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### OFF---Torts CP

#### The United States federal government should substantially increase its prohibitions on anticompetitive business practices by private electricity and gas corporations as tortious interference.

#### The CP solves the case by prohibiting conduct as unlawful interference---tort liability has the same penalties, unlimited capacity for expansion, and is entirely distinct from antitrust

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A. Introduction

Antitrust and business tort laws cover much common territory. Both regulate the commercial conduct of marketplace participants, including manufacturers, distributors, retailers and consumers, and both establish norms for competitive relationships as well as relationships between buyers and sellers.

It is thus not surprising that antitrust and business torts are frequently involved in the same litigation. This may occur in several ways. A plaintiff may join a business tort claim with an antitrust claim, either as an alternative theory of recovery for the same wrong, as a claim based on a separate but related wrong, or as a claim based on a wrong that constitutes a part of a pattern of anticompetitive conduct. n1

Additionally, a business tort may be offered as proof of anticompetitive or exclusionary conduct in support of a claim under sections 1 or 2 of the Sherman Act. n2 Conversely, a claim of tortious interference may be based on wrongful conduct that also creates or perpetuates an unlawful restraint of trade. n3

[FOOTNOTE] n3 . See Chapter II, Part F.3; see also RESTATEMENT (SECOND) OF TORTS § 768(1)(c) cmt. f (1979) (an intent to unreasonably restrain competition can support a tortious interference claim); Caller-Times Publ'g Co. v. Triad Commc'ns, 855 S.W.2d 18, 21-22 (Tex. App. 1993) (same; citing RESTATEMENT). [END FOOTNOTE]

Although these two areas of the law are at times consistent, they have developed separately and reflect different economic and social policy concerns. Contrasting unfair competition and antitrust law, the Fifth Circuit has remarked:

[T]he purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. The law of unfair competition tends to protect a business in the monopoly over the loyalty of its employees and its customer lists, while the general purpose of the antitrust laws is to promote competition by freeing from monopoly a firm's sources of labor and markets for its products. n4

The Seventh Circuit has observed that "[c]ompetition is a ruthless process. A firm that reduces cost and expands sales injures rivals-- sometimes fatally. . . . These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds." n5 Going further, Judge Easterbrook has characterized competition as "a gale of creative destruction. . .and it is through the process of weeding out the weakest firms that the economy as a whole receives the greatest boost. Antitrust law and bankruptcy law go hand in hand." n6

The U.S. Supreme Court has long stressed that the antitrust laws are for "the protection of competition, not competitors." n7 But it is also true that there can be no competition without competitors, and a competitor often will be the market participant most likely to both recognize and have the incentive to challenge exclusionary conduct. n8 And "merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well." n9 Tortious conduct seldom can be characterized as efficiency-enhancing competition on the merits, n10 and "'[i]improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.'" n11

Business torts also may be relatively "cheap" to implement and lack any procompetitive virtues. A campaign of removing a competitor's point-of-sale displays from retail locations may be much more cost effective than, say, engaging in predatory pricing. n12 Unfair competition through false statements likewise can protect a monopoly and is unlikely to be procompetitive. For example, in United States v. Microsoft Corp., n13 the government alleged that Microsoft deceived Java developers into believing that their software would run on non-Windows platforms. The Justice Department claimed that this was part of Microsoft's plan to prevent Java from threatening its operating system monopoly. The D.C. Circuit observed:

Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers. n14

This chapter examines the role that business torts play in establishing antitrust claims as well as the use of business torts as additional claims in private antitrust litigation.

B. Historical Underpinnings: The Pick-Barth Doctrine

Antitrust law and business torts intersected in earnest in the First Circuit's 1932 decision in Albert Pick-Barth Co. v. Mitchell Woodbury Corp. n15

The plaintiff alleged a scheme by the defendants to appropriate its business by hiring away the plaintiff's employees and inducing them to take the plaintiff's customer lists, business plans and other records, and sought recovery under section 1 of the Sherman Act. n16 The First Circuit affirmed judgment for the plaintiff, reasoning that "[i]f a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition, such a conspiracy . . . is a violation of section 1 of the Sherman Act" as a matter of law. n17 In reaching this conclusion, the First Circuit characterized the business tort of unfair competition as a per se antitrust violation when conducted through collusion among competitors. n18

Unlike other per se illegality rules under the antitrust laws, Pick-Barth's focus was on "fairness" to competitors, rather than the potential effects of the defendants' conduct on competition. When the First Circuit revisited Pick-Barth almost thirty years later in Atlantic Heel Co. v. Allied Heel Co., n19 it again concluded that "the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act." n20 Evaluating conduct factually similar to the allegations in Pick-Barth, n21 and relying on the Supreme Court's intervening decision in Klor's, Inc. v. Broadway-Hale Stores, n22 which involved a conspiracy to eliminate a competitor through a "group boycott" or concerted refusal to deal, N23 the Atlantic Heel court reaffirmed that a conspiracy to destroy a rival constituted a per se violation of section 1. n24

Very few courts followed the First Circuit's Pick-Barth rationale, and the cases that did usually involved egregious misconduct. n25 For example, in C. Albert Sauter Co. v. Richard S. Sauter Co., n26 the Eastern District of Pennsylvania held that the defendants' tortious acts, which included hiring away the plaintiff's key employees, misappropriating the plaintiff's confidential business information, intentionally confusing customers by using a deceptively similar trade name, and disparaging the plaintiff's business, amounted to a per se violation of section 1 because such acts "'unreasonably' restrain[ed] competition"; the defendants' conspiracies were "accompanied with a specific intent to accomplish a forbidden result." n27

C. The Decline of Pick-Barth

Subsequent decisions questioned Pick-Barth's rationale, or specifically limited the decisions following it to their facts. n28

In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, n29 the First Circuit critically analyzed whether unfair competitive practices accompanied by an intent to hurt a competitor should qualify as per se violations of the antitrust laws. After considering the "aggregation of dirty tricks, played by those with little market power," allegedly committed by the defendants, the court concluded that, while the actions were unfair and reprehensible, they did not constitute a per se antitrust violation. n30

The Whitten court offered several reasons for refusing to apply the per se rule. On a practical level, the court noted that Pick-Barth and Atlantic Heel condemned as anticompetitive practices that were commonplace but prohibited in very few cases. Therefore, the Whitten court reasoned that Pick-Barth and Atlantic Heel provided no clear basis upon which to distinguish the "unfair" practices that would amount to an antitrust violation from those that would not. n31 Additionally, the court observed that tort law is available to deal with "garden variety" unfair competitive business practices and that extending the per se classification to competitive torts would tend to create a federal common law of unfair competition, an undertaking the federal courts have long resisted. n32

Instead, the court analyzed the defendants' conduct under "the rule of reason," which assesses the effect of the unfair practices in the relevant market. n33 Although the plaintiff may have lost some contracts due to the defendants' actions, the Whitten court observed that there was no evidence of harm to the competitive process. The number of competitors was not affected, and the market was neither fixed nor manipulated. Regardless of how offensive, the defendants' behavior simply did not amount to an antitrust violation. n34 Nevertheless, the court stopped short of formally overruling Pick-Barth. Noting that the pirating of key employees and theft of trade secrets involved in Pick-Barth and Atlantic Heel - efforts "to eliminate a competitor" - were going for the "jugular," the court concluded that the defendants' conduct in Whitten affected only "lesser arteries" - "concentrating on winning customers" - and thus rendered use of the per se rule inappropriate. n35

Later cases further eroded Pick-Barth. In Northwest Power Products v. Omark Industries, n36 the Fifth Circuit considered "unfair conduct" similar to Pick-Barth: solicitation of the plaintiff's employees, misappropriation of customer lists, and circulation of false and disparaging comments to the plaintiff's customers about its alleged financial difficulties. The effect of the defendants' actions was to diminish the plaintiff's market share while increasing that of one defendant. n37 The court discussed Pick-Barth at length and rejected it. n38 Rather than condemn the defendants' conduct as a per se violation of section 1, the court concluded that the defendants' tortious acts in fact had a positive effect on competition. By replacing the plaintiff, which had a 20 percent share of the market, with one of the defendants, which achieved an 11.5 percent share, the alleged conspiracy actually enhanced rivalry and created greater competitive possibilities. n39

The Northwest Power court gave two reasons why a defendant's market power is critical in determining whether unfair competition amounts to an antitrust violation. First, absent some market impact comparable to that prohibited by the law of mergers, antitrust interests are not implicated. Second, only when the defendant gains an increment of monopoly power through unfair competition are treble antitrust damages appropriate, as "[s]ingle damages or equivalent injunctive relief

is thought sufficient to compensate a firm for unfair competition." n40 The Northwest Power court determined that the defendant lacked the level of market power necessary to raise antitrust concerns and affirmed summary judgment for the defendants. The court concluded that the plaintiff made no showing that substitution of one distributor for another affected consumers in the relevant market. n41

Several other courts likewise have rejected Pick-Barth's application of the per se rule, concluding that the elimination of a competitor through unfair means must be evaluated under the rule of reason. n42

As a leading commentator has noted, "the cases giving rise to Pick-Barth claims have not been disputes involving naked cartel exclusion," but rather involved single-firm conduct or vertical relationships, which generally require proof of anticompetitive effects. n43 "If properly restricted, a version of the Pick-Barth rule does seem to describe a per se violation of the antitrust laws. A 'naked' agreement among two rivals to drive a third rival out of business could be a violation of § 1" of the Sherman Act. n44

Accordingly, absent conduct amounting to naked cartel exclusion, a plaintiff seeking to advance a section 1 claim cannot merely allege that its business was harmed by a competitor's inequitable and unfair practices; the plaintiff must go further and establish actual or threatened harm to competition in the marketplace.

D. Business Torts Under the Rule of Reason

In Associated Radio Service Co. v. Page Airways, n45 the Fifth Circuit had occasion to revisit its decision two years earlier in Northwest Power. Recalling the court's observation in the earlier case that "[t]he more modern courts examining the Pick-Barth rule have stated that it applies only when the defendant is a 'significant existing competitor,'" n46 the Associated Radio court expressed the belief that "[w]hile this requirement begins to limit Pick-Barth to Sherman Act proportions, it fails to do the job entirely." n47

Invoking the Northwest Power court's observation that "absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise," n48 the Fifth Court concluded that "Northwest Power establishes for unfair competition cases under section 1 of the Sherman Act a two-part test: (1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." n49

Applying this test to the facts before it, the Fifth Circuit noted that the relevant market was highly concentrated, there was conclusive evidence that the defendant was a potential entrant into that market, and that the plaintiff was the most significant existing competitor in that market. n50 Accordingly, under the Supreme Court's decision in FTC v. Procter & Gamble Co., n51 the defendant's attempt to acquire the plaintiff directly would have violated the merger provisions of the antitrust laws. n52 Additionally, there was evidence that the prices the defendant charged its customers as well as its profits dramatically exceeded those of the plaintiff, and that its market share had risen to 64 percent by the time of trial. n53 Based upon its finding that the defendant could not have acquired the plaintiff lawfully under the antitrust laws and the evidence that the defendant's tortious conduct, which included bribery, had the requisite anticompetitive effect, the Fifth Circuit found it unnecessary to reach the issue whether business torts, standing alone, could ever rise to the level of a section 1 violation. n54

E. The Role of Business Torts in Section 2 Claims

In addition to potentially supporting a rule of reason claim under Sherman Act section 1, business torts may, in an appropriate case, constitute exclusionary conduct actionable under Sherman Act section 2.

A leading antitrust treatise defines exclusionary conduct as acts that:

(1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and

(2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits. n55

The Supreme Court has explained that when determining whether conduct can be condemned as exclusionary in an antitrust sense, it is not enough to focus simply on its effect on the competitor plaintiff; rather, it is necessary to consider the effect on consumers, the defendant's rivals and the defendant itself. n56 The Court has further explained that if the defendant '"has been attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." n57

Just as a section 1 claim cannot be based on business torts alone, a section 2 claim requires more than proof that a dominant firm engaged in business torts that injured a smaller rival. Absent some reason to believe that the defendant's tortious acts are likely to contribute to the acquisition or maintenance of monopoly power, or to materially impair the competitive opportunities of rivals, business torts - even when committed by a dominant firm - are unlikely to qualify as "exclusionary" for section 2 purposes. n58

When it appears that a firm's use of business torts is likely to contribute to the acquisition or maintenance of a dominant position, courts have been willing to recognize an antitrust claim based on tortious conduct. n59

Examples of tortious conduct that may qualify as exclusionary include misrepresentations to buyers; deceptively influencing purchaser specifications; disparagement of rivals; compromising rival's employees; compromising rival's suppliers; industrial espionage; payments to buyer's employees; monopolist permeation of a customer with former employees; premature delivery dates and exaggerated advertising claims; sham litigation; concealment of transactions through straw parties; interference with contracts; and retaliation for privileged conduct. n60 When the defendants' tortious conduct appears unlikely to contribute to the acquisition or maintenance of a dominant position, however, the courts have been less likely to uphold a section 2 claim. n61

Associated Radio illustrates the successful use of business torts in support of a section 2 claim. In that case the plaintiff alleged a variety of tortious conduct, including bribery, the defendant's use of sham litigation to delay the payment of needed funds owed to the plaintiff, and inducement of the plaintiff's employees to disclose the plaintiff's confidential business information to the defendant. n62

Agreeing with a leading treatise that the courts should be wary of invitations to find antitrust violations from acts of unfair competition, and that a de minimus standard should be applied, the court found that the plaintiffs' evidence was probative of enough instances of exclusionary behavior to constitute more than de minimus violations of section 2. n63

A more recent case, Conwood Co., L.P. v. United States Tobacco Co., n64 which involved one of the largest civil antitrust awards ever rendered, likewise was based on business torts. In that case the plaintiff complained that the defendant had engaged in a widespread campaign of removing and destroying the plaintiff's point-of-sale displays of its moist snuff products in retail locations. The plaintiff also complained that the defendant used its position as "category manager" for moist snuff products to limit or eliminate competitive products, including lower priced products, and to give preferential position to the defendants' products at the point-of-sale. Rejecting the defendant's argument that the evidence amounted to no more than "insignificant" tortious behavior and acts of ordinary marketing services, n65 the Sixth Circuit affirmed a treble damages judgment under Sherman Act section 2 of $ 1.05 billion.

F. The Additional Requirement of "Antitrust Injury"

In addition to proof of harm to competition, a private antitrust plaintiff must establish "antitrust injury." n66

The Supreme Court articulated this principle in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., n67 a merger case under section 7 of the Clayton Act. There, the plaintiffs alleged that the defendant, one of the nation's largest bowling equipment manufacturers and bowling center operators, violated section 7 of the Clayton Act by acquiring bowling centers that had defaulted in their payments for equipment. The plaintiffs, competing bowling center operators, sought treble damages for the anticipated increase in profits the plaintiffs would have reaped had the rival bowling centers instead gone out of business. n68 Rejecting this claim, the Court emphasized that the antitrust laws are designed to protect competition, not individual competitors, and that it would be inimical to the purpose of the antitrust laws to award the plaintiffs damages for profits they would have realized had competition been reduced by elimination of the acquired assets from the market. n69 To recover antitrust damages, the Court explained, a plaintiff must prove more than that its injury was causally linked to an illegal presence in the market; rather, antitrust plaintiffs must prove "antitrust injury . . . of the type the antitrust laws were intended to prevent." n70 Such injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. n71

The antitrust injury requirement stands as one of the most significant barriers to competitor plaintiffs seeking to recover antitrust damages. n72 As the Seventh Circuit observed:

[T]here is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated. Competition means that some may be forced out of business; not a guarantee of tenure for every competitor in the marketplace. n73

G. The Assertion of Business Torts in Addition to, or in Lieu of, Antitrust Claims

In addition to constituting conduct that supports an antitrust claim, business torts can be joined with antitrust claims as additional grounds of recovery. This is often sensible in cases that involve alternative, complementary claims and overlapping evidence. Tortious conduct by a dominant firm may support both a claim of tortious interference and a claim of anticompetitive or exclusionary conduct under the Sherman Act. n74

[FOOTNOTE] n74 . This was the case in Conwood Co. v. U.S. Tobacco Co, 290 F.3d 768, 773 (6th Cir. 2002) (plaintiff asserted a claim of monopolization as well as claims for tortious interference with contract and prospective advantage; prior to trial the plaintiff dropped the tortious interference claims and proceeded only on the section 2 claim). [END FOOTNOTE]

In other cases, however, the underlying theories and principles involved may conflict, or the pursuit of multiple claims may raise problems of damages apportionment. n75 And there are situations when invocation of every conceivable claim engenders confusion and frustration. n76

Litigation strategy can involve consideration of several factors that may impact antitrust or tort theory selection, including jurisdiction and venue, conflict of laws, remedies, direct and indirect purchaser considerations, other standing rules, and the availability and scope of potential classwide relief. Judicially created obstacles to the successful maintenance of antitrust claims often make statutory and common law unfair competition and tort claims attractive alternatives for plaintiffs. n77

[FOOTNOTE] n77 . William L. Jaeger, New Tools for the Plaintiff in the 1990s, 4 ANTITRUST L.J. 4, 5 (1990) ("Consigning state claims to second class status in an antitrust case may not be the wisest move for plaintiffs, in view of the increasing hostility of the federal courts to antitrust claims, and the eagerness of some courts to dismiss antitrust claims on summary judgment motions."); Harvey I. Saferstein, The Ascendancy of Business Tort Claims in Antitrust Practice, 59 ANTITRUST L.J. 379 (1990). The Supreme Court has noted the "considerable disadvantages" of antitrust claims to private litigants. Verizon Commc'ns v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 412 (2004). [END FOOTNOTE]

#### Using torts as an independent limit on anticompetitive conduct revitalizes the field

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But amid this general expansion of tort law, certain theories of liability have faded or disappeared. A century ago, a husband could recover substantial damages from someone who had sex with his wife, 6 even if the interloper had no idea that his lover was married. 7 In the Deep South, a Caucasian rail passenger could bring a claim against a railroad company if a conductor directed him or her to a compartment used by African-American customers. 8 And in several states, a wife could proceed against a tavern for the wages that its patron-her alcoholic husband-had failed to earn due to his chronic inebriation. 9 Should a contemporary plaintiff have the temerity to press any one of these claims, most courts would reject his or her lawsuit out of hand.

Scholars have paid more attention to how new torts are born than to how-and why- torts die. 10 But torts do die. Formerly prominent causes of action-of which the aforementioned criminal conversation, insult, and spousal alcoholism torts are but three of many-have become rare or have vanished altogether. Some of these torts have been abolished by courts or legislatures, others have been abandoned by plaintiffs, and still others have been abrogated in some jurisdictions and deserted elsewhere. In a few instances, a particular impetus (for example, the end of Prohibition) clearly bears responsibility for the demise of a related cause of action (claims against public officers for failing to enforce dry laws). 11 Other torts have disappeared under more mysterious circumstances, with the precise cause of death re- [\*361] maining unknown. Adding to the mystery, these claims have withered and died even as other torts have thrived in seemingly inhospitable environments.

A few authors have performed autopsies on specific torts and identified the suspected reasons behind their deaths. 12 These analyses, though interesting, are by their own admission of limited scope and do not provide especially useful analytic or predictive tools. This Article has a broader goal. Just as pathologists and epidemiologists study how fatal illnesses spread, 13 conservation biologists examine why animal species go extinct, 14 and geographers and anthropologists try to understand why societies succeed or fail, 15 this Article surveys the roster of dead and dying torts and then asks (and tries to answer) a novel question: Why do torts die? This question quickly breaks down into several other queries, of which the following are just a few: Do defunct tort theories share a common fatal flaw? Do torts die for reasons of substance, procedure, or some combination of both? What roles do courts, legislatures, and plaintiffs each play in the deaths of torts? And what, if anything, can the disappearance of some tort theories tell us about what makes other claims survive and prosper?

This Article proposes some answers to these questions. The discussion below offers and develops a framework for analyzing why torts die that focuses upon the contributions made by the following six factors: (1) the changes in the cultural atmosphere surrounding a tort; (2) the quality of the arguments directed against the tort; (3) the interests, abilities, and limitations of the audiences that entertain and act upon these arguments; (4) the influence exerted by the agents who advocate or oppose the elimination of the tort; (5) the attractiveness of alternatives, if any, that may exist to tort liability; and (6) the attributes of the tort itself that make it more or less susceptible to abolition or abandonment. When tested through case studies, this model suggests that torts die when atmosphere, arguments, audiences, agents, alternatives, and attributes combine to direct a tort toward abolition, abandonment, or both. Put another way, most bygone torts have not died simply because times changed. Changing times, or other ambient conditions of the environment in which a tort operates, may prove lethal to a tort if and when they produce arguments against the cause of action that are properly at- [\*362] tuned to the interests, concerns, and capabilities of the agents and audiences who endorse or reject theories of liability, and the attributes of the tort and any available alternatives accelerate, rather than defuse, the drive toward abolition or abandonment. Where these factors are not properly aligned, a tort may prove capable of tacking into the prevailing cultural winds.

This Article proceeds as follows. The first step in developing the argument summarized above requires that I establish that some torts actually have died or are dying. Toward this purpose, Part II of this Article maps the graveyard of extinct or moribund torts, in which are buried the "amatory" or "heartbalm" 16 torts (alienation of affections, breach of promise to marry, criminal conversation, and seduction); bad faith denial of contract claims; corpse mishandling claims; claims for insult; the torts of maintenance and champerty; claims seeking consequential damages for injuries negligently inflicted on servants; certain nuisance suits; support actions by the wives of alcoholics; suits involving unsent, misdirected, or garbled telegrams; tort claims attacking a range of unfair trade or labor practices; and personal injury actions against employers, to the extent these suits sound in negligence. In this Part, I briefly describe the gist of each departed cause of action and review the evidence of its decrease or demise.

Next, Part III discusses how atmosphere, arguments, audiences, agents, alternatives, and the attributes of a given tort theory affect its ability to survive. To better ascertain how these factors operate and interact, Parts IV, V, and VI relate how claims for insult, "obesity lawsuits," and the heartbalm torts have arrived at the brink of extinction. To summarize these studies, the insult tort has vanished due to an atmospheric change-a marked decrease in passenger rail travel (which formerly produced the lion's share of insult claims)-combined with the cannibalizing effect of an alternative form of relief, the "new tort" of intentional infliction of emotional distress. The "obesity lawsuit" has come under attack because it threatens the interests of a cohesive group of potential defendants and has no comparably motivated base of supporters; additionally, holding the food industry accountable for the health effects of its products has been portrayed, effectively, as inconsistent with prevailing values. Finally, the amatory torts have fallen victim to the legal equivalent of a "perfect storm," in which fierce opponents, persuasive arguments, flaws within the torts themselves, and unfriendly cultural trends produced [\*363] two perversely complementary rounds of abolitionist fervor-the first of which followed from a perceived excess of heartbalm suits in the 1920s and early 1930s, and the second, decades later, from a sense that so few of these claims were being filed by then that the torts no longer served a useful purpose. In each instance, the studied tort or torts succumbed to a confluence of compromising circumstances, implicating multiple components of the framework proposed in this Article.

