement recedes.3 And, unlike public enforcers, private enforcers can obtain significant damages on behalf of the victims of antitrust violations.4 This serves as a crucial source of deterrence for illegal anticompetitive conduct and the primary means of compensating victims for harms suffered at the hands of cartelists and dominant firms.5 The importance of the antitrust class action, a major private enforcement device, is clear. The recently released 2020 Antitrust Annual Report: Class Action Filings in Federal Court (“2020 Report”)6 by Huntington National Bank and the University of San Francisco School of Law (“USF Law”) reflects that the cumulative total settlement amount recovered for victims in antitrust class actions from 2009-2020 was over $27 billion.7

Antitrust class actions recover damages from companies engaged in harmful, illegal conduct, such as price fixing and attempted monopolization, in markets for important and essential products and services. The most active defendants during the period, for example, included companies providing financial services, pharmaceuticals, automobile parts, and electronics parts. 8 In light of the vital role played by private antitrust enforcement, and the antitrust class action in particular, continued empirical analysis of trends in activity is essential. This analysis aids in understanding and evaluating proposals for reforming the antitrust laws in the U.S. and such proposals’ impact on private enforcement, the public-private partnership, and ultimately on competition and consumers.

II. Overview of the Commentary

The American Antitrust Institute (AAI)9 and Professor Joshua P. Davis at USF Law10 evaluated the 2020 Report with the goal of identifying its major implications for private enforcement in the U.S. The 2020 Report builds and expands on the 2019 Antitrust Annual Report: Class Action Filings in Federal Court (“2019 Report”)11, which assessed private enforcement activity from 2009-2019. Like the 2019 Report, the 2020 Report relies largely on data for private U.S. antitrust class actions available through Lex Machina, as well as supplemental data analysis.12 The 2020 Report extends the dataset to the eleven-year period covering 2009-2020, thus allowing for a deeper analysis of private enforcement trends and their implications. The analysis provided in this Commentary highlights the importance of private antitrust enforcement in the U.S. system and the particularly important role played by the antitrust class action.

III. Observations and Implications for Private Enforcement

The 2020 Report provides further evidence of a divergence between public and private enforcement trends. As public enforcement has waned, private filings have waxed, undermining the notion that class actions simply ride the coattails of public enforcement. On the contrary, the data suggest that as lax public enforcement fosters higher market concentration and invites bad behavior, private filings may compensate for underenforcement in an effort to address the resulting antitrust violations.

Looking beyond the number of enforcement actions filed and focusing on the results of the actions, the rich data reveal more nuance to this narrative. Despite increased private actions in the face of decreased public enforcement, the amount of money recovered from violators by both public and private enforcers has diminished. For public enforcers, this diminution is to be expected, as fewer cases have been brought. For private enforcers, though, the explanation likely lies with other trends, most notably the increasing headwinds faced by private enforcers due to heightened pleading and class certification standards. If these explanations are correct, the clear implication is that for private enforcement to fulfill its increasingly vital role as a complement and a backstop to public enforcement, these trends must be reversed.

A theme we noted in the 2019 Report, and that continues to feature in the 2020 Report, is the tremendous variability in the data on some measures related to settlement size. Aggregate settlement amounts over the period vary widely from year to year. By disaggregating the settlements by size, however, we are able to observe that settlements at different levels trend somewhat independently. Very large settlements, which are few in number, drive most of the variability in the aggregate data. But trends and anomalies in very small settlements cannot be entirely discounted, as they are the force behind one of the highest recovery years in the period, 2018.

Finally, building on analysis from our 2019 commentary, we take a deeper dive on attorneys’ fees and how they correspond to settlement amounts. Our findings reinforce the tentative conclusion from last year’s analysis that the so-called “megafund doctrine”—a dramatic decrease in attorneys fee percentages on settlements above a threshold of about $100 million—does not operate in federal antitrust cases in a significant way. Rather, decreases in the fee award percentage in antitrust cases are not discrete and drastic, but rather gradual, much like marginal tax rates in the United States. In what follows, we discuss each of the above observations in more detail and provide analysis of their implications for private enforcement, many of which suggest fertile areas for additional study.

A. The Relationship of Private to Public Enforcement: Riding on Coattails or Stepping into the Breach?

A long-running antitrust policy debate centers on the value that private enforcement adds to the antitrust enterprise as a whole. Critics of private actions maintain that private plaintiffs often follow an easy trail blazed by government enforcers, and that private enforcement therefore does not supplement worthwhile public actions as much as it should. Proponents of private actions have sought to debunk this claim with empirical evidence suggesting that many large and successful private antitrust cases often precede, or else expand the scope of relief sought in, any overlapping government actions.13

Data from the 2020 Report, together with future reports, may warrant a reexamination of this debate through a different lens. Apart from the question of the extent to which private enforcement serves as a useful complement to public enforcement, it may also be worth inquiring into the extent to which private enforcement serves as a substitute for public enforcement, particularly during periods of government forbearance.

As AAI noted in an independent report, “The State of Antitrust and Competition Policy in the U.S.,” several indicators had suggested a decline in government cartel enforcement at the midway point of the Trump Administration.14 Perhaps most notably, the average number of cartel investigations opened during the period from 2017-2018 was 80% lower than the annual average number of investigations opened over the previous three administrations (1993-2016). In addition, the average number of corporations fined by the Trump agencies in 2017 and 2018 fell by about 45% relative to the Obama Administration.

Notably, the 2020 Report shows that private federal consolidated antitrust filings rose significantly during each year of the Trump Administration. First, they increased from 74 in 2017 to 136 in 2018. But in 2019, they rose dramatically to a ten-year-high of 211. And, in 2020, that number was eclipsed, with 220 filings. In other words, a dramatic increase in private filings appears to have occurred immediately subsequent to a substantial decline in the opening of government cartel investigations and the number of corporations fined.

#### Class actions are a vital material and imaginative tool for any attempts at collective resistance and alternative relationalities. By precluding them, compulsory arbitration generates affective helplessness, which spills over and shuts down any hope of radical organizing.

Keren, 20—Professor of Law, Southwestern Law School (Hila, “Divided and Conquered: The Neoliberal and Emotional Consequences of the Arbitration Revolution,” Florida Law Review 72, no. 3 (May 2020): 575-638, dml) [language modifications denoted by brackets]

As argued in the previous Parts, the arbitration revolution has created a separation process that has been inspired by neoliberal theorists, executed and funded by organized corporate leaders, and embraced by the Supreme Court. This Part cautions that this separation process has a penetrating effect on the soul. It leaves people isolated from their peers and abandoned by their state. All alone, ordinary citizens are being put into a long-term condition of feeling powerless and helpless, too weakened to engage in resistance. The fact that such powerlessness perfectly aligns with the neoliberal goal of reaching hegemony suggests that the emotional consequences are far from accidental.

A. Individualized Arbitrations and Neoliberal Individualization

Decades of organized pressure to defeat collective actions, both in judicial and arbitral forums, have left people like Frank Varela with only one path of action: to pursue justice outside of courts and all alone. Intriguingly, while eradicating all other options, the decisions that constitute the revolution reformed even the name of this surviving option. In the middle of the revolution, after Stolt-Nielsen, Concepcion, and Italian Colors, the Court drifted away from the tradition of calling a nonclass arbitration a "bilateral" arbitration.2 65 Instead-and for the first time at the Supreme Court level-Justice Gorsuch introduced in Epic a new designation, repeatedly referring to a non-class arbitration as an "individualized" arbitration.2 66 Shortly after, Chief Justice Roberts adopted this new labeling in the recent Lamp Plus, as well as other judges and scholars who wrote about the topic post-Epic.267

Like Shakespeare's Juliet, one may ask: "[W]hat's in a name?"268 To which at least two replies are due, both relying on the broad recognition of the expressive power of law.2 69 The first relates to the comparison between using "bilateral" and "individualized" to describe the only option left post-revolution. The adjective "bilateral," which literally means two-sided, 2 70 also denotes, when used in the context of arbitration, a dispute resolution process that is mutual, reciprocal, and consensual. 271 The use of "bilateral" thus encourages associating the path to redress that it describes with fundamental principles of justice. At the same time, "bilateral" also helps to conceal the typical gap of power between the parties to the standard contracts that forbid collective action, a gap that so clearly existed in cases like Concepcion and Italian Colors. For those reasons, using "bilateral" was a convenient linguistic choice for Justice Scalia, as he introduced for the first time a revolution that closes options formerly open for all. Moreover, and related to the previous Part, such rhetoric illustrates the stealth "winning strategies" that Buchanan recommended and Koch institutionalized. 272 Conversely, substituting "bilateral" with "individualized" has none of the above strategic advantages as the latter word highlights rather than obscures the solitude that is inherent to the non-collective path to redress.

The second reply relates to the difference between describing the single remaining way to seek justice as "individualized" and not merely (as numerous courts have done) as "individual." 273 Interestingly, Justice Gorsuch added the adjective "individualized" to the discussion in Epic after the lower court that decided the dispute, the U.S. Court of Appeals for the Seventh Circuit, limited itself to the language of "individual" arbitration. 274 The increasing use of the word "individualized" is a particularly meaningful rhetorical choice in light of the neoliberal background of the revolution. It is similarly crucial if one wishes to better understand how the legal change operates to further disseminate the neoliberal common sense.

Most generally, breaking social life into individualized segments is a core idea in neoliberalism. As political scientist Wendy Brown explained, neoliberalism "solicits the individual as the only relevant and wholly accountable actor." 275 The goal of neoliberal individualization is not only to separate people from each other out of the aversion to collectives mentioned before. It is also to draw a clear dividing line between the self and its environment, disconnecting people and their experiences from any social context. In this way, neoliberalism suppresses individuals' ability to link their fate to the social order or to implore assistance from social institutions or the state. It makes, in short, "[s]elf and society . . . mutually exclusive,"276 echoing Margaret Thatcher's infamous declaration that there is no justification for government help because "[t]here is no such thing as society." 277

It is worth recognizing here that neoliberal individualization is markedly different from liberal individualism. Individualism emerges from a celebration of individuality that is associated with agency and autonomy, and it leaves each person to self-determine her needs and goals. By contrast, individualization is an imposed process that ignores private inclinations and wishes and generally cares very little about the individual herself. An important part of the individualization process is the way neoliberal rationality interrupts autonomy, dictating to all people that their primary goal, as they approach any area of their life, should be to maximize their human capital. 2 78 The purpose of such a selfoptimization project is to endlessly attempt to win what neoliberalism frames as an ongoing competition against other individuals over scarce resources. 2 79 Individualization also denies the universal vulnerabilities that make us inevitably interdependent while rendering irrational the natural yearning for giving and receiving (free) care. 280

Accordingly, when Justice Gorsuch repeatedly used the word "individualized" he revealed that even when they are included in signed contracts, collective action waivers may not truly be mutual and consensual (as suggested by "bilateral") or the product of individual choice (as indicated by "individual"). Instead, what comes to the fore thanks to Justice Gorsuch's new articulation is the forced and involuntary nature of the process that pressures claimant to battle wrongdoing all by themselves. Similarly, when Chief Justice Roberts followed Justice Gorsuch's discourse in Lamps Plus, he brought to light the fact that even when arbitration clauses do not include waivers, courts nonetheless are going to compel claimants to fight alone by reading these clauses as if they were limiting collective action. To call the resulting narrow path of access to justice "individualized arbitration" is, therefore, to concede that "individualization is a fate, not a choice. "281

It is certainly possible that neither Justice Gorsuch nor Chief Justice Roberts was aware of the critical analyses of the neoliberal "relentless process of individualization, "282 as they each shifted to using the language of "individualized" arbitration. They surely did not adopt this new phrasing with out of a wish to expose the forced nature of the single path they have left open for claimants. However, at the same time, the ease with which the word "individualized" entered the conversation despite its nonconsensual tone can teach us something about how far along the revolution had already been by the time the decisions in Epic and Lamps Plus were written. It suggests that by 2018, seven years post-Concepcion, and after the election of President Donald Trump resulted in a conservative control of the Court, the Justices felt confident enough to forego previous efforts to "market" individual arbitration as something that, from claimants' perspective, might be favorable or at least fair.

Moreover, in both Epic and Lamps Plus, the Justices not only described the claimants as subj ect to an "individualized" process, but they also adopted another signature move of neoliberalism and "responsibilized" these claimants, holding them solely and entirely responsible to their fate. 283 First in Epic and then in Lamp Plus, the individualized employees were further framed as the only ones responsible for being left without an effective path of redress simply because they "agreed" to arbitrate. For example, in Epic, Justice Gorsuch went as far as blaming the individual employee, Mr. Morris, for daring to sue Ernest and Young "despite having agreed to arbitrate claims against the firm."284 In a similar tone, Chief Justice Roberts stated in his description of the facts in Lamp Plus that "[l]ike most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. But after the data breach, he sued Lamps Plus . ... "285 It appears that because both Justices had already conceded that the employees were limited to an "individualized" arbitration they had no particular need to cope with Justice Ginsburg's dissent that in both cases tried to remind everyone that the employees had not truly agreed to anything but rather had faced a "Hobson's choice" to "accept arbitration on their employer's terms or give up their jobs." 28 6

And yet, even if the adoption of the "individualized" modifier was not aimed at illuminating the true nature of non-class arbitration, its appearance can help seeing that by using the power of the legal system, neoliberalism individualizes even the ways humans cope with inevitable crises in their lives, such as the scams that harmed the employees in both Epic and Lamp Plus. Limited to "individualized" solutions, each person learns that when in trouble, she [they] cannot count on anyone but herself [themselves]. Ironically, the discussion above shows that as part of the neoliberal project, corporations and the Court have acted together in the last few decades to create a world defined by intense separation and isolation. What are the consequences of living in such a world?

B. The Emotional Consequences of Individualization

Importantly, neoliberalism is not only a top-down project led by corporations and their avid supporters. Much of its success to reach people of all political persuasions relates to the fact that we have all internalized the neoliberal logic until it feels our own, sometimes without even having full awareness of its origins. This internalization process is itself a product of a neoliberal strategy. As sociologist Sam Binkley explains it: "Preferring not to act on subjects directly" and seeking to "govern minimally" the neoliberal project "brings about specific changes in its subjects.... "287 To use only one simple example, many think and say that they need to "invest" more time in themselves, their health, or their relationship with others, accepting the economic dynamics of calculating investments and returns without noticing the structural limitations on their time (such as due to having to work for long hours).288 Some even invest actual money in measuring and ranking their performance in these noneconomic spheres, using a rapidly growing marketplace of products designed for such tasks. 289 Through such an internalization process, the neoliberal worldview disseminates itself by working from within. 290

Eventually, coming at us from many external sources and springing internally, the neoliberal message ends up influencing everything in our lives, including not only well-calculated big decisions such as what to study and where, but also, for example, the way we express ourselves. A particularly relevant example is found in longitudinal studies of written texts in the United States and Norway that demonstrate how with the rise of neoliberalism during the last few decades the frequency of words related to collective solidarity (e.g. "obliged" or "common") decreased, while the frequency of words pertaining to individual self-promotion (e.g., "choose" or "entitlement") increased. 291 Importantly, with this penetrating power neoliberalism also influences our emotional life.

Accordingly, this section argues that the inability to seek justice together with others either in courts or in arbitration creates a severe sense of isolation that produces intense feelings of powerlessness and helplessness. Such lasting emotions are individually and socially harmful much beyond the arbitration-controlled contractual arena: they deplete individual and social resilience in all areas of life and stand to produce despair and apathy that would further enhance the general social disconnect produced by neoliberalism.292

Illuminating the emotional consequences of ousting collective actions and leaving people to fend for themselves is an intricate task. Part of the complexity is that this separation project has culminated, as we have seen, only recently and in an intentional and stealthy way, which makes evidence scant. Another complication comes from the general inclination to ignore the emotions when analyzing legal issues. 293 As a result, despite the richness of scholarly work studying and criticizing the arbitration revolution, no attention was given to the possibility that it has a long-term impact on people's emotions.

And yet, a notable exception recently appeared in the context of employment contracts when an employee explicitly expressed in a published interview the emotional impact of being subject to a class action waiver. The interviewed employee stated: "The employment class action waiver affected me emotionally as I felt powerless in the organization. I felt isolated from others .... " 294 This direct statement offers a critical starting point, and it indeed begins to substantiate the considerable emotional toll that the neoliberal attack imposes on collective actions. A 2017 psychological experiment provides further direct support, reporting that exposing people to information regarding the effect of arbitration clauses generated "negative feelings toward binding arbitration." 295 What follows is a detailed study of less direct evidence. The findings strongly support the above employee's account and particularly demonstrate how denying access to collective legal actions can produce the powerlessness that the interviewed employee reported.