Finally, Part VII of this Article reviews a few lessons that the three case studies provide. These studies establish the need to account for the impacts of atmosphere, arguments, audiences, agents, alternatives, and attributes when studying the death of a tort. Not all of these factors may be involved in the death of a cause of action, but as the case studies suggest, they often interact in interesting and unanticipated ways. The case studies also indicate that an unused tort is an endangered one, and thus portend that even modest "tort reform" measures cast as mending, not ending, the tort system may lead to the demise of tort theories by setting in motion a series of events in which the causes of action are first forsaken by plaintiffs and then eventually abolished by courts or legislatures.

II. Dead or Dying Torts

Tort plaintiffs today can recover for far more affronts than their ancestors ever dreamed possible. Across our nation, courts and legislatures seem to place an ever-broadening array of causes of action in the hands of plaintiffs and their attorneys. 17 But it would be a mistake to conclude from this overall expansion of tort liability that, once born, torts never die. On the contrary, just as animal species go extinct, buildings collapse, and stars implode into black holes, certain torts have already vanished, and others will disappear in the future.

To give an idea of the menagerie of defunct causes of action, the following is a partial 18 roster of extinct or endangered torts. 19

A. The "Heartbalm" Torts

The heartbalm or amatory torts all involve derailed intimate relationships. An alienation of affections claim arises when a defendant 20 intentionally interferes with a marriage, straining relations between husband and wife. 21 Criminal conversation occurs when the defendant engages in sexual intercourse with a married person. 22 The plaintiff in a breach of promise to marry suit attacks a failure to follow through with an accepted promise of marriage. 23 Seduction, the fourth and final heartbalm tort, involves at least one act of intercourse between the defendant and an unmarried woman, accomplished by way of artifices and persuasions. 24

A century ago, leading treatises devoted extensive discussion to the amatory torts. 25 Today, these claims barely survive. As of this writing, all but a handful of states have abolished or substantially limited claims for alienation of affections 26 and criminal conversation, 27 and about half of the states have abrogated or pared back claims for breach of promise to marry 28 and seduction. 29 Even where these claims persist, few plaintiffs show much interest in them. With [\*365] the notable exceptions of Mississippi 30 and North Carolina 31 (both of which have recently entertained a spate of alienation of affections suits), over the past several years very few states have witnessed even a handful of cases implicating any of the heartbalm torts. 32

B. Support Actions by Wives of Alcoholics

An ancient common law rule provided that the mere provision of alcohol to someone who subsequently committed a liquor-fueled wrong did not provide a basis for imposing liability on the seller. 33 This rule changed starting in 1849, 34 when the temperance movement brought about the enactment of the first of the more than thirty civil liability laws-also known as "dramshop acts"- passed by various states. 35

Consistent with one of the principal evils associated with alcohol back in the 1800s-the abandonment or neglect of families by chronically inebriated husbands and fathers 36 -several of these statutes were construed as allowing the wives of alcoholics to recover damages against saloonkeepers who sold drinks to their drunkard, unemployed-but otherwise healthy-husbands. The theory underlying these suits was that these sales worsened the husbands' alcoholism and thus prevented them from supporting their families through gainful employment. 37 Spousal alcoholism claims of this type were [\*366] quite common in the early 1900s, particularly in the Midwestern states. 38 There, church groups went so far as to give seminars that taught women how to bring these suits. 39

Spousal alcoholism actions dwindled during Prohibition, as the taps ran dry at the saloons whose owners once had been named as defendants. These claims disappeared altogether once temperance fervor abated, 40 leading to the repeal of both Prohibition 41 and many of the dramshop acts from which the spousal alcoholism tort sprouted. 42 Notwithstanding the recent reemergence of statutes and [\*367] case law that permit suits against bars and restaurants for the consequences of questionable or unlawful alcohol sales, 43 claims seeking recovery for lost wages due to spousal alcoholism alone are almost certainly a thing of the past.

C. Maintenance and Champerty

Maintenance occurs when a third party provides a plaintiff with money for the purpose of bringing or sustaining a lawsuit. 44 A maintenance claim holds the sponsor liable for any injurious consequences of these payments. 45 Champerty, a particular type of maintenance, develops when a person or entity otherwise without a stake in a lawsuit agrees to fund the suit in exchange for a share of the profits, if any, reaped by the action. 46

Tort claims for maintenance or champerty have never been common in the United States. 47 Beginning in the mid-1800s, American courts and legislatures determined that contingency-fee contracts between attorneys and their clients were not champertous, withdrawing the most common form of "officious intermeddling" 48 from the maintenance theory. 49 Maintenance and champerty have been invoked in modern cases typically only as defenses to allegedly unlawful contracts, not as affirmative causes of action in tort. 50 In the rare situations in which plaintiffs have alleged these theories as torts, a majority of courts have determined that maintenance and [\*368] champerty claims are no longer viable, if they were ever recognized at all. 51

D. Bad Faith Denial of Contract

A tort does not have to be old to die. A tort claim for bad faith denial of the existence of a contract was first recognized in Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 52 a 1984 decision by the California Supreme Court that espied a tort when a defendant, in addition to breaching a contract, "seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." 53 That same court repudiated the bad faith denial of contract tort just eleven years later. 54

Other claims embraced by the California Supreme Court in the 1980s under Chief Justice Rose Bird ultimately shared the fate of the bad faith denial of contract tort after Bird and two other progressive justices were replaced by more conservative jurists in 1986. 55 Under Chief Justice Malcolm Lucas, who took over for Bird after the 1986 election, the court revisited language in Tameny v. Atlantic Richfield Co. 56 that suggested that an employee could sue his or her employer in tort for a breach of the covenant of good faith and fair dealing that was implicit in an employment contract. 57 In Foley v. Interactive Data Corp., 58 the Lucas court concluded that no such cause of action existed. 59 The court also backed off its earlier position 60 that a landlord was strictly liable for injuries caused by defects associated with rented premises, 61 a retreat construed by some as abandoning what had been a new cause of action against landlords. 62 Also, in Moradi- [\*369] Shalal v. Fireman's Fund Insurance Cos., 63 the court overruled an earlier decision, Royal Globe Insurance Co. v. Superior Court, 64 to the extent that Royal Globe had read into state insurance law a statutory cause of action against insurers for an unreasonable failure to settle a claim. 65

E. Mishandling of Dead Bodies

Sometimes a tort remains viable in theory, but ignored in practice, as when it is displaced by an alternative cause of action without ever being formally abolished. One such forsaken tort concerns the abuse or mishandling of dead bodies. Courts and commentators once treated claims involving such facts as giving rise to a distinct and unique "corpse mishandling" tort. 66 It was said that the deceased's next of kin had a property right in, 67 or "a right of custody, control and disposition" of, 68 the corpse for purposes of burial or cremation and that infringements of this right would support a tort claim for injured feelings. 69 Thus, an action lay when a passenger on a steamship died during a voyage and his body could have been returned to the decedent's relatives, but was buried at sea instead. 70 Unauthorized dissections or autopsies also provided fertile grounds for litigation under this theory of recovery. 71

The occasional decision recognizing a distinct wrongful autopsy or mishandled cremation tort still appears from time to time. 72 In practice, however, this cause of action is slowly being swallowed by the "new torts" of negligent and intentional infliction of emotional distress. This is a case of a child overtaking its parent; as originally devised, the emotional distress torts knit together under a single theory several formerly distinct torts, of which corpse mishandling was one, which shared little except that they all permitted plaintiffs [\*370] to recover emotional distress damages even if they had not suffered any physical harm. 73 The widespread acceptance of the emotional distress torts over the past half-century has meant that plaintiffs suing upon facts that once would have supported a claim labeled "corpse mistreatment" are instead choosing to plead and prove their lawsuits under a negligent or intentional infliction of emotional distress framework. 74 Courts, meanwhile, have taken to treating the formerly distinct cause of action for corpse mishandling as a mere subspecies of the emotional distress torts, 75 in some cases requiring plaintiffs to apply an emotional distress label to their corpse mishandling claims. 76

The net result has been a leaching away of corpse mistreatment's identity as a distinct tort-death by absorption, one might say. The Restatement (Second) of Torts continues to devote a separate section to corpse mishandling claims. 77 The treatise acknowledges, however, that "in reality the cause of action has been exclusively one for the mental distress," 78 and its drafters expressed some doubt as to whether this type of claim still merited independent treatment in light of recent recognition of the emotional distress torts. Ultimately, the drafters concluded that it was "probably" desirable to retain the original Restatement's discussion of corpse mishandling claims, "at least for this Restatement." 79

F. Loss of Services Actions

As masters and servants have evolved into employers and employees, the law governing their respective rights has likewise undergone a transformation. In the past, a master could recover for consequential damages attributable to an injury negligently inflicted upon his servant. 80 This cause of action vindicated and protected the [\*371] master's property interest in the servant, 81 whom the master was required to support. 82

Attempts have been made to transfer this rule to the modern context of business employers and employees, 83 but the doctrine has not thrived in this new setting. Scholarly criticism of this cause of action as archaic and ill-suited to modern employment relations has not helped matters. 84 As it stands, opinions in which an employer has been allowed to seek or recover consequential damages assignable to an injury negligently wrought upon an employee represent a decided, and possibly extinct, minority of modern decisions addressing this subject. 85

G. Insult

The insult tort departs from the general rule that denigrating (but nonslanderous) words normally provide no basis for a tort claim. 86 A century ago, if an employee of a railroad or another common carrier directed harsh words toward a customer or (in some jurisdictions) failed to protect a passenger from verbal abuse by third parties, this action or inaction conferred a cognizable tort claim upon the victim. 87

To recover under this theory, the plaintiff (often a woman) 88 merely had to be subjected to language that would offend "a normal person of ordinary sensibility" 89 -that is, "such language as is by common consent among civilized people regarded as vulgar, coarse, immodest, and offensive." 90 Actionable misconduct included

[p]rofane and indecent language, abusive and insulting epithets, indecent proposals, accusations of dishonesty or immoral conduct, insinuations as to poverty or stinginess, threats of violence, the attempt to put a white man into a Jim Crow car, shaking a ticket punch under a passenger's nose, and other assorted varieties of unpleasantness. 91

The Restatement (Second) of Torts continues to recognize the tort of insult 92 as an exception to the more general rule that only extreme and outrageous behavior by a defendant will lead to liability for "pure" emotional distress unaccompanied by an invasion of another personal or property right. 93 But if the tort of insult still exists in theory, today it is a mere shadow of its former self. One author has observed that the "cause of action has largely vanished from American tort practice." 94 The available evidence bears out this statement. While an American Law Reports annotation on liability for insulting or abusive language identifies several dozen decisions implicating the tort of insult, 95 the vast majority of these cases date from the late 1800s or the first few decades of the 1900s, and the author has located only a smattering of published decisions over the past half-century in which plaintiffs have recovered even a pittance under an insult theory. 96

H. Nuisance

Make no mistake: the law of nuisance is alive and well. But this "impenetrable jungle" 97 no longer covers certain factual acreage. For instance, courts in the United States have rejected the old English "ancient lights" doctrine. 98 Long ago, a landowner invoking this rule could acquire a prescriptive right to the free flow of sunlight and air across neighboring land owned by another, 99 a right enforceable through a nuisance action. 100 As Blackstone wrote, "to erect a house or other building so near to mine, that it obstructs my ancient lights and windows is a [nuisance]." 101 Although some jurisdictions in this country initially embraced this doctrine, 102 the switch was flipped more than a century ago. Over the past one hundred and fifty years, one decision after another has gainsaid a compensable right to the maintenance of ancient lights. 103 During this span, only a handful of states, desirous of encouraging solar power, have permitted tort claims for interrupted sunlight. 104

I. Telegram Suits

Telegraph companies used to find themselves on the wrong end of verdicts holding them liable in tort for the negligent transmission of messages. Even though the transmission of a telegram was governed by a contract, tort liability adhered to Western Union and other companies when they did not send a message or somehow garbled the transmission. 105 One common fact pattern involved a failure to transmit, or the delayed transmission of, a message conveying a lucrative job offer or another business opportunity. 106

This sort of claim disappeared in the early 1900s, once the federal and state governments began to comprehensively regulate the telegraph industry. 107 These schemes typically required telegraph companies to file tariffs with the appropriate regulatory agencies. 108 The tariffs set the rates and terms of service; they also typically included terms limiting the liability of the regulated interest for lapses or mistakes in service. 109 In 1921, the United States Supreme Court upheld the validity of these liability limitations, holding that they went hand-in-hand with the strict government control and rate structures to which the companies had submitted. 110 This determination, and the gradual displacement of the telegraph by other methods of communication, triggered a decline in this type of litigation. 111

J. Unfair Trade and Labor Practices

The common law of the late 1800s treated certain labor and marketing practices as essentially tortious in nature. Grievances assessed under a tort rubric included labor strikes and boycotts, which were adjudicated under principles borrowed from the torts of interference with contract and interference with prospective economic advantage, 112 and claims alleging that the defendant passed off its products as those of the plaintiff, behavior that was regarded as a type of deceit. 113

Plaintiffs still sue for similar wrongs today. However, lawyers no longer dress these claims in tort clothing, and courts do not look to tort law to supply the pertinent rules of decision. Instead, we regard [\*375] these claims as properly addressed by, and under, the distinct fields of labor and trademark law. 114 Statutes enacted to dispel the confusion (or repeal the rules) attendant to the adjudication of these disputes under common law principles 115 now provide the rules of decision for these actions. In labor law, the forum for resolution of these conflicts has changed as well, with administrative agencies assuming responsibility for entertaining most grievances between labor and management and between individual employees and unions. 116

The disappearance of trademark and labor disputes from the Restatement of Torts reflects their reassignment from tort law to newly developed fields of study. The First Restatement devoted numerous sections to distinguishing fair from unfair trade practices 117 and legitimate from illegitimate labor activities. 118 These sections were deleted from the Second Restatement, which was published just a few decades later. An introductory note in the Second Restatement explained the drafters' decision to omit the discussion of unfair trade practices:

The rules relating to liability for harm caused by unfair trade practices developed doctrinally from established principles in the law of Torts, and for this reason the decision was made that it was appropriate to include these legal areas in the Restatement of Torts, despite the fact that the fields of Unfair Competition and Trade Regulation were rapidly developing into independent bodies of law with diminishing reliance upon the traditional principles of Tort law. In the more than 40 years since that decision was initially made, the influence of Tort law has continued to decrease, so that it is now largely of historical interest and the law of Unfair Competition and Trade Regulation is no more dependent upon [\*376] Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level. The Council formally reached the decision that these chapters no longer belong in the Restatement of Torts, and they are omitted from this Second Restatement. 119

#### Expanding tortious interference prevents Martian back contamination---extinction

Dr. Rhawn Gabriel Joseph 17, Ph.D., Published and Co-Authored Major Articles in the fields of Astrobiology in Books Edited by Senior Scientists at NASA, Invited Speaker at University of California at Berkeley, University of Geneva, Brigham Young, University of Japan and Other Universities, Editor of the Journal of Cosmology, “NASA is the Inquisition: NASA's 50 Year History of Defaming Scientists Who Discovered Evidence of Extraterrestrial Microbial Life”, 1/1/2017, http://cosmology.com/NASAIsTheInquisition.html

It is impossible to have an informed and open discussion when NASA openly attacks, ridicules, slanders, defames and threatens to murder legitimate scientists, and encourages others to do likewise with NASA's blessing. NASA is not exercising First Amendment Rights, but engaging in terror and violating the First Amendment: Freedom of Speech and Freedom of the Press.

In 2012, John Grotzinger NASA's Mars rover project scientist, excitedly announced a major discovery on Mars by the rover Curiosity, which he described to the world's media as "earthshaking news." "This data is gonna be one for the history books," he said, and promised a full report which many believed would confirm there is life on Mars. Instead, Grotzinger was silenced by NASA, and no report was issued and nothing more was said about this "earthshaking" discovery other than to claim there had been no discovery.

Normally, NASA controls the scientific community by threatening to take away their funding, and by destroying their reputations through ridicule and condemnation. However, if threats to funding are not sufficient, or if the scientist is self-funded, and as will be detailed in the present case, NASA resorts to harassment, intimidation, defamation, death threats, and direct assaults on the First Amendment, including engaging in tortious interference to eliminate the source of the funds which pay for the research--which is what NASA did to Dr. Joseph.

Life On Mars In May of 2016, Dr. Rhawn Gabriel Joseph provided evidence, based on the expert judgment of 40 biologists, that there is a high to low probability of Life on Mars (http://Cosmology.com/LifeOnMarsStudy1.html).

Dr. Joseph predicted that Martian organisms pose a threat to life on Earth if transported to our planet--which NASA plans to do in a few years--as they may cause disease and plague, and possess the capability of destroying metal, plastics, and the infrastructure of civilization. Dr. Joseph then tested his prediction, and in December of 2016 provided evidence, to a Federal Court, that Martian bacteria and fungi had contaminated and were damaging the Mars rovers (http://Cosmology.com/FungiContaminateMarsRovers.html). NASA responded to this evidence by demanding that the Courts not look at the evidence, which is what the Inquisition demanded of Galileo: do not look.

Science means "re-search"; search again, look again, keep looking; and NASA's recent demand that the Federal Court, and the scientific community, not look at the evidence is just more evidence that NASA is no friend to science.

Science is premised on the "scientific method" which includes observation, the collection of a body of evidence, and experimentation and the testability of predictions. Science is not refusing to look at the evidence, and attacking those who do; yet this is NASA's M.O.

NASA fears the truth. Forty biologist, identified by their universities as experts in fungi formed a consensus, there is life on Mars (Joseph 2016), and now there is evidence Martian fungi have contaminated the rovers (Joseph & Rabb 2016); findings which have twice humiliated NASA by discovering what was right before their eyes but were too blind to see. A culture of denial is policy,so they demand of the Court, and the scientific community: do not look at the evidence. In fact, NASA's official policy is not just denial and lies, but defamation, slander, and if all else fails: death threats.

NASA is the Inquisition, and NASA has a fifty year history of attacking and destroying the reputations of scientists who make discoveries NASA opposes; and NASA's victims include NASA scientists.

NASA is an Anti-Science Organization which Promote Religion Masquerading as Science

NASA is, the Inquisition, and employs tactics little different from those of the Inquisition of the Middle Ages so as to terrorize the scientific community into silence. In the late 1500s, Copernicus was so terrified of his fellow "scientists" and the Inquisition, that he did not allow his master work to be published until after his death. His crime? He provided evidence that Earth was not the center of the Universe, or this solar system--a discovery which contradicted the Jewish and Christian religion. NASA, like the Inquisition, prefers to keep the faithful ignorant, and despite all evidence to the contrary, NASA has rejected Copernicus and placed Earth right back in the center of the Universe, and makes ridiculous claims as to the age of distant stars, based on how far away they are from Earth; and claiming that stars--so far detected--furthest from Earth must have been formed right after the "Big Bang". Its laughable. This is how children think. These people at NASA are fools and idiots. NASA is not even a scientific organization, but an engineering and aerospace agency controlled by the military and staffed by mathematicians, geologists, and astronomers who are little more than government bureaucrats. NASA doesn't even have a space ship, no longer has the know how to put men on the moon, and has to rent space on Russian craft to shuttle its "astronauts" to and from the ISS which is not even in space, but orbits in the thermosphere.

NASA is not a scientific organization, but an anti-scientific organization with some great engineers. In fact, many of the so called scientific discoveries claimed by NASA, have been faked, fudged, and reek of fraud and magical thinking, and cannot be replicated by independent scientists. One of the more notorious examples of this fakery, is NASA's claims that "A Bacterium That Can Grow by Using Arsenic Instead of Phosphorus" and which was published with little or no legitimate "peer review" by the journal of minutia: "Science" in 2010 (Wolfe-Simon, et al, Science, DOI 10.1126/science.1197258). No one could replicate this garbage and the study was widely rejected as "crap" (see http://cosmology.com/Arsenic100.html). NASA's entire purpose in concocting this fraud was to provide evidence against an extraterrestrial origin for life on Earth, and in favor of the religious view found in Genesis 1. Much of what comes out of NASA cannot be trusted, has been faked, misinterpreted, can't be replicated outside of NASA, and is little more than fantasy, dogma, and religion masquerading as science.

NASA Lies About Life on Mars Because NASA Plans to Transport Martian Organisms to Earth

NASA has ignored, censored, suppressed, and lied about the evidence, and sought to terrorize and silence the scientific community, not just because of the ignorance, incompetence, and mendacity which runs rampant at NASA, and not just because of military orders requiring denial, but because NASA intends to transport invaluable and extremely dangerous Martian organisms to Earth so as to harvest their invaluable Martian genes. These Martian organisms and their genes will become the most valuable and most sought after property on Earth; and the most dangerous due to contamination; which NASA admits, cannot be completely prevented as stated on the Mars sample return website.

And then, despite all the evidence for past and present life on Mars, NASA assures the public: "... it is highly unlikely that living organisms will be found on the samples...." and thus no reason for public oversight or any special precautions. This is an incredibly dangerous lie. To allow the bone-heads at NASA to go forward with this plan, would be like giving 7-year olds atomic bombs. The folks are NASA are not competent and cannot be trusted--which was also the judgment of NASA's Inspector General who, in 2011, discovered widespread theft of astromaterials which NASA tried to cover up.

Fact is, NASA's own scientists, and 40 experts in biology, have already proven NASA is wrong--there is life on Mars-- and the consequences of NASA's "willful ignorance" and "deliberate indifference" --in a "worst case scenario"-- could be contagion, disease, plague, and a sixth mass extinction.

### OFF---Pharma DA

#### The plan creates a rippling, cross-industry effect that wrecks pharma innovation

Dr. Douglas Holtz-Eakin 21, Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University, “Losing Focus on Antitrust”, American Action Forum – The Daily Dish, 2/11/2021, https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/

The point of antitrust law is to ensure that markets deliver the maximal possible benefits to Americans. Specifically, a prime tenet of competition policy is the consumer welfare standard. Vigorous market competition ensures that no firm is able to exploit consumers. Testing whether a business practice, merger, or acquisition diminishes consumer welfare is the right bottom line for checking on the quality of competition.

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

The current standards focus antitrust on clearly defined markets, the quality of competition in those markets, and the resulting consumer benefits. Losing focus on consumer welfare is tantamount to losing the rudder on a ship; who knows where it ends up?

#### Pharma innovation stops extinction from natural disease and bioweapons

Dr. Piers Millett 17, PhD, Senior Research Fellow at the University of Oxford, Future of Humanity Institute, and Andrew Snyder-Beattie, MS, Director of Research at the University of Oxford, Future of Humanity Institute, “Existential Risk and Cost-Effective Biosecurity”, Health Security, Volume 15, Number 4, 8/1/2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/

Abstract

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios.

Keywords: : Biothreat, Catastrophic risk, Existential risk, Cost-effectiveness, Cost-benefit analysis

How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives.

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world's population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity's favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21

Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of state-run bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27

Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that “we can ensure Gaia's survival only through the extinction of the Humans as a species … we now have the specific technology for doing the job … several different [genetically engineered] viruses could be released”(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32

What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higher-consequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures. We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\*

A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34

The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.† Biological warfare provides examples of events and disasters. These historical examples provide indicative data on likelihood and impact that we can then feed into a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we use multiple datasets to corroborate our numbers, but ultimately the “true rate” of bioweapon attacks is highly uncertain.

Biocrimes and Bioterrorism

Historically, risks of biocrime‡ and bioterrorism§ have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths.

Biological Warfare

Academic overviews of biological warfare†† detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1).

The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare.

We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The second data set came from disease events that were alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000.

For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.‡‡

Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure.

An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an “engineered” pandemic would lead to extinction by 2100.42

The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.§§

Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wild-type influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 × 10–8 and 8 × 10–7.†††

Model 3: Naive Power Law Extrapolation

Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.‡‡‡ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers.

Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bio-attacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 × 10–6).

We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War—constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 × 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks.

Why Uncertainty Is Not Cause for Reassurance

Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 §§§

Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge.

### OFF---T Subsets

#### ‘Antitrust’ applies to the entire economy---targeting single industries isn’t topical

Dr. Babette Boliek 11, Associate Professor of Law at Pepperdine University School of Law, J.D. from the Columbia University School of Law, and Ph.D. in Economics from the University of California, Davis, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011, Lexis

Although the two regimes share a commonality of purpose--to protect consumers and to promote allocative efficiencies in production--the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving [\*1629] as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals--i.e., low and economically efficient prices, innovation, and efficient production methods"--regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about." The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets--regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures. Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly. In the vast majority [\*1630] of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

#### Vote neg:

#### Limits---they devolve into hundreds of specific subsets like aviation, ag, defense or rail AND allow thousands of cases that deny single mergers OR regulate individual companies like Facebook or Amazon

#### Ground---economy-wide change ensures links to core generics like biz con and politics by forcing the aff to structurally change antitrust AND be big enough to deviate from the background noise of daily enforcement actions

### OFF---Midterms DA

#### The plan causes Dem control of the Senate in ‘22

Zephyr Teachout 20, Associate Professor of Law at Fordham University School of Law, BA from Yale in English, MA in Political Science from Duke University, JD from Duke University, National Director of the Sunlight Foundation, Non-Resident Fellow at the Berkman Center for Internet and Society at Harvard Law School, “A Blueprint for a Trust-Busting Biden Presidency”, The New Republic, 12/18/2020, https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting

Just as important, given the precarious political footing of the incoming Biden administration, is the potent electoral appeal of such an agenda—something that FDR also well understood as he instituted federal income supports as the basis for a Democratic governing coalition that spanned generations. Antitrust is one of the few policy arenas in which aggressive action will win Biden the devoted support from the activist left wing of the Democratic Party, while splitting apart and exposing the always unsustainable economic arguments mounted against crony capitalism by self-styled populists on the right. For starters, this realignment of the Democratic Party’s vision of the American political economy would go a long way to help Democrats win the Senate in 2022—a cycle that boasts an unusual number of vulnerable GOP incumbents, weighed down with the dismal Trump-McConnell legacy on Covid relief.

The opportunity that Biden and the Democrats need to seize here stems from the basic fact that antitrust politics is not like other politics. Traditional left and right loyalties simply do not hold within its orbit. The economic populists of the right hate corporate monopolies as much as working-class progressives and immigrant small-business owners do. It’s not for nothing that Ted Cruz keeps yelling about monopolies—or that Trump, when he first campaigned in 2016, and when he was clearly losing in 2020, turned to attacking corporate monopolies. Trump of course reneged on his trust-busting promises, but he understood the rhetorical power of saying that “big media, big money, and big tech” were all against him. On the front lines of Democratic policymaking, meanwhile, a generation’s worth of neoliberal giveaways to these sectors is finally yielding to a new social democratic consensus. In antitrust politics, Amy Klobuchar, Elizabeth Warren, and Bernie Sanders share their anger with Andrew Yang and Scott Galloway—a beloved tech business guru who rooted for Bloomberg.

Within the electorate proper, the depth of the emerging new antitrust consensus is even more striking. One recent poll by Data for Progress showed that 74 percent of Republicans and 80 percent of Democrats are “very concerned” or “somewhat concerned” about monopolies in the U.S. economy. The same survey showed the number of people who support breaking up big tech companies outnumbers those who oppose it by a two-to-one margin, again with no significant Democratic-Republican divide on the question. Indeed, some surveys now show that Republicans are more likely to see tech companies as having too much political power. A Harvard CAPS/Harris survey found similar numbers in 2019, with nearly 70 percent of voters saying that big tech should be subject to antitrust review, and had used market power to gain enormous profits. Almost two-thirds of Americans also told Data for Progress they wanted actions against big tech.

And while big tech soaks up a great deal of attention as the most recent monopoly player on the block, the same trend holds through most major sectors of the U.S. economy—voters see a plague of bigness, and are increasingly clamoring for the federal government to intervene. A 2020 poll by RuralOrganizing.org found that among rural voters, fighting corporate power is a top priority. Sixty-nine percent of the respondents in the survey believed that “a handful of corporate monopolies now run our entire economy.” Almost half said they’d be more likely to support a political leader combating this pattern of top-down concentration and endorsed “a moratorium on factory farms and corporate food and agriculture monopolies.” Opposition to the 2018 Bayer-Monsanto merger reached as high as 93 percent in one poll, with critics citing very sophisticated economic arguments for their opposition. More than 90 percent of respondents, for example, were concerned that the newly merged ag-and-medical giant would “use its dominance in one product to push sales of other products.”

These aren’t the voices of diehard Democrats with a few Republican crossovers, or vice versa. Within traditional political and policy disputes, you don’t see anything close to such openings for trans-partisan accord. In one representative 2020 Hill-HarrisX survey, for instance, 88 percent of Democrats supported Medicare for All, while 46 percent of Republicans did. Antitrust, by contrast, is foundationally bipartisan, interdenominational, cross-cutting—everything Biden said he wanted to be during his general election campaign and in his victory speech. Unlike other well-flogged economic or culture-war issues, antitrust affords an inviting path out of the bitter cul-de-sacs of prevailing political debate. In an age of trench-warfare–style base mobilizations, the antitrust agenda promises something else: a vision of widening opportunities for ordinary citizens, the basic American civic ethos of giving people a fair shot, and a governing plan that could actually unite Republican and Democratic support.

#### Flipping the Senate prevents rogue appeasement and defense cuts

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But here is where the "storyline" (sorry, "narratives" are children's stories) changes. The year 2022 represents a chance for a sharp turn back to normalcy. Americans are sick of lockdowns, lost jobs, and canceled pipelines, drilling, and fracking. They are tired of elites not caring.

They are tired of leaders with constitutional immunity from defamation hammering their free speech. They are tired of left-leaning governors halting worship but allowing riots. They are tired of restrictions on assembly, travel, self-defense, and independence. To borrow from Barbara Stanwyck (friend of Ronald Reagan) in Christmas in Connecticut, "In short, they are tired."

They should be. That is why 2022 matters. America deserves better and can get it. Here is how. The House and Senate could be flipped in 2022, throwing brakes on a runaway power grab.

To date, we have seen more executive orders than in recent history. Efforts continue to curtail the legislative filibuster, permitting any random outrages on majority vote. We see bills like H.R. 1, hoping to unconstitutionally federalize state elections and blunt free speech.

So, what do we know? Midterm elections favor the party that does not hold the White House. This year, Republicans need 10 seats to regain the House, putting Nancy Pelosi in the past. As Biden's approval lags—from job cuts, lockdowns, higher taxes, expensive oil and gas, re-indulging China and Iran, defense cuts, "open borders," and attacks on rights—momentum builds.

Fear of Biden-Harris flipped 15 Democrat seats to Republican in 2020. As safety, security, health, and jobs roil people, a wholesale shift may be in the offing. If 2020 was "Year of the Republican Woman," with a record 26 GOP women in the House, 2022 could see more. Experts note that these women are conservative—and their voices are rising.

Other issues play into 2022, especially censorship. Already, 4.6 percent of 2020 Biden voters say they would NOT have voted Biden if they had known more about Hunter. Biden won by 4.4 percent.

Even when lockdowns lift, socialist Democrat priorities are on track to kill jobs, raise taxes and costs, and restrict rights. Reopening schools is a parental priority, yet Democrats are slowing openings to satisfy teacher unions—that is, their donors.

On the numbers, Republicans have a real shot at regaining control of both chambers, which means hope for core values, defense, free markets, constitutional rights, a family focus, safe streets, secure borders, less regulation, and a shot at returning to what most call normalcy.

In the US House, 15 pickups are discussed, including Reps. Carolyn Bourdeaux (D-Ga.), Andy Kim (D-N.J.), Cheri Bustos (D-lll.), Ron Kind (D- Wis.), Peter DeFazio (D-Ore.), Filemon Vela, Henry Cuellar, Vicente Gonzalez, Colin Allred (D-Texas), Sharice Davids (D-Kan.), Katie Porter (D- CA), Deborah Ross (D-N.C.), John Garamendi (D-Calif.), Stephanie Murphy (D-Fla.), and Carolyn Maloney (D-NY).

Beyond these, two vacancies exist for the late Ron Wright (TX) and Luke Letlow (LA). Biden aims to pull Reps. Marcia Fudge (D-OH) and Cedric Richmond (D-LA) into his administration, bringing possible gains to 19. Again, history cuts for Republicans.

In the US Senate, 34 of 100 seats are up in 2022. Of these, 14 are held by Democrats and 20 by Republicans. While this suggests a challenge, especially since four Republican incumbents are not seeking re-election, Democrat seats in Georgia and Arizona were won by slim margins, and trends put Democrats on defense, with Biden's woeful agenda to defend.

Another harbinger is redistricting. The GOP will control two-thirds of all House seats and the Democrats a tenth, the rest settled by divided states and state commissions. Likely, 117 congressional districts will be drawn by Republican-controlled states, 47 by Democrats, 132 by division or commission. Seven are "at large," covering an entire state.

Perhaps the biggest factor, beyond 75 million voters roiled by 2020 and Biden's stumbling start, is history. Looking back, in 19 of the last 21 midterm cycles, the president's party lost seats in one or both chambers. In 18 of those 19, the president lost seats in both chambers. Only John F. Kennedy and George W. Bush gained seats in their first midterm, the latter after 9/11.

Specifically, FDR lost 81 House seats and seven Senate in his first midterm, Truman lost 45 House and 20 Senate, Ike 18 House and one Senate, Johnson 47 House and four Senate, and Nixon 12 House (picking up two Senate). Ford lost 48 House and five Senate, Carter 15 House and three Senate, and Reagan 26 House (picking up one Senate). Bush 41 lost eight House and one Senate, Clinton 52 House and eight Senate, Obama 63 House and three Senate, and Trump 40 House (picking up two in Senate). So, you see which way the wind blows.

The party in the White House loses big in most midterms—and in both chambers, slowing the president's agenda. The only first-term gains were in the Senate, all four Republicans: Nixon, Reagan, Bush 43 (who gained in both chambers), and Trump.

The message is this: have hope and focus on 2022. Sudden turnabouts are not just for movies and not just for one side. The funny thing is that the sun also rises. Much that is wrong can be corrected.

#### Nuclear war

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Over the past six months, the world has edged closer to nuclear war than it has been since the Cuban Missile Crisis. The Doomsday Clock is ticking toward midnight. The global power balance has been dramatically reshuffled, and the potential for disastrous miscalculation hasn't been so high in 80 years. The match and fuse for this is instability — an exaggerated sense of U.S. weakness and lack of capability and resolve — that could lead to huge, aggressive military miscalculations and mistakes by our enemies. The Biden administration has set the table for such a catastrophe.

The timing could not be more dangerous. China has changed strategic direction and has been building its nuclear stockpile and delivery systems. China also has continued to develop hypersonic weapons, including stand-off “carrier killers,” space weapons and cyber capabilities to blind opponents’ strategic and conventional systems. Russia has been advertising (mostly for domestic consumption, but nonetheless worrying) its “unstoppable” delivery systems, and has a very capable nuclear stockpile and military. Iran will continue to move forward with building nuclear weapons. Pakistan and India both have significant nuclear capability in an increasingly unstable part of the world. Nuclear-armed North Korea is again assuming a more belligerent posture. Israel has a full nuclear triad (land, air, subs) to respond to existential aggression. The U.K. and France have significant nuclear deterrents. The world is a powder keg.

In Hollywood terms, today’s capacity for nuclear holocaust is thousands of times greater than the era portrayed in the Armageddon films “On the Beach,” “Fail Safe,” or “Dr. Strangelove.” There would not be anything left for “Mad Max.” Climate disasters may be unfolding over the next hundred years. Nuclear disaster is unfolding now. COVID-19 has killed more Americans than the flu typically does. Nuclear war could kill us all. Our leaders must get their priorities straight.

The danger lies in the growing global perception of weakness and incompetence in the Biden administration, combined with claims of the politicized weakening of the FBI, CIA, State Department and Defense Department. This has crystallized in Secretary of State Antony Blinken’s unsure Anchorage meeting with the Chinese, Biden’s wooden Geneva summit with Russia’s Vladimir Putin, the colossal failure of the Afghan withdrawal, which may devolve into a humiliating hostage crisis for America, and the budget- and inflation-based defunding of Defense. In addition, the fully politicized Intelligence and Armed Services committees on Capitol Hill add to the danger. Our enemies may decide that now is the time to move.

It would be a huge miscalculation.

Catastrophic mistakes at this scale often unfold when isolated events light powder kegs, which then inexorably explode into global conflict.

An incident in Sarajevo lit a powder keg of nationalistic, economic and ambitious personality struggles in Europe to unleash World War I. A century later, possible “Sarajevos” are numerous: China’s overly aggressive and self-confident People’s Liberation Army pushing for the use of military force against Taiwan, calculating a weak and ineffective U.S. response, leading to the sinking of a U.S. carrier and a potential march toward nuclear exchange. Major North Korean aggression against South Korea, or an off-course North Korean missile hitting a Japanese city. A successful Iranian (Hamas, Hezbollah) terrorist attack against an Israeli city. The seizure of one or more Pakistani nuclear weapons systems by a Taliban or another terrorist-linked group. Overt aggression or a “misunderstanding” between Pakistan and India. A “Crimson Tide” communications error. Proof that a devastating bioterror attack was intentional. The list of potential doomsday scenarios is endless.

The one powerful factor holding back such miscalculations has been coherent U.S. foreign policy and resolve, combined with pragmatists in Moscow and Beijing. But in the past six months, the world’s confidence in the U.S. leadership has begun to slip. An agonizing hostage crisis would make it even more dangerous. Added to that is the potential that a stubborn and wounded U.S. administration might overreact to try to show its strength. The U.S. has devastating countermeasures for all enemy strategies, and an enemy underestimating that power, combined with a White House trying to prove itself, could be disastrous.

Some will say it started with Donald Trump. That may be true, but it’s irrelevant, and there is some evidence from China, Russia and North Korea that Trump’s loud, unpredictable behavior kept things far more in check than Joe Biden’s overt weakness and blunders.

In addition, there is no room for “disarmament,” “peace movement” or “the squad” nonsense politics. Today, “treaties” are useful but cannot prevent disaster. The return to safe global strategic balance will require America regaining the world’s respect, and our enemies’ fear. That is the only course to create the strategic balance to avert Armageddon. And it requires full bipartisan support — recent patterns of cynical opportunism have no place when facing these threats.

The only way forward is to fully recognize the growing danger and for this administration to immediately replace the inept National Security Council, State Department, Defense and perhaps intelligence teams with truly capable, first-class, experienced leaders. Most of the current team should go. Global security demands an immediate leadership, strategy, organization and process reset.

### OFF---Multilat CP

#### The United States federal government should establish and advocate a framework for contingent international cooperation that substantially increase its prohibitions on anticompetitive business practices by private electricity and gas corporations.

#### The CP’s framework multilateralizes antitrust---explicit reciprocity bypasses generic barriers AND spills over to deep economic integration

Dr. Daniel Francis 21, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate of Laws Degree from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, Former Deputy Director of the Federal Trade Commission, “Choices and Consequences: Internationalizing Competition Policy after TPP”, in Megaregulation Contested: The Global Economic Order After TPP, Ed. Kingsbury, Revised 8/26/2021, p. 40-48

B. Between Contracts and Networks: Frameworks

Another dichotomy that dominates the integration of competition policy pertains to the forms of internationalization, which in the competition policy space have generally been dominated by contract-style treaties on the one hand and by open networks on the other.166 Between these two models lies what seems to be an under-utilized alternative, which I call a “framework for contingent cooperation.”

[FOOTNOTE] 166 This binary view dominates the literature. See, e.g., Edward M. Graham, “Internationalizing” Competition Policy: An Assessment of the Two Main Alternatives, 48 Antitrust Bull. 947, 949 (2003) (“[M]echanisms [for antitrust internationalization] range from bilateral treaties creating arrangements for cooperation between or among national competition law enforcement agencies to informal working arrangements among agencies.”); Eleanor M. Fox, International Antitrust and the Doha Dome, 43 Va. J. Int’l L. 911, 912 (2003) (contrasting “horizontalism” with “globalism”); Anu Piilola, Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation, 39 Stan. J. Int'l L. 207, 247 (2003) (“Rather than drafting overarching multilateral agreements on antitrust laws, cooperation efforts in the immediate future are more likely to succeed in managing existing diversity and promoting voluntary convergence based on approximation of domestically applied standards. Networks of antitrust authorities are well-suited to facilitate this process of cooperation and voluntary convergence.”). [END FOOTNOTE]

A “framework” in the sense that I am using that term is a facilitative arrangement that does not constitute a treaty under international law,167 and which does not carry the charge of international legal obligation, but which involves an exchange of specific and reciprocally contingent commitments by participant jurisdictions to engage in mutually beneficial conduct. Specifically, each party states that it will extend certain benefits to each other party so long as each other does likewise; the parties may also create supplementary mechanisms to monitor and/or adjudicate compliance with these commitments.168

A framework of this kind is not a treaty: it is what Kal Raustiala calls a “pledge,”169 and what Charles Lipson calls an “informal” agreement,170 involving no legal obligation, and it involves no commitment of the parties’ reputation for law-abiding behavior.171 On the other hand, it differs from an open, information-sharing network because it precisely specifies behavioral commitments, and because each of the parties shares an understanding that concrete consequences will promptly follow—exclusion from the benefits provided by others—if its behavior materially deviates from the terms of the commitment.172 A framework is therefore essentially a specific declaration of intention to engage in conduct that benefits others, contingent upon parallel behavior by other participating states, without obligatory status under international law.

This is, in some sense, the direct opposite of the approach typically taken in competition policy chapters in trade agreements. The provisions of competition policy chapters partake of the substance of treaty law, but are generally framed in broad terms rather than specifics, and generally do not reflect a shared understanding that specific consequences will attend breach. By contrast, frameworks do not bind in international law, are framed in specific terms than aspirational generalities, and reflect an understanding that the benefits of cooperation will be withdrawn in the event of violation.

Contingent cooperation thus depends for its effectiveness primarily upon three important dynamics. The first and most important of these is the rationality of strategic cooperation. A familiar mainstream view holds that to a significant extent states behave in international society in ways that rationally serve their interests.173 And when cooperation over a series of interactions is overall in the interests of each member of a group, but when each member faces a rational incentive to defect from the terms of cooperation in individual cases, familiar economic theory teaches that a strategic cooperative equilibrium can be maintained among the parties.174 In contingent cooperation, each party understands that if it defects materially from the terms of the framework, the other participants will withdraw the excludable benefits of cooperation, and this provides the incentive to comply.175

Contingent cooperation can be made more stable by the introduction of certain structures designed to monitor compliance (just as with a cartel among private companies).176 This might among other things involve the creation of a central “facilitator” that is responsible, in a general sense, for obtaining, collecting, and processing information necessary to sustain a cooperative equilibrium.177 Depending on the purpose and scope of the cooperation project, this could include (for example): reviewing the text of laws, regulations, and policy documents for consistency with the terms of the framework; conducting peer-review-style evaluations and certifications; hosting voluntary dispute resolution processes, including mediation and/or arbitration, to determine whether and when the framework has been violated; or even receiving and handling complaints of violations ombudsman-fashion (i.e., receiving the complaint, giving the subject of the complaint an opportunity to respond, and publishing findings and conclusions). A central facilitator could also go beyond a policing function and offer a common forum for certain forms of cooperation and information sharing. The nature of such broader functions, and the extent to which they would be useful or desirable, would depend on the nature and purpose of the cooperation.

The second dynamic that powers contingent cooperation is the normative appeal of the project itself. The point here is not unlike what Gráinne de Búrca calls “mission legitimacy”: the normative force of the underlying purpose of a cooperative project, and specifically the power of that normativity to secure the acceptance and cooperation of those who participate.178 Parties joining projects of contingent cooperation can be expected to be in some sense self-selecting: they join such endeavors because, in part, they are genuinely committed to promoting and achieving the ends that the project represents, and they embrace the project of cooperation as worthwhile.179 It may sound a little naïve to suggest that a project of cooperation may be more likely to “stick” if it has some normative appeal to the participating polities, but legal scholarship has long recognized that states do what they undertake to do more often than strictly rational analysis would predict.180 And I think the proposition that genuine commitment to a goal can contribute to compliance is in truth somewhat less naïve than the converse idea that compliance is just as likely without it.

The third source of a framework’s effectiveness is to be found in the acculturative and socializing effects of interaction in an environment in which values and practices are shared and reinforced as normative, and in which attention is paid to the existence and nature of violations. There is a rich and complex literature on the ways in which states, state actors, and the individuals within them may be “socialized” or “acculturated” by repeated engagement with others through common institutions and shared environments of normativity, eventually contributing to the emergence of obligations with genuine normative force.181 Jutta Brunnée and Stephen Toope have pointed out ways in which the force of legal obligation itself arises from shared communities of practice grounded in social reality and shared understandings, not formal commitments.182 As they put it, “[s]tability may be aided by explicit articulation of a norm in a text, but it is ultimately dependent upon [an] underlying shared understanding and a continuous practice of legality.”183

Participation in an endeavor of contingent cooperation may help to engender the development of such understandings and practices, and these may contribute to the effectiveness of the framework. In the longer term, this may even result in the creation of a legal instrument. But this progression is not necessary for acculturation to exert a reinforcing effect: for, as Anu Bradford accurately notes, there is no reason to think that “the pathway from nonbinding to binding rules” is an inevitable or even a natural one.184

The distinctive value of a framework is that it provides a low-cost way for jurisdictions to explore and participate in possible arrangements of mutual benefit that depend upon shared concrete understandings regarding future behavior, but without bearing the burden of an obligation under international law, without running the reputational risk of having to break a treaty, and without facing the domestic hurdles (or political scrutiny) that a treaty would necessitate.185 Use of such a framework may help to reduce the concerns grounded in political morality that might otherwise attend inter-jurisdictional action in sensitive areas:186 to use a term I have coined elsewhere, as contingent practices from which states could withdraw at any time, frameworks would benefit from considerable resources of “exit legitimacy.”187

Frameworks are not suited to every application. They seem particularly apt for types of international cooperation that generate excludable benefits for other participants and can be reasonably well monitored: in the sphere of competition policy, for example, this would include commitments to provide nondiscriminatory access to procurement markets as well as many forms of antitrust cooperation (including cooperation with one another’s investigations, coordination of enforcement activity, the operation of joint filing systems for merger review and cartel leniency programs, and so on). Certain guarantees of nondiscriminatory treatment by SOEs could also be extended on a selective basis. On the other hand, contingent cooperation is much less suitable for projects that require strong and highly credible guarantees of commitment from the participants (in which case a traditional treaty-contract would seem more appropriate188) or groups of parties still lacking the prerequisite agreement on the terms and ambit of desirable cooperation. Nor is it suitable in the absence of sufficient confidence in the ability or incentive of other parties to deliver on their commitments: in these cases, open dialogue and information exchange through a network would seem preferable. Nor, obviously, is it a good fit for projects in which the benefits of cooperation are non-excludable.189 To pick an obvious example, contingent cooperation would not recommend itself as a natural choice for an international project to introduce SOE discipline: the benefits are non-excludable (there is no obvious way to withdraw them selectively in the event of defection) and compliance is very difficult to monitor, so the use of a framework is unlikely to make much of a contribution.190

#### Only harmonized transnational antitrust solves the case---compliance and competition require streamlining the regulatory drag of conflicting legal systems, but the plan’s ad hoc unilateralism proliferates it

Camilla Jain Holtse 20, Associate General Counsel in Maersk Line, LL.M in European Law from King’s College, Master’s Degree from University of Aarhus, “Navigating Through Uncertain Waters—The Importance of Legal Certainty, Predictability, and Transparency in Future Antitrust Enforcement”, Journal of European Competition Law & Practice, Volume 11, Issue 8, October 2020, p. 446-447

I. Global developments suggest increased need for legal certainty in rulemaking and enforcement

Companies today operate in an increasingly globalised world, interconnected via digital platforms and ecosystems. The technological revolution is accelerating at an ever-increasing speed. It promises to fundamentally alter both the competitive landscape and the tools by which competition is regulated. Against this backdrop, the world is facing substantial environmental challenges with mounting pressure on businesses to change the way they operate, including an increasing need for firms to collaborate to achieve social goals and increased efficiency that no one firm could achieve independently.