1. Reports by Class Action Participants

People who did manage to get involved in class action have reported an array of positive emotions. Their reports strongly suggest that by banning class actions, corporations, and the courts that support them, deprive people of such valuable affective effects. The positive impact of engagement in class actions can be gleaned from a set of interviews conducted by Professor Stephen Meili with active representatives of class actions (often called "named plaintiffs") and their lawyers. Building on previous work by Professor Bryant Garth, 296 Meili's interviews demonstrate a general "sense of empowerment" that comes from the involvement in class actions.297 As part of such broad empowerment, interviewees reported feeling capable, worthy, influential, effective, and proud. For example, they felt that class actions gave them, despite being "little people," the rare ability "to take on large corporate interests."298 Similarly, they described feeling "satisfied" because they had made a difference and had been successful in bringing about change.299 As one plaintiff said, "[T]he point was made . .. the next time around [debt collectors] will look more in depth at what they're sending out . ... 300

Moreover, some interviewees have highlighted the potential of feeling self-validation by the process. To illustrate, one named plaintiff who expressed deep disappointment when "his" class action was not certified explained that certification would have meant that participants "could have been somebody." 301 Significantly, much of the empowerment-related emotions were experienced in the face of a threat to resilience. Interviewees repeatedly contrasted their emerging positive feelings with being previously disempowered and disrespected by the corporations they took action against. They described how being part of a class action activity helped them survive humiliation and restore self-value after having been made to feel "insignificant"302 or even like "dirt." 303 Such a description illuminates how collective actions not only offer a practical solution to limited resources but also offer an essential emotional coping mechanism.

Similarly, class actions function at the emotional level by offering a healthy mode of coping with anger and other intense negative emotions caused by the wrongdoing. For example, for several named plaintiffs the process allowed them to "air private grievances. "304 Likewise, one attorney reported that the procedure offered a method for plaintiffs "to do something" about feeling angry.301 In other words, participants found in class actions a way to "channel" anger into a much more productive path. 306 Their experiences accord with other scholarly work of law and emotions theorists that more generally explained the way law could assist in positively channeling emotions, for example, in the context of international tribunals convened in response to episodes of genocide. 307 As Professor Martha Minow has argued, such tribunals may turn consuming grief and rage toward the more concrete and socially attainable goal of securing justice in relation to specific perpetrators.308

Most relevant to the social aspects of life under forced separation, many of the named plaintiffs emphasized that what motivated them to invest their time and energy in the collective process, and what made them eventually feel empowered by it, was not only and not even mainly self-interest. 309 Because success is far from being guaranteed, and even a win of a class action frequently means only a modest tangible reward, participants emphasized first being driven and later feeling rewarded by something else.310 They described their motivation and satisfaction as related to being engaged in "protecting the public"311 or representing "the people who had been harmed."312 Some even expressed particular care for class members "who were [more] vulnerable."313 Confirming the authenticity of these reported sentiments and explaining their importance, class action lawyers stated that the best class representatives are those who "care for something beyond their self-interest." 314 Given such emphasis on the unselfish drive to collaborate, it is worth noting that many studies have shown that engaging in other-regarding behaviors and experiencing other-oriented positive emotions are associated with greater wellbeing. 315 Thus, understanding class actions as expressions of prosocial motivations explains much of the general sense of empowerment reported by partakers.

Furthermore, contributors to class actions have also associated their activity with a sense of moral adequacy. Blending the value of prosocial behavior and morality, they described, for instance, a feeling that they "were doing the right thing for hopefully a lot of people." 316 Contributors also framed their class action as a battle of right and wrong, attributing their satisfaction to the fact that "'right' won out." 317 Needless to say that participants' view of class actions as morally valuable stands in sharp contrast to their demonized portrayal in the cases constituting the arbitration revolution. Even more importantly, the reported satisfaction from doing the right thing reveals that participants in class actions not only care for other claimants who were similarly harmed but also care about maintaining just social order.

For all those reasons combined, people who took part in class actions often stressed that for them, participation meant far more than using a procedural tool. They have defined class actions as "consumers' only recourse"318 and as "the only way" to cope with corporate wrongdoing. 319 Indeed, even though emotions were not the focus of Meili's study, he found it necessary to emphasize "how many named plaintiffs see the class action as their last best hope of holding corporations accountable." 32 0 Accordingly, these reported sentiments suggest that involvement in class actions was the only thing that saved participants from feeling helplessness and even despair.

All in all, when they are read with special attention to emotions, the statements of Meili's interviewees offer a rare glimpse into the emotional world of those involved in class actions. Recognizing the positive emotions coming from such involvement also sheds light on what it would feel like to live in a world without any collective legal recourse. Instead of feeling caring, moral, empowered, and proud, people may remain trapped in their initial anger while feeling disempowered by their inability to do anything about it. In other words, Meili's interviewees reveal emotions that corroborate the feelings of the employee cited earlier, who--due to being subject to a class action waiver--reported feeling powerlessness and isolation. 321 Most importantly, Meili's interviews also help to reconceptualize class action activity as an act of care and as a form of social activism that aligns with morality and justice. Such new understanding provides a way to resist the hostile neoliberal message--often amplified by the Justices responsible for the arbitration revolution--according to which collective actions are driven by selfish greed and a desire to a desire to achieve "'in terrorem' settlements" of "questionable claims." 322

Finally, focusing on the emotions that drive collective actions and are produced by them helps in understanding how natural and robust the drive to band together is, especially when personal resilience is so evidently insufficient. A new study by Professors Andrea Chandrasekher and David Horton further validates this point.3 23 It reveals that as the arbitration revolution has progressed and has blocked access to class arbitrations, claimants yearning for justice have found a new way to band together, which the authors call "class action-style cases." 324 According to the study, in this way hundreds of seemingly individual actions that share identical facts and claims are brought against the same wrongdoer and are all managed by the same lawyers. 3 25 For example, the study reports that in one case, the same law firm filed on the same day "1,354 employment cases against Macy's in the AAA." 326 Although the authors criticize this new development, their empirical findings tell a story that matches the testimonies of Meili's interviewees: that people feel a need to band together and will make much effort to act in concert against injustice.

2. Consumers' Complaints Websites

Both the existence and the content of consumer-created complaint websites can illustrate how corporate wrongdoing generates a painful sense of powerlessness that is followed by a rise of need to alleviate the pain by creating solidarities with others who have similarly suffered. The websites offer a dense description of the helplessness that comes from having to face big corporations all alone. First and foremost, such websites demonstrate a constant quest for coping with wrongdoing collectively: by communicating with others, exchanging information and ideas for solutions, and considering and planning engagement in a variety of collective actions. And, with particular relevance to the current discussion, a salient place within this effort to band together is saved in these websites to hopes and attempts to use legal measures and bring about collective actions.32 7

Marketing scholars James Ward and Amy Ostrom conducted a study of forty consumer-constructed websites. The study reported that what motivates consumers to create complaint websites or engage in their operation are feelings of isolation and powerlessness as a result of corporate wrongdoing. 328 For example, the study cited one aggrieved consumer who wrote: "If things go seriously wrong you will be totally on your own." 329 More generally, Ward and Ostrom noted that "[c]onsumer dissatisfaction has long been regarded as primarily a lonely experience."330 Importantly, the loneliness that the coauthors described in their study echoes the feeling of isolation expressed by the employee cited earlier, who found himself limited by a class action waiver. 331

Another interviewee in Ward and Ostrom's study stated: "us 'little people' seem to have no recourse!! !",332 Note that this last statement is remarkably identical to the sentiments of Meili's interviewees, who also reported resorting to collective action to cope with being made to experience themselves as "little people" and who also felt that they had no other recourse. 333 This matching choice of words suggests how characteristic is the link between powerlessness and isolation and how common it is for people interacting with big corporations to feel disempowered and as a result to feel a pressing emotionally driven need to come together. It also explains why when coming together is forbidden, like in the case of the employee cited earlier, the result is experiencing similar emotions and referring to them explicitly as isolation and powerlessness.

Intriguingly, founders of and participants in consumers' complaints websites frequently express a strong belief that, pursuant to corporate aggression, collective action is the exclusive coping mechanism and the only way to fight the paralyzing effect of powerlessness. 334 On this point, Ward and Ostrom's study quoted, for example, a disgruntled customer of Allstate who stated: "If we don't help each other out, we're all potential victims, but there is strength in numbers."335 Similarly, another frustrated customer, this time of United Airlines, reportedly asserted: "We must all work together if we have any chance of making a difference. Let's get together and make a stand United!" 336 To tie these quotes to the previous Part, note how they directly clash with Buchanan and Koch's fear of the power of numbers and people's ability to get together. 337 More generally, Ward and Ostrom found that 85% of the site creators encouraged others to join their efforts by adopting a website design that includes the ability to add and share comments and stories.338 Significantly, 45% of them also expressly called for acting collectively. 339

Most importantly to the discussion of the arbitration revolution, consumers' complaint websites reveal that when consumers imagine joining forces against the business that harmed them, they often envision using the law and specifically initiating class actions. In one leading site, tellingly titled the Complaint Board, 340 many borrowers have contested and protested long years of exploitation by a specific lender: Specialized Loan Services (SLS). For example, expressing both the powerlessness of confronting SLS all by herself and her desperate desire to unite with others specifically through a class action, one borrower stated: "I am a single mother with 3 children. Please let us all get together and make this into a large if not the largest class action suit ever." 341 Likewise, Ward and Ostrom's study described a consumer who was in "tears," having realized she is not alone in her battle and asked: "Can we bring a joint suit against this fraudulent company?" 3 4 2 Another consumer cited in this study, named Karla, expressed a similar wish, asking: "Can we get together? Go to the media, or a class action suit???"343 Meaningfully, such explicit yearning for class actions coming from consumers' websites mirrors and reinforces the positive emotions that the participants of class actions in Meili's interviews expressed.

All these voices together--the employee who directly expressed feelings of powerlessness due to inability to initiate class actions, Meili's interviewees who took part in class actions, and the consumers who so explicitly make online wishes for class actions--present a clear quest for coming together in response to being harmed. They reflect a reality in which when individuals feel powerless to cope with wrongs all by themselves, they tend to handle the situation by searching for an escape from this paralyzing sense and naturally seek to establish coalitions with similar others. Then, as an essential part of this prosocial coping mechanism, people tend to turn to the law, imagining a class action as one of the most effective ways out of their powerlessness. 344 All of that speaks volumes as to the magnitude of the emotional cost of taking away from those who already feel powerless their primary method of coping: the collective action option. As we shall now see, the study of emotions offers additional support to this observation.

3. The Affective Dimensions of Isolation and Powerlessness

While isolation and powerlessness can be treated as cognitive descriptions of factual conditions, it is crucial to acknowledge their emotional, sometimes called "affective," side. 345 Scholars interested in emotions in a variety of disciplines have linked alienation and powerlessness, describing them as "intra-psychic mental states." 346 They have also stressed the need to understand powerlessness "in terms of subjective sentiments." 347 Without diving into nuanced distinctions, common among theorists of emotions, between emotions, affects, feelings, and other parallel terms, what is significant for the current discussion is to notice that a meaningful part of what the interviewees in all the settings described above had voiced relates to the affective (or emotional) dimensions of their experiences. "Hearing" their voices as expressing emotional states is central to improving our understating of the consequences of the arbitration revolution.

Once the affective side of powerlessness is better recognized, it is vital to illuminate some of its leading emotional components further to grasp why feeling powerless can be painful and create the need to overcome the pain by seeking collective action. In his extensive exploration of affective powerlessness (which he calls subjective powerlessness), sociologist Warren TenHouten explains powerlessness as an emotional state that includes several basic emotions that are each unpleasant on its own.34 8 For example, his account presents sadness as part of powerlessness and explains that feeling subjected to external dominance, at the expense of being able to control one's reality personally, tends "to increase sadness and clinical-level depression."349

Additionally, TenHouten explains that fear is also involved in feeling powerless, emerging as a response to the realization that actions of a powerful agent are, or may become, damaging to the wellbeing of the powerless agent. 35 0 Social hierarchy-such as the one existing between corporations and their consumers and employees-can generate such fear as soon as the possibility of wrongdoing by the dominant party arises. 351 Pertinent to legal disputes, even the prospect of having to confront the stronger party, especially alone, may induce fear relating to the risks of both defeat and retaliation. 352 For example, in his influential study of social power, political sociologist John Gaventa described how powerless coal miners at the Appalachian Valley were afraid to complain and protest against their working conditions out of fear for their lives, jobs, and homes. 353

What is worse, the fear in powerlessness is often associated with anxiety due to the lack of perceived ability to cope with the threat. 354 Such anxiety may have additional debilitating consequences. 355 Finally, powerlessness sometimes brings shame about, and even humiliation, both due to the inability, perceived or actual, to fend off the pressures of those with power advantage. 356 As one scholar observed: "There is no more humiliating experience than to have one's relative lack of power in relation to another continuously rubbed in one's face," 357 concluding that "[p]owerlessness activates shame." 358

Appreciating how unpleasant is the affective experience of powerlessness, especially given the other negative emotions it entails, it is easier to comprehend how it induces a natural, perhaps even inevitable, response directed at alleviating the pain. 359 And, since the pain is coming from a sense of diminished control, the spontaneous reaction is an attempt to restore some power.360 Indeed, a leading theory in social psychology, "the theory of psychological reactance," holds in general that "a threat to or a loss of a freedom motivates the individual to restore that freedom." 361 In the context of consumption, for example, researchers have argued based on experiments that "feeling powerless is often an aversive state that will lead consumers to attempt to attenuate or alter this state."362 Accordingly, efforts to band together with others to counter wrongdoing by a stronger entity should be understood as an effort to escape feelings of powerlessness and restoring some control via collective actions.

However, when restoring control is impossible, as it is in the world recently created by the arbitration revolution, an opposite psychological response is likely to emerge. Being trapped in continuous powerlessness and imposed isolation, people may internalize the external legal rule and develop learned helplessness. 363 According to this influential psychological theory, when people are exposed to a prolonged (or permanent) inability to control external events or conditions by taking action, they become "prone to learn a passive or 'helpless' action orientation. "364 The broader implications of the possibility that the arbitration revolution is cultivating learned helplessness will be further discussed in the remaining sections. For now, however, it is valuable to recognize that at the most individual level, learned helplessness is known to be associated with many physical and mental health problems such as chronic stress and depression. 365 This is not to suggest that every uncompensated small-dollars claim can lead, by itself, to these severe outcomes, but to call attention to the aggregate risk society takes when it exposes millions of people to arbitration clauses and thus to a systemic lack of redress.

4. Intentionally Produced Resignation

The affective outcomes of depriving people of their legal ability to take part in acts of solidarity are hardly unintended consequences. The neoliberal project, in general, and large corporations, in particular, are highly interested in maintaining their dominance. 366 In the service of this interest, they engage not only in influencing rules such as the FAA. They also deliberately and strategically target emotions, imposing isolation in an effort to deplete people's emotional resources and, in that way, undermine their resilience. 3 67 The resulting feelings of powerlessness help neoliberals and corporations to maintain the status quo because they operate to repress resistance and secure a docile state of mind.368

In their article Capitalism and the Politics of Resignation, anthropologists Peter Benson and Stuart Kirsch argue that "corporations actively cultivate" and benefit from a "general feeling of disempowerment." 369 Naming this feeling "resignation," the authors explain it, along the lines of affective powerlessness, as a feeling structure that reflects a recognition that "things [have] gone awry[,] but one is practically unable to do anything about it."370 They further argue that resignation arises from an "acknowledgment that structural limitations impede one's ability to bring about change." 371 In many cases of felt resignation, they assert, all that is left is to use the popular response of "whatever," which conveys the general surrendering to corporations' unlimited power. 372

To illustrate their argument that corporations deliberately "seek to produce resignation and stifle critique,"373 Benson and Kirsch analyze strategies that tobacco companies use against consumers' class actions and legislative intentions to prohibit smoking. 374 They also describe similar practices used to achieve what they call "the hijacking of critique"375 in the mining industry.376 Further supporting Benson and Kirsch's descriptions of how the politics of resignation works, others have more recently revealed a similar pattern of intentional cultivation of powerlessness and resignation in additional corporate settings, such as in the rapidly growing industry of data-gathering.377 Together, such works generally demonstrate that corporations have routinized ways to make people feel that resistance would be futile with the intention of fostering resignation.

But why would neoliberals and corporations target the emotions? In general, because it is an effective way to have people internalize a message that would have been resisted if ordered from above. Indeed, in many non-legal disciplines, the so-called "affective turn" has increased awareness of the role emotions play in guiding human behavior. Such a body of work teaches that one salient way in which emotions are understood to direct behavior is their capacity to create action tendencies. 37 8 Anger, for example, induces an inclination to attack 379 and is considered an emotion that motivates collective action. 380 To a large degree, then, corporations and those who are interested in maintaining their control must counter such anger at the emotional level. Importantly, feelings of powerlessness, especially when combined with fear, sadness, and/or shame, all generate precisely the behaviors that serve best the goal of securing hegemony: inhibiting defiance and fostering acceptance of the status quo.

First, with regard to the inhibition of defiance, the cultivation of affective powerlessness creates action tendencies of avoidance and inaction381 as well as "passivity and resignation." 382 In the same vein, studies of affective powerlessness suggest that it is associated with conforming to authority and submissiveness. 38 3 Over time, all the tendencies that feeling powerless produce may even turn into the condition of learned helplessness that was discussed earlier. When this occurs, the inhibition of defiance becomes more permanent, in line with the interests of neoliberals and corporations.

Second, with regard to the acceptance of the status quo, it should be noted that while fostering affective powerlessness produces formal consent, it is a distorted type of approval. 384 Far from expressing an agreement agreeing to desired results, this consent is based on reluctant acceptance and has more to do with surrendering to a given reality due to lack of choice or alternatives. 385 Some scholars have called this type of unwilling consent "acquiescence," 386 and others named it "disaffected consent." 387 This is also precisely the sort of consent that consumers and workers are giving--at the beginning of the process--to class action waivers. Hence, in her dissent in Epic, Justice Ginsburg aptly named them "arm-twisted waivers. "388 The arbitration revolution thus can and should be seen as operating at the emotional level to finish off what corporations have started: cultivating affective powerlessness that not only suppresses resistance but is also capable of producing "disaffected consent" to the entire process.

To conclude, an emotional state of powerlessness is not only a severe consequence of the arbitration revolution but also an intentional outcome that has been strategically produced to serve the interests of neoliberals and corporations. Inciting people to feel powerless benefits the hypercapitalist system that neoliberalism promotes and enriches corporations because, as argued here, it can produce resignation or even learned helplessness. As a result of such manipulation of the emotions, the urge to band together and act collectively--so loudly articulated in the interviews cited earlier--has been dying from within.

CONCLUSION

At the core of this Article are neoliberal processes difficult to notice, trace, and narrate. And yet, the task is vital. The neoliberalization of everything, including our laws, extracts a toll too high to overlook. Such toll demands that we delve into the intricacies of nonlegal disciplines and wrestle with their integration so that we can fully account for what is at stake.

By adding to previous discussions an analysis of the latest episode of the arbitration revolution, the Supreme Court decision in Lamps Plus, this Article has made it more evident that the legal system has been going through a "tectonic shift." 389 It has exposed that as a result of this decision, corporations do not even need to insist on collective action waivers anymore. Post-Lamps Plus, corporations need only include simple arbitration clauses in their standard contracts-the courts will do the rest. That is, corporations now have the ability to separate millions of future claimants even without drafting waivers of collective action into their contracts. The upshot of forging such an easy path to liability evasion has never been more palpable: without the ability to band together, most claims are doomed to disappear. This is precisely the reason corporations sought to include "arbitration" clauses in standard contracts to begin with: to sound the death knell for most claims against them.

In her recent book, The Code of Capital: How the Law Creates Wealth and Inequality, Professor Katharina Pistor identifies the wealthenhancing impact of the law. 390 She describes how lawyers who "seek to ensure that their clients can accomplish their goals legally," use their planning and drafting skills to shape transactions that "push the boundaries of existing law," and then await the response of judges and regulators. 391 Pistor explains that such legal strategies do not always succeed (recall the invalidation of class action waivers in the "Discover Bank Rule" 392), but insists that through "constantly contesting the existing boundaries of legal rules . . . lawyers turn any of their clients' assets into capital." 393 As retold here, the story of using arbitration clauses as devices that buy corporations' immunity by the strategy of divide and conquer provides a powerful example. It details how lawyers and the law have meaningfully contributed to the creation of new capital for corporations, allowing them to extract value from their contractual counterparts while minimizing their exposure to liability.

Moreover, this Article has shown that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Instead, the revolution and its sweeping consequences can be fully understood only once put in their broader context. Taking into account parallel changes in ideology, politics, and culture, this Article has illuminated the arbitration revolution as an essential part of a more extensive neoliberal program. It has demonstrated that as both a product of neoliberal logic and a tool for further establishment of neoliberal hegemony, the resulting new arbitration jurisprudence should be reconceptualized as a building block in the intentional construction of a corporatized political economy. As such, the revolution belongs with a growing list of legal shifts similarly operating to allow corporations not only to immunize themselves from legal liability through contracts, but also to dominate campaign finance, 394 have First Amendment rights,395 break unions,396 and so much more.

Foreclosing all paths to solidarity does much more than extinguish any realistic way to cope with corporate power. With immeasurable authority and immense influence on public opinion, the Supreme Court has engaged in normalizing, legitimizing, and encouraging the ability of corporations to become invincible. As a result, and precisely as Margaret Thatcher wanted it to be, the process has been changing our souls,397 extending the harsh practical effects of the revolution "into the depths of our subjectivities." 398 As this Article has explained for the first time, the prolonged factual state of "divided and conquered" induces affective powerlessness: a dangerous cluster of emotions that leaves people resigned and unable to resist. Even worse, such affective powerlessness is not an unintended consequence, but rather part and parcel of "the 'politics of resignation'" 399 a calculated effort by neoliberals and the corporations they promote to protect their dominance. The principal risk, thus, does not arise merely from the fact that corporations found a way that the Supreme Court approved-to avoid liability. The threat goes far beyond that to the production of collective numbness and the possible creation of learned helplessness in our society. Alarmingly, it does not stop there.

In her recently published book, In the Ruins of Neoliberalism, political scientist Wendy Brown cautions against the fatal harm to democracy that the neoliberal takeover of our lives continues to cause. She argues that while at the beginning the neoliberal project focused on replacing political control with market control, it more recently (and in a timeline that parallels the arbitration revolution) has gone even further.400 According to Brown, "the neoliberal utopia" of a social order "in which individuals and families would be politically pacified by markets and morals" 401 has developed into a program of "starving . . . democratic energies."402 Her chilling analysis describes relentless neoliberal efforts "to dedemocratize the political culture and the subjects within it." 403

The arbitration revolution, as reconceptualized in this Article, forcefully demonstrates the magnitude of the risk Brown identifies. We cannot assume that the effects of the revolution's widespread cultivation of affective powerlessness will remain contained in the realm of standard contracts. Instead, it is predictable that people who feel resigned because there is nothing left for them to do when their service providers and employers wrong them are unlikely to feel motivated to engage in any other form of democratic citizenship. This specter should motivate anyone who cares about democracy to not abandon the efforts to change the current situation. This Article has offered an original understanding of how the arbitration revolution threatens democracy. Such understanding should reignite efforts to reverse the revolution and give people back their freedom to act collectively. Hopefully, a resumed ability to band together would restore access to justice and, with it, would generate a broader drive to become more involved in our democratic society.

#### The 1AC uses debate to integrate pro-competition legal advocacy within a broader method of movement lawyering. That lends radical force to any struggle for change.

Cummings, 20—Robert Henigson Professor of Legal Ethics and Professor of Law, UCLA School of Law (Scott, “Movement Lawyering,” Indiana Journal of Global Legal Studies 27, no. 1 (2020): 87-130, dml)

In addition to broadening the scope of organizational relationships in which movement lawyers participate, integrated advocacy also reframes the work that movement lawyers do: moving from the narrow lens of technical legal skill (especially litigation) to the broader art of persuasion. Within this framework, advocacy is understood as the process of telling compelling stories to those in positions of decisionmaking power and the wider public.1 16 Such stories exert pressure and build support for political and cultural change. To do this, lawyers deploy different, but interrelated, modes of advocacy: litigation, policy advocacy, organizing support, media work, and community education. 7 Lawyers add value to movement campaigns by using their problem-solving skills to integrate these tactical modes, contributing to the construction of movement narratives that seek to shift understandings of the structural underpinnings of inequality and offer ways to address them.11 8

Two preliminary points are important. First, it is necessary to distinguish movement goals, strategies, and tactics. 1 9 Goals refer to ultimate movement objectives: for example, changing an unjust law, increasing access to services, enhancing conditions for workers within a particular industry, or changing cultural norms to promote diversity and inclusion. Strategies refer to overall plans for achieving a goal: conscious decisions made by movement actors in pursuit of an objective, encompassing a plan of action that generally targets particular decision makers, identifies resources and pressure points, and proceeds through sequential steps toward the predefined goal. 120 Although ideally deliberate and forward-looking, movement strategies in the real world are never neat or precise; instead, they are developed under conditions of deep uncertainty through a contest of competing views espoused by leaders with different organizational and normative perspectives. 12 1 Nonetheless, out of the welter of intra-movement exchange, strategies develop and adapt: sometimes through structured planning and other times through more informal processes of leadership give-and-take. In contrast, tactics are the discrete means that movement actors use to advance goals pursuant to strategies. A movement's tactical repertoire consists of activities such as public education and media relations, litigation and lobbying, and disruptive activities (for example, protests, marches, boycotts, and sit-ins). The crucial point is that, in the movement lawyering model, such tactics are deliberately coordinated by movement lawyers and other stakeholders, and executed according to an overarching strategy designed to maximize their combined power to advance the movement-defined goal. This leads to the second point, which notes that within movement campaigns, there are times when movement lawyers themselves directly implement a diverse range of tactics, while in other instances, lawyers coordinate different tactical approaches with nonlawyer allies.

This model of tactical integration has deep roots in the Civil Rights period and before. Contemporary examples of movement lawyering pick up on the theme of connecting litigation to base-building and organizing, but also move beyond that theme in ways that suggest a broader conception of how multi-faceted advocacy tactics might fit together and be mutually reinforcing in social movement campaigns. In contrast to earlier stories, new accounts of movement lawyering reveal a self-conscious, and often explicit, commitment to a social change methodology built upon sophisticated insights from social movement theory and practice. Through these accounts are contextualized analyses of legal advocacy embedded within broader social movement activism, they illuminate the interconnected use of tactics outside of court, as well as efforts to synchronize litigation with a comprehensive movement strategy. Overall, these stories underscore both the degree to which campaign objectives shape the range of tactics deployed and how, within a given campaign, movement lawyers attempt to deliberately think through tactical relationships in order to maximize their impact.

Recent examples of movement lawyering make a point of emphasizing the ways that lawyers mobilize law outside of courts, showing how nonlitigation modes of advocacy involve "real" lawyering that can prove valuable—and even decisive—in particular types of social movement campaigns. These stories do not present movement lawyers as operating outside of conventional legal roles, but rather portray their advocacy work as a movement-based application of the type of legal work that lawyers typically do for clients. From this perspective, nonlitigation advocacy is both affirmed as essential to specific campaigns and linked together in ways that reveal deliberate planning and execution.

The significance of nonlitigation tactics is perhaps most apparent in descriptions of social movement policy campaigns. Returning to the campaign to pass a Clean Truck Program at the ports of Los Angeles and Long Beach, a critical role played by the lawyers was shepherding that policy through the complex process of administrative review. Lawyers for both the environmental and labor coalition members each drafted legal opinions supporting the authority of cities to enact a law requiring trucking companies to hire employee drivers and purchase clean fuel trucks under the market participation exception to the federal preemption doctrine. 122 Those opinions were essential documents in policy negotiations with city officials: they provided legal credibility that gave officials confidence that if they spent political capital on passing the Clean Truck Program, there was a good chance it would be upheld in court. 123 The legal opinions were used as part of an overall campaign strategy in which environmental lawyers at the NRDC wielded the threat of litigation to bring city officials to the table, labor movement leaders used their political clout to push those officials to cut a deal, and grassroots coalition partners staged public actions (which included a 100-truck caravan to the port of Long Beach) and mobilized community members to make statements at critical public hearings. 124

In a related example, Jennifer Gordon describes a policy campaign by a coalition of labor and immigrant rights groups—led by the Workplace Project—to pass the 1997 New York Unpaid Wages Prohibition Act, which dramatically increased civil and criminal penalties against employers who failed to pay their workers minimum wage and overtime. 12 5 Gordon's account of the campaign stresses the strategic interrelation among the campaign's research, lobbying, and media tactics. First, the Workplace Project's legal clinic, which represented individual workers in wage enforcement cases in the state's labor agency, compiled research on the labor agency's drastic underenforcement of valid worker claims and mistreatment of workers attempting to file cases. This research became the basis for worker affidavits used in sympathetic news reports, filed in public hearings, and presented to the state labor agency and law makers. 126 Second, the coalition drafted legislative language to address the problem of underenforcement, crafted policy arguments framed around the key idea of preventing unfair competition by employers "who undercut legitimate businesses by paying less than minimum wage,"1 27 and effectively neutralized key Republican legislators hostile to the bill, garnering support from business allies unhappy about unfair competition and buoyed by the powerful voices of immigrant workers who led the lobbying sessions. Finally, the coalition developed a strong outreach and media strategy, stressing the scope of the problem and the support of the business community, which resulted in positive coverage including a lead editorial in the New York Times. 12 8 Together, these tactics helped to gain passage of one of the nation's strongest pro-labor bills, benefitting a largely immigrant workforce, by legislators known for their anti-labor and anti-immigrant politics. 129

Even in policy campaigns such as these, in which affirmative litigation is not a centerpiece, movement lawyers nonetheless must anticipate the grounds on which opponents might mount a legal challenge to movement action and seek to prospectively minimize the risk of damage to the movement's policy goals or public position. In this sense, affirmative movement organizing and policy advocacy always operates in the shadow of potential countermovement legal mobilization to limit or reverse movement gains—and thus requires concurrent defensive worst-case-scenario planning. 130 This was a key feature in the ports campaign for a Clean Truck Program, where policy development and drafting occurred in the shadow of the trucking industry's threat to challenge the policy on preemption grounds. The fact that the industry challenge succeeded in striking down the critical employee conversion piece of the Los Angeles program, 13 1 despite careful legal planning to avoid that precise outcome, underscores both how important prospective legal analysis is to movement policy campaigns and how uncertain predictions about judicial behavior ultimately are in the face of doctrinal ambiguity.

Defensive litigation may also be crucial in campaigns that rely on protest. In addition to defending protestors charged with breaking the law, movement lawyers may be called upon to provide additional forms of legal defense. In the anti-sweatshop campaign discussed above, defensive litigation became a central part of the campaign's culminating case: used to protect coalition members engaged in organizing against prominent Los Angeles-based garment retailer, Forever 21, accused of contracting with manufacturers that systematically violated the labor rights of cut-and-sew workers. 132 In that campaign, Forever 21's law firm brought suit against activists who staged coordinated boycotts against the retailer's stores, charging the activists with "defamation, interference with prospective business advantage, unfair business practices, and nuisance." 133 In response, movement lawyers from APALC enlisted the ACLU, along with private attorneys from a pro bono law firm and the NLG, to file an anti-SLAPP (Strategic Litigation Against Public Participation) suit, arguing that Forever 21 was violating the protestors' free speech-and ultimately forced the retailer to withdraw its action. 134

When affirmative litigation is a key feature of a social movement campaign, tactical integration focuses on how to link that litigation to different modes of advocacy: either surrounding the litigation with other tactics to strengthen its direct impact, designing the litigation to indirectly advance advocacy in other domains, or both. In so doing, movement lawyers seek both to affirm the significant power that litigation has to change institutional behavior and potentially influence public attitudes, while also responding to some of its limits.1 3 5 Movement lawyers thus remain committed to impact litigation, and believe in the value of building favorable precedent, but seek to do so in ways that are responsive to critiques of litigation and sensitive to underwriting broader mobilization efforts.

Within the integrated advocacy framework, movement lawyers recognize that there are times when claiming rights in court is essential to challenge structural injustice: litigation may produce concrete short-term benefits that improve movement constituents' material conditions, force tangible changes in institutional behavior, or directly expand the possibility of political participation. On the front end of movement campaigns, integrated advocacy seeks to strengthen the potential for litigation to achieve these positive outcomes; on the back end, it directs attention to issues of enforcement and implementation.