While some progress has been made towards a unified view of competition law, companies are also facing rising geopolitical tensions that have led to protectionist measures and the pursuit of industrial policy objectives under the guise of competition law enforcement. Concepts including national security, full employment, and ‘fair’ or ‘level’ pricing frequently introduce domestic protection concerns into traditional economic tests. With the proliferation of competition regimes, now well over 100, the potential for regulatory drag on the global markets increases exponentially. Having spent the last two decades as competition counsel, I can say with certainty that the complexity of the legal landscape and uncertainty and unpredictability as to compliance with competition law regulations have increased dramatically in recent years both at a global and EU level. Companies are struggling to achieve legal competition law compliance despite consistent efforts including scaling up their compliance departments.

As our markets continue to evolve in the face of technology and sustainability and other social goals, it is now more important than ever for the European Commission (‘the Commission’) to ensure legal certainty, both in rulemaking and in enforcement. The costs associated with uncertainty should not be underestimated, particularly as the Commission considers new enforcement tools designed to address competition structures and practices that may fall outside of traditional economic analyses. Not only is transparency and predictability vital for the proper functioning of the European Economic Area, but it would also send a much-needed signal to the rest of the world. Conversely, if, in any new enforcement system transparency and predictability do not prevail, the Commission’s efforts would likely serve to indirectly legitimise non-transparent and unpredictable protectionist systems in other countries, not founded on the rule of law and due process.

Even if one of the key roles of the Commission is to enforce competition law, it is important to keep in mind that competition policy and enforcement are tools of economic policy. Implemented well, competition policy can stimulate economic growth and competitiveness but, if not, it can be a significant regulatory brake on investment, economic development, and sustainability advances.

#### Normative convergence through antitrust harmonization prevents extinction from resource depletion, human rights abuse, and war

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A. The international political environment

At the root of international political theory is the fundamental maxim that relations between sovereign nations in the absence of mitigating factors is characterized by intense competition, mutual distrust, the inability to make credible commitments, and war.20

[FOOTNOTE] 20 Political scientists characterize the international system as “anarchic.” In the absence of world government (or other mitigating force), competition between states is largely unregulated by external laws or enforcement. The world is characterized by mistrust, the inability to contract, and the ultimate reliance on a state’s own devices. See THOMAS HOBBES, LEVIATHAN 80 (Edwin Curley ed., 1994) (in the state of nature “the condition of man . . . is a condition of war of everyone against everyone”). In fuller terms:

There is no authoritative allocator of resources: we cannot talk about a ‘world society’ making decisions about economic outcomes. No consistent and enforceable set of comprehensive rules exists. If actors are to improve their welfare through coordinating their policies, they must do so through bargaining rather than by invoking central direction. In world politics, uncertainty is rife, making agreements is difficult, and no secure barriers prevent military and security questions from impinging on economic affairs.

ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 18 (1984). Efficiency-enhancing gains from trade are difficult to appropriate because trade itself (and any other form of exchange or agreement between nations) is characterized by the absence of credible commitments to future behavior. And underlying the problem is the ever-present threat of the use of force. See, e.g., Kenneth N. Waltz, Anarchic Orders and Balances of Power, in NEOREALISM AND ITS CRITICS 98, 98 (Robert O. Keohane ed. 1986) (“The state among states . . . conducts its affairs in the brooding shadow of violence . . . . Among states, the state of nature is a state of war.”). Although this dire characterization of the international environment is, of course, a stylized approximation of the real world—there are always overlying constraints on sovereign behavior in the form of norms, reputational effects, and customary international law, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977)—it is a useful and widely accepted heuristic for crafting a theory of international politics. [END FOOTNOTE]

As one commentator notes, “Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests.”21 And states are “unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination.”22 As a result, states operating on the international stage are unable to judge the sincerity of each others’ stated intentions when those intentions are contrary to this manifest interest. Because of self-help rules, states are forced in the main to assess their own security environment by assessing the capabilities of competitors, downplaying their motives. Given that the nature of the competition can implicate the fundamental survival of one (or more) of the actors, actions taken by one state to improve its own security must necessarily decrease the security of its competitor; in the absence of mitigation, security is a zero-sum game.23 In a world where cooperation is exceedingly difficult (because there is no authority to enforce agreements, nor any basis for assessing the reliability of another state’s commitments), international relations are characterized by a continuous race to the bottom, a mindless arms race rather than the opportunity to realize gains from cooperation.

It is obvious that not all relations between states are characterized by the security dilemma, however. Canada, for example, shares an unprotected border with the most powerful nation in the world without degenerating into a destructive and costly arms race. By some mechanism, then, Canada must be able reliably to judge U.S. intentions, even absent the apparent ability by the United States credibly to bind itself to a nonaggressive policy toward Canada. The key to mitigating the pressures of the security dilemma is the ability to distinguish a state with aggressive and expansionist tendencies from a benign one.24 States can be distinguished by their fundamental type. They can be classified as “revisionist,” that is, they seek to subvert the dominant order, or they can be classified as “status quo,” that is, they seek to support it.25 But, as noted, a state’s ability to judge another’s intentions (as opposed simply to counting its armaments) is extremely tenuous and comes at great cost. In fact, political science offers few well-understood mechanisms for judging a state’s propensity for aggression.

At the same time, hegemonic states have an abiding interest in spreading and maintaining their dominant worldview.26 Not only is it imperative that dominant states receive credible signals about other states’ intentions, but it is also important that dominant states attempt to inculcate their norms within other states that, over time, might mount credible challenges to the dominant states’ security.27 The spread of hegemony through internalization of norms occurs for three reasons. First, states with similar institutions and sympathetic domestic norms are simply better and more reliable trading partners, and it is in the hegemon’s economic interest to instill its norms.28 Second, states with defensive military postures and that adhere to the status quo present significantly less security risk to dominant states.29 And finally, the hegemon has a normative interest in the spread of its culture, its worldview, and its norms.30 This conception of the playing field upon which states interact leads to the conclusion that, entirely apart from the immediate and substantial economic benefits to a state from well-ordered interactions with other states, hegemonic states also have a national security and a normative interest in the information to be gleaned from the fact that these interactions are, in fact, well ordered.

In the absence of centralized enforcement, privately held and nonverifiable information as to a state’s fundamental type is the critical problem in assessing motives.31

[FOOTNOTE] 31 See KEOHANE, supra note 20, at 31 (“Order in world politics is typically created by a single dominant power [or hegemon].”). States are consequently classified as one of two types, “revisionist” or “status quo,” based on their acceptance and adherence to the political norms, institutions, and rules created by the hegemon. Status quo states are those that try to improve their condition from within the framework of the accepted world order. Revisionist states, by contrast, seek to gain position both by working outside that order and by working to subvert the hegemonic order itself. For instance, the existing world order is generally accepted to be that created by the United States after World War II. It comprises a liberal international economic order, the use of multilateral institutions (such as the United Nations and the WTO), negotiation for dispute resolution rather than the threat of violence, and the promotion of liberal democratic moral norms. See, e.g., Schweller, supra note 24, at 85; HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 32 (1948). Trade disputes between status quo states (like tariff disputes between the United States and Europe) are resolved through peaceful negotiation rather than the threat of war. Although status quo states do not entirely eschew the use of violence, they typically seek international authorization and legitimization before employing military force, as in the multilateral operations in Iraq, Kosovo, and Afghanistan. Revisionist states, on the other hand, such as North Korea, Iran, and China, will more readily use military force as a bargaining tool and are more reluctant fully to participate in transparent military, economic, and political negotiations. [END FOOTNOTE]

States wishing to escape the pressures of the security dilemma and engage in cooperative behavior need a means of conveying their preferences to others in a credible manner. There are, in general, two means by which such information can be transmitted: states can either bind themselves in such a way that they are unable to deviate from a stated behavior (known as “hands tying” in Schelling),32 or they can signal their intention to engage in a specified course of action by incurring costs sufficiently large that they discourage the misrepresentation of preference.33

International institutions can play a crucial role in facilitating the transmission of this information.34 In particular, international agreements over the terms of trade, even without binding supranational enforcement authority, provide a means for states to bind themselves to a desirable course of behavior in the short run and, more importantly, to signal their acquiescence to the ruling world order in the long run. Because compliance with treaty obligations often requires signatories to alter their domestic laws to reflect the terms of the treaty, the costs of compliance can be substantial. In the short run, to the extent that states enforce their domestic laws they can bind themselves to a certain course of behavior. In the long run, a state’s willingness to incur the substantial costs of changing its laws, both the transaction costs inherent in changing domestic laws and the even more substantial costs in domestic political capital, signals a willingness to engage other states on the terms set by the reigning international power. Moreover, there may be unintended effects, as changes in domestic laws result in a new set of domestic incentives to which actors respond, and new windows of opportunity may open up through which policy entrepreneurs can push for the internalization of new norms.35 Competition laws in particular are susceptible to this mode of analysis.

Most nations have adopted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices . . . . The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.36

The surest way to remove the threat of war, increase wealth, conserve resources, and protect human rights is through fundamental agreement between all states (or at least effective agreement between verifiably status quo states) under a normative umbrella that promotes all of those values. This normative convergence can be effected through the stepwise internalization of the sorts of economic and democratic values inherent in international economic liberalization, perhaps most notably through the adoption of principled international antitrust standards.37

### OFF---States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should substantially increase its prohibitions on anticompetitive business practices by private electricity and gas corporations

## DER Advantage

### Warming Defense---1NC

#### Even extreme warming won’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 110-112

But the purpose of this chapter is finding and assessing threats that pose a direct existential risk to humanity. Even at such extreme levels of warming, it is difficult to see exactly how climate change could do so. Major effects of climate change include reduced agricultural yields, sea level rises, water scarcity, increased tropical diseases, ocean acidification and the collapse of the Gulf Stream. While extremely important when assessing the overall risks of climate change, none of these threaten extinction or irrevocable collapse.

Crops are very sensitive to reductions in temperature (due to frosts), but less sensitive to increases. By all appearances we would still have food to support civilization.85 Even if sea levels rose hundreds of meters (over centuries), most of the Earth’s land area would remain. Similarly, while some areas might conceivably become uninhabitable due to water scarcity, other areas will have increased rainfall. More areas may become susceptible to tropical diseases, but we need only look to the tropics to see civilization flourish despite this. The main effect of a collapse of the system of Atlantic Ocean currents that includes the Gulf Stream is a 2°C cooling of Europe—something that poses no permanent threat to global civilization.

From an existential risk perspective, a more serious concern is that the high temperatures (and the rapidity of their change) might cause a large loss of biodiversity and subsequent ecosystem collapse. While the pathway is not entirely clear, a large enough collapse of ecosystems across the globe could perhaps threaten human extinction. The idea that climate change could cause widespread extinctions has some good theoretical support.86 Yet the evidence is mixed. For when we look at many of the past cases of extremely high global temperatures or extremely rapid warming we don’t see a corresponding loss of biodiversity.87

[FOOTNOTE]

We don’t see such biodiversity loss in the 12°C warmer climate of the early Eocene, nor the rapid global change of the PETM, nor in rapid regional changes of climate. Willis et al. (2010) state: “We argue that although the underlying mechanisms responsible for these past changes in climate were very different (i.e. natural processes rather than anthropogenic), the rates and magnitude of climate change are similar to those predicted for the future and therefore potentially relevant to understanding future biotic response. What emerges from these past records is evidence for rapid community turnover, migrations, development of novel ecosystems and thresholds from one stable ecosystem state to another, but there is very little evidence for broad-scale extinctions due to a warming world.” There are similar conclusions in Botkin et al. (2007), Dawson et al. (2011), Hof et al. (2011) and Willis & MacDonald (2011). The best evidence of warming causing extinction may be from the end-Permian mass extinction, which may have been associated with large-scale warming (see note 91 to this chapter).

[END FOOTNOTE]

So the most important known effect of climate change from the perspective of direct existential risk is probably the most obvious: heat stress. We need an environment cooler than our body temperature to be able to rid ourselves of waste heat and stay alive. More precisely, we need to be able to lose heat by sweating, which depends on the humidity as well as the temperature.

A landmark paper by Steven Sherwood and Matthew Huber showed that with sufficient warming there would be parts of the world whose temperature and humidity combine to exceed the level where humans could survive without air conditioning.88 With 12°C of warming, a very large land area—where more than half of all people currently live and where much of our food is grown—would exceed this level at some point during a typical year. Sherwood and Huber suggest that such areas would be uninhabitable. This may not quite be true (particularly if air conditioning is possible during the hottest months), but their habitability is at least in question.

However, substantial regions would also remain below this threshold. Even with an extreme 20°C of warming there would be many coastal areas (and some elevated regions) that would have no days above the temperature/humidity threshold.89 So there would remain large areas in which humanity and civilization could continue. A world with 20°C of warming would be an unparalleled human and environmental tragedy, forcing mass migration and perhaps starvation too. This is reason enough to do our utmost to prevent anything like that from ever happening. However, our present task is identifying existential risks to humanity and it is hard to see how any realistic level of heat stress could pose such a risk. So the runaway and moist greenhouse effects remain the only known mechanisms through which climate change could directly cause our extinction or irrevocable collapse.

This doesn’t rule out unknown mechanisms. We are considering large changes to the Earth that may even be unprecedented in size or speed. It wouldn’t be astonishing if that directly led to our permanent ruin. The best argument against such unknown mechanisms is probably that the PETM did not lead to a mass extinction, despite temperatures rapidly rising about 5°C, to reach a level 14°C above pre-industrial temperatures.90 But this is tempered by the imprecision of paleoclimate data, the sparsity of the fossil record, the smaller size of mammals at the time (making them more heat-tolerant), and a reluctance to rely on a single example. Most importantly, anthropogenic warming could be over a hundred times faster than warming during the PETM, and rapid warming has been suggested as a contributing factor in the end-Permian mass extinction, in which 96 percent of species went extinct.91 In the end, we can say little more than that direct existential risk from climate change appears very small, but cannot yet be ruled out.

### Climate Wars Defense---1NC

#### Warming won’t cause global conflict

Dr. Ian Cook 20, Senior Lecturer in Global Politics and Policy at Murdoch University, PhD in Political Theory from the University of Queensland, The Politics of the Final Hundred Years of Humanity (2030-2130), Springer Singapore, Kindle Edition

Yet another problem with the assumption that catastrophic human-caused environment change simply causes civil war, as Salehyan and Hendrix noted, is that violence at the scale of a civil war requires significant resources. In their view, civil wars are more likely to occur in times of relative abundance. While “riots and protests, may emerge from conditions of scarcity,” they argue, “sustaining a militant organization requires considerable planning and resources” (Salehyan and Hendrix 2014, p. 240). Reasons to fight might exist. For this to turn into civil war, however, people “also need the capability to do so, and environmental scarcity may limit such capability, thus undermining the resource base necessary for mobilizing armed violence” (Salehyan and Hendrix 2014, p. 240).

A related debate concerns what Adams and colleagues have claimed to be a sampling bias in studies of the connection between environment change and armed conflict (Adams et al. 2018). Levy accepts the existence of some sampling bias but rejects the view that this bias results in an overstatement of the connection between environment change and conflict. “Knowing that case selection is biased is useful, but not a reason to lower our estimate of the climate’s impact on conflict” (Levy 2018, p. 441).

In responding to Levy’s criticism, authors claiming bias wrote that they did not “deny a link between climate change and conflict in principal. Indeed, some of our own recent work indicates that such a link exists, but it is highly conditional.” Their problem with the research being done in this field was that “sampling biases… increase the risk that such links are overstated, that crucial world regions do not receive sufficient attention and that little knowledge is produced on peaceful adaptation” (Ide et al. 2018, p. 442– 3).

After reviewing the literature on the relationship between climate change and violent conflict, Sakaguchi, Varughese and Auld concluded that the “current literature offers mixed evidence. This makes it difficult to render a definitive statement about the climate-conflict relationship” (2017, p. 640). While they pointed out that just over 60% of the studies they reviewed found “that climate change variables are positively correlated with higher levels of violent conflict,” Sakaguchi, Varughese and Auld also argued that “many subtleties and countertrends underlie this overall pattern” (2017, p. 640). Thus, even though “a majority of reviewed studies envision climate variables influencing conflict through a causal pathway, … these pathways are often theoretically underspecified and have only weak empirical support” (Sakaguchi et al. 2017, p. 641).

As Koubi put it, the research that has been done on this question “provides some evidence that climatic changes could act as a ‘threat multiplier’ in several of the world’s regions. In particular, the extant literature shows that climatic conditions can lead to conflict in agricultural-dependent regions and in combination and interaction with other socioeconomic and political factors” (Koubi 2018, p. 200). After having claimed that, to their knowledge, “no one in the field of climate research has suggested that climate change could be the ‘sole cause’ of war, violence, unrest or migration”, Butler and Kefford recommended “viewing climate change instead as a risk multiplier, influencer or co-factor … In this way of thinking, environmental and ecological factors interact with social determinants, including those that are economic, demographic and political, to produce phenomena such as migration, conflict and famine” (2018, p. 587).

There can be no doubt that conflict will increase during the final hundred years of humanity. But it will result from a complex interaction of socio-political factors and a catastrophically changed environment. It may not go beyond conflict between different groups or between the government and opposition groups and become civil war. This depends on the capacity of those opposition groups. In many cases, they will lack the resources to conduct a civil war. The Syrian war is itself a good illustration of the problem, as the groups opposed to the Syrian government have only been able to conduct the extended civil war in which they have been engaged with the support of outside groups. (Mazzetti and Apuzzo 2016).

The question of whether civil war will break out is something that can only be answered “region by region” and the answer must be based on “knowledge of pre-conflict geographies, such as drivers of resilience and vulnerability” (Farbotko 2018). Sometimes governments may abandon territory and opposition groups can seize control of that land. But it is likely to be land that is suffering worst from the effects of catastrophic human-caused environment change and will not be habitable. To replace an existing government or take control of a region within a country through civil war is no simple thing. It may happen. But it will not happen on the scale that some people have predicted. And it will not happen just because of the weather.

## Prices Advantage

### Turn---1NC

#### Growth is unsustainable AND innovation can’t solve---shifting away from productivism is key to avoid extinction.

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As the previous chapters have shown, economic growth is regarded as a prime policy aim by policy makers and economists because it is thought to be essential for reducing poverty and generating rising living standards and stable levels of employment (Ben-Ami 2010: 19–20). More generally, support for economic growth is usually intertwined with advocating social progress based on scientific rationality and reason and hence with an optimistic view of humans’ ingenuity to solve problems (ibid.: 17, 20, Chap. 5). Growth criticism thus tends to be portrayed as anti-progress and inherently conservative (ibid.: Chap. 8). While it is important to acknowledge and discuss this view, it needs to be emphasised that growth criticism is formulated with long-term human welfare in mind which advocates alternative types of social progress (Barry 1998). This chapter first outlines ecological and social strands of growth critiques and then introduces relevant concepts of and positions within the postgrowth debate. Ecological Critiques of G rowth Generally speaking, two types of growth criticism can be distinguished: the first focuses on limitations of GDP as a measure of economic performance; the second goes beyond this by highlighting the inappropriateness of growth as the ultimate goal of economic activity and its negative implications for environment and society. Since GDP measures the monetary value of all final goods and services in an economy, it excludes the environmental costs generated by production. For instance, as long as there is no cost associated with emitting greenhouse gases , the cost for the environmental and social damage following from this is not reflected in GDP figures. Worse even, GDP increases as a consequence of some types of environmental damage: if deforestation and timber trade increase or if natural disasters or industrial accidents require expenditures for clean-up and reconstruction, GDP figures will rise (Douthwaite 1999: 18; Leipert 1986). Several critics of GDP as a measure of progress have proposed alternative indicators of welfare such as the Genuine Progress Indicator, Green GDPs or other approaches which factor in environmental costs (see Chap. 5 for more details), but they do not necessarily object to economic growth being the primary goal of economic activity (van den Bergh 2011). In contrast, the idea of ecological limits to growth goes beyond the critique of GDP as a measure of economic performance. Instead, it maintains that economic growth should not, and probably cannot, be the main goal of economic activity because it requires increasing resource inputs, some of which are non-renewable, and generates wastes, including greenhouse gases, that disturb various ecosystems, severely threatening human and planetary functioning in the short and long term. 4 CRITIQUES OF GROWTH 41 Resources are regarded as non-renewable if they cannot be naturally replaced at the rate of consumption (Daly and Farley 2011: 75–76). Examples include fossil fuels, earth minerals and metals, and some nuclear materials like uranium (Daly and Farley 2011: 77; Meadows et al. 2004: 87–107). Based on work by Georgescu-Roegen (1971), many ecological economists also assume that non-renewable resources cannot be fully recycled because they become degraded in the process of economic activity. Historically speaking, economic growth is a fairly recent phenomenon (Fig. 2.1). Since its onset in the late seventeenth century in Europe and mid-eighteenth century in the US (Gordon 2012), it has gone hand in hand with an exponentially increasing use of non-renewable resources such as fossil fuels (Fig. 4.1). While we are not yet close to running out of non-renewable resources, over time they will become more difficult and hence more expensive to recover. This idea is captured by the concept of “energy returned on energy invested” (EROEI). In relation to oil for instance, it has been shown that the easily recoverable fields have been targeted first and that therefore greater energy (and hence financial) inputs will be required to produce more oil. Over time, the ratio of energy returned on energy invested will decrease, reducing the financial incentive to invest further in the recovery of these non-renewable resources (Dale et al. 2011; Brandt et al. 2015: 2). Relevant to this is also the debate about peak oil—a concept coined by Shell Oil geologist Marion King Hubbert in the 1950s—the point at which the rate of global conventional oil production reaches its maximum which is expected to take place roughly once half of global oil reserves have been produced. There is still controversy about whether global peak oil will occur, and if so when, as it is difficult to predict, or get reliable data on, the rate at which alternative types of energy will replace oil (if this was to happen fast enough, peak oil might not be reached, if it has not yet occurred), the size of remaining oil reserves and the future efficiency of oil extraction technologies (Chapman 2014). However, it is plausible to assume that oil prices will rise in the long term if conventional oil availability diminishes, while global demand for oil increases with continuing economic and population growth. Since economic growth in the second half of the twentieth century required increasing inputs of conventional oil, higher oil prices would have a negative impact on growth unless alternative technologies are developed that can generate equivalent liquid fuels at lower prices (Murphy and Hall 2011). Some scholars have criticised the focus on physical/energy resource limitations as initially highlighted in the “limits to growth” debate (Meadows et al. 1972) and state that instead catastrophic climate change is likely to be a more serious and immanent threat to humanity (Schwartzman 2012). The main arguments here are first that much uncertainty remains about the potential and timing of peak oil, future availability of other fossil fuels and development of alternative low energy resources, while the impacts of climate change are already immanent and may accelerate within the very near future. Second, even if peaks in fossil fuel production occurred in the near future, remaining resources could still be exploited to their maximum. However, this would be devastating from a climate change perspective as, according to the latest IPCC scenarios, greenhouse gas emissions need to turn net-zero by the second half of this century for there to be a good chance to limit global warming to 2° Celsius (and ideally, below that) (Anderson and Peters 2016). It is telling that some of the more recent debates about ecological limits to growth put much more emphasis on environmental impacts of growth, rather than on peak oil or other resource limitations (Dietz and O’Neill 2013). Differently put, limits of sinks, especially to absorb greenhouse gases, and to the regeneration of vital ecosystems are now attracting greater concern, compared to limits of resources. Growing economic production generates increasing pressures on the environment due to pollution of air, water and soil, the destruction of natural habitats and landscapes, for instance, through deforestation and the extraction of natural resources. Therefore, growth often also threatens the regeneration of renewable resources such as healthy soil, freshwater and forests, as well as the functioning of vital ecosystems and ecosystems services such as the purification of air and water, water absorption and storage and the related mitigation of droughts and floods, decomposition and detoxification and absorption of wastes, pollination and pest control (Meadows et al. 2004: 83–84). Recent research on planetary boundaries has started to identify thresholds of environmental pollution or disturbance of a range of ecosystems services beyond which the functioning of human life on earth will be put at risk. Rockström and colleagues have identified nine such “planetary boundaries”—“climate change; rate of biodiversity loss (terrestrial and marine); interference with the nitrogen and phosphorus cycles; stratospheric ozone depletion; ocean acidification; global freshwater use; change in land use; chemical pollution; and atmospheric aerosol loading” (Rockström et al. 2009: 472). They also present evidence according to which three of these boundaries—climate change, rate of biodiversity loss and the nitrogen cycle—have already reached their limits (Rockström et al. 2009). Of those three thresholds, climate change has received most attention. The 5th Assessment Report of the Intergovernmental Panel on Climate Change (IPCC 2014) concluded that global temperatures have risen by an average of 0.85° since the 1880s (while local temperature increases can be much higher than that) and that the concentration of greenhouse gases in the atmosphere has reached unprecedented levels over the last 800,000 years—that of CO2 has now reached 405.6 parts per million (NASA, January 2017, Fig. 4.2), far surpassing the level of 350 ppm which is considered safe by many scientists (Rockström et al. 2009). The IPCC report also maintained that humans very likely contributed to at least 50% of global warming that occurred since the 1950s (IPCC 2014: 5). A range of climate change impacts can already be observed, including a 26% increase of ocean acidification since industrialisation; shrinking of glaciers, Greenland and Antarctic ice sheets, as well as arctic sea ice; and the rise of sea levels of 19 cm since 1901. This is projected to increase by an additional 82 cm by the end of this century at current levels of greenhouse gas emissions (ibid.: 13). Climate change impacts are already felt with increased occurrences of heat waves, heavy rain fall, increased risk of flooding and impacts on food and water security in a number of regions around the world. It is projected that with a rise of 2° of global temperatures, 280 million people worldwide (with greatest numbers in China, India and Bangladesh) would be affected by sea level rise, escalating to a projected 627 million people under a 4° scenario (Strauss et al. 2015: 10). At the 21st Conference of Parties of the United Nations Framework Convention on Climate Change in Paris in 2015, representatives agreed that action should be taken to limit rise of global temperatures to 2° and Fig. 4.2 Concentration of CO2 in the atmosphere. Source NASA, available from https://climate.nasa.gov/vital-signs/carbon-dioxide/. The CO2 levels have been reconstructed from measures of trapped air in polar cap ice cores 4 CRITIQUES OF GROWTH 45 to “pursue efforts” to limit it to 1.5°. This has been adopted by 196 countries, but immense efforts and very radical reductions of greenhouse gas emissions will be required to comply with the agreement. Even if net greenhouse gas emissions were reduced to zero, surface temperatures would remain constant at their increased levels for hundreds of years to come and climate change impacts such as ocean acidification and rising sea levels would continue for hundreds or even thousands of years once global temperatures are stabilised; moreover, a range of climate change impacts are deemed irreversible (IPCC 2014: 16). One controversial question in the debate about economic growth and environmental impacts has been whether growth can be decoupled from the damage it causes. Important to this debate is the theory of the Environmental Kuznets Curve which applies Simon Kuznets’ hypothesised inverted u-shaped relationship between economic development and income inequality to the relationship between economic development and environmental degradation. According to this theory, environmental degradation is low in the early phases of economic development, then rises with increasing development up to a certain point, beyond which it falls again with advancing development because more resources can be invested to render production and consumption more efficient and less polluting. Therefore, this theory suggests that it is possible to decouple economic growth (measured in GDP) from its environmental implications. The counter-argument to this theory is that it does not take into account the difference between relative and absolute decoupling. Relative decoupling refers to the environmental impacts generated over time per unit of economic output, for instance CO2 emissions per million of US$. In contrast, absolute decoupling would examine aggregate environmental impact, compared to total economic output over time. Here it has been argued that while relative decoupling may be possible as the environmental impact per unit of economic output decreases over time due to efficiency gains, absolute decoupling is much harder to achieve while growth continues. Indeed, there is no evidence for absolute decoupling as total environmental impacts, for instance total global CO2 emissions, are still rising with rising global GDP (Jackson 2011: 67–86). This is partly due to rebound effects which we discussed in Chap. 2: rising consumption because the increase in efficiency has made it cheaper to produce/consume (Jackson 2011: 67–86; see also Czech 2013: Chap. 8 criticising “green growth”). Furthermore, if decoupling is examined at the country level, one would need to take consumptionbased resource use/emissions into account rather than productionbased impacts. Substantial environmental impacts related to everything that is consumed in rich countries occur in developing countries from which goods are imported. A focus on production-based environmental impacts would hence be misleading as it ignores the [and] environmental impacts that relate to a country’s living standards and that occur outside of that country. Social Critiques of Growth Economic growth has not only been criticised from an ecological perspective, but also from an individual and social wellbeing point of view. Here, we can again distinguish a critique of GDP as a measure of wellbeing and a wider critique which highlights potential negative consequences of economic growth for human wellbeing. Several scholars have argued that GDP is an inadequate measure of prosperity or wellbeing because it only includes market transactions and ignores activities of the informal economy in households and the volunteering sector which make an important contribution to individual and social wellbeing (Stiglitz et al. 2011; van den Bergh 2009; Jackson 2011). It also excludes the contribution of certain government services that are provided for free (Douthwaite 1999: 14; Stiglitz et al. 2011: 23), and the roles of capital stocks and of leisure in generating welfare (Costanza et al. 2015: 137). Furthermore, all market transactions make a positive contribution to GDP, regardless of whether expenditures increase or decrease welfare. Similar to the way in which environmental costs of growth are either excluded from GDP or even increase it, expenditures that arise from road accidents, divorces, crime, etc., contribute positively to GDP (ibid.: 133). The focus on market transactions also means that an increasing marketisation (or “commodification”) of an economy will be reflected in a rise of GDP, which may or may not be related to actual “welfare” outcomes (Stiglitz et al. 2011: 49). It also implies that GDP is an insufficient cross-national comparator for the quality of life, as it does not take into account the different sizes of the informal economy across countries (ibid.: 15). Furthermore, GDP does not indicate how income and consumption are distributed in society (Stiglitz et al. 2011: 44). This implies that a rise of GDP can be consistent with a rise of inequality of income and wealth. 4 CRITIQUES OF GROWTH 47 However, if greater inequality has negative impacts on social wellbeing (Wilkinson and Pickett 2009), this would be masked by rising GDP figures (Douthwaite 1999: 17). An even more fundamental criticism of GDP as a measure of wellbeing is that it focuses on the accumulation of money or wealth and thus on the material aspects of wellbeing. Such a narrow conception of the goals of economic activity and wellbeing has been criticised early on in the history of economic thought, e.g. by Aristotle’s distinction between oikonomia and chrematistics. The latter refers to the accumulation of wealth and was regarded by him as an “unnatural” activity which did not contribute to the generation of use value and wellbeing (Cruz et al. 2009: 2021). The argument that wider conceptions of wellbeing and prosperity are required has also become relevant for contemporary critiques of economic growth (Jackson 2011; Paech 2013; Schneider et al. 2010) as we will discuss this in more detail in Chap. 5. Arguments About the Psychological and S ocial Costs of G rowth The broader social critique of economic growth highlights potential “social limits” to or even negative consequences of economic growth for individual and collective wellbeing. The term “social limits to growth” was coined by Fred Hirsch (1976). He argued that the benefits of growth are initially exclusive to small elites and that these benefits disappear as soon as they spread more widely through mass consumption. For instance, only few people can own a Rembrandt painting; holiday destinations are more enjoyable when they are not overrun by hordes of other tourists; there are only few leadership positions, etc. From this perspective, there are “social limits” to the extent to which the benefits of growth can be socially expanded and equally shared. Other scholars have expressed concern about individual and collective social costs of economic growth. First, there is the argument that the need to keep up with ever-rising living standards and new consumer habits, “keeping up with the Joneses”—a lot of which is seen to be driven by advertisement and social pressure rather than real needs, for instance fashionable clothing or gadgets—can generate stress and increase the occurrence of mental disorders (James 2007; Offer 2006; Kasser 2002). 48 M. BÜCHS AND M. KOCH Second, it has been argued that economic growth can imply wider social costs. For instance, with its emphasis on individual gain, market relations and competition, and the need that it generates for spatial mobility (e.g. for successful participation in education and labour markets), it is feared to undermine moral and social capital and put a strain on family and community relations, potentially even leading to increasing divorce and crime rates (Douthwaite 1999; Daly and Cobb 1989: 50–51; Hirsch 1976). Social costs of technological development and industrialisation also include industrial workplace and traffic accidents and time lost in traffic jams and for commuting (Czech 2013: Chap. 2; Stiglitz et al. 2011: 24). Technological innovation which arises from growth can also act as a factor for job losses and increasing job insecurity (Douthwaite 1999), especially if growth rates are not sufficiently high to compensate gains in productivity. It is often assumed that growth will benefit the many because of assumed “trickle-down” effects which promise to improve the lot of the poor simply because the “cake” of available wealth is growing. While progress has been made in reducing extreme global poverty and inequality (Sala-i-Martin 2006; Rougoor and van Marrewijk 2015), the number of people living in poverty across the globe remains high.1 At the same time, income inequality in a range of countries has been rising and the situation of many of the people living in extreme poverty is not improving which means the fruits of economic growth remain to be unequally distributed (Collier 2007; Piketty and Saez 2014). The post-development debate goes even further than that in arguing that not only may growth not have reached the global poor to the extent that had been predicted by neoclassical economists, but that it can also have negative impacts on indigenous communities in developing countries, especially those who rely on local natural resources for their livelihoods which often suffer exploitation, pollution or even destruction through the inclusion of local economies into global value chains (Rahnema and Bawtree 1997). While the distinction between critiques of growth that focus on its problematic ecological and social consequences is useful for analytic purposes, the two dimensions are of course closely linked. Ecological consequences of growth have the potential to severely impact or even undermine human wellbeing. Local livelihoods are already affected by current climate change impacts such as ocean acidification and its impact on marine organisms, draughts, floods and severe weather events, the 4 CRITIQUES OF GROWTH 49 frequency of which has been rising. Accordingly, it is estimated that crop and fish yields are already diminishing in several regions (Stern 2015; IPCC 2014) and that millions of people are already being displaced and forced to migrate due to climate change and other environmental impacts (Black et al. 2011). While the overall long-term impacts of climate change and the surpassing of other planetary boundaries are difficult to predict, they clearly have the potential to substantially undermine human wellbeing. Since greenhouse gas emissions are driven by economic growth, the development of alternative economic models that do not depend on growth is urgent since continued growth “threatens to alter the ability of the Earth to support life” (Daly and Farley 2011: 12).

#### Crisis now solves the transition to a sustainable society

Loorbach et al 16, DRIFT, Erasmus University, Rotterdam, Derk, with Flor Avelino, DRIFT, Erasmus University, Rotterdam, Alex Haxeltine, School of Environmental Sciences, University of East Anglia, Julia M. Wittmayer, DRIFT, Erasmus University, Rotterdam, Tim O'Riordan, School of Environmental Sciences, University of East Anglia, Paul Weaver, LUCSUS, Lund University, and René Kemp, ICIS, Maastricht University, “The economic crisis as a game changer? Exploring the role of social construction in sustainability transitions,” Ecology and Society 21(4):15

Meanwhile, many political and public debates seem to be primarily concerned with standard, relatively short-term, economic issues, such as monetary losses, stop-and-start economic growth, increasing unemployment, falling real estate prices, failing banks, virtually bankrupt nations, and how to get back on course to economic growth. The standard responses when national governments are struggling to get their economies healthy again are mostly about inducing more money, austerity measures, and introducing financial regulations, all often part of a broader financial–economic logic (Stiglitz 2010). The dominant focus on fighting economic deficits and problems at the expense of investing in social and ecological deficits—thereby failing to address persistent problems in these areas—can be argued to be a short-term strategy to prop up an inherently unmanageable system. Examples are the support of system banks with public money and the green growth strategy (OECD 2009, 2013a). Transition theory (Grin et al. 2010, Markard et al. 2012) suggests that such short-term fixes are typical regime-based strategies to sustain existing structures, cultures, and practices, and to fend off the threats of more radical systemic change. The transition perspective suggests that most regular policy and governance strategies essentially reproduce existing systems and, by definition, do not address the root causes of problems that are embedded in the same structures and cultures that determine how solutions are framed and implemented. Such path-dependent development optimizing existing institutional structures will inevitably lead to recurring crises and ultimately a more disruptive, shock-wise structural change of an incumbent regime. Transition studies thus argue that solutions that address symptoms rather than the underlying structural causes tend to reinforce a lock-in and result in further emergent problems (Rotmans and Loorbach 2010, Schuitmaker 2012). We argue that the underlying causes and mechanisms of the economic crises have not been thoroughly analyzed, let alone addressed through effective policies. In a globalized economy, fundamental changes will not likely come from actions by (national) governments or incumbent businesses, as these are inherently intertwined with and dependent upon the currently still dominant financial– economic systems and their governance. The need for alternative economic approaches, discourses, and systems is increasingly emphasized (Schor 2010, Simms 2013, Jackson 2013, van den Bergh 2013, Schor and Thompson, 2014). Even though the benefits of liberalization are still significant, it seems that the transfer of control from government to markets has substantially diminished possibilities for top-down policy making, adding to brittleness, complexity, and lock-in (Loorbach and LijnisHuffenreuter 2013). In this paper, we take a transition perspective on transformative social innovation to conceptualize and map the systemic dynamics that have caused the economic crisis, as well as how it influences the dynamics of social transformation. We explore how the economic crisis might be considered as a phase in a broader economic transition and which types of changes coincide to develop into this direction. We thus view the economic crisis not as a phenomenon in isolation within a relatively short time frame, but as an intrinsic part, or perhaps a symptom, of deeper underlying structural societal changes over the longer term. The question we seek to address is how the economic crisis interacts with broader societal changes as well as which dynamics might accelerate or hamper more structural (sustainability) transitions. To this end, we ask when and how a macrolevel or landscape development like the economic crisis fundamentally changes the dominant logic, rules, and conditions of incumbent regimes. In other words, when does a macrodevelopment become a game changer (cf. Avelino et al. 2014)? The paper builds upon theoretical work from the European FP7 project TRANSIT, which draws on transition theory to develop an empirically grounded theory on transformative social innovation. In this paper, we introduce the analytical perspective that we developed on transformative social innovation and two empirical examples. Although our analytical perspective suggests that alternatives and breakthroughs can come from any sector or actor, in this paper, we focus on the agency of social innovation and civil-society-led initiatives in providing and producing alternatives. The paper was developed through a number of iterations, workshops, and theoretical synthesizing. To develop our arguments, we build upon insights from sustainability transitions literature (Grin et al. 2010, Markard et al. 2012), social innovation research (Mulgan 2006, Murray et al. 2010, Franz et al. 2012, Westley 2013, Moulaert et al. 2013) and other fields aiming to understand the economic crisis. In addition, we include two empirical cases, transnational networks of social innovation, time banks, and the transition movement. For both cases, we draw upon a general literature review. The paper is structured as follows. In the next section, “Economic change or transition?,” we introduce the economic crisis as a multifarious phenomenon, how we understand it from a transition perspective, and how it is understood from an economist’s point of view. We illustrate that it is an ambiguous phenomenon that is simultaneously seen as part of regular changes in that it is part of disruptive or transformative change. In the section “Making sense of the economic crisis?,” we present a number of alternative perspectives on the economic crisis that put forward particular fundamental and systemic causes of the economic crisis and how these are translated in so called “narratives of change.” In “Transformative social innovations,” we highlight two specific social innovation initiatives, time banks and transition towns, which have an evident transformative claim and potential, and reflect upon how such transformative social innovations relate (themselves) to the economic crisis. In “Reconceptualizing societal transformations and the role of the economic crisis,” we synthesize our findings and argue that the concepts of game changers and narratives could help to unpack the landscape and better understand how macro- and microlevels interact to trigger transformative changes at the mesolevel. In conclusion, we address the need for a better understanding of the transformative impacts of the different shades of change (in coevolution) vis-é-vis the restorative dynamics associated with incumbent regimes.

#### Growth increases war---both funds AND motivates aggression

Lucas **Hahn 16**. Bryant University. April, 2016. Global Economic Expansion and the Prevalence of Militarized Interstate Disputes.

Economic Factors Leading to Increased Militarized Interstate Disputes Running counter to the arguments that global economic expansion has led to a decline in MIDs throughout the world, there is a large body of literature that claims the exact opposite. In particular, some authors argue that the recent declines that have been observed are a direct result of a decline in conflict after major spikes during the World Wars and the Cold War. The following section will highlight four different economic factors that are potentially leading to an increase in MIDs. These four factors include: (1) imperialism and resources, (2) the “War-Chest Proposition”, (3) Neo-Marxist views on asymmetrical trade, and (4) interdependence versus interconnectedness. 1. Imperialism and Resources The presence of imperialism between the 17th and early 20th centuries was, in a way, a precursor to globalization today. During this period of time the most developed nations worked to expand their empires and in doing so, began to connect the people of the world for the first time. However, while there were many positive benefits of this expansion, there were also many negative happenings that led to violent conflict. As Arquilla (2009, 73) frames it imperialism involved commercial practices (often supported by military force) that took advantage of the colonized people and ultimately destroyed their way of life. Thus, the increased economic expansion that was brought about in order to build the empire, often led to violent encounters. More specifically, imperialism and the conquest of particular regions was often done in an effort to gain access to that region’s natural resources. Authors such as Schneider (2014) state that undeveloped nations or regions are often subject to what he refers to as the “domestic resource curse”. Basically, during the times of imperialism, the more powerful nations would go to undeveloped areas and take whatever they wanted or needed from areas that were rich with resources5. This often involved a great deal of conflict and the native people were often exploited. In modern times, the presence of significant caches of national resources, particularly in Africa, has been shown to lead to violence as corrupt governments and warlords take advantage of those native to the area. Additionally, as Barbieri (1996) points out, conflict over resources may not be limited to an imperialist nation’s encounter with the undeveloped region. Violent conflict can also exist between the multiple nations that are competing to gain access or control over natural resources in a given area. 2. The “War Chest Proposition” Building on the previous discussion, Boehmer (2010) proposes something that he calls the “War-Chest Proposition”. He states that economic growth can lead to increased military/defense spending and that this buildup of a nation’s “war chest” may be used to pay for new or continuing military engagements (251). In other words, increased economic power often leads to greater capabilities of the nation-state as a whole. This is particularly true in terms of military capabilities and in this way, nations may thus be able to engage in more conflict. Furthermore, he argues that positive economic expansion builds up the confidence of the nation to a point where they may feel invincible and thus, engage in violent conflict that will help them to continue to expand. 3. Neo-Marxist Views on Asymmetrical Trade One of the most supported arguments against the notion that economic expansion promotes peace is that trade, brought about by economic expansion, actually increases MIDs. Many authors have in fact argued that increased economic interdependence and increased trade may have, in some ways, “cheapened war”, and thus made it easier to wage war more frequently (Harrison and Nikolaus 2012).