At the outset of litigation, movement lawyers plan for how to fold in other modes of advocacy—especially organizing and media relations 1 36—to exert coordinated pressure on litigation targets as part of a broader "mobilization template." 137 The anti-sweatshop campaign offers an important case in point. There, movement lawyers from APALC, in collaboration with their policy and organizing partners, designed an impact-litigation campaign to "extend the joint employer theory developed in the Thai worker case more broadly within the industry-setting a precedent that would force other manufacturers and retailers to take seriously their responsibility to ensure labor standards were met."1 38 The cases were carefully selected against high-profile targets engaged in egregious (but not atypical) practices to maximize their strategic effect. Impact cases were "coordinated with a media campaign: the filing of each suit [was] timed with a press conference and media contacts [were] used to pressure defendants to agree to worker demands."1 39 This strategy also used protest tactics, like the Forever 21 boycott, to place additional pressure on garment companies and succeeded in winning a string of high-profile settlements for garment workers against major fashion companies, including Forever 21, City Girl, BCBG, and XOXO.140

A similar strategy was used by advocates at NDLON and the Mexican American Legal Defense and Education Fund (MALDEF), who developed a blueprint for challenging antisolicitation laws banning day laborers-most of whom were recently arrived immigrant menl 4 1-from seeking work in public spaces like street corners. 142 By the early 2000s, roughly forty cities in the greater Los Angeles area had passed such laws. 143 To challenge them, NDLON organized day laborers at key hiring sites into committees, on whose behalf MALDEF filed lawsuits arguing that the laws violated day laborers' First Amendment right to seek employment.144 When the lawsuits were filed, NDLON and MALDEF would "stage a public event, marching from the day labor site to city hall." 14 5 This was done to jointly advance the legal strategy (by pressuring city officials to negotiate) and the organizing strategy (by promoting worker participation). In the words of the main MALDEF lawyer in the campaign: "Working together we could accomplish the legal policy goal and NDLON could organize groups around California." 146 Using this model, the campaign succeeded in winning a dramatic legal victory in the Ninth Circuit Court of Appeals invalidating most of the day labor antisolicitation laws around the region.1 47 In addition to coordinating the litigation, organizing, and media efforts in specific legal challenges, movement lawyers supported the campaign by playing a range of other roles: organizing students to pose as day laborers and getting local news media to film their arrest, coordinating favorable news editorials and other media coverage, negotiating with construction retailers to set up day labor sites, testifying at city council hearings against proposed ordinances, drafting legislation, and briefing public defenders charged with representing day laborers prosecuted under the antisolicitation laws on the larger campaign stakes. 148

At the back end of impact litigation campaigns, integrated advocacy seeks solutions to enforcement problems. In the anti-sweatshop campaign, the failure of garment workers to recover against employers even after winning judgments-owing in part to corporate shell games in which employers would claim to go out of business and reorganize in another guise-gave rise to more systematic enforcement efforts. 149 These included the creation of a new organization in 2007, Wage Justice, solely dedicated to using "innovative legal theories and legal tools borrowed from commercial collections law" to collect "back wages and penalties owed to low-income workers."15 0 Building on this effort, labor and immigrant rights groups formed the Los Angeles Coalition Against Wage Theft,' 5 1 which produced groundbreaking reports documenting the extent of wage theft in Los Angeles and around the country, 152 and helped lobby for the creation of enforcement divisions in the City and County of Los Angeles to prosecute and enforce wage theft in the region. 153

As these campaigns reveal, litigation may be designed by movement lawyers to reinforce other advocacy strategies that are either operating in parallel to the litigation or planned for the future. Litigation, in this sense, is used for its "indirect" or "radiating" effects on other types of movement work. 154 Rather than enervate movements by individualizing conflicts, integrated advocacy seeks to use rights strategically and flexibly to build collective power at the grassroots level. Michael Grinthal's analysis of movement lawyering shows how litigation may serve as a "scaffolding" for local mobilization, describing a campaign by Christian right groups in which litigation was coordinated with local organizing to advance their goal of using public school space for religious purposes. 5 5 A recent account of lawyers in the disability rights movement similarly spotlights how they have combined lower court litigation with local mobilization to produce wide-ranging settlements affecting large groups of disabled people, thus advancing the movement's goal of promoting social integration while avoiding the barriers erected by narrow Supreme Court rulings that restrict the reach of the Americans with Disabilities Act. 156

Other portraits of movement lawyering illustrate the design of litigation campaigns to influence the policymaking process. Commentators have emphasized the potential of litigation to force decision makers to the policy-making table by invalidating existing laws and imposing costs, 157 and some of the new movement lawyering stories demonstrate this dynamic. In the lunch truck campaign recounted above, for example, the criminal case was selected by the movement organization in order to undermine the existing municipal ordinance, freeing Asociaci6n members to "have sufficient time for other organizational objectives, such as promoting a positive image of catering vendors, building their core leadership, and working with local stakeholders to draft truck-friendly laws."15 8 Successful litigation also raises the public salience of issues, reveals significant enforcement gaps, creates models for possible statutory reform, and gives advocates credibility with lawmakers that can push long-stalled legislation forward. In the anti-sweatshop campaign, advocates had repeatedly failed, since the 1970s, to pass a statewide joint employer law holding garment companies liable for the labor violations of contractors. 159 Yet, in the wake of the prominent Thai worker litigation, advocates were able to capitalize on the opportunity created by increased public attention to the issue (and state government leadership more receptive to change) to help push through a comprehensive new state law establishing that any company "engaged in garment manufacturing. . shall guarantee payment of the applicable minimum wage and overtime compensation, as required by law, that are due" from its contractors. 16 0

Sometimes, the interaction between litigation and policy advocacy runs in the opposite direction with policy advocacy structured to positively influence litigation. In the California campaign for marriage equality described above, movement lawyers coordinated with the movement's policy advocacy group, Equality California, to draft the state's domestic partnership law in ways that were deliberately designed to strengthen the planned equal protection litigation challenge to the state's same-sex marriage ban. 16 1 As drafted, the domestic partnership bill granted same-sex couples the "same rights, protections, and benefits" as opposite-sex spouses and contained extensive legislative findings documenting discrimination against same-sex couples and affirming their role as good parents and caregivers.1 62 This language was consciously inserted to set up a later equal protection challenge by creating, "through the legislative process[,] a body of findings and policy on same-sex couples [showing] how they are equal in every way ... [in order to] set up suspect class arguments." 163 When a frontal challenge to the same-sex marriage ban in California was successfully litigated five years later, the California Supreme Court specifically referred to the fact that same-sex couples, through domestic partnership, were already accorded the full benefits of marriage to support its holding that their exclusion from marriage could only be based on illegal animus.1 64 That decision was ultimately nullified by statewide initiative, Proposition 8, but it marked a turning point in the marriage equality movement by drawing intense national attention and reinforcing similar coordinated efforts to pass marriage and domestic partnership laws in roughly two dozen states 1 65 -collectively setting the stage for the sweeping Supreme Court victory to come in Obergefell v. Hodges, which banned prohibition of same-sex marriage nationwide.1 66

The marriage campaign also draws attention to a final dimension of integrated advocacy: the use of litigation and policy development in connection with media strategies in efforts to shape positive public opinion. Scholars have suggested that judicial decisionmaking and policy development tend to follow changes in public opinion, citing the movement for same-sex marriage as a case in point; on this view, premature legal change at large variance with public opinon can produce backlash.1 6 7 As seen in the national marriage movement, however, movement advocates sought to use the pro-movement narratives developed through litigation and the legitimacy conferred by judicial and legislative acceptance of movement policy positions, to shape public opinion in pro-movement directions. This approach suggests that movement advocacy to change law, at least when carefully planned and orchestrated with a thoughtful public relations campaign, can help to win hearts and minds as well. 168

3. Institutional

As the discussion of the relation between legal change and attitudinal change already suggests, the concept of integrated advocacy rests on a complex understanding of how law operates within different types of political and social institutions. Borrowing Susan Strum's terms, integrated advocacy can be said to operate within a multi-level systems framework, in which actors are simultaneously situated in interconnected domains of power and normative pluralism, within which law is one tool for influencing values and behavior.1 69 In deploying integrated advocacy strategies, lawyers seek to connect change processes together within multiple domains of people's lived experiences: some within formal lawmaking institutions, like courts and legislatures, and some outside, on the streets through protest or in everyday interactions at home and work. As with organizational and tactical integration, the key point about these institutional efforts, from a movement lawyering perspective, is that they are deliberately planned and linked.

Institutional integration draws attention to what Richard Abel calls the "spatial configuration of power"-the idea that "polities allocate power across various levels of the state hierarchy from apex to base" and that within different spatial units, there are opportunities for law to be produced and used as a tool to constrain power.1 70 What this means for movement lawyers is that planning and executing strategic campaigns requires thinking through the relationship between distinct domains of law making (for example, courts and legislatures at different levels of government), how they are influenced by extra-legal sites of norm generation (particularly social movement challenges at the grassroots level), how legal change interacts with the public's preexisting views (potentially shaping pro-movement attitudes or causing backlash), and how legal rights are translated into legal consciousness among movement constituents (equipping them to mobilize law in their day-to-day encounters with power holders). These struggles to leverage law and norms from one institutional site, to influence decision making or behavior in another, occur across multiple spatial directions-bottom-up, sideways, and top-down-that are mapped out here.

Recent social movement legal scholarship has been most attuned to bottom-up norm generation, legal change, and culture-shifting projects. Scholars in this literature have focused on how social movement mobilization from below may succeed in transforming legal doctrine. In these accounts, legal change occurs after social movements at the grassroots level assert a new interpretation of a social norm, convince the public of the legitimacy of that new interpretation through sustained social struggle, and ultimately persuade courts to validate the interpretation as constitutional law. 171 Central examples of this bottomup dynamic include: Guinier and Torres's account of the Montgomery Bus Boycott, in which the Montgomery Improvement Association's courageous mobilization succeeded in breaking the city's segregated bus system and making new law in the form of a decisive Supreme Court ruling; 1 72 Reva Siegel's analysis of how the debate over women's rights, framed by the clash between Equal Rights Amendment (ERA) movement activists and their opponents, profoundly shaped sex discrimination doctrine; 173 and William Eskridge's comprehensive treatment of how identity-based social movements, asserting a politics of recognition, "generate constitutional facts" and spark normative contests that create new doctrinal ideas, which sometimes get adopted by the Supreme Court.1 74 Although generally optimistic about the power of movements to reshape law, this new social movement scholarship also contains stories of failure. In Chris Schmidt's account of the student sit-ins of the 1960s, it is the Supreme Court's ultimate reluctance to legitimate civil disobedience by extending the reach of the Fourteenth Amendment to private property owners that prevented the sit-ins from dislodging the linchpin state action requirement. 175 The role of movement lawyering in these campaigns is not the focal point of analysis. The stories do, however, offer practical lessons: drawing attention to the critical importance of movements naming injustice, framing normative solutions, and defending those solutions in the face of recrimination and reprisal. Movement lawyers can play crucial roles in these normative exchanges by protecting the free speech rights of movement actors, retelling and legitimizing their stories in courts and other lawmaking bodies, and gradually building precedent that helps influence public opinion and validate new legal principles over time.

In addition to bottom-up efforts to translate norms into law, there are sideways strategies to import norms and legal ideas from one institutional arena to produce change in another. Human rights scholars have identified "boomerang" patterns, in which domestic activists enlist international human rights norms external to their legal system as leverage to challenge abuses by domestic power holders. 176 Movement lawyering can involve similar efforts to leverage external sources of legal legitimacy to fortify movement campaigns. After 9/11, the Center for Constitutional Rights and the ACLU used human rights in multiple fora to contest the detention of so-called enemy combatants at Guantanamo Bay and in secret CIA "black sites."1 77 The organizations petitioned the Inter-American Commission to determine the legal status of detainees under international law, filed amicus briefs raising international claims in the major Supreme Court cases asserting detainees' right to habeas corpus and challenging military commissions, and filed appearances before United Nations bodies challenging the validity of secret renditions.1 7 8

Within the domestic political system, movement lawyers make similar shifts from one lawmaking institution to another to advance their positions: asking local jurisdictions to fix problems created by the federal system, courts to correct problems made by legislatures, and vice versa. This type of continuous jurisdictional maneuvering has defined the ports campaign in Los Angeles. There, the labor movement's effort to devise a local strategy to require port trucking companies to convert their drivers to employees was motivated at the outset by the failure of federal labor law to protect those workers. Local policy makers, in turn, were motivated to pass a Clean Truck Program to avoid further litigation by environmental groups. When industry opponents challenged the program in court, labor activists and lawyers went to Congress to try to amend the federal law that the Ninth Circuit had held preempted the Clean Truck Program-in an attempt to carve out a specific exception to permit employee conversion. 179 When that failed, lawyers associated with the movement represented truck drivers in the state labor commission and court to challenge trucking companies for misclassifying drivers as independent contractors, using that litigation to pressure companies to convert their drivers and accept unionization. 8 0 As that litigation met limited success, movement leaders returned to the city to consider other legal strategies for blocking port entry for independent-contractor firms. 18 1 The ports struggle still continues with concurrent institutional efforts moving forward: misclassification litigation in court, union organizing in the workplace, and rulemaking and legislative efforts at the port and local government level. 182

Finally, movement lawyering focuses on top-down efforts to bring legal rights from the legal system to the ground level where they can be understood and mobilized by affected individuals to access legal benefits, enforce legal protections, and perhaps galvanize further activism. In this role, movement lawyers seek to translate "law on the books" into "law in action," raising the legal consciousness of movement constituents so that they can fight for their own rights and help others to do the same. Jennifer Gordon's analysis of the Workplace Project offers a classic account of this type of movement lawyering work. In it, she recounts how the use of "rights talk" about employment protection in the center's legal clinics "became a springboard that launched a vision of justice that went far beyond the law's provisions," spurring low-wage immigrant workers to organize collectively against employer abuse and governmental inaction. 183 Other scholars have similarly shown how strategies to promote rights consciousness have helped in some contexts to enhance legal enforcement in the workplace, 1I spark grassroots organizing,18 5 and promote feelings of empowerment among movement constituents. 186

In practice, these types of legal, policy, and culture-shifting projects are dynamic and iterative: they play out over multiple cycles in complex ways that can never be fully predicted or mapped out. Integrated advocacy reframes these dynamics in affirmative terms: presenting them as empirical facts to be studied, understood, planned for, and (when things do not go as planned) revised. In contrast to the negative spiral story of legal liberalism (in which legal mobilization in court undercut political mobilization on the ground), integrated advocacy envisions a pathway for embedding change at one level that creates positive feedback loops in others: grassroots activism by movement constituents changes norms and practices, those changes shape policy reform, that reform further reinforces norm change so that the reform itself is implemented in daily life, and that implementation then strengthens the movement's base in ways that produce new changes in a widening circle of democratic transformation. 187 The key is that movement lawyers may intervene at different levels to build and fortify these cycles. Their work is affirmative, prospective, and ongoing. In this regard, movement lawyers do not simply rely on virtuous cycles to emerge nor, once started, do lawyers presume that the cycles will endure. To the contrary, they presume that any struggle for political or economic redistribution is going to provoke strong countermobilization that will persist over time, with opponents seeking out the most favorable institutional levels upon which to assert opposition. Thus, rather than viewing their goal as advancing policy change that constitutes a decisive victory, movement lawyers appreciate that integrated advocacy is a repeat-player process in which success must be defended and extended over time. In this sense, the opposition itself becomes integrated into the movement lawyer's frame of analysis.

#### Class actions creates a new paradigm that can overcome the individualizing logics of Western law.

Lovell, et al, 16—Harry Bridges Endowed Chair in Labor Studies and Professor of Political Science at the University of Washington (George, with Michael McCann, Gordon Hirabayashi Professor for the Advancement of Citizenship and Professor of Political Science at the University of Washington, and Kirstine Taylor, Post Doctoral Lecturer in Political Theory in the Department of Political Science, University of Washington, “Covering Legal Mobilization: A Bottom-Up Analysis of Wards Cove v. Atonio,” Law & Social Inquiry, Volume 41, Issue 1, 61–99, Winter 2016, dml)

One of the most promising features of the disparate impact logic embraced by cannery activists was the amenability to collective mobilization through class action lawsuits. The focus on structural inequalities embedded in longstanding practices meant that violations were systematic and thus affected groups of workers and not just individual victims of discrete discriminatory decisions. The opportunity for class actions was important in several ways. First, class action suits helped to overcome collective action and cost problems by improving the incentives for workers and their attorneys to file disparate impact lawsuits (Cramton 1995; Hensler and Moller 2000). Moreover, as scholars (McCann 1994) have shown in other contexts, the activists recognized that class action lawsuits can be useful beyond the courtroom as mechanisms for organizing workers, increasing union participation, and forging coalitions with other groups. As Scott put it: “[T]he idea of the EEOC contract ... was to educate workers about Title VII. But what we actually did in the process, was we organized” (interview with Tyree Scott, March 17, 1998). The organizing began with workers, but, as with the legacy of gender-based pay equity, it often extended well beyond to broad coalitions. As former ACWA activist Michael Woo told us:

There was a community organizing aspect to bring in support around these lawsuits. Well, the idea was to develop a class action lawsuit ... to not only have a legal component, which was the centerpiece of it, but have a community organizing piece to span the generations and to get the kind of community support we needed to move the lawsuits forward. ... It was important to surface some of the earlier generations of cannery workers, to do that kind of organizing and get people feeling like this was a movement that affected all of us, affected all of our families. And it really helped in terms of surfacing not only the plaintiffs who were part of the class action lawsuit. It also was important in bringing the kind of political support in the community we needed to bear. (Interview with Michael Woo, March 13, 1998)

In sum, disparate impact claims facilitated solidaristic group action advancing a collective nomos that overcame, rather than perpetuated, the individualizing logic of disparate treatment litigation and much US civil law (Scheingold 1974).

Far from viewing the litigation and anticipated legal remedies as ends in themselves, the activists from the beginning integrated Title VII lawsuits into a much broader political and organizing strategy for advancing a variety of goals grounded in their ambitious nomos and reaching well beyond the lawsuit (and beyond the borders of the United States). Those broader efforts were sometimes linked to their involvement in litigation, but they also persisted long after the Supreme Court’s ruling led them to abandon the strategy of using Title VII litigation. First, the young cannery activists sought to challenge and replace the corrupt and unresponsive leadership of the cannery workers’ union, ILWU Local 37 (Domingo 2010, 81– 100). “I think it’s 1976 where we’re becoming much more clear we ... need to take the situation from having this lawsuits that we file outside the union, to actually going back into the union. Part of our strategy of influence was to re-seize the union, and to change the way that it operates,” David Della told us (interview with David Della, March 8, 1998). The lawsuits provided direct support when key ACWA activists returned to Alaska as workers after a court found that the blacklist was unlawful retaliation against civil rights plaintiffs. “Most of us were blacklisted for a really long time. So we never got back up there until pretty close to when the cases were won” (interview with Cindy Domingo, March 8, 1998).

The lawsuits thus directly aided the activists’ broader effort to challenge corrupt union leaders by mobilizing worker support for a reform campaign. The activists immediately began a reform campaign as a “rank and file committee” (RFC) within the union. They revitalized long-dormant grievance processes, pressured leaders for more transparency, and ran slates of candidates in union elections. “So there’s a focus on the dispatch system, there’s a focus on organizing the unorganized that had been lost. And then there was a focus in on grievance, handling grievances and complaints. Shop steward training, you know, and getting people to actually advocate. And to move complaints from the floor into some sort of resolution with the industry through the union and all that kind of stuff. ... Those three problems become the major reform movement cause” (interview with David Della, March 8, 1998). In 1978, the RFC slate, which was multiracial male and female, won a majority of seats on the executive board. Two years later, ACWA leaders Silme Domingo and Gene Viernes won the important vice-president and dispatcher positions. The newly elected leaders quickly accelerated efforts to “change the union back to a progressive body that protected the rights of workers” (Domingo 2010, 96). They “cleaned up the corruption” and won contracts “that allowed us grievances,” both legally grounded reforms (Hatten, quoted in Chew 2012, 82).

Second, the same activists—allied with the KDP—worked to mobilize support for ending the rule of Philippine dictator Ferdinand Marcos and to promote democratic socialism both in the former colony and its mainland metropole (Churchill 1995). The rights-based antiracism campaign in the canneries and within the union merged well with the challenge to Marcos’s rule by martial law and brutal trampling of dissenters’ rights.

Tragically, the challenge to Marcos proved the most costly of the activists’ causes. On June 1, 1981, shortly after winning support for an inquiry into Marcos’s human rights violations at the international ILWU convention, Silme Domingo and Gene Viernes were shot and killed while working in the union’s office in Seattle. Two members of the Filipino Tulisan gang were convicted of being the gunmen in the murders, but surviving friends and family members believed there had been a broader conspiracy. They built a new grassroots coalition that helped to support an independent investigation into the murders. Working with progressive lawyers, the activists launched a civil suit against Marcos and US intelligence agencies that helped uncover evidence proving that Marcos had sent the money that the president of the union used to hire the gunmen in the murders. A federal court found Marcos’s estate liable for the murders. The trial also exposed new dimensions of the corrupt, despotic rule by Marcos, including the fact that US and Philippine intelligence agencies collaborated to spy on US activists during the years prior to the murders.

Throughout the 1970s and early 1980s, the activists continued to pursue these interrelated struggles and cultivate alliances with local, national, and international activists battling at all levels of state and social power (Griffey 2011). These projects expressed the activists’ jurisgenerative nomos of workplace equality, union power, and socialist democratic change in both the United States and in the Philippines, and they demonstrated their nomic worldview that legal contests are inextricably struggles between the “haves and have-nots” in society. Such political contests over hierarchical social power illustrate the political dimensions of legal rights activism that legal mobilization scholars often study but are less visible in Cover’s jurisprudential focus. Again, integrating Cover’s provocative theorizing into the legal mobilization framework holds greater promise than either analytical framework alone.

Remedies: Institutional Injustice Requires Worker-Led Structural Reform

The ACWA activists’ articulation of pervasive and historically-based institutional racism led them to demand broad and multidimensional structural reforms. They were not narrowly seeking quotas or any other discrete, technocratically defined, one-shot legal fixes for structural problems.10 They instead sought changes in job training opportunities, hiring processes, job ladder mobility, and wage structure to remove race and gender bias. Most important, ACWA activists remained committed to direct participation by aggrieved workers in reform implementation processes. As such, efforts to democratize workplace organization required broad participation directly in reform processes. Like their mentor Tyree Scott (Griffey 2011) and gender-based wage equity workers (McCann 1994), the activists appealed to judges to authorize direct worker involvement in creating and monitoring various processes of workplace transformation.

Moreover, the activists did not think of their campaigns in terms of “desegregation” or even “integration” of the workplace. They valued increased individual opportunity for better work and wages, but they were focused on collective power in the workplace, in the union, in their local community, and in national and international politics. The scope of issues addressed by ACWA went far beyond the workplace to include immigration, health care, bilingual education, low-income housing, fair access to capital for home building and small business, and much more, including deposing the despotic Philippine president and advancing socialism at home and abroad (Chew 2012). As such, their aims better fit what Manning Marable has described as a “transformative” rather than merely integrationist nomos (Marable 1996).

The Jurisgenerative Project: Beyond Liberal Civil Rights

The previous observations call attention to a final point. Like Carlos Bulosan and earlier Manong socialist leaders, the young reformers’ movement narrative challenging institutionalized racism was savvy in its conditional embrace of a liberal dialect of rights and democracy. “We wanted America to live up to its democratic ideals” (Chew 2012, 4). At the same time, though, the KDP activists in ACWA also self-identified as fellow travelers in the New Left, and as socialists (Toribio 1998; Domingo 2011, 1). The activists’ aspirations were protean and ever evolving; they drew on a nomos grounded in an eclectic mix of inspirations and influences that inspired a wide range of social reform projects.

That said, they were constant in their embrace of jurisgenerative inspiration from traditions of positive socioeconomic human rights. As Scott explained: “Now is the time to push for a new human rights agenda for the US at home, one that encompasses what have been called civil rights, workers’ rights, and women’s rights, among others” (letter from Tyree Scott and Diane Narasaki to The Hon. Ronald Dellums, July 14, 1989; Authors’ files). An affinity for human rights language dated back at least to the earliest cannery worker unionizing efforts in the 1940s, solidified in the McCarthy era, and was reborn with the young ACWA reformers in the 1970s. Clearly, their efforts in the lawsuits to pursue the relatively narrow liberal rights remedies of Title VII did not limit the workers’ aspirational rights narratives to the terms of mainstream liberal civil rights law.

#### No cooption.

--while it’s not explicitly mentioned in this card, many of the movements referenced (the gender equity movement, Alaskan canneries, building trades) heavily featured class-action litigation

McCann and Lovell, 18—Gordon Hirabayashi Professor for the Advancement of Citizenship at the University of Washington AND professor of political science, department chair, and the Harry Bridges Endowed Chair in Labor Studies at the University of Washington (Michael and George, “Toward a Radical Politics of Rights: Lessons about Legal Leveraging and Its Limitations,” *From the Streets to the State: Changing the World by Taking Power*, Chapter 7, 149-152, dml)

That said, we, as nonlawyer scholar-activists, have engaged with many lawyers who serve radical social movements very well. The basic contours of how legal resources can be mobilized are documented by many studies. For example, McCann’s (1994) Rights at Work shows how, during the 1970s and 1980s in the United States, coalitions of unions, feminist groups, community progressives, and working women claimed rights and used or threatened lawsuits to build grassroots movements demanding increased gender equity in salaries, hiring, and promotion policies. Lawyers served as critical leaders who understood how litigation could help to mobilize grassroots activism, leverage collective bargaining and legislation, and help to fortify policy implementation. The gender equity movement paralleled the challenges to white domination by Asian American workers in the Alaskan salmon canneries and African Americans in the building trades. While some federal and local litigation proved quite important, in many cases merely the threats of litigation were effective in generating positive media attention, winning supporters, leveraging cooperative (or at least respectful) responses from employers and managers, changing policies in legislatures and collective bargaining, and sustaining pressure for policy implementation. Like the cannery workers’ movement, the movement for wage equity was killed off by judicial shifts rightward and business backlash, but that was hardly the fault of movement lawyers. Grassroots activists were critical of judges and frustrated by the limits and unreliability of litigation, but they acknowledged lawyers as invaluable, even beloved, actors in the movement.

The most important contribution of legal mobilization scholars is showing how legal rights claiming and litigation, whether enacted or threatened, can help to catalyze grassroots mobilization, reshape public opinion, leverage legislative and other institutional policy-making processes, and bolster other forms of influence. Movements that integrate legal tactics into broader political strategies are less reliant on fickle courts with limited power. Furthermore, they are more capable of exercising power in the shadows of official law, either without positive court actions or after they occur.

In the American context, there are numerous cases of robust coalitions for which legal resources and tactics proved important, including the movements for civil rights, women’s rights, animal rights, the movement for equity in educational funding, and the recent LGBTQ campaigns for same-sex marriage. There are also parallel examples of legal mobilization by progressive movements around the world in many places with legal systems quite different from the United States (Cichowski 2006; Klug 2000; Santos and Rodriguez-Garavito 2005). Lawyers and legal mobilization tactics were critical to the campaign to dismantle apartheid in South Africa (Abel 1995), to the highly ambitious and effective recent struggle for socioeconomic rights of displaced people in Colombia (Rodriguez-Garavito and Rodriguez-Franco 2015), and countless other struggles (Haglund and Stryker 2015).

3. Many scholars and activists rightly are wary of lawyers’ tendency to dominate grassroots movements, but this wariness is often exaggerated and unproductive. Lawyers can be integrated into a social movement in ways that remain accountable to its broader strategies and goals.

Critical scholars regularly bemoan the tendency of lawyers to grab the reins of movements and to steer them toward litigation and away from alternative, arguably more transformative, tactics. This diverts the strategies and often the very goals defined by these movements. Moreover, lawyers are well positioned to use their expertise, experience, and status to dominate movements, not least in their interaction with mass media. Many have recently blamed lawyers for steering the LBGTQ movement toward litigation for same-sex marriage, producing campaigns that marginalize many LGBTQ populations and contribute to hegemonic stigmatizing norms, practices, and power relationships. As Stuart Scheingold (1974) once put it, lawyers often become “a tail that wags the dog” of movement struggles (see Sarat and Scheingold 1998, 2006). These scholarly critics convey some important truths, but they also tend to paint a simplistic, one-dimensional portrait that misses much of what lawyers do in and for movements.

Our ongoing research of civil rights activism by Black and Filipino workers in the Seattle area during the 1970s illustrates how lawyers can be integrated into movements so as to ensure fidelity to grassroots activist control (McCann and Lovell, forthcoming). Tyree Scott, a Black construction worker and activist, pioneered legal mobilization politics to challenge racially segregated building trades in the city. He led a host of walkouts, strikes, and protests that were coordinated with lawsuits filed by the Equal Employment Opportunity Commission (EEOC) and private attorneys that he directed. This resulted in landmark litigation providing extensive remedies—skill development programs, hiring targets, and compensatory damages—for local workers and similar campaigns around the nation. He also spearheaded the founding of a worker-led public interest law firm, the Northwest Labor and Employment Law Office (LELO), to govern the legal campaigns and coordinate with other movement activities. As one activist recalled, Scott’s insurgent United Construction Workers Association (UCWA) “had learned some important lessons about working with lawyers. . . . The lawyers didn’t want to lose control of ‘their’ cases. So it became clear to the UCWA leadership that we needed our own lawyers.” Scott helped to organize LELO to work jointly with UCWA, the radical young reformers in the Alaskan Cannery Workers Association (ACWA), and the California Farmworkers Association. Al Simmons, a Black activist who had been hired by the American Friends Service Committee to work on campaigns with Scott, later explained:

Tyree Scott would say, poor people should be able to treat their lawyers like rich people treat their lawyers: they tell them what to do. All these movement lawyers always try to tell the poor folks what to do. What may be the best legal strategy may not be the best movement strategy. And if you’re trying to build a movement, you say “fuck the law, we’re trying to build something here.” And we did not defer to lawyers at all at any time. So Tyree and I had gotten so tired of dealing with lawyers at that level, that’s the genesis of what became LELO. (quoted in Griffey 2011, 67)

One of the first lawyers hired was Michael Fox, a young attorney who brought several successful actions enabling central Washington farmworkers to organize. He then bailed Scott out of jail after his arrest for a protest action. LELO also coordinated fundraising for and through litigation, ensuring that the workers had substantial control over financial decisions. LELO orchestrated the filing of the three anti-discrimination lawsuits against Alaskan canneries by young Filipino reformers in ACWA. In turn, these reformers coordinated legal action with the contentious politics that aimed to reform racially segregated salmon canneries, take over and democratize the long corrupted union, and mobilize transnational coalitions to help depose Marcos. As we explained before, all three goals were achieved to a large degree, although at a cost of the two murdered reform leaders and a devastating loss before the US Supreme Court many years down the road. In any case, LELO offers a creative model of how to work with lawyers in legal mobilization politics while retaining grassroots activist control over the movement.

4. Legal institutions are less co-optive than other domains of the state because of the inherent indeterminacy of legal discourses and the relative independence and weakness of courts.

Legal language and rights logics are inherently indeterminate, polyvalent, and contestable. Dominant groups exercise unequal control over official rules, rights, principles, and modes of governance, but progressive and radical activists have considerable latitude to frame new rights claims or other legal demands against state priorities. The multiplication of intersecting legal traditions in most contexts further expands the jurisdictional opportunities for progressive constructions of legal meaning. Furthermore, as E. P. Thompson points out in the above quotation, since most courts are at least nominally independent of social groups and other state actors, ongoing interdependent relationships are less common. Therefore, social movements and progressive activists are far less likely to become dependent on courts personally, institutionally, or financially. Courts can frustrate, redirect, defy, or simply defeat social movements, but courts tend to produce less co-optation than our relations with bureaucracies and elected leaders. The episodic appeal to courts promises fewer positive benefits, but also risks fewer long-term costs and constraints than interdependence with other parts of the state.