#### Growth-oriented AI ensures extinction---BUT, degrowth orientation solves.

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The challenges of sustainability and of superintelligence are not independent. The changing 84 fluxes of energy, matter, and information can be interpreted as different faces of a general acceleration2 85 . More directly, it is argued below that superintelligence would deeply affect 86 production technologies and also economic decisions, and could in turn be affected by the 87 socioeconomic and ecological context in which it develops. Along the lines of Pueyo (2014, p. 88 3454), this paper presents an approach that integrates these topics. It employs insights from a 89 variety of sources, such as ecological theory and several schools of economic theory. 90 The next section presents a thought experiment, in which superintelligence emerges after the 91 technical aspects of goal alignment have been resolved, and this occurs specifically in a neoliberal 92 scenario. Neoliberalism is a major force shaping current policies on a global level, which urges 93 governments to assume as their main role the creation and support of capitalist markets, and to 94 avoid interfering in their functioning (Mirowski, 2009). Neoliberal policies stand in sharp contrast 95 to degrowth views: the first are largely rationalized as a way to enhance efficiency and production 96 (Plehwe, 2009), and represent the maximum expression of capitalist values. 97 The thought experiment illustrates how superintelligence perfectly aligned with capitalist 98 markets could have very undesirable consequences for humanity and the whole biosphere. It also 99 suggests that there is little reason to expect that the wealthiest and most powerful people would be 100 exempt from these consequences, which, as argued below, gives reason for hope. Section 3 raises 101 the possibility of a broad social consensus to respond to this challenge along the lines of degrowth, 102 thus tackling major technological, environmental, and social problems simultaneously. The 103 uncertainty involved in these scenarios is vast, but, if a non-negligible probability is assigned to 104 these two futures, little room is left for either complacency or resignation. 105 106 2. Thought experiment: Superintelligence in a neoliberal scenario 107 108 Neoliberalism is creating a very special breeding ground for superintelligence, because it strives 109 to reduce the role of human agency in collective affairs. The neoliberal pioneer Friedrich Hayek 110 argued that the spontaneous order of markets was preferable over conscious plans, because markets, 111 he thought, have more capacity than humans to process information (Mirowski, 2009). Neoliberal 112 policies are actively transferring decisions to markets (Mirowski, 2009), while firms' automated 113 decision systems become an integral part of the market's information processing machinery 114 (Davenport and Harris, 2005). Neoliberal globalization is locking governments in the role of mere 115 players competing in the global market (Swank, 2016). Furthermore, automated governance is a 116 foundational tenet of neoliberal ideology (Plehwe, 2009, p. 23). 117 In the neoliberal scenario, most technological development can be expected to take place either in the context of firms or in support of firms3 118 . A number of institutionalist (Galbraith, 1985), post119 Keynesian (Lavoie, 2014; and references therein) and evolutionary (Metcalfe, 2008) economists 120 concur that, in capitalist markets, firms tend to maximize their growth rates (this principle is related 121 but not identical to the neoclassical assumption that firms maximize profits; Lavoie, 2014). Growth 122 maximization might be interpreted as expressing the goals of people in key positions, but, from an 123 evolutionary perspective, it is thought to result from a mechanism akin to natural selection 124 (Metcalfe, 2008). The first interpretation is insufficient if we accept that: (1) in big corporations, the 125 managerial bureaucracy is a coherent social-psychological system with motives and preferences of 126 its own (Gordon, 1968, p. 639; for an insider view, see Nace, 2005, pp. 1-10), (2) this system is 127 becoming techno-social-psychological with the progressive incorporation of decision-making 128 algorithms and the increasing opacity of such algorithms (Danaher, 2016), and (3) human mentality 129 and goals are partly shaped by firms themselves (Galbraith, 1985). 130 The type of AI best suited to participate in firms' decisions in this context is described in a 131 recent review in Science: AI researchers aim to construct a synthetic homo economicus, the 132 mythical perfectly rational agent of neoclassical economics. We review progress toward creating 133 this new species of machine, machina economicus (Parkes and Wellman, 2015, p. 267; a more 134 orthodox denomination would be Machina oeconomica). 135 Firm growth is thought to rely critically on retained earnings (Galbraith, 1985; Lavoie, 2014, p. 136 134-141). Therefore, economic selection can be generally expected to favor firms in which these are greater. The aggregate retained earnings4 137 RE of all firms in an economy can be expressed as: 138 RE=FE(R,L,K)-w⋅L-(i+δ)⋅K-g. (1) 139 Bold symbols represent vectors (to indicate multidimensionality). F is an aggregate production 140 function, relying on inputs of various types of natural resources R, labor L and capital K (including intelligent machines), and being affected by environmental factors5 141 E; w are wages, i are returns to 142 capital (dividends, interests) paid to households, δ is depreciation and g are the net taxes paid to 143 governments. 144 Increases in retained earnings face constraints, such as trade-offs among different parameters of 145 Eq. 1. The present thought experiment explores the consequences of economic selection in a 146 scenario in which two sets of constraints are nearly absent: sociopolitical constraints on market 147 dynamics are averted by a neoliberal institutional setting, while technical constraints are overcome 148 by asymptotically advanced technology (with extreme AI allowing for extreme technological 149 development also in other fields). The environmental and the social implications are discussed in 150 turn. Note that this scenario is not defined by some contingent choice of AIs' goals by their 151 programmers: The goals of maximizing each firm's growth and retained earnings are assumed to 152 emerge from the collective dynamics of large sets of entities subject to capitalistic rules of 153 interaction and, therefore, to economic selection.

#### Outweighs the AFF.

Alexey **Turchin &** David **Denkenberger 18**. Turchin is a researcher at the Science for Life Extension Foundation; Denkenberger is with the Global Catastrophic Risk Institute (GCRI) @ Tennessee State University, Alliance to Feed the Earth in Disasters (ALLFED). 05/03/2018. “Classification of Global Catastrophic Risks Connected with Artificial Intelligence.” AI & SOCIETY, pp. 1–17.

According to Yampolskiy and Spellchecker (2016), the probability and seriousness of AI failures will increase with time. We estimate that they will reach their peak between the appearance of the first self-improving AI and the moment that an AI or group of AIs reach global power, and will later diminish, as late-stage AI halting seems to be a low-probability event. AI is an extremely powerful and completely unpredictable technology, millions of times more powerful than nuclear weapons. Its existence could create multiple individual global risks, most of which we can not currently imagine. We present several dozen separate global risk scenarios connected with AI in this article, but it is likely that some of the most serious are not included. The sheer number of possible failure modes suggests that there are more to come.

## Capture Advantage

### Space Weather D---1NC

#### No chance of a short-term solar storm

Miriam Kramer 18, MA in Science Reporting from New York University, Science Editor at Axios, Former Staff Writer at Space.com, BA in Journalism from the University of Tennessee, Knoxville, “Don't Believe The Hype About The Coming Solar Storm”, Mashable, 3/13/2018, https://mashable.com/2018/03/13/solar-storm-hitting-earth/

Perhaps you've heard; a solar storm is on the way.

If much of the news coverage is to be believed, the coming solar storm is "massive" and could "cause power outages" because of "equinox cracks" that have appeared in Earth's magnetic field, leaving us vulnerable.

But that's not the full story.

In fact, at best, it's a serious misunderstanding of the facts, and at worse, it's a purposeful sensationalization of a pretty average solar event.

"This is just garbage, quite frankly," Robert Rutledge, of the National Oceanic and Atmospheric Administration's Space Weather Prediction Center (SWPC), said of the coverage around this solar storm, in an interview. Rutledge went on to say that he's unsure what "equinox cracks" are, and that the SWPC doesn't use that term.

A solar storm is actually expected to impact the Earth from March 14 to March 15, but it certainly isn't massive.

The storm, known as a "G1" geomagnetic storm, is actually the most minor of these types of solar storms, and it likely won't create any of the serious issues mentioned in many news articles published over the course of the past couple days.

The sun is actually pretty quiet at the moment.

According to the SWPC, it's possible that the solar storm — which will occur when charged particles from the sun interacting with Earth's magnetic field — will cause "weak power grid fluctuations" and may have a "minor impact on satellite operations."

That's a far cry from the serious power outages touted by some.

#### No impact to flares or grid collapse

Eric Niiler 19, Adjunct Faculty Member at Johns Hopkins University’s Science Writing Program, Contributor at Wired, “The Grid Might Survive an Electromagnetic Pulse Just Fine”, Wired Magazine, 4/30/2019, https://www.wired.com/story/the-grid-might-survive-an-electromagnetic-pulse-just-fine/

Over the past few years, speculation has risen around whether North Korea or any other nation could detonate a nuclear weapon over the United States that would create an electromagnetic pulse and knock out all electricity for weeks or months. This doomsday hypothesis has been promoted by a former CIA director, a commission set up by Congress, and a book by newsman Ted Koppel. But a sober new engineering study by industry experts finds that key equipment on the grid can be protected from any such EMP. Even if it could happen, the resulting blackouts would affect a few states but wouldn't turn the US into a backdrop for The Walking Dead.

The study, by the Electric Power Research Institute, a utility-funded research organization, finds that existing technology can protect various components of the electric grid to buffer it from the effects of solar flares, lightning strikes, and an EMP from a nuclear blast all at the same time: a three-for-one surge protector. “We have a strong technical basis for what the impacts [of an EMP] might be,” says Randy Horton, EPRI project manager and author of the report being released today. “That is one thing that didn’t exist before.”

Horton says that EPRI technicians worked with experts at the Department of Energy labs at Los Alamos and Sandia to simulate some effects of an EMP on substations and distribution systems. They also did real-world testing of electrical equipment at an EPRI laboratory in Charlotte, North Carolina. The study, which took three years to complete, looks at the effects of three kinds of energy spawned by a nuclear detonation.

The first high-energy wave occurs in just a few nanoseconds and is called an E1. The second wave, called an E2, lasts up to a second and can fry electric systems the way a lightning strike does, unless they are properly grounded. Effects of an E2 wave on the grid are expected to be minimal. The third kind of wave can last for tens of seconds and is similar to what utility operators might expect from a low-frequency, long-duration solar flare or geomagnetic storm. The report says that the combination of an E1 and E3 would cause the most damage over the widest area.

Horton says simulations and testing by EPRI contradicts earlier findings that an EMP would wipe out the US grid. “You could have a regional voltage collapse, but you wouldn’t damage a large number of bulk power transformers immediately,” Horton says. “That was the difference in our finding. There were some studies that said you could damage hundreds of transformers. We just didn’t find it.”

Some members of an EMP commission have argued for the past decade that an attack would destroy the electric grid, and kill 90 percent of the US population through disease or starvation. That panel shut down in 2017 after the Department of Homeland Security did not request more funds from Congress to keep it going.

Apart from the electric power industry, the Pentagon has been conducting its own classified tests about potential effects from such an event on military installations. A group of experts is meeting this week at Maxwell Air Force Base in Montgomery, Alabama, says Air Force lieutenant-general Steven Kwast, who is coordinating the event.

Kwast says the threat is much more real than the public believes. “You don’t need to have a nuclear detonation in space to do this,” he said. “You could have a hot-air balloon rising above a city with a tactical electromagnetic weapon. You could do one over an airfield of F-35s or one Army post so none of the tanks work or over a shipyard so that none of the ships sail. Our enemy is clever and adaptive. They see our soft underbelly is our electricity.”

But other nuclear weapons experts say the technical study by EPRI brings scientific rigor to a field that has been dominated by hype and fearmongering. “When you are doing documented research on physical systems, it is still solid evidence, no matter who paid for it,” says Sharon Burke, a senior adviser at the Foundation for a New America and a former assistant secretary of defense for operational energy in the Obama administration. “This is not someone’s opinion.”

## 2NC

### Torts CP---2NC

#### Including antitrust alongside torts degrades its attractiveness AND causes courts to refuse to recognize it

Kyle Graham 8, Deputy District Attorney for Mono County, California. J.D. from Yale Law School, Former Judicial Law Clerk in the Chambers of the Hon. William H. Alsup, United States District Court, N.D. Cal., Former Attorney at Gibson, Dunn & Crutcher LLP, “Why Torts Die”, Florida State University Law Review, Volume 35, Number 2, 35 Fla. St. U.L. Rev. 359, Winter 2008, Lexis

E. Alternatives

The availability of alternatives to a tort may also play a part in ushering claims out the door. The desirability of a tort is always a relative proposition. Even if all can agree that a tort addresses a legitimate harm or problem, this consensus does not rule out the possibility that another approach, whether within or outside of the tort system, might respond to the same situation more effectively. 170

[FOOTNOTE] 170 Neil K. Komesar, Injuries and Institutions: Tort Reform, Tort Theory, and Beyond, 65 N.Y.U. L. Rev. 23, 23 (1990) ("Proposals for tort reform often amount to choices about which societal institution-the torts system, the criminal-regulatory system, or the market-should be responsible for preventing particular types of injuries."). See generally Peter H. Schuck, Why Regulating Guns Through Litigation Won't Work, in Suing the Gun Industry, supra note 165, at 225, 230 (listing the institutional capabilities needed to create effective policy). [END FOOTNOTE]

The advent of worker's compensation programs offers the paradigmatic case-in-point of an alternative remedy displacing a tort. Similarly, courts that recently have refused to recognize the maintenance and champerty torts have justified their decisions partially on their perception that malicious prosecution and abuse of process theories address similar ills, making the older torts unnecessary. 171

#### Future cases will be remanded because the perm makes the alternative remedy of antitrust available

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The Court rejected both Granite Rock's policy argument and its contention that failure to allow a federal tortious interference with contract claim against IBT under Section 301(a) would place Granite Rock in a wholly untenable position. 110 The Court viewed Granite Rock's position in a more flexible light, and pointed out that, while Section 301(a) did create a body of federal law to deal with the enforcement of collective bargaining agreement issues, allowing Granite Rock to bring a federal tort claim under [\*20] this statute would create policy concerns that could upset the balance struck between unions and employers under federal labor statutes. 111 The Court preferred to retain Section 301(a)'s current limit on common law contractual remedies and rather than extend its reach to tort claims. 112

Justice Thomas concluded that even if Section 301(a) did authorize the federal courts to create a common law claim for tortious interference of contract, it would be premature for the Court to decide the issue because Granite Rock had not shown that other remedies were unavailable. 113 For instance, Granite Rock failed to show that state claims were insufficient to provide a remedy. 114 [FOOTNOTE] 114 Id. (espousing the other remedies still available to Granite Rock on remand and those that Granite Rock had already availed itself of). [END FOOTNOTE] Granite Rock also failed to show that breach of contract or administrative claims, such as those falling under an alter-ego or agency theory, against the IBT would fail on remand. 115

#### Torts are a mutually exclusive substitute for antitrust

Marina Lao 97, Associate Professor at the Seton Hall University School of Law, JD from Albany Law School, BA from Stony Brook University, “Tortious Interference and the Federal Antitrust Law of Vertical Restraints”, Iowa Law Review, 83 Iowa L. Rev. 35, October 1997, Lexis

III. The Interplay Between Tortious Interference and the Antitrust Law of Vertical Restraints

Tortious interference has become a popular additional, or even substitute, claim for antitrust plaintiffs hoping to enhance their chances of recovery. 170 It is a logical choice for these plaintiffs because the tort takes a less doctrinal and more factually based approach than antitrust law, one which considers noneconomic factors such as business ethics and fairness. Since the tort permits recovery, absent a countervailing privilege, for any intentional and "improper" interference with a plaintiff's contract or business relations with a third party, 171 any act in restraint of trade can be cast as an improper interference with another's contractual or prospective economic relations. 172 For example, a plaintiff dealer terminated for its low prices pursuant to an agreement between its manufacturer and other dealers could argue that the manufacturer's conduct improperly and unjustifiably interfered with plaintiff's prospective economic relations with its customers. It could also charge that the complaining dealers' actions improperly interfered with plaintiff's contractual or prospective relations with the manufacturer. And, in view of the disparate liability standards of antitrust and tortious interference, plaintiffs with little or no chance of prevailing on their antitrust vertical claims may nonetheless have viable tortious interference claims. 173 [\*62]

#### Prohibiting anticompetitive practices can be through either antitrust or tort

David G. Larimer 4, JD from Notre Dame Law School, BA from St. John Fisher College, Judge on the United States District Court, New York Western, Agency Dev., Inc. v. MedAmerica Ins. Co., 310 F. Supp. 2d 538, 544-545, 2004 U.S. Dist. LEXIS 5017, 3/24/2004, Lexis

Plaintiff conceded at oral argument that replacement of one distributor for another or by utilization of an in-house sales force is not an antitrust violation. Plaintiff claims, [\*\*15] however, that this case is different and that it has shown sufficient antitrust injury because defendants committed various business torts (i.e. unfair competition, improper use of the Blue Cross and Blue Shield logo, predatory hiring of ADI's officers/agents) that resulted in a reduction of plaintiff's sales of competing LTCI, thereby reducing overall competition in the LTCI market. This theory is flawed. HN10 Not every business tort or breach of contract that has an adverse impact on a competitor can form the basis of an antitrust claim. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition …."); Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979) ("It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort.").

Further, plaintiff seems to equate anticompetitive conduct with antitrust injury. HN11 The injury [\*\*16] required for antitrust standing is one that flows from the unlawful (anitcompetitive) nature of the defendants' acts. HN12 See Clayton Act, 15 U.S.C. § 15(a) (granting private right of action to anyone who has been injured "by reason of anything forbidden in the antitrust laws …."). Plaintiff asserts here that its injury (a reduction in its sales and profits) as a result of the termination of the contract and its agents leaving to work for MANY has resulted in reduced sales of competing LTCI and, therefore, less competition in the overall market. Plaintiff has it backwards. The defendants' anticompetitive [\*545] conduct must cause plaintiff's injury, not the other way around. That is, plaintiff's injury cannot cause the anticompetitive conduct, which is precisely what plaintiff here alleges. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) HN13 ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive [\*\*17] acts made possible by the violation.").

#### The ‘core laws’ of antitrust are the big 3

Kendall Kuntz 21, J.D. Candidate at The University of Maryland Francis King Carey School of Law, “Can the Courts and New Antitrust Laws Break Up Big Tech?,” 2/23/21, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

There are three core antitrust laws in effect today: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. These three antitrust laws attempt to protect market competition for the benefit of consumers. The Sherman Act outlaws monopolies and contracts that unreasonably restrain trade. The Clayton Act prohibits mergers and acquisitions that substantially lessen competition or create a monopoly. Lastly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

#### ‘Scope’ is their breadth

Buccirossi 9, LEAR and EUI, “Measuring the Deterrence Properties of Competition Policy: The Competition Policy Indexes,” September 2009, https://tinyurl.com/sbpbv553

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004. 47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

#### ‘Of’ means deriving from them

M. Margaret McKeown 11, Judge on the US Court of Appeals for the 9th Circuit, “Simonoff v. Expedia, Inc,” 643 F.3d 1202, Lexis

Our recent decision in Doe 1 is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that [\*\*5] provided for "exclusive jurisdiction for any claim or dispute . . . in the courts of Virginia." Id. at 1080. We concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Id. at 1082 (quoting Black's Law Dictionary 1080 (6th ed. 1990)). Thus, the phrase "the courts of" a state refers to courts that derive their power from the state—i.e., only state courts—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts. Id. at 1081-82.

#### Torts do not affect the scope of core antitrust law, even when it renders new practices unlawful

Marina Lao 97, Associate Professor at the Seton Hall University School of Law, JD from Albany Law School, BA from Stony Brook University, “Tortious Interference and the Federal Antitrust Law of Vertical Restraints”, Iowa Law Review, 83 Iowa L. Rev. 35, October 1997, Lexis

That tortious interference and the federal antitrust laws espouse different values is evident from the development of the two bodies of law. The essence of the Sherman Act, the primary federal antitrust statute, is economic; it was adopted in 1890 against a background of rampant monopolization and cartelization. 234 Though the legislative history of the Act shows congressional interest in a multitude of values, a common thread [\*71] runs through the divergent concerns: a distrust of the concentration of economic and political power and an apprehension of its possible impact on small businesses and consumers. 235 Congress feared that large companies might limit production, destroy the viability of small businesses, raise consumer prices and derive higher producer profits at the expense of consumers. 236 Although there was no discussion of allocative efficiency as we understand the term, 237 the general congressional concern with consumer costs, producer profits, and ease of market entry leaves little doubt about the statute's economic grounding.

Because of the Sherman Act's explicit focus on economic issues, antitrust scholars of almost all persuasions have come to accept economic efficiency as an important goal of federal antitrust policy. 238 There is disagreement, of course, as to the meaning of the term "efficiency" and as to its proper role in analysis. There are those who think that promoting allocative efficiency should be the exclusive concern of the antitrust laws, and that only practices leading to reduced output in a properly defined market should be illegal. 239 There are others who believe that it is entirely [\*72] appropriate to consider additional values unrelated to efficiency, such as the dispersion of economic and political power, ease of market entry, protection of the competition process, and fairness to market participants. 240 Some would not define efficiency in microeconomic terms, but would have it encompass the protection of the competitive process, which would ultimately serve the consumers' long-run interests. 241

Within the last twenty years, economics went from merely informing antitrust analysis to being its sole end. The Chicago School considers allocative efficiency the exclusive goal of the antitrust law, and microeconomic price theory the only tool for measuring efficiency. 242 If one accepts the legitimacy of this approach, in terms of vertical restraints, only those dealer restrictions that result in reduced output in a properly defined market should be prohibited. 243 This, in turn, means that when there is a significant interbrand market, even vertical price fixing should not be illegal because it is unlikely to be allocatively inefficient. 244 From this perspective, the current laissez-faire policy toward vertical restraints would be quite appropriate.

The merits of this very narrow view of antitrust are, however, much debated. Critics contend that the pursuit of efficiency should not be the single goal of law in all areas of life, 245 and they observe that the antitrust law cannot possibly focus exclusively on efficiency and be consistent with other legal policies. 246 Another line of criticism argues that even if efficiency were the only appropriate antitrust concern, the Chicago model [\*73] of market efficiency is based on unproven premises and therefore the conclusions that are drawn are questionable. 247 No attempt is made to set forth the details of the debate in this Article as much has already been written on the subject. 248 The point made here is merely that the idea of a single goal--allocating resources efficiently--for antitrust policy is not without its critics, despite the economic underpinnings of the law.

The notion that allocative efficiency should control tortious interference is even more controversial. Unlike antitrust law, tortious interference is not primarily about economics. Little in its common-law development supports the notion that efficiency forms its core. 249 Instead, the modern tort, which began to take shape with Lumley v. Gye 250 more than one hundred years ago, has historically evinced a concern for business ethics and fairness in business dealings. 251 In determining whether an interference was privileged (or justified) or not, early cases inquired into whether the conduct was "both injurious and transgressive of generally accepted standards of common morality or of law." 252 The cases spoke in terms of judging the act against the "common conception of what is right and just dealing under the circumstances." 253 And they asked if the interference was "sanctioned by the 'rules of the game' which society has adopted," 254 if it fell within "the area of socially acceptable conduct" 255 that is privileged, or if it was "conduct below the behavior of fair men similarly situated." 256 [\*74]

The concept of fair play applied in these early cases continues to be central in delineating the scope of privilege in tortious interference. 257 Although there are no precise rules, case law suggests that the privilege of competition is lost if the defendant fails to play by "the rules of the game," 258 engages in conduct that is not "socially acceptable," 259 violates "business ethics and customs," 260 or engages in some sort of "unfair competition." 261 Also, in keeping with the emphasis on fairness, tortious interference law stresses the protection of individual competitors over the protection of competition. 262 For instance, the tort does not require a finding of discernible harm on the broader market as a condition to imposing liability. 263 Given the clear "fairness" underpinning of tortious interference as contrasted with the economic basis of antitrust law, there is little justification for adopting allocative efficiency as the tort's exclusive goal even assuming that one were to accept it as the single proper objective for federal antitrust policy. [\*75]

#### The outcome is indistinguishable---torts target the same conduct, with strong penalties that establish competition without antitrust

Dr. Nicolas Cornell 20, Assistant Professor at the University of Michigan Law School, JD from Harvard Law School, PhD in Philosophy from Harvard University, AB in Philosophy from Harvard College, “Competition Wrongs”, Volume 129, Number 7, 129 Yale L.J. 2030, May 2020, Lexis

I. THE STANDING CLAIM

In this Part, I defend the claim that market actors are sometimes wronged by the competitive practices of other market actors. I refer to this as the standing claim, because the point is that injured competitors have special standing to complain or hold wrongdoers accountable. The concept of a wrong is defined in terms of a set of interpersonal practices and relations. Some conduct--for example, illegal drug use or tax evasion--might be wrong without wronging anyone in particular. To say that a party is wronged is to say that the party is not a mere bystander but rather might assert a specific complaint in his or her own name. A wronged party might feel personal resentment--not mere general indignation--and demand remedial actions like apology or compensation. Such attitudes and actions are inapt when conduct is merely wrong without wronging anyone in particular: tax evasion or illegal drug use may ground feelings of indignation or even outrage but not personal resentment that would make appropriate apology, forgiveness, compensation, or the like. It is wrongs, not mere wrongful conduct, that ground such attitudes and responses. The standing claim is thus a moral claim about how parties relate to one another ex post.