#### The law has emancipatory potential despite its repressive history. Rejecting it dooms radical social change.

McCann and Lovell, 18—Gordon Hirabayashi Professor for the Advancement of Citizenship at the University of Washington AND professor of political science, department chair, and the Harry Bridges Endowed Chair in Labor Studies at the University of Washington (Michael and George, “Toward a Radical Politics of Rights: Lessons about Legal Leveraging and Its Limitations,” *From the Streets to the State: Changing the World by Taking Power*, Chapter 7, 139-141, dml)

In our aspirations for progressive change, engaging with the law is not a free choice among tactics. It is a necessity. Egalitarian activists are routinely forced into legal engagement by the omnipresence of law as a violent force imposing hierarchical order and harsh punitive constraints on oppressed populations. Although activists are often motivated by the quest for legal recognition of rights claims, offensively mobilizing law to support egalitarian struggles is only a small part of movement appeals to law. Defensive actions to evade law’s repressive force or to protect previous gains are often much more significant. In our view, there is surprisingly little rigorous theorizing about the different types of struggles on the terrain of law, the most useful indicators of effective legal action, and especially the measures of egalitarian or inclusionary change.1

Law is an enduring site for progressive democratic contestation. Although official law is often a tool of repression, legal norms and institutions can also be resources for egalitarian rights claims, and, at certain historical moments, even social transformation. No matter how radical one’s political aspirations, the necessarily long-run character of revolutionary social transformation requires a series of intermediate steps, including those on the terrain of law. As the British socialist E. P. Thompson (1975) asserts,

Most [people] have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class’s hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. . . . The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. . . . And it is often from within that very rhetoric that a radical critique of the practice of the society is developed. (436–39)

In this chapter, we describe legal mobilization as the articulation of a social interest, general policy, or a societal vision in terms of legal entitlement. As Frances Kahn Zemans (1983) famously put it, legal mobilization entails that “a desire or want . . . is translated into a demand as an assertion of one’s rights” (3). Since legal language is indeterminate and polyvalent, it is contestable. Dominant legal norms are incomplete and rife with tensions, and they adapt as the perceived interests of dominant groups respond to, or occasionally converge with, the demands of oppressed groups (Bell 1980). Although much legal contestation occurs between recognized rights-bearing subjects over the authoritative meaning of clashing liberal legal principles, legal mobilization also involves oppressed groups mobilizing liberal principles against illiberal, repressive modes of social control. These contests over ascribed race, gender, sexual, immigrant, and other marginalized identities often expand the rule of liberal legalism (Smith 1997; Orren 1992). More importantly, struggles by progressive activists can use the liberal principle of equal citizenship to counter the property- and contract-based principles of capitalism, thereby challenging unequal resource distribution and class exploitation (Brown 2003; Smith 1997). As Stuart Scheingold (1974) argues, “law cuts both ways,” both for and against egalitarian social justice (91; see also McCann 1994).

When, how, and to what degree legal discourse and institutions provide resources for oppressed groups depends largely on the mix of legal and especially extralegal factors in a given historical context. Our research devotes considerable attention to the changing features of the cultural and institutional terrain that delimit the possibilities and forms of contestation within and against law. Of course, fighting for control of legal institutions and principles does not guarantee radical social change. But succumbing to anti-legalism cedes control over the terms of institutional organization, instrumental rule, and regime legitimation to dominant forces propelling capitalism and other hierarchies.

We recognize that our approach is at odds with some important recent movements and their interpreters. Arguably, the Occupy movements in and beyond the United States expressed a notable disdain for legal rights claiming, litigation strategies, and general appeals to legal strategies (Almog and Barzilai 2014). This disenchantment with law, legal processes, and lawyers is understandable in the post-civil rights era and the immediate post-recession moment. Indeed, wariness about law is always sound. Moreover, Occupy did profoundly reorient the dominant agenda in many parts of the global North. It put “deficit and debt hawks” on the defense and elevated concerns about economic fairness and the political accountability of private financial managers. At the same time, Occupy espoused and enacted little in the way of institutional changes within government and capitalist society. By shedding any reliance on discourses of rights, Occupy arguably limited its use of important ideological resources in the neoliberal context (Brown 2003; Obando 2014).

It is noteworthy that many movements inspired by the Occupy movement— especially among low-wage workers and advocates for corporate accountability— have recovered and prominently invoked rights claims and legal resources. Indeed, there has been a recent convergence around rights-based claims by campaigns for a minimum wage and sick pay, for immigrant rights and support, for LBGTQ rights, for the Black Lives Matter movement, and for other progressive and radical causes in the United States. Their reliance on lawyers and litigation has varied widely, but none of these movements discount them as much as did the earlier Occupy movement. Furthermore, many grassroots struggles in both the global North and South—against apartheid; for indigenous people’s sovereignty; for socioeconomic entitlements to housing, health-care, education, and minimum income—also appeal to legal or human rights and rely in part on national or transnational courts (Haglund and Stryker 2015; Rodriguez-Garavito 2011).

## 2AC

#### Monopoly capitalism worsens every form of oppression and antitrust advocacy strengthens every angle of resistance.

Greer and Rice, 21—co-founders and co-executive directors of Liberation in a Generation (Jeremie and Solana, “Anti-Monopoly Activism: Reclaiming Power through Racial Justice,” <https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism_032021.pdf>, dml) [language modifications denoted by brackets]

Since the founding of the nation, people of color have been living an economic nightmare. People of color have persistently lagged behind white people in nearly every economic category, including employment, income, education, small-business ownership, home ownership, and asset-ownership. This is the result of the rise and reach of concentrated wealth and power, including monopoly power.

The Racial Wealth Gap

Economic racial disparities do not happen by accident. Rather, they are the product of centuries of systemic racism and have been built into the design of our economic system, which has created what we at Liberation in a Generation call the Oppression Economy. The Oppression Economy uses the racist tools of theft, exclusion, and 31 exploitation to strip wealth from people of color, so that the elite can build their wealth. In this Oppression Economy, racism is profitable, and it fuels a cycle of oppression 32 that depresses the economic vitality of people of color, suppresses our political power, and obstructs our ability to utilize democracy to change economic rules that make racism profitable in the first place.

Racial wealth inequality is the consequential disease caused by the Oppression Economy. Today, racial wealth inequality has reached astronomical levels and will continue to rise if nothing is done. Without drastic policy action it will take 228 years for average Black wealth and 84 years for average Latinx wealth to match the wealth that white households hold today. Further, if nothing is done—or we attempt to return 33 to “normal” and fail to distance racism34 after COVID-19—Black and Latinx wealth will reach zero sometime in the middle of this century. These disparities are driven by 35 36 two reinforcing phenomena connected to the issue of corporate concentration: 1) the systematic withholding of wealth from people of color and 2) the gross concentration of wealth held by the corporate elite.

Between 1983 and 2016, which coincides with the rise of corporate and monopoly power, average Black and Latinx wealth was dwarfed [outpaced] by the wealth accumulated by white households. In fact, average Black wealth decreased by more than 50 percent over this period. This is the result of a long history of economic oppression that has 37 actively blocked people of color from building wealth or has stripped their wealth through theft and predation. The beneficiaries and perpetrators of this ever-growing gap are the corporate elite who set the rules of the economy. The corporate elite’s actions have led to people of color being paid less for their labor and having to pay more for the basic necessities of life. Here are a few metrics that speak to this reality.

• Black, Indigenous, and Latinx women earn between 55 cents and 63 cents for every dollar earned by white men.38

• Low income people of color often pay a 10 percent poverty premium for essential goods and services.39

• Black and Latinx households are far more likely than white households to be unable to pay their monthly bills or cover unexpected expenses.40

• Black households are more likely to be denied mortgage credit and end up paying more when they are able to access credit.41

• Black households, in particular, suffer from a crippling debt burden composed of an array of predatory credit products (e.g., student, small-dollar, auto, and home loans).

The phenomenon fueling racial wealth inequality is the concentration of wealth in the hands of a small number of individuals. Today, the wealthiest 400 people in the US hold more wealth ($3.2 trillion) than the entire Latinx population ($2.4 trillion)and 43 more than 70 percent of the Black population combined ($4.41 trillion). While the 44 average wealth of Black people has decreased since the 1980s (as cited earlier), the average wealth of those on Forbes’s list of the 400 wealthiest people increased from $600 million in 1982 (adjusted for inflation) to $8.0billion in 2020.. You might be 45 asking, what does the Forbes 400have to do with monopoly? Well, it is a who’s who of corporate monopolists.

The people on this list are some of the most egregious perpetrators of driving down wages, expanding income inequality, degrading the health of workers, desecrating the environment, fleecing consumers, perpetuating racial residential segregation, driving community disinvestment, avoiding taxes, and corrupting our democracy. These monopolists utilize ruthless business practices to perpetuate their unquenchable thirst for maximized profits and for control of major segments of the US economy—and people of color bear the brunt.

America’s Legacy of Racism Drives and Sustains Corporate Concentration

The confluence of monopoly power and racial inequality is not new. The construction of an economy that relies on unchecked capitalism to create the modern-day monopolist relies on the construction and maintenance of America’s racial caste system. The legacy of theft, exclusion, and exploitation of people of color by corporate monopolists has been with us since the founding of the nation. In fact, prior to the Civil War, southern plantation owners were the equivalent of the modern-day Fortune 500 monopolists. The Mississippi Valley had more millionaires per capita than anywhere in the country, making it the Silicon Valley of that period. Prior to the Civil War, the combined value of America’s approximately 4 million slaves was $3.5 billion, making it the largest single financial asset in the entire economy, bigger than all manufacturing and railroads combined.46

As the roots of this problem run deep and disproportionately impact people of color, so too must the solutions. Today’s corporate monopolies are built on the foundation of an economy that also stole land from Indigenous people through genocide and forced removal, and built a labor market on the bodies of enslaved Black people. Nothing in our economy is race-neutral, including our work to dismantle monopoly power and the racial wealth inequality it causes, so we must seek race-conscious solutions.

Scholars have developed a catalogue of research confirming what many people of color experience on a daily basis: Corporations have seized control of many aspects of our lives that were once intended to serve the public good over private sector interests. Examples include the growth of charter schools and for-profit colleges as an alternative to public schools; the growth of private health insurance and private hospitals; the growth of private prisons and paid services in prison, such as phone calls and health care. However, more research is needed that connects the economic conditions of people of color to the growth of monopoly power, a call to action we further explore in Section 6.

Connecting Monopoly Power to Other Movements

There is no silver bullet to slaying the monster that is systemic racism. Leaders of color across the country are actively organizing people of color to advance bold and transformational economic and racial justice policies. These leaders are doing the hard work of transforming our economic systems by advancing liberatory policies such as a Homes Guarantee and a federal jobs guarantee; and by dismantling systems of oppression, including police and prison abolition, ending voter suppression, and curbing corporate power. To this end, anti-monopoly policy and advocacy work can be a powerful tool to advance these transformative, activist-led movement priorities.

To win the battle to advance movement priorities, we must seek to pull every lever of power at our disposal and to directly confront one of their most ardent political opponents: corporate monopolies. The Action Center on Race and the Economy (ACRE) is deftly integrating anti-monopoly tactics to advance their racial and economic justice mission. In advancing police abolition, for example, they highlight the fact that big banks (as discussed in Section 1) finance “police brutality bonds” that fund the payment of police department settlements for acts of police brutality.47 Additionally, they have highlighted for grassroots leaders of color the connections that corporate monopolies have to anti-Muslim bigotry, the Puerto Rican debt crisis, and pharmaceutical prices.48

Corporate monopolists, including big banks, big tech, and big pharma, are often primary opponents in the battles for bold, transformational movement priorities. For example, activists for bold environmental justice policies, such as the Green New Deal, have encountered strong opposition from fossil fuel monopolies, such as Exxon, Shell and BP; but also, Wall Street bank monopolies financing fossil fuel monopolies, in addition to other monopolies in the airline industry. In another example, Wall Street 49 monopolies have aggressively clashed with affordable housing advocates as their investments have displaced residents of color from their homes and businesses and have also gentrified communities of color from Harlem to Oakland and Detroit to New Orleans. Directly challenging the monopoly power of these corporations could prove to be a useful tactic for activists of color to further movement priorities.

#### Class action in the context of the plan is vital to redress systemic racial discrimination.

Toto ’17 [Caitlin; September 20; Boston College Law School; Boston College Law Review, “Sharing Economy Inequality: How the Adoption of Class Action Waivers in the Sharing Economy Presents a Threat to Racial Discrimination Claims,” 58 B.C. L. Rev. 1355, lexis]

III. CLASS ACTION WAIVERS PRESENT A SERIOUS THREAT TO RACIAL DISCRIMINATION CLAIMS

Class action is a vital way in which individuals can bring a fair legal fight against a corporation that has done widespread harm. 122 While class action waivers have widespread effects on consumers and employers generally, the waivers distinctly threaten civil rights due to the tie between class action and racial discrimination cases. 123 Section A of this Part discusses the connection between the fight for racial equality and class action. 124 Section B of this Part explains that class action waivers within the sharing economy endanger the future protection of civil rights. 125 Section C confronts potential counterarguments that self-regulation and government enforcement are sufficient to enforce civil rights in the sharing economy. 126

[\*1373] A. The Importance of Class Action in Racial Discrimination Cases

The Civil Rights Act allows aggrieved parties to bring forth private causes of action for discrimination in areas such as employment, housing, and public accommodation. 127 Due to the difficulty of proving a racial discrimination case and the scope of available remedies, class action has played a vital role in privately enforcing civil rights. 128

Subsection 1 discusses the importance of class action in civil rights cases for practical and financial reasons. 129 Subsection 2 discusses the importance of class-wide rewards. 130 Subsection 3 discusses the deterrent theory of class action. 131

1. Difficulty in Identifying and Proving Racial Discrimination Claims Renders Class Action Necessary

While the Civil Rights Act is impressive in scope, proving that an individual has been discriminated under the statute is no easy task. 132 First, identifying discrimination is difficult because the discrimination may be covert. 133 Second, plaintiffs must meet the high legal standards imposed by courts. 134 Class action is therefore an essential way in which individuals are able to enforce civil rights guaranteed to them by the statute. 135

The preliminary task of identifying discrimination is arduous. 136 Unlike other legal causes of action, discrimination is often latent and thus difficult to [\*1374] pinpoint. 137 Consequently, determining whether one's rejection from a job or from affordable housing was due to discrimination, rather than a benign reason, is difficult to prove. 138 Class action, however, alleviates the burden of individually identifying discrimination by allowing a plaintiff to show that discrimination has occurred on a large scale. 139 An employer or landlord has little defense when hundreds of minority applicants are rejected rather than one. 140

Class action is also essential when attempting to meet the courts' onerous legal standards. 141 For example, with Fair Housing Act claims, plaintiffs are often trying to prove a disparate treatment; that is, that the policies of an adverse party have resulted in a disproportionately adverse effect on minorities. 142 In the realm of Title VII employment claims, plaintiffs are often demonstrating a pattern or practice of discrimination. 143 These legal standards may require showing the experiences of hundreds or thousands of people. 144

[\*1375] Because civil rights cases often attempt to evidence discrimination on a macro scale, an individual will have more difficulty meeting such standards than a class. 145 Class action is thus an essential avenue of redress for practical and financial reasons. 146 Practically, it is unlikely that an individual would be able to show such large scale discrimination on his or her own. 147 Proving such discrimination likely requires evidence from a number of people across wide strata. 148 Further, meeting the legal standards requires enormous resources. 149 The discovery process is burdensome thus leading to hefty legal fees. 150 Therefore, it is unlikely an individual will have sufficient capital to finance a discrimination case. 151

[\*1376] 2. Limiting Plaintiffs, Limiting Rewards

Successful class action lawsuits have led to resolutions that redress systemic racial discrimination. 152 For example, courts have mandated injunctions ordering company-wide reform. 153 Additionally, class action cases are often the impetus for companies to alter practices, as businesses want to limit future liability and curb negative press. 154 In fact, such lawsuits have engendered work-place reform at numerous Fortune 500 companies such as Coca-Cola, FedEx, and Xerox. 155

Requiring a party to individually arbitrate has implications for the type and scope of redress that a court will mandate. 156 The systemic relief detailed above is often not a consequence of individual litigation. 157 Courts have explained that class remedies are improper in the absence of class claims, and further a company may not feel the same sense of urgency to reform workplace policies. 158 Obtaining class-wide relief is therefore an essential way to effectively [\*1377] address entrenched discriminatory practices. 159 Consequently, inhibiting class action, and thus the scale of relief, undermines an important tool used to redress systemic racial discrimination issues. 160

3. The Policy Goal of Deterrence

In addition to the purposes listed above, class action serves a number of policy goals regarding the public good and racial discrimination. 161 The most important of these goals is the deterrence theory. 162

The deterrent theory posits that companies are disincentivized from illegal conduct when class action is a possibility due to the high cost of such lawsuits. 163 In other words, companies are more motivated to ensure lawful practices rather than remain exposed to a class action lawsuit that could potentially result in a multi-million dollar lawsuit and negative publicity. 164

[\*1378] When claims are aggregated, plaintiffs' attorneys have more resources to investigate the potential wrongdoing, likely enhancing the quality of such claims. 165 The higher the quality of claims, combined with the higher stakes of the case, means that the opposing party has a considerable amount to lose. 166 Thus the availability of class action to plaintiffs is a large legal liability for defendants, who are often corporations. 167

Conversely, the absence of class action hampers, if not eliminates, such an incentive. 168 Companies do not have the same sense of urgency to comply with the law, since individual lawsuits and arbitrations often do not pose the same financial threat. 169 For example, when class action is a possibility, a company may take steps to implement an internal discrimination reporting system, as this may be financially preferable to defending a class action lawsuit. 170 Without class action, however, the implementation of the same system may seem like an administrative burden in comparison to individual lawsuits or arbitrations. 171 In sum, class action serves the policy goal of deterring illegal behavior, thus serving an important public good in regards to racial discrimination. 172

B. Class Action Waivers in Arbitration Agreements Hinder Racial Discrimination Claims

The arguments discussed above--that class action waivers are on the rise in the sharing economy, and class action is essential to civil rights claims--dovetail, and lead to the conclusion that class action waivers in the sharing economy present a two-fold threat to racial discrimination claims. 173 First, class action waivers in arbitration agreements prevent emerging theories of sharing economy liability from developing due to the procedural differences in arbitration. 174 [\*1379] Second, even if the law is reformed so that sharing economy companies can be found liable under the Civil Rights Act or another law, class action waivers prevent discriminated parties from obtaining proper redress. 175

#### Monopolies individuate the world and preclude caring relations, but imagining redistributive anti-corporate policy can repurpose the state for revolutionary ends despite its violent history.

Pârvan, 21—Lecturer, MSSP Program, University of Pennsylvania (Oana, “Technologies of Control and Infrastructures of Redistribution,” e-flux #123, December 2021, dml)

The legacy of the 2019–21 biennium is yet to be fully grasped and processed, and often the urgency of chasing the next affective imperative (be it fear, terror, concern, relief, or indignation dictated by the virus’s iterations) can distract from looking back at how rapidly this period has transformed the world in ways unacceptable before 2019. Superficially, corporate capital in the form of techno-giants, big pharma, and the surveillance industry has managed to do the unimaginable: extract, evade, and profiteer even more than before, enabled by governments and central banks—the same governments and central banks advocating for the resilience, self-reliance, and autonomy of welfare states, individuals, and real economies. All the while, in many countries, the mantra of “public health on the brink of collapse” echoed as the best and most insistent advertisement for private healthcare in decades.

As more inhabitants of the planet seemed to empathize with experiences of being immobilized, terrified, and collateralized, the assassination of George Floyd in Minneapolis generated the Abolitionist Summer, with unprecedented multiracial and internationalist resonances. This was the most affirmative legacy of the biennium, alongside the activation of mutual aid infrastructures and all the practices of reciprocal nurture that kept most alive.

According to the Greek economist Yanis Varoufakis, August 12, 2020—the day the UK’s national income declined by over 20 percent as the London Stock Exchange saw an increase of more than 2 percent—was the symbolic moment of the decoupling of finance and the real economy. Continuing the trend that started after the 2008 financial crisis, in 2020 the global economy was supported by the proliferation of central bank money, independent of whether profit was made or not. Furthermore, the pandemic also determined a massive relocation of value extraction to digital platforms, which now adhered even more to people’s time, reproductive work, and eventually their lives. “Amazon,” Varoufakis explains, “is not a market; it’s a fiefdom. And it’s a fiefdom that’s connected to other fiefdoms, like Facebook, through the cloud services of Amazon, which are much greater and bigger than Amazon.com. It’s like a more technologically advanced form of feudalism.” In his postcapitalist utopian novel Another Now: Dispatches from an Alternative Present, Varoufakis depicts a world in which capitalism died in 2008 thanks to a utilities pay strike in Yorkshire. Inspired by speculative fiction and social-justice movements, what are some directions for imagining top-down redistribution into existence? A good starting point is the $427 billion in global corporate and private tax evasion in 2020—money that could be used to cover the salaries of thirty-four million nurses every year, thereby granting free healthcare to everyone. While rich countries are responsible for facilitating 98 percent of all global tax losses, impoverished countries are losing “tax equivalent to nearly 52% of their health budgets.”[footnote The State of Tax Justice, 4.] A true global challenge that requires international collaboration, tax justice can be achieved by global policy measures such as the automatic exchange of bank account information between countries, the registration of the beneficiaries of profits (“beneficial ownership registration”), country-by-country reporting of the profits of multinational corporations, a unitary taxation system for corporations to pay taxes where the real work is done (not where they declare profits), and, eventually, a UN tax convention, able to be enforced by tax collectors equipped and funded to do their jobs.

While the Tax Justice Network, an advocacy group consisting of researchers and activists, has pushed for these measures since 2003, Covid-19 has brought new challenges in terms of international tax abuse. The pandemic iteration of capitalism requires customized redistribution antidotes to what some have called the “Amazon model.”[footnote The State of Tax Justice, 10.] One antidote is an excess profit tax

on the large multinational corporations whose profits have soared during the pandemic while local businesses were forced into lockdown. For the digital tech giants who claim to have our best interests at heart but have been short-changing us out of billions in tax for years, this could be their redemption tax.

Another antidote is a wealth tax on asset values that have exploded during the pandemic, as in the case of Amazon shares, which have increased in value by $60 billion during the pandemic. What if profit was to be taxed where workers and consumers generate it? Corporate tax abuse isn’t new, but with inequalities dramatically exacerbated by the pandemic, is it not time to end the “moral bankruptcy of allowing value to be captured far from where it is generated”?[footnote The State of Tax Justice 2020, 9.]

What to do with a spare $427 billion then? Varoufakis might claim that this money isn’t even necessary, as the aforementioned central banks could just divert digital money from corporate finance toward common citizens, through a personal digital bank account, a portion of which would represent a form of universal basic income (UBI) not derived from taxation but rather from a sort of redistribution of global dividends. Italian feminist Cristina Morini slightly tweaks the notion of universal basic income, taking inspiration from the Italian feminist movement Non Una Di Meno. Moroni argues that with waged labor almost extinct and gendered reproductive labor a terrain of extraction for both techno-capitalism and the state, what is needed is “self-determination income,” in other words,

basic income which is self-determined, universal, and unconditional and which does not depend on job activity, on citizenship status or a permit to stay … An instrument for everyone for preventing gender violence and for providing autonomy and freedom from exploitation, labor and precarity.

Can our conception of politics be shifted from the capitalist trope of producing scarcity for extraction to an ecology of the redistribution of abundance? Morini’s self-determination income not only resonates with the postworkerist imaginations of time freed from alienation and devoted to care and art; it also provokes the question of what global citizenship looks like at a time when many countries are eroding the rights of elderly citizens, and “denizenship” proliferates at nauseating speed, with an ever-renewed arsenal of borders and incarceration.

While this period is certainly marked by a discursive emphasis on the public dimension of care and health, and while the virus itself brings forward a dimension of interdependence that one cannot unsee, the underlying idea “we are in this together” bears an estranging tone in the various settings, as states either abandon public health and safety, or enforce isolation and containment. But could interdependence become the foundation of politics? The Care Collective, born out of a London-based reading group, thinks so. In their book The Care Manifesto, they advocate universal care promoted by a state—“not a paternal, racist or settler-colonial state”—that can

enable everyone to cultivate what disabilities studies have called “strategic autonomy and independence,” while creating the conditions that allow for new relationships within and among the state and its diverse communities—relationships predicated on everyone receiving what they need both to thrive and to participate in democratic practices.

Inspired by mutual-aid traditions and social-justice movements, the ongoing practices that answer the question “how do we care for each other and the planet?” should be only the starting point for altering larger systems of cohabitation, like markets, constitutions, states, and neighborhoods. This is how we reach solutions and tools for redistribution, like a return to public space making, platform cooperativism, new municipalism, replacing outsourcing with insourcing, and replacing public-private partnerships with “public-commons partnerships” “in which co-operative institutions link up with public services and local citizens with an active stake in their organisations.”

Within the discursive moment of this biennium, the movement for black liberation and for abolition has been an indispensable and tireless space for projecting futures, imagining safety, health, and thriving not only for this generation but for many to come. With the Vision for Black Lives, which was first published during the post-Ferguson movement of 2016 and then rewritten in 2020, the Movement for Black Lives built a policy platform around the demand to end the war against black communities, especially black youth; black women; black trans, queer, gender-nonconforming, and intersex people; black disabled people; and black migrants. They also called for the abolition of all jails, prisons, and immigration detention centers; an end to the death penalty and the war on drugs; an end to the surveillance of black communities; and an end to pretrial detention and money bail. And while these demands sound very specific to the North American setting, are racism and mass incarceration really just North American? I am specifically thinking about the proliferation of privately managed maxi prisons in the UK—publicly funded, privately managed prisons that will eventually have to be filled somehow.

The North American movement for black liberation is a source of inspiration for at least two reasons. Firstly, the hegemony of the US means that its oppressive social and economic ideas can become influential in all communities directly impacted by its geopolitical reach, so understanding the consequences of those ideas is key. Secondly, movements like Black Lives Matter have had political and organizational victories in one of the most hostile and militarized civilian environments in the world. Their methods are thus a model for how marginalized communities everywhere can make their voices heard. In a time marked by terror and isolation, Black Lives Matter has made space for people internationally not only to unearth the roots of genocide in the past and expose the obscenity of racism in the present, but also to “radically reimagine public safety, community care and how we spend money as a society.” Black Lives Matter put abolition on the public agenda, provoking debates that went beyond merely defunding the police. While older generations, in “old media” like tabloids and talk shows, often dismissed the abolitionist option, younger generations were digitally exposed to imaginaries of futures in which climate justice, abolition, and queerness were embraced and uplifted. Those seeds of the future find support in policy initiatives like the Breathe Act, a revolutionary piece of proposed legislation unveiled by the Electoral Justice Project of the Movement for Black Lives in 2020. The Breathe Act redefines public safety and community care in an abolitionist direction, which is an indispensable dimension of present and future redistribution. The proposed legislation calls for

divesting federal resources from incarceration and policing, while investing in new, non-punitive, non-carceral approaches to community safety that leads states to shrink their criminal-legal systems and center the protection of Black lives, by allocating money to build healthy, sustainable, and equitable communities.

What if the Breathe Act were to inspire other countries to divest from privately managed maxi prisons or detention centers for migrants, and invest in public insourced quality healthcare and education, while redistributing self-determination income for all, irrespective of citizenship or permission to stay? From feminist theories and political practices to the Breathe Act, what is at stake are different conceptions of the state and the public good that transcend all previous models of welfare, since they make visible those same infrastructures of gendered and racialized extraction on which states were built and continue to thrive for the benefit of the few.

As abolitionist geographer Ruth Gilmore Wilson teaches, “if unfinished liberation is the still-to-be-achieved work of abolition, then at bottom what is to be abolished isn’t the past or its present ghosts, but rather the process of hierarchy, dispossession, and exclusion that congeal in and as group-differentiated vulnerability to premature death.” A horizon of redistribution in the context of the pandemic iteration of capitalism is intrinsically opposed to carceral practices and inspired by the longevity of what Gilmore Wilson calls “abolition geography,” which “is capacious (it isn’t only by, for, or about Black people) and specific (it’s a guide to action for both understanding and rethinking how we combine our labor with each other and the earth),” which “takes feeling and agency to be constitutive of, no less than constrained by, structure,” and which is “a way of studying, and of doing political organizing, and of being in the world, and of worlding ourselves.”

#### The neg must rejoin the plan by proving there’s a unique opportunity cost—otherwise the alt’s not mutually exclusive with the plan—any other model for debate stunts its potential to realize Black liberation

Splawinski, 16—University of Toronto (A., “The Internal Backlash of Contemporary Black Liberation,” Harvard Journal of African American Public Policy, 2015-2016, dml)

However, as external pressures complicate activist progression on the social scale, internal conflicts threaten collective identity and the ability to define, organize, and move towards a collective goal. This can be internally demonstrated through the radical/moderate dichotomy, a distinction attempting to reconcile those activists who operate within, as opposed to outside, the traditional political system. However, this ignores the means, ability, and education people might have. Respecting diverse tactics used to reach a similar goal is not only ethical, but also strategic. Short-term goals amid long-term objectives leave room for old-school activists who contend we could live outside of the system we are in, as well as the novice who does not know another system is even a possibility. Political scientist Janet Conway articulates that respecting how other activists engage with issues does not necessarily mean one would choose the same, or even agree with the usefulness or ethics of such an action; “rather, it holds that everyone has the right and the responsibility to identify their own thresholds of legitimate protest and to make their own political, strategical, and ethical choices, while also allowing others to do so free from public criticism or censure.”8 A different tactic does not necessarily make it wrong. These internal activist-group interactions can be seen in the qualification of #BlackLivesMatter and other Black activists being cited as nothing more than a “liberal distraction” by other Black liberationists. The article “#BlackLivesMatter: Black Liberation or Black Liberal Distraction” by Halima Hatimy states that #BlackLivesMatter is composed of Western “Black petit bourgeoisie.”9 I agree that addressing global anti-Blackness is necessary, and that activists should be criticized for not addressing anti-Blackness in non-Western countries or not being proper allies to those in non-Western countries. However, the notion we can stretch criticism to a place where we can say all of this is in vain is unfair. According to Hatimy, an honest effort on the part of the #BLM movement would call for the abolition of oppressive, racist, and capitalistic structures, and demand full social and economic equality, rather than state-implemented reforms and deliberate moves to work in the system. However, framing the movement this way ignores the justifications one may have for advocating for reform as opposed to abolition—one group sees abolition as a plan while the other sees it as a goal. Perhaps, as Judith Butler describes in Critically Queer, there is a kind of “necessary error” occurring here. Butler argues we cannot create the terms that represent our liberation from nothing, and we are responsible for the terms carrying the pain of social injury. “[Y]et, neither of those terms are as a result any less necessary to work and rework within political discourse.”10 Perhaps, even in its faults, there is something uniquely necessary about #BlackLivesMatter and similar Black activist groups, and the multiplicity of tactics used within and outside of these groups. The #BlackLivesMatter movement does not state an end goal of police reformation. Instead, it defines one of its primary goals as “(re)building the Black liberation movement,” explaining that Black poverty and the disproportionate number of Black individuals in prisons are manifestations of state violence.11 Though it is misleading to articulate the movment’s goals as otherwise, counter-movements constituently question the credibility of #BlackLivesMatter by doing so. Ironically, it appears the radical and moderate activists often have the same goal—Black liberation—yet they’ve chosen to employ varied means to achieve that goal. Strategies of the #BlackLivesMatter movement are often critiqued, citing its discussions of privilege, reform of the prison industrial complex, reform of police practice, or meetings with politicians, as a sign of moderation.12 Critics contend if activists were indeed radical, as Hatimy’s article states, they would primarily call for abolition, not reform. However, this presupposes the activists are choosing reform as an end in itself, rather than a means to an end. Unlearning a Eurocentric Worldview Activists, like the general public, are inundated with regulations of Black bodies. This extends from the streets where victims of police brutality lifelessly lie, to the halls of the classroom where Black skin and Black hair are wholly unwelcome. Black girls have been kicked out of school for their natural hair, and dark-skinned women have been barred from entering spaces due to their complexion.13 Further, dark-skinned individuals face a high risk of sometimes violent consequences due to their complexion. Some of these consequences include having lower chances of obtaining employment than their light-skinned counterparts, and even being sentenced to 12 percent more time behind bars for the same crime as compared to light-skinned individuals.14 These legacies of colonialism, slavery, and Jim Crow compound alarming statistics that also demonstrate an increased likelihood of Black Americans being unarmed when killed by the police.15 The intersection of sexuality, race, and place— in addition to the historical contexts of slavery, colonialism, and systematic discrimination—impedes activists’ ability to “unlearn,” or envision ways of being that are outside of dominant or mainstream thinking. The process of unlearning requires activists to move away from the status quo, to see above the examples society presents them and apply a critical lens to their very being. Activists have to grapple with colorism’s impact on the sociopolitical world, and/or why African American English vernacular is framed with negative connotation, similarly to the dichotomy between “good” and “bad” hair, for that which is more straight and silky vis-à-vis curly and coarse. In doing so, activists not only undergo a journey of self-acceptance, but also make political decisions in the process, which are political acts rooted in one’s worth, rebuking Eurocentric consumerist ideals that dictate a “preferred” look, action, or being that confirms to the admissible politics of respectability.16 Activists enter and progress through the unlearning process in different ways. At these varied stages, then, it is troublesome for groups to cast one another aside because of differing perspectives, particularly in terms of methodology. Being at different places in the unlearning process is the reality, and activist groups must accept that as fact. The “Problematic” Identity The radical/moderate divide illustrates a larger problem in activist spaces: activists imposing the all-encompassing “problematic” identity onto one another. The power-hungry and ego-latent activist industrial complex employs a problematic identity on dissenters, casting anyone in the group aside who says or does something not in perfect alignment with their arbitrarily set standard of “activism,” or what may be deemed “appropriate” by the group. Though many groups aim to create safe spaces in order to respect a diverse set of voices and experiences, these groups simultaneously conduct, create, and assert “problematic” identities, which essentially rebuke dissenting opinions and differing viewpoints from the group’s intra-space. By silencing or discrediting dissent, the activity of activism is twisted into an unattainable mold an individual can perfect, rather than existing as a transformative activity that an individual strives to perfect. Through this frame, the internal backlasher’s viewpoints, strategies, and opinions are right, while those of the “problematic” activist are wrong. While the “internal backlasher” may purport him or herself as being open to a variety of lived experiences, eventually the “problematic” activist will not be able to reconcile their feelings with this assumed standard, and may even be qualified as being in the “wrong” phase of unlearning. While it seems contradictory for social movements to operate like quasi-political parties, employing a similar “agree-with-me-or-leave” rhetoric, this phenomenon may help explain why activists aligning with radical or moderate ideologies view their means (and only their means) as the best or safest way to proceed. Rather than critique an off-norm perspective for foundational validity, it is more productive for these groups to explore the rationale behind their choices and examine the reasoning of the dissent for both weaknesses and strengths. Labeling “problematic” that which is “different” dismisses the individual realities of each activist. Through this, the “internal backlashers” refuse to consider their collective goal could be achieved in a number of ways. Rather than assuming rigid value judgments, activists should acknowledge the comfort, safety, and value in the multiplicity of strategies as they may stimulate new ways to think about and exist in Black political spaces. The intellectual entrepreneurship in activist spaces is unlike any other. The need to harmonize ideas and reconcile lived experiences with the cause at hand can only occur when individuals feel safe to fully participate. However, there are scenarios wherein those who are labeled “problematic” face adverse consequences. In “Why This Radical Activist is Disillusioned by the Toxic Culture of the Left,” author Bailey Lamon cites after being termed problematic, or being called out, some activists she knew allegedly lost jobs, relationships, and friends.17 Some felt so alienated they avoid attending certain events or going to specific community spaces. The mental distress of the isolated individuals has even led to suicide. The fear and isolation produced in supposed “safe spaces” not only has adverse consequences, but also stunts the crux of activist activity—the process of unlearning. If not properly mitigated, this could ultimately stall the collective progress of the greater movement. The Impact of Fear There is a fear surrounding activist spaces that functions within the boundaries of the state. In The New Jim Crow: Mass Incarceration in the Age of Colorblindness, lawyer and legal scholar Michelle Alexander carefully describes the waves of reform that did not end racism, but rather merely changed its form. From slavery, through the Jim Crow era, and into the war on drugs and mass incarceration, Alexander explains racism has never left us; it has only become subtler.18 The anxiety of operating within traditional boundaries of institutional politics stems from the idea that perhaps by using purely conventional means, racism will, once again, only change its form—not its quantity or impact. The historical trend of Black activist spaces operating within the confines of the state (either by choice or by force), positions the state as an indicator of morality and success. Yet, when we consider what it means to use the state as an indicator of success, we are reminded the state’s supposed inclusiveness just slightly changes the color of the hierarchy—it does not necessarily reflect day-to-day occurrences on the ground. Clarence Lusane’s What Color is Hegemony? illustrates a version of this by dissecting the appointments of Condoleezza Rice as National Security Advisor and Colin Powell as Secretary of State during the second George W. Bush term. Their appointments raised questions about race relations and the state, as well as the active participation of Black Americans as “high-level functionaries operating within spheres in which they can agree but cannot fundamentally determine.”19 Being an active shareholder in the government’s plan to use economic and military means to ensure a rival power never emerges is worrying, especially when economic and military policy often intertwines with racist and xenophobic ideals. Operating within conventional activist tactics (such as voting) upholds state power, and calling for legislative reform may do the same. However, it is not fair to say these tactics must act in isolation, or that they will forever perpetuate the very systems against which Black activists are fighting. There are ways to simultaneously operate inside and outside of conventional means. For instance, despite being ridiculed as a “miscreant” and an example of “one of the sanctimonious and self-aggrandizing activists [that make] a career out of the Black Lives Matter protests,”20 DeRay McKesson, once at the forefront of unconventional activism, is now running for mayor of Baltimore. When questioned about his intentions, McKesson has said he is not a politician and that a multi-faceted approach to activism is necessary: “It will always be important that people continue to push on the system from the outside. It will also be important that people make the changes that we know are necessary on the inside.”21 We could consider he might be wrong; however, we must also consider he very well may be right. Perhaps a multi-pronged approach to Black activism won’t always be necessary, perhaps it is not the way of the future. Nevertheless, perhaps it is necessary right now. Conclusion Though the use of the radical/moderate dichotomy is necessary to explain the varied tactics employed by activist groups, respecting diverse strategies is sometimes more than ethical—it can be tactical. Demanding perfection via censorship or the constant threat of isolation is not social justice. My argument is not that one should be forced to align with positions for which they fundamentally disagree. However, if the goal is Black liberation, a diverse set of strategies—dependent on varying levels of comfort, ability, knowledge, access, and belief—it should not define alienation. Rather, it should be holistically viewed, with due benefits incurred from each. We should analyze the pros and cons of all tactics, while also exploring the reasons why we choose to use them. Such internal critique is necessary for the future and progress of the Black activist space.