[\*2038] To illustrate the standing of competitors, I turn to some cases. Market actors are often afforded legal standing to bring a complaint. As I describe, the complained-of conduct ranges from direct interference to much more detached misconduct. Of course, it is possible that the legal standing granted to competitors is either a mistake or a matter of policy rather than morality. I will return to these possibilities at the end of this Part. But I hope that examination of the legal cases will at least provide a prima facie case for the moral claim that misconduct can wrong the competitors it harms.

A. Interference

Let me start with a run-of-the-mill case of dubious competition. Lehigh Corporation was a real-estate broker in Florida in the 1970s. Lehigh promoted the sale of property by providing prospective buyers with expense-paid accommodations and the opportunity to see Lehigh's properties and talk to salespeople. Leroy Azar was a former Lehigh employee who was familiar with Lehigh's business model. He adopted a practice of following Lehigh customers--whom he could spot on the street based on their big envelopes of sales literature--and persuading them to rescind their contracts with Lehigh and to purchase property from him instead. 14

Morally speaking, Azar wronged Lehigh. Lehigh might reasonably resent his activities. He was, after all, taking its customers, and not in an honorable way. And tort law agreed that there was a wrong here. A Florida court concluded that Azar was tortiously interfering with advantageous business relations. 15Tort law generally recognizes torts for interference with contractual relations and, in most jurisdictions, with prospective economic advantage. The basic idea is that a party who, like Azar, intentionally causes the transactions of others to collapse can be liable for doing so. 16The legal standing is suggestive: there seems to be a distinct wrong suffered by individual parties like Lehigh.

One might grant this point but remain skeptical of the broader thesis that the wrong Lehigh suffered cannot be explained by a right held by Lehigh. It is not my aim to defend the independence claim yet. But notice, for now, that tortious interference does not obviously track legal entitlements. 17In this particular [\*2039] case, federal law entitled Lehigh's customers to rescind their purchases at any time within three days of signing, a right that Azar was deliberately exploiting. 18 The wrong of tortious interference can thus arise even where the victim had no legal right to her customer or her deal. 19One might respond that Lehigh had a right not to its deal per se, but against Azar's causing its customers to abandon their deals. On this score, it is worth noting that Lehigh would have had no tort claim against Azar had he been acting as a concerned consumer advocate or organizing a lawful boycott. 20It is therefore difficult to pinpoint the sphere of true entitlement that Azar invaded. For present purposes, however, the important point is that parties like Lehigh suffer wrongs at the hands of interfering competitors.

B. Exclusivity

Azar induced third parties to back out of existing deals; other competitors might induce third parties not to enter into contracts in the first place. In the late 1960s and early 1970s, Kodak dominated the camera market, accounting for over sixty percent of camera sales. 21It did not, however, make flash equipment. 22Over the years, Sylvania and GE developed various flash technologies and approached Kodak about using them in its cameras. In each instance, Kodak entered into joint development agreements requiring that these technologies--to which Kodak had not contributed--not be disclosed to any other firms. 23A smaller camera manufacturer, Berkey Photo, sued Kodak, alleging that these joint development agreements denied Berkey access to the best flash technologies and the opportunity to bring to market cameras that would compete with Kodak's. 24The complaint, in short, was that Kodak was inducing suppliers not [\*2040] to deal with Berkey and other competitors. 25The Second Circuit affirmed a judgment in Berkey's favor. 26

Exclusive dealing is a cousin of tortious interference. Berkey's complaint was based in statutory antitrust law, not the common law of torts. But the continuity should be clear. Structurally, the cases similarly involve private plaintiffs seeking a private remedy. And there is substantive continuity as well. In both tortious interference and exclusive dealing arrangements, the wrongdoer influences a third party to modify its economic relationship with the wrongdoer's competitor, thereby denying that competitor prospective economic gains. They are wrongs of a similar form. Morally speaking, the conduct seems analogous.

Antitrust is not the only statutory basis for private redress for an agreement not to deal. State unfair-competition laws may offer similar standing. For example, relying upon California's unfair competition law, businesses recently succeeded in suing competitors for forcing employees to sign noncompete clauses, alleging that the competitors had impaired their ability to acquire talent. 27 Such statutory competition suits should be seen as continuous with traditional interference torts. They similarly involve an outsider undermining relations between two contracting parties, and they similarly offer the injured competitor a private avenue for redress.

C. Marketing

Another way that market competitors sometimes wrong one another occurs when businesses engage in false or misleading advertising. Seemingly recognizing such injuries, the law affords private causes of action to businesses injured by competitors' statements that are misleading or likely to cause confusion. 28 [\*2041] These misleading statements need not be about the injured competitor or its products; a company that makes false statements about its own products may be liable to competitors whom the false statements harmed.

Consider the facts of POM Wonderful, LLC v. Coca-Cola Co. 29POM Wonderful grows pomegranates and sells various pomegranate juices, including a pomegranate-blueberry juice. Under its Minute Maid brand, Coca-Cola marketed a competing juice blend with a label featuring the words "POMEGRANATE BLUEBERRY." 30Below that, in smaller, lower-case letters, the label read, "flavored blend of 5 juices," and then, in even smaller type, "from concentrate with added ingredients and other natural flavors." 31In fact, the Minute Maid juice blend contained 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice. 32

POM brought suit, alleging that the Minute Maid label constituted false or misleading advertising. Pause for a moment to appreciate why POM would take itself to be aggrieved by Minute Maid's marketing. Minute Maid had said nothing about POM. 33But POM--which manufactures actual pomegranate juice--naturally regarded Minute Maid as illegitimately capturing some of POM's would-be consumers. Morally speaking, this is a perfectly coherent complaint. As with interference and exclusivity, here too the injury stems from the competitor's lost relations with a third party--in this case, consumers. It should be unsurprising that the law offers an avenue of redress.

In response, Coca-Cola argued that the case should be dismissed because the Minute Maid label was compliant with the Food and Drug Administration's (FDA) labeling regulations. 34The relevant regulation stated that, if a juice [\*2042] names only juices that are not predominant in the blend, then it must either declare the percentage content or "[i]ndicate that the named juice is present as a flavor or flavoring." 35Minute Maid had done precisely that, stating that its product was a "pomegranate blueberry flavored blend of 5 juices." 36The case made it all the way to the Supreme Court, which rejected Coca-Cola's argument. FDA regulatory compliance was a different issue than liability to POM under the Lanham Act; the public health and safety regulations did not preempt the possibility of a private suit for misleading consumers. 37

It is natural to think of marketing law as fundamentally aimed at protecting consumers from being misled. But even if such consumer protection determines the substantive norms, competitors are empowered to assert their own grievances at violations of those norms. 38POM's complaint was, essentially, "You misrepresented things to consumers, and we lost out." That the suit turned on POM's complaint, not that of consumers, is reflected in the fact that damages were based on POM's losses, not on the magnitude of the injury to consumers or society at large. 39It is also, interestingly, reflected in the available defenses, which may concern the standing of the particular plaintiff--a consideration that might seem irrelevant if the injury to consumers were the sole motivation for liability. For example, on remand, Coca-Cola was permitted to invoke a defense of "unclean hands," arguing that POM's own advertising had itself misled consumers about both the content of its juice blends and the health benefits of pomegranate juice. 40In sum, like interference and exclusivity, marketing, too, can generate a grievance particular to the competitor.

[\*2043] D. Other Misconduct

In marketing cases, a plaintiff alleges that a competitor gained an illicit advantage by misleading consumers. But a competitor might gain an illicit advantage in other ways as well, mistreating not consumers but employees, the environment, or the public at large. Consider the facts of one case, recently allowed to proceed and still pending. 41Diva Limousine is a California livery cab company. 42It brought suit against the ride-sharing service Uber, alleging that Uber secures unlawful cost savings by misclassifying its drivers as independent contractors instead of employees in violation of California labor law. Diva argued that, in doing so, Uber takes business and market share from competitors, like Diva, that comply with the law. 43In denying Uber's motion to dismiss, the trial court explained that California's unfair competition law "allows competitor suits predicated on conduct that . . . significantly threaten[s] or harm[s] competition . . . . [W]orker misclassification may constitute an example of such conduct." 44

Like the previous examples, Diva's complaint is intelligible. Diva finds itself losing revenue and market share because a competitor is apparently exploiting its workers. It is harmed by Uber's conduct, and it has standing to complain. Such a complaint need not imply that California labor law exists in order to protect companies like Diva. Its substantive norms are shaped to protect employees, and it is the employees' rights that are being violated. But business competitors have a particular stake in whether their rivals are gaining an edge by mistreating others--be they consumers, employees, or anyone else. It is thus no surprise that [\*2044] competitors have sued each other for conduct ranging from unlicensed professional practice 45to violating environmental regulations 46to money laundering. 47Of course, there are limits on competitors' standing, 48but their ability to bring suit at all in such cases suggests a legal recognition of the relation that competitors bear to the misconduct of their rivals.

E. Competition Law as Private Law

My aim, in walking through these cases, is to emphasize the structural and substantive similarities between them. If we accept that interference is a private wrong appropriately redressed by private law, then these competition cases seem to involve parties with a similar standing to assert a grievance. The harmed competitor is no mere bystander, nor merely in possession of a complaint shared by every other market participant. The legal standing tracks a natural sort of interpersonal standing. Another way to put this point is to say that competition law, in these contexts, is private law--instantiating a justice between the parties. 49And it is, in this way, an instantiation of a moral relation.

[\*2045] Many scholars might try to cut off the line that I have drawn from common law torts to antitrust and marketing law. They might contend that the standing in these latter cases is not moral but artificial. We allow these private lawsuits, the thought goes, as a matter of effectuating public-policy objectives. These plaintiffs have no moral complaint; they are simply empowered to act as private attorneys general. As courts explicitly say, these legal schemes are not meant to protect competitors per se, but rather the public at large. 50This has generally meant a consumer-welfare standard, though that approach has faced more criticism of late. 51But, even among the critics of the consumer-welfare standard, it is some public concern--with equality or democracy or justice--that should shape the law. 52 Regardless, then, a competitor's standing looks to be purely instrumental: the damages defendants must pay are imposed only to deter conduct that harms the public (consumers, workers, etc.), and competitors are allowed to recover those damages only to provide them an incentive to bring such suits on the public's behalf. As a matter of classification, this is public law, not private law in any deep sense. 53Corrective-justice theorists and relational-moral theorists [\*2046] might thus try to escape the challenge presented by the above cases by cleaving them off into the admittedly instrumentalist domain of regulation. This is simply to endorse the dominant understanding of antitrust itself.

But I am questioning precisely this widely but unreflectively endorsed assumption that antitrust and marketing law are public law. Its foundation is unsound. From the idea that considerations of public protection determine the substantive legal norms, it need not follow that the injured competitor's standing to complain is simply a policy choice about efficient enforcement. Regardless of the substantive norms involved, 54there are features of these competition cases that strongly suggest treating them as private law, making the domain of private law more expansive than typically conceived by high theory.

Competition wrongs are private--and best conceived as part of private law--in three important ways. 55 First, these cases are structured as a drama between plaintiff and defendant. One private party initiates a lawsuit with a complaint against another private party, who must then respond. The state serves as the neutral adjudicator of the dispute; it neither initiates nor controls the course of the legal action. 56 Second, remedies are calculated based on the injury suffered [\*2047] by the plaintiff, not the harm suffered by the public. The law is, in this way, responding to a private injury. One might object, at this point, that these laws often come with treble damages, departing from a purely compensatory measure. 57 But treble damages are still damages fundamentally based on the injury suffered by the plaintiff, which need not correspond to the amount of harm to the public that particular anticompetitive conduct has caused. In reality, treble damages may be more truly compensatory than traditional common-law damages, which typically undercompensate victims significantly. 58 Furthermore, if the presence of treble damages meant that the law is not responding to a wrong to the plaintiff, we would have to say that civil-rights cases, too, are not truly addressing wrongs done to plaintiffs. As long as the damages are anchored to the injury to the plaintiff, the presence of enhancing elements--whether they be trebling or an award of attorney fees or punitive damages--should not produce the conclusion that the law is no longer fundamentally concerned with the wrong to the plaintiff. Third and finally, as I have tried to suggest, competition law is often continuous with paradigmatically private tort law, such as tortious interference. The underlying conduct is similar; the relationship between the parties is similar; the ultimate harm to the plaintiff is similar; our pretheoretical sense of injustice is similar. Of course, traditional economic torts have common-law origins, whereas modern competition law is largely statutory. 59 But, substantively, they involve the same relation between plaintiffs and defendants.

#### The CP prohibits identical practices and revitalizes tortious interference by focusing it on competition

Gary Myers 93, Assistant Professor of Law at the University of Mississippi, B.A. from New York University, M.A. in Economics and J.D. from Duke University, Member of the State Bar of Georgia, “The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law”, Minnesota Law Review 77 Minn. L. Rev. 1097, May 1993, Lexis

CONCLUSION

Antitrust law and the law of tortious interference play significant roles in the regulation of marketplace behavior. Both areas of law define the "rules of the game," that is, the boundaries between lawful and impermissible competition. Both seek to promote desirable economic arrangements while deterring behavior that undermines the operation of efficient markets. [\*1150] Plaintiffs often include both types of claims in litigation with competitors.

Antitrust doctrine, particularly as the Supreme Court has developed it in the last twenty years, generally furthers free competition and economic efficiency for the ultimate benefit of consumers. Accordingly, antitrust law has focused on the objective economic effect of the challenged restraint on the market. Practices that harm competition, based on demonstrable experience and economic analysis, are presumptively unlawful under the per se rule. The courts analyze practices that have more uncertain economic effect under the more relaxed standards of the rule of reason, with its focus on whether the restraint promotes or inhibits competition.

Business tort law, however, has not consistently developed in accordance with the competition principle. Although "'[t]he policy of the common law has always been in favor of free competition,'" 271 tortious interference law has developed haphazardly. Some decisions display insufficient concern for competition, efficiency, or the interests of consumers. Therefore, several aspects of tortious interference law, as interpreted in most jurisdictions, should be modified to permit more vigorous competition.

Tortious interference law reserves its strongest protection for cases involving interference with existing, valid contracts. The nearly unanimous view is that third parties do not have a right, absent a privilege, to undermine the stability of these economic arrangements. Like the protection given these agreements under contract law, tort protection for existing contracts is economically defensible. The only economic objection concerns the availability of punitive damages, which may deter efficient breaches of contract. This aspect of tortious interference law consequently requires, at most, limitation of remedies to actual damages, except in cases involving independently tortious actions.

#### The mere threat of tort liability solves, even if never used

Dr. Cristián A. Banfi 11, Lecturer of Private Law at the University of Chile and Ph.D. from Pembroke College, “Defining the Competition Torts as Intentional Wrongs”, The Cambridge Law Journal, Volume 70, Number 1, March 2011, Lexis

II. Private antitrust enforcement

A. Subsidiary Contribution

The fact that the competition torts involve intentional wrongs immediately discards negligence and strict liability as possible ways of dealing with the harm following anticompetitive conduct. The width of tort liability is therefore very tight. In addition, as will now be argued, the influence of tort on competition law enforcement is and should remain modest. Tort law only secondarily promotes compliance with antitrust legislation. In effect, whereas competition policy concentrates on deterring and punishing breaches, tort law is limited by intention and used basically for compensatory purposes. The implementation of antitrust law is entrusted to the competition authorities, their task being to prosecute, prevent and punish anticompetitive practices through penalties, imprisonment and directors' disqualification. 139 Tort law simply assists those bodies by dissuading potential infringements via injunctions and by compensating identifiable traders for their losses. But its influence can be significant. For instance, the "Georgetown Private Antitrust Litigation Project", which reviewed over 2,000 tort actions filed in US district-courts between 1973 and 1983, concluded that the threat to initiate tort proceedings and to seek injunctions or compensation served to deter anticompetitive practices. 140

#### Torts have punitive damages---that’s the equivalent of antitrust’s treble

Dr. Dmitry Karshtedt 18, Associate Professor of Law at the George Washington University Law School, Ph.D. in Chemistry from U.C. Berkeley, AB from Harvard University, JD from Stanford University, “Enhancing Patent Damages”, University of California, Davis Law Review, 51 U.C. Davis L. Rev. 1427, April 2018, Lexis

Supra-compensatory damages in patent law present a very different picture. To begin, although the section of the Patent Act governing damages, 35 U.S.C. § 284, at least states the function of compensatory damages - unsurprisingly, they must be "adequate to compensate for the infringement" 11 - that section says nothing about the purpose of enhanced damages or the standard for awarding them. The only "guidance" given by Congress is that "the court may increase the damages up to three times the amount found or assessed" beyond the damages clearly denominated as compensatory. 12 In an effort to give content to the statutory authorization to award these so-called "treble [\*1431] damages," 13 courts have sometimes looked to private law, and particularly to the common law of torts, to see how courts handle enhanced damages in those cases. 14 This instinct is understandable, and seems sound as a matter of statutory interpretation. 15 After all, the various iterations of the Patent Act have been passed with little indication that, when it comes to issues shared with other areas of law, courts in patent cases are to develop rules that are unique and patent-specific. 16 Indeed, there is much evidence to the contrary - that [\*1432] Congress meant for background common-law principles to apply to cognate patent law issues. 17 Accordingly, courts in patent cases have drawn on the law of torts to deal with problems ranging from mental states for indirect infringement, 18 to proximate cause limits on the scope of the defendant's liability, 19 to - reasonably enough - the but-for causation requirement for awarding compensatory damages. 20 This move has not always enabled dispute-free resolutions of these various aspects of patent infringement claims, 21 but it has at least given courts a starting point for interpreting the sometimes sparse language of the Patent Act.

When it comes to treble damages, however, examination of other areas of law has not yielded a clear answer even with respect to the [\*1433] basic purpose of this remedy. In recent times, consensus has developed that such damages should be reserved for "willful" patent infringement, 22 however defined. But over the long history of treble damages in patent law, courts have variously mentioned punishment, 23 deterrence, 24 and even adequate compensation 25 as potential justifications for these awards, and legal scholarship has sent similarly conflicting messages over the years. 26 Although it is certainly possible for a remedy to have multiple purposes, 27 at least some of the pairings - like punishment and compensation - might be at odds. 28 Moreover, deciding which of these multiple possible purposes of treble [\*1434] damages is dominant would be helpful because that framing could shape the standards for awarding them. 29

But the fact that the common law has not supplied ready answers for enhanced damages in patent law is, unfortunately, not a surprise. The very idea of awarding more than make-whole damages in civil cases has been controversial, and the theory of punitive damages - a potential tort-law analog of patent treble damages that courts and scholars have often looked to for content when dealing with this issue in patent law 30 - is widely debated and appears rather unsettled, as evidenced by the prodigious amount of scholarship devoted to this field. 31 Nonetheless, as I argue in this Article, there is much useful [\*1435] guidance that courts deciding patent cases can still glean from a close examination of the historical developments that brought forth the modern law of punitive damages in tort. 32 Indeed, tort law can help courts develop a standard for awarding treble damages for patent infringement that is more rational than the one currently in place. 33

#### They’re comparatively larger than antitrust

Patricia A. Conners 3, JD from the University of Florida, Chief Associate Deputy Attorney General under Florida Attorney General, and Dr. Kevin J. O'Connor, chair of the Antitrust and Trade Regulation Practice Group at Godfrey Kahn, JD from Harvard Law School, PhD in Economics from the University of Wisconsin, “Antitrust Enforcement Regarding Vertical Restraints by State Attorneys General”, Product Distribution and Marketing Volume 1, ALI-ABA Course of Study Materials, March 2003, Lexis [numbers to words]

C. State Business Torts as an Alternative to Federal Antitrust Law

Often an antitrust violation can be a business tort as well. Of increasing importance to antitrust plaintiffs, a "combination" within the meaning of the antitrust laws may not be required. See W.L. Jaeger, Business Torts and Unfair Competition: New Tools for the Plaintiff in the 1990's, 4 Antitrust 4 (Spring, 1990). For example, a recent case decided by the United States Supreme Court involving predation in the commercial garbage hauling market in Burlington, Vermont yielded a judgment of [one hundred and fifty thousand] $ 153,438 for violations of federal antitrust law and a judgment of [six million] $ 6,066,082 for compensatory and punitive damages on a pendent state tort claim. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989).

The Restatement (Second) of Torts § 766 et seq., followed in most states, describes the elements of a tortious interference claim as follows: (1) a contract, or a legitimate expectancy of economic gain; (2) defendant's awareness of the contract or expectancy; (3) an intentional or improper act that causes a breach of contract or frustration in the expectancy; and (4) damages. These elements establish a "broad and undefined tort" with potentially very significant utility to the antitrust litigator. W. Prosser & W.P. Keeton, Law of Torts 979 (5th ed. 1984)

Successful interference claims can be based on intentional or negligent conduct. See, e.g., Blank v. Kirwan, 39 Cal.3d 311 (1985), intentional interference; J'aire Corp. v. Gregory, 24 Cal.3d 799 (1979), negligent interference. Punitive damages may be available for both torts. See, e.g., Cal. Civ. Code § 3294(c)(1). Breach of the implied covenant of good faith and fair dealing may also give rise to a substantial claim, although at least in California this tort has been recently limited in its scope. Foley v. Interactive Data Corp., 47 Cal.3d 654 (1988).

State law claims for tortious interference have been successfully employed when one or more elements of an antitrust claim could not be proved. See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683 (10th Cir. 1989); Deauville Corp. v. Federated Department Stores, Inc., 756 F.2d 1183, 1196 n.9 (5th Cir. 1985).