#### Defense epistemologies reify structural oppression.

Táíwò, 20—assistant professor of philosophy at Georgetown University (Olúfémi, “Being-in-the-Room Privilege: Elite Capture and Epistemic Deference,” The Philosopher, vol. 108, no. 4, dml)

I think it’s less about the core ideas and more about the prevailing norms that convert them into practice. The call to “listen to the most affected” or “centre the most marginalized” is ubiquitous in many academic and activist circles. But it’s never sat well with me. In my experience, when people say they need to “listen to the most affected”, it isn’t because they intend to set up Skype calls to refugee camps or to collaborate with houseless people. Instead, it has more often meant handing conversational authority and attentional goods to those who most snugly fit into the social categories associated with these ills – regardless of what they actually do or do not know, or what they have or have not personally experienced. In the case of my conversation with Helen, my racial category tied me more “authentically” to an experience that neither of us had had. She was called to defer to me by the rules of the game as we understood it. Even where stakes are high – where potential researchers are discussing how to understand a social phenomenon, where activists are deciding what to target – these rules often prevail.

The trap wasn’t that standpoint epistemology was affecting the conversation, but how. Broadly, the norms of putting standpoint epistemology into practice call for practices of deference: giving offerings, passing the mic, believing. These are good ideas in many cases, and the norms that ask us to be ready to do them stem from admirable motivations: a desire to increase the social power of marginalized people identified as sources of knowledge and rightful targets of deferential behaviour. But deferring in this way as a rule or default political orientation can actually work counter to marginalized groups’ interests, especially in elite spaces.

Some rooms have outsize power and influence: the Situation Room, the newsroom, the bargaining table, the conference room. Being in these rooms means being in a position to affect institutions and broader social dynamics by way of deciding what one is to say and do. Access to these rooms is itself a kind of social advantage, and one often gained through some prior social advantage. From a societal standpoint, the “most affected” by the social injustices we associate with politically important identities like gender, class, race, and nationality are disproportionately likely to be incarcerated, underemployed, or part of the 44 percent of the world’s population without internet access – and thus both left out of the rooms of power and largely ignored by the people in the rooms of power. Individuals who make it past the various social selection pressures that filter out those social identities associated with these negative outcomes are most likely to be in the room. That is, they are most likely to be in the room precisely because of ways in which they are systematically different from (and thus potentially unrepresentative of) the very people they are then asked to represent in the room.

I suspected that Helen’s offer was a trap. She was not the one who set it, but it threatened to ensnare us both all the same. Broader cultural norms – the sort set in motion by prefacing statements with “As a Black man…” – cued up a set of standpoint-respecting practices that many of us know consciously or unconsciously by rote. However, the forms of deference that often follow are ultimately self-undermining and only reliably serve “elite capture”: the control over political agendas and resources by a group’s most advantaged people. If we want to use standpoint epistemology to challenge unjust power arrangements, it’s hard to imagine how we could do worse.

To say what’s wrong with the popular, deferential applications of standpoint epistemology, we need to understand what makes it popular. A number of cynical answers present themselves: some (especially the more socially advantaged) don’t genuinely want social change – they just want the appearance of it. Alternatively, deference to figures from oppressed communities is a performance that sanitizes, apologizes for, or simply distracts from the fact that the deferrer has enough “in the room” privilege for their “lifting up” of a perspective to be of consequence.

I suspect there is some truth to these views, but I am unsatisfied. Many of the people who support and enact these deferential norms are rather like Helen: motivated by the right reasons, but trusting people they share such rooms with to help them find the proper practical expression of their joint moral commitments. We don’t need to attribute bad faith to all or even most of those who interpret standpoint epistemology deferentially to explain the phenomenon, and it’s not even clear it would help. Bad “roommates” aren’t the problem for the same reason that Helen being a good roommate wasn’t the solution: the problem emerges from how the rooms themselves are constructed and managed.

To return to the initial example with Helen, the issue wasn’t merely that I hadn’t grown up in the kind of low-income, redlined community she was imagining. The epistemic situation was much worse than this. Many of the facts about me that made my life chances different from those of the people she was imagining were the very same facts that made me likely to be offered things on their behalf. If I had grown up in such a community, we probably wouldn’t have been on the phone together.

Many aspects of our social system serve as filtering mechanisms, determining which interactions happen and between whom, and thus which social patterns people are in a position to observe. For the majority of the 20th century, the U.S. quota system of immigration made legal immigration with a path to citizenship almost exclusively available to Europeans (earning Hitler’s regard as the obvious “leader in developing explicitly racist policies of nationality and immigration”). But the 1965 Immigration and Nationality Act opened up immigration possibilities, with a preference for “skilled labour”.

My parents’ qualification as skilled labourers does much to explain their entry into the country and the subsequent class advantages and monetary resources (such as wealth) that I was born into. We are not atypical: the Nigerian-American population is one of the country’s most successful immigrant populations (what no one mentions, of course, is that the 112,000 or so Nigerian-Americans with advanced degrees is utterly dwarfed by the 82 million Nigerians who live on less than a dollar a day, or how the former fact intersects with the latter). The selectivity of immigration law helps explain the rates of educational attainment of the Nigerian diasporic community that raised me, which in turn helps explain my entry into the exclusive Advanced Placement and Honours classes in high school, which in turn helps explain my access to higher education...and so on, and so on.

It is easy, then, to see how this deferential form of standpoint epistemology contributes to elite capture at scale. The rooms of power and influence are at the end of causal chains that have selection effects. As you get higher and higher forms of education, social experiences narrow – some students are pipelined to PhDs and others to prisons. Deferential ways of dealing with identity can inherit the distortions caused by these selection processes.

​But it’s equally easy to see locally – in this room, in this academic literature or field, in this conversation – why this deference seems to make sense. It is often an improvement on the epistemic procedure that preceded it: the person deferred to may well be better epistemically positioned than the others in the room. It may well be the best we can do while holding fixed most of the facts about the rooms themselves: what power resides in them, who is admitted.

But these are the last facts we should want to hold fixed. Doing better than the epistemic norms we’ve inherited from a history of explicit global apartheid is an awfully low bar to set. The facts that explain who ends up in which room shape our world much more powerfully than the squabbles for comparative prestige between people who have already made it into the rooms. And when the conversation is about social justice, the mechanisms of the social system that determine who gets into which room often just are the parts of society we aim to address. For example, the fact that incarcerated people cannot participate in academic discussions about freedom that physically take place on campus is intimately related to the fact that they are locked in cages.

Deference epistemology marks itself as a solution to an epistemic and political problem. But not only does it fail to solve these problems, it adds new ones. One might think questions of justice ought to be primarily concerned with fixing disparities around health care, working conditions, and basic material and interpersonal security. Yet conversations about justice have come to be shaped by people who have ever more specific practical advice about fixing the distribution of attention and conversational power. Deference practices that serve attention-focused campaigns (e.g. we’ve read too many white men, let’s now read some people of colour) can fail on their own highly questionable terms: attention to spokespeople from marginalized groups could, for example, direct attention away from the need to change the social system that marginalizes them.

Elites from marginalized groups can benefit from this arrangement in ways that are compatible with social progress. But treating group elites’ interests as necessarily or even presumptively aligned with full group interests involves a political naiveté we cannot afford. Such treatment of elite interests functions as a racial Reaganomics: a strategy reliant on fantasies about the exchange rate between the attention economy and the material economy.

Perhaps the lucky few who get jobs finding the most culturally authentic and cosmetically radical description of the continuing carnage are really winning one for the culture. Then, after we in the chattering class get the clout we deserve and secure the bag, its contents will eventually trickle down to the workers who clean up after our conferences, to slums of the Global South’s megacities, to its countryside.

But probably not.

A fuller and fairer assessment of what is going on with deference and standpoint epistemology would go beyond technical argument, and contend with the emotional appeals of this strategy of deference. Those in powerful rooms may be “elites” relative to the larger group they represent, but this guarantees nothing about how they are treated in the rooms they are in. After all, a person privileged in an absolute sense (a person belonging to, say, the half of the world that has secure access to “basic needs”) may nevertheless feel themselves to be consistently on the low end of the power dynamics they actually experience. Deference epistemology responds to real, morally weighty experiences of being put down, ignored, sidelined, or silenced. It thus has an important non-epistemic appeal to members of stigmatized or marginalized groups: it intervenes directly in morally consequential practices of giving attention and respect.

The social dynamics we experience have an outsize role in developing and refining our political subjectivity, and our sense of ourselves. But this very strength of standpoint epistemology – its recognition of the importance of perspective – becomes its weakness when combined with deferential practical norms. Emphasis on the ways we are marginalized often matches the world as we have experienced it. But, from a structural perspective, the rooms we never needed to enter (and the explanations of why we can avoid these rooms) might have more to teach us about the world and our place in it. If so, the deferential approach to standpoint epistemology actually prevents “centring” or even hearing from the most marginalized; it focuses us on the interaction of the rooms we occupy, rather than calling us to account for the interactions we don’t experience. This fact about who is in the room, combined with the fact that speaking for others generates its own set of important problems (particularly when they are not there to advocate for themselves), eliminates pressures that might otherwise trouble the centrality of our own suffering – and of the suffering of the marginalized people that do happen to make it into rooms with us.

The dangers with this feature of deference politics are grave, as are the risks for those outside of the most powerful rooms. For those who are deferred to, it can supercharge group-undermining norms. In Conflict is Not Abuse, Sarah Schulman makes a provocative observation about the psychological effects of both trauma and felt superiority: while these often come about for different reasons and have very different moral statuses, they result in similar behavioural patterns. Chief among these are misrepresenting the stakes of conflict (often by overstating harm) or representing others’ independence as a hostile threat (such as failures to “centre” the right topics or people). These behaviours, whatever their causal history, have corrosive effects on individuals who perform them as well as the groups around them, especially when a community’s norms magnify or multiply these behaviours rather than constraining or metabolizing them.

For those who defer, the habit can supercharge moral cowardice. The norms provide social cover for the abdication of responsibility: it displaces onto individual heroes, a hero class, or a mythicized past the work that is ours to do now in the present. Their perspective may be clearer on this or that specific matter, but their overall point of view isn’t any less particular or constrained by history than ours. More importantly, deference places the accountability that is all of ours to bear onto select people – and, more often than not, a hyper-sanitized and thoroughly fictional caricature of them.

The same tactics of deference that insulate us from criticism also insulate us from connection and transformation. They prevent us from engaging empathetically and authentically with the struggles of other people – prerequisites of coalitional politics. As identities become more and more fine-grained and disagreements sharper, we come to realize that “coalitional politics” (understood as struggle across difference) is, simply, politics. Thus, the deferential orientation, like that fragmentation of political collectivity it enables, is ultimately anti-political.

Deference rather than interdependence may soothe short-term psychological wounds. But it does so at a steep cost: it can undermine the epistemic goals that motivate the project, and it entrenches a politics unbefitting of anyone fighting for freedom rather than for privilege, for collective liberation rather than mere parochial advantage.

How would a constructive approach to putting standpoint epistemology into practice differ from a deferential approach? A constructive approach would focus on the pursuit of specific goals or end results rather than avoiding “complicity” in injustice or adhering to moral principles. It would be concerned primarily with building institutions and cultivating practices of information-gathering rather than helping. It would focus on accountability rather than conformity. It would calibrate itself directly to the task of redistributing social resources and power rather than to intermediary goals cashed out in terms of pedestals or symbolism. It would focus on building and rebuilding rooms, not regulating traffic within and between them – it would be a world-making project: aimed at building and rebuilding actual structures of social connection and movement, rather than mere critique of the ones we already have.