#### Expanding tortious interference stops natural resource degradation from an unenforceable public trust---extinction

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I Introduction

Tortious inference with the public trust has always been actionable under state law as a substantive right of the state trustee in its fiduciary capacity suing on behalf of the public for injury or impairment to natural resources belonging to the people. 1That right arose "when the [American] revolution took place," and the thirteen colonies won their independence, thus making King George transfer the trusteeship to the thirteen colonies at the conclusion of the Revolutionary War, not upon ratification of the Constitution. 2

Two things are tricky with the public trust doctrine, and that is what this Article addresses. First, what is the subject matter of the public trust and how should it evolve? Second, what tools are available to the trustee to protect the public trust? Most state public trust doctrines at least provide that the tidelands and lands beneath tidal and navigable waters are held in trust by the state to promote the public interest. 3Navigation, commerce, and fishing were originally seen as serving the public interest. 4But a lot has changed since colonial times, and our conception of the public interest has evolved to include values like [\*41] recreation, preservation, and restoration of natural resources. The public trust doctrine protects the public interest even in the face of private property rights:

The law we are asked to interpret in this case - the public trust doctrine - derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use. That common law principle, in turn, has roots in Roman jurisprudence, which held that "by the law of nature[,] ... the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." ... No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea... ." The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." In Arnold v. Mundy, the first case to affirm and reformulate the public trust doctrine in New Jersey, the Court explained that upon the Colonies' victory in the Revolutionary War, the English sovereign's rights to the tidal waters "became vested in the people of New Jersey as the sovereign of the country, and are now in their hands." 5 Arnold, addressed the plaintiff's claim to an oyster bed in the Raritan River adjacent to his farm in Perth Amboy. Chief Justice Kirkpatrick found that the land on which water ebbs and flows, including the land between the high and low water, belongs not to the owners of the lands adjacent to the water, but to the State, "to be held, protected, and regulated for the common use and benefit." 6

This is an exciting time in the development of the public trust doctrine. Courts are more frequently recognizing a standalone public trust action 7 or natural resource damages action, 8 empowering trustees to protect the public interest by undoing decades of pollution. These recent developments have built on earlier cases 9 and portend future developments. 10

II Public Trust

Most courts today acknowledge that the public trust must be allowed to evolve to meet changing conceptions of the public interest, 11such as recreation, 12 ecological management and restoration, 13and environmental justice. 14 States have the right to protect and manage the water, 15 air, and land 16 over which they are trustees to advance the public interest. The doctrine itself "imposes duties on government[,] instills certain inalienable rights in the people[, and] ... constitutes the sovereign legal obligation that facilitates the reproduction and survival of our society... ." 17Under the public trust doctrine, citizens stand as beneficiaries, holding public property interests in these essential natural resources. The public trust significantly demarcates a society of "citizens rather than of serfs." 18Today, the public interest is generally seen to encompass a broader range of interests expanding the trustee's duties. 19 The tools available to protect the public trust should be clarified and improved. In states with a narrower judicial definition of the public trust doctrine, the state as trustee often sues as parens patriae in its quasi-sovereign capacity to protect public health, safety, and the environment. 20Other states prefer to sue directly for interference with [\*43] the public trust. 21States may even sue in their proprietary capacity where they own the natural resource, such as water bottoms. Although there are clear differences among suits to protect the public trust as parens patriae or in a proprietary capacity, advocates and judges often muddle their reasoning, comingling, say, public trust language and parens patriae language. Because there are limits to the reach of parens patriae, it is important to skip the verbiage and focus on the substantive content of common law public trust claims. 22

The term "public trust" refers to a fundamental understanding that "we the people" share equally in certain natural resources, that private property rights are limited by the public's interest in certain natural resources, that government must protect the public as a fiduciary, and that no legislature may legitimately abdicate its core sovereign responsibility by undermining the public interest in natural resources. 23

In a constitutional system of checks and balances, the public trust is among the fundamental checks on government. In a nonenvironmental case, Stone v. Mississippi, the Supreme Court held the following:

No legislature can bargain away the public health or the public morals ... The supervision of both these subjects of governmental power is continuing in its nature ... The power of governing is a trust committed by the people to the government, no part of which can be granted away. 24

The public trust doctrine prohibits complete privatization of sovereign resources because privatization would constitute an impermissible transfer of governmental power into private hands, wrongfully limiting the powers of later legislatures and the rights of the public to safeguard crucial societal interests.

The public trust doctrine also focuses on the government's obligation to protect. Nonalienation is only one aspect of this - as is the [\*44] state's obligation to protect and, if necessary, restore the public trust. 25"The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public ... are protected, and to seek compensation for any diminution in that trust corpus." 26This is crucial because the trustee cannot have a duty without the ability to discharge that duty by litigation for damages or equitable relief. The duties owed by a public trustee to protect the public trust are generally analogous to those of a private trustee. 27For example, courts have adopted § 174 of the Restatement (Second) of Trusts, which states that "the fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." 28The comments to § 174 of the Restatement (Second) of Trusts clarify that if the trustees were selected because they have specialized knowledge or training, they will be held to that standard of skill and care: "If the trustee procured his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has." 29Trustees, therefore, have the authority and duty to protect the public trust from tortious interference and to protect the State's natural resources for the benefits of its citizens. 30In New Jersey, a suit in the State's capacity as parens patriae and a suit in its capacity as public trustee of the State's [\*45] groundwaters generally afford the State identical remedies. 31In effect, New Jersey already recognizes a standalone public trust claim, including the protection of the public to have meaningful access to the state's beaches. 32

There are a number of reasons favoring the more articulated use and development of tortious interference with the public trust. First, parens patriae actions for public nuisance involve a balancing of interests, which often fails to give due weight to the public's interest or jus publicum, trumping private interests or the jus privatum. Second, these same public nuisance claims do not compensate the public trust for loss of use of the damaged property and the delta between abatement and restoration to pre-nuisance conditions. In multi-defendant cases, a series of abatement orders may produce a patchwork of fixes as opposed to an appropriate trustee-implemented master plan. 33Third, a minority of courts have not favored public nuisance claims against a product manufacturer. 34Fourth, a minority of courts have failed to allow the state to sue for trespass despite the jus publicum because a parens patriae plaintiff does not have a sufficient property interest to sustain a trespass action for natural resources which belong to everyone. The argument generally is that the trustee lacks a right to exclusive possession of the resource which belongs to everyone. 35 [\*46] However, it is well settled that in other contexts a trustee may sue for trespass to property owned by trust beneficiaries. 36Trespass which tolerates no invasion of interests may be a better fit for public trustees than public nuisance. Fifth, parens patriae causes of action lack the evolutionary purpose of public trust cases as set forth in cases like Illinois Central. Sixth, remedies that are suited to private individuals may not work for natural resources protected by the public trust. For example, public nuisance is often limited to abating the nuisance, though some courts have moved away from this, recognizing that the trustee can only undo damages to scarce natural resources with money to pay for natural resource damages. We are seeing more parens patriae cases attempting to invoke the public trust doctrine to address these and related concerns. 37However, both parens patriae and tortious interference with public trust can and should also evolve independently.

The public trust means the jus publicum trumps the jus privatum. This was the case in Illinois Central. Likewise, in Just v. Marinette County, the Wisconsin Supreme Court upheld wetland regulations that diminished property values under the public trust doctrine without finding a takings, meaning the jus privatum takes subject to the jus publicum:

This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of the owner's right to use of his property. In the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man-made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the [\*47] balance of nature and are essential to the purity of the water in our lakes and streams. 38

Cases like Just v. Marinette County, and others, 39remind us that the public trust requires us to look at the positives to the trust and its beneficiaries, not just the negatives, as is often the case in some parens patriae litigation. 40Thus, for example, a public trust approach allows for loss of use damages and restoration for damaged resources both to compensate the public and to incentivize the tortfeasor to restore resources as quickly as possible. 41

Parens patriae often focuses on loss and requires "an injury to a "quasi sovereign' interest" (an interest different from the interest of private parties), and that the injury is to a "substantial segment of the population." 42 Alfred L. Snapp & Son v. Puerto Rico, was decided as a parens patriae case. 43The underlying issue arose in the labor context but does a good job of explaining the concept:

Parens patriae means literally "parent of the country." The parens patriae action has its roots in the common-law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function ... often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." 44

[\*48] Tortious interference with the public trust action is a stand-alone claim tied to government's fiduciary duties regarding public resources. 45 Parens patriae is a tool of the state's police power. The parens patriae claim gives the state standing to protect its quasi-sovereign interests by prosecuting the nongovernmental rights of its citizens under various state causes of action, such as public nuisance, 46strict liability, 47trespass, 48and unjust enrichment, 49among others. 50In some cases, the state may sue under the public trust and as parens patriae 51 for damages and unjust enrichment. 52

In re Matter of Steuart Transportation likewise relied on both public trust and parens patriae language to find state and federal rights to sue for the loss of migrating waterfowl resulting from an oil spill while explaining their differences:

This Court is of the opinion that both of these doctrines are viable and support the State and the Federal claims for the waterfowl ... . Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people. Likewise, under the doctrine of parens patriae, the state acts to protect a quasi-sovereign interest where no individual cause of action would lie. In the case currently before this Court, no individual citizen could seek recovery for the waterfowl, and the state certainly has a sovereign interest in preserving wildlife resources. 53

In some cases, the trustee may "bring suit [as parens patriae] to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources." 54Many opinions recognize tort remedies including strict liability, nuisance, and trespass, as tools for the state or its trustee to fulfill its fiduciary duty to the public. However, these same opinions are unclear as to whether the action is based on the public trust or on a parens patriae theory.

Because of some overlap (in the sense of both being applicable to a given case) and some jurisprudential confusion, some courts erroneously label public trust claims as " parens patriae" cases, and vice versa. These courts, and other courts, seemingly improperly examine public trust cases in terms of the elements of other tort claims, such as public nuisance. Sometimes the court gets it right when the advocate may not. 55On the other hand, as shown below, the tort of tortious interference involves an unreasonable interference with the public trust. 56Clearly, a wrongful interference exists if defendant engaged in trespass-like conduct 57or a public nuisance-like situation, for example, so we are not faulting that analysis; instead, we address the labeling of the underlying state claim that the court is vindicating. 58In some cases, the label may not matter to the outcome, but it often [\*50] does matter. Specifically, the elements of tortious interference do not require proof of a public nuisance, trespass, or any other tort.

III Elements of Tortious Interference

A. Elements

In order to show tortious interference with the public trust, 59 the State needs to show

(1) a protectable public trust interest; 60

(2) an unreasonable interference with that interest; 61 and

(3) a reasonable likelihood that the interference caused the loss to that protected interest or nexus. 62

B. Protectable Public Trust Interest

In a natural resource damage case, a protectable public trust interest includes water bottoms, 63waterfront land, 64migratory birds, 65 fisheries habitat, 66 groundwater, 67 air, land and water, 68 coastal waters, 69 wildlife, and other natural resources by which the injured resource is no longer able to serve the everchanging public interest. Protected public trust interests continue to develop at common law and include both the defense, restoration, or enhancement of natural resources damages 70and access to those resources. 71

This has become particularly clear in recent cases involving the injury to natural resources caused by products like MTBE, 72PCBs, 73PFAS 74, and legacy pollution cases. 75The courts focus on the substance of the interest, not necessarily its form. 76The public interest preexisted [\*52] and survived the creation of private property rights; the public trust may overlap and trump private property rights. The limits imposed on private property by the public trust have been the subject of numerous cases, finding in favor of the State's right to enforce the jus publicum without committing a taking. 77For example, the U.S. District Court for the District of Massachusetts held that when the federal government or the State conveys public trust property to a private individual, that individual takes subject to the terms of the trust - "the trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." 78Our analysis here focuses on natural resource damage public trust cases, but it is worth noting that the public trust extends to more than just natural resources. 79

Part of the public trust doctrine and its protectable interests reveal how society harmonizes private property rights ( jus privatum) and public property rights ( jus publicum). 80Strictly speaking, the public trust arises from the State's duty to its citizens, not traditional property law. 81The case law clearly provides the states with the common law [\*53] power to protect the public trust. Each state is a trustee of its natural resources. 82In Phillip Petrol. Co. v. Mississippi, the court explained, "It has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." 83What is less often discussed is how to cubbyhole or name the common law theories of liability available to the states. The scope of private property rights is decided by the state, subject to the public trust, and private property is taken subject to that understanding. In ExxonMobil, Judge Anzaldi specifically found that public trust extended to Exxon's private property but rejected trespass theory on the "exclusive possession" issue. 84In Deull Fuel Judge Mendez reached the opposite conclusion on trespass that "the public trust doctrine trumps the exclusivity element of a trespass claim":

This responsibility to protect public lands and natural resources forms the basis of the State to take action consistent with the policy stated by the Legislature. In this court's opinion, the remedy of trespassing as outlined in Count Four of the Complaint is available to the State as it performs its fiduciary obligation to ensure the rights of the public and to prosecute claims to protect the environment. Based on the facts alleged in the Complaint, the Public Trust Doctrine trumps the exclusivity element of a trespass claim. While possessory interests are usually for individual owners themselves to protect, when the harm is as extensive to the State's natural resources as [\*54] outlined in the Complaint, the harm is not just to the individual, but to the people of New Jersey as a whole. 85

The jus publicum exists even if "the State [does] not expressly retain its rights as public trustee in the conveying instruments." 86It follows that title is not synonymous with trusteeship. In National Ass'n of Home Builders v. New Jersey Dep't of Envt. Prot., the court held that:

title to such "public trust property' is subject to the public's right to use and enjoy the property, even if such property is alienated to private owners... This right of the public to use and enjoy such "public trust lands' does not disappear simply because the land that was once submerged is filled in. 87

The reality is that since the State originally holds the property in trust for the people, "[it] cannot convey to their prejudice." 88

The U.S. Supreme Court first fully delineated the parameters of the environmental public trust doctrine in 1892 in Illinois Central Railroad v. Illinois. 89 In that case, the Court was asked to settle the ownership of submerged lands extending out from Chicago under Lake Michigan. 90In 1869, the Illinois legislature passed an act which gave the Illinois Central Railroad Company the right to use and develop the land. 91However, in 1873 the state repealed the act. 92When the railroad company continued to develop the land, the Illinois Attorney General filed suit against it. 93

[\*55] The Court found for the State of Illinois, holding that the rights granted by the statute were revocable. 94The Court acknowledged that the State of Illinois held the title to the lands under the water of Lake Michigan, and that, in general, title carries with it freedom of alienation. 95But the title the state holds in public lands is "different in character ... [because] it is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein ... ." 96The state may grant parcels of the property in this public trust for the construction of "wharves, piers, and docks" to the extent that the structures improve the people's interest in the land. 97But, the Court observed, this is "a very different doctrine from the one which would sanction the abdication of the general control of the state over lands." 98It held that "the state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace." 99In other words, the state may grant control of the trust to a private organization in order to improve the land because private organizations may be in a better position than the state to effectuate that improvement. 100But any such improvements must be for the benefit of the people, who are the beneficiaries of the land. 101Such grants to private organizations are "necessarily revocable," and "the power to resume the trust whenever the state judges best is ... incontrovertible." 102The Supreme Court in Illinois Central applied the constitutional reserved powers doctrine to natural resources, which are held in trust and cannot be fully privatized. 103At issue was control of Chicago's harbor, which the Illinois legislature had privatized. In an explanation that extends beyond submerged lands, the Court explained the rationale of the public trust doctrine:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private [\*56] parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace... . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time... . The trust with which they are held, therefore, is governmental, and cannot be alienated ... . 104

Illinois Central made clear that alienating or destroying essential resources would amount to relinquishing sovereign powers in violation of the constitution's reserved powers doctrine. 105Land must remain with the sovereign in perpetuity. 106Legislatures cannot be assumed to intend to "casually dispose of irreplaceable public assets" through an act designed to merely simplify land title transactions. "We cannot ascribe to the legislature an intention that [sovereign lands] be permitted to be lost by default." 107Sovereign lands are not subject to alienability to the same degree as other lands held by the state. 108

The public trust creates the freedom to enjoy clean air and water, to recreate, and to otherwise enjoy and benefit from nature without regard to the self-interest of private parties who may have disproportionate influence over government. The public trust makes us all equal, and no amount of wealth or political influence can make one more equal or entitled than the whole of us. 109As Professor Wood has written, the public trust ensures that the government serves the common good, not itself or private individuals pursuing their own interests. 110Quoting Geer v. Connecticut,

the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. 111

The public interest evolves. "The industrial revolution has given way to the environmental revolution." 112The state administers the public trust and retains the continuing power that "extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust." 113

For example, New Jersey has recognized the broad nature of the public trust doctrine, and as such, application of the public trust doctrine has expanded over time. 114"It has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." 115For example, the Court in Arnold v. Mundy held that the public trust included land between the high and low tidewater level, dispelling the notion that the Doctrine might apply just to tidal waters. 116This evolved to include neighboring land and reasonable access, even if that access involved crossing private property. 117Still more, the public trust doctrine has been applied not only to the resources themselves, such as marshes and upland forests, but also to the public's right to recreational uses, for example, in the tidal lands, including bathing, swimming, and other shore activities. 118

New Jersey law describes the important role of natural resources to this State:

New Jersey's lands and waters constitute a unique and delicately balanced resource; [] the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; [] the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; [and] the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State ... . 119

The Spill Act's broad definition of natural resources arguably constitutes an effort to strengthen the public trust doctrine, especially as it relates to remedies.

C. Unreasonable Interference

Unreasonable interference, especially in the natural resource context, can occur in a number of ways, and traditional tort concepts may illuminate whether an interference is unreasonable. 120 Illinois Central is clearly a public trust case, which restrains the trustee from alienating the public trust, arguably the most extreme form of interference:

The harbor of Chicago is of immense value to the people of the State of Illinois, ... and the idea that its legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose, - one limited to transportation of passengers and freight between distant points and the city, - is a proposition that cannot be defended. 121

Interference may also include destroying natural resources, which is another extreme form of interference. In State of Ohio v. City of Bowling Green, the Ohio Supreme Court allowed money damages to the State for a fish kill that resulted from a mishap at the municipality's sewage treatment plant. 122The court noted that "the state holds... such [\*59] wildlife as a trustee for all citizens." 123"An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs." 124

In State of Maryland, Dept. of Natural Resources v. Amerada Hess, the court allowed an action for money damages for an oil spill in State waters that damaged the waters, fish, and birds. 125The Court found the Crown's Charter to Lord Baltimore to be broad enough to cover these resources and to find an unreasonable and actionable interference. 126

In Attorney General, State of Michigan v. Hermes the Court also allowed the state as trustee to bring a civil action for money damages to protect its fisheries. 127It followed other cases, including Bowling Green and Amerada Hess.

Public nuisance claims protect against a broader array of interferences. 128The Restatement definition nevertheless provides an initial standard for assessing whether the parties have stated a claim for common law interference. The Restatement definition of public nuisance set out in § 821B(a) has two elements: an unreasonable interference and a right common to the general public. 129Section 821B(2) further explains:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. 130

[\*60] This is helpful but not sufficient if the public trust is at issue. For example, interference is unreasonable when it (a) significantly interferes with the (changing) public interest, and (b) a significant interference exists when a conflict arises between the jus publicum and jus privatum, say, when a developer wants to build on wetlands, though both acts and omissions by the private landowner may give risk to that conflict.

A defendant's interference is unreasonable relative to the jus publicum. A public nuisance then is "an unreasonable interference with a right common to the general public" or the interest of the public at large. 131Under common law, the destruction and alteration of natural resources is generally without justification. Unjustified interference may also arise from engaging in abnormally dangerous activities, including the discharge of hazardous substances. 132Those who "introduce extraordinary risk of harm into the community for their own benefit" are strictly liable. 133Even manufacturers may be held liable by the state for trespass. 134Conduct may also be considered wrongful if the defendant interfered with the public trust for the sake of appropriating its benefits. Additionally, conduct may be wrongful if the defendant acted for the purpose of producing the interference, or with knowledge that interference was substantially certain to occur. 135Conduct may also be wrongful if it is an independently wrongful act, culpable apart from its effect on the public trust.

[\*61] Nuisance, 136trespass, 137strict liability, 138conversion, 139products liability 140and negligence teach us a great deal about interference. However, these legal cubbyholes often obscure the boundaries between jus publicum and jus privatum. 141Thinking and talking in terms of tortious interferences with the public trust provides a more illuminating way of analyzing this boundary under a specific set of circumstances. 142In the end, courts will decide if there is a duty on the basis of the evolving standards of the community. Practical rules and not formalistic quibbling should determine duties. As Justice Holmes said, "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." 143In general it should not matter if the label "tortious interference with public trust" hardly appears in the case law. 144

D. Nexus

There must also be a nexus between that wrongful interference and the loss to the protected interest. This requires proof that defendant's act or omission directly or indirectly led or contributed to the harm, regardless of other causes. That is, the wrongful act damaged the public trust. Damages or remedies within the nexus of harm must be determined. Harm often refers to the disruption of the ecosystem:

Biological integrity ... refers to the capacity to support and maintain a balanced, integrated adaptive biological system having the full range of elements (genes, species, and assemblages) and processes (mutation, demography, biotic interactions, nutrient and energy dynamics, and metapopulation processes) expected in the natural habitat of a region. 145

A nexus exists even if there is only a de minimis impact. "Application of [the de minimis] doctrine...may involve making it equally so elsewhere. In total consequence, the State's trust interests ... could be affected ... considerably more than a trifling matter." 146Cumulative impacts matter. 147

Nexus is different from proximate cause. 148The trustee must be able to identify an articulable nexus between the business transacted by the defendant and the resulting claim being sued upon. 149The nexus can be based on geography, market share, waste streams or other case-by-case and site-specific factors. In public nuisance cases, the plaintiff is generally required to prove causation - that "the defendant created or assisted in the creation of the nuisance," 150which is more than a nexus requirement. However, if that role cannot be traced, courts may rely on [\*63] circumstantial evidence of causation. 151Nevertheless, the added burdens and delays in a public nuisance case are other reasons to proceed under a public trust theory.

IV Common Law Is Always Evolving

"Continuity and change are essential attributes of a legal system." 152Public trust law enjoys these attributes and is no different from other common law doctrines: "the public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." 153Public trust law dates back to the Romans 154and continues to evolve at common law 155to meet the contemporary challenges of pollution and limited resources. The advent of public law enactments is not a reason to halt the evolution of the public trust, or to eliminate it entirely, but rather to allow it to develop in that new legal context in light of the changing societal values driving those enactments 156>The law should be based on current concepts of what is right and just and the judiciary should be alert to the never ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and intend to discredit the law should be readily rejected. 157

As the Matthews court said, "Archaic judicial responses are not an answer to a modern social problem." 158For example, New Jersey's natural resource restoration program is grounded in the public trust [\*64] doctrine, which originates from a body of common law 159providing that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens," 160and has been enhanced by statute: 161the New Jersey Spill Act. 162The Spill Act identifies the Department of Environmental Protection (DEP) as the trustee of the State's natural resources. 163Natural resources are broadly defined to include "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State." 164

V Suing to Enforce

The public trust is not self-executing, and the state must sue to enforce. 165"If the health and comfort of the inhabitant of a state are threatened, the state is the proper party to represent and defend them"; 166 since natural resources are part of the common public trust, 167 the state as trustee should sue for tortious interference. Public trust natural resources enjoy at least the same protections as private resources. Tort law, like the Spill Act, requires interpretations that deter misconduct and spur restorative actions. 168The Supreme Court has repeatedly affirmed that the state is the trustee of environmental resources, which are held in trust for the benefit of the public. 169Though governmental agencies routinely grant environmental management contracts to private organizations, the public beneficiary does not change nor does the government's fiduciary duty. 170Understandably, most public trust cases focus on the responsibilities of the state as a trustee for its people. 171The U.S. District Court for the [\*66] Eastern District of Virginia reaffirmed that "under the public trust doctrine, the [states] and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people." 172Obviously, the state's trustee's fiduciary duties include the right to sue for injury to the public trust. 173 The specific common law tools available to the trustee to discharge its fiduciary duty to preserve and protect the public trust are less often discussed.

VI Remedies

Trustees investigate natural resource injuries and determine appropriate remedies. This subject generally is beyond the scope of this article. However, it is worth noting public trustees may also recover for the defendant's unjust enrichment. 174For example:

In Wyandotte Transport Co. v. United States, the Supreme Court held that restitution was an allowable remedy for government, even though statutory penalties already applied. In Wyandotte, the government sued for the negligent sinking of a ship in a navigable river. The case can be considered a toxic tort because the sunken vessel contained chlorine. The court allowed the government to be reimbursed for the expenses of raising the ship and any cleanup involved, because statutory fines were "hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign. The court further added, "denial of such a remedy ... would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." 175

Conclusion

The common law public trust doctrine is a dynamic and evolving doctrine. It is a "background principle" of property law. 176 Historically, courts have cubbyholed such state claims to protect the public trust as a parens patriae action or public trust action for "public nuisance," "trespass," or "strict liability," or ignored identifying the operative legal theory being used to enforce the public trust. In many ways, this jurisprudence invokes a formalism unsuited to the evolving public trust. The governing jurisprudence could be vastly improved by recognizing and evolving over time the cause of action for tortious interference with the public trust. The public trust provides a framework, integrated with applicable science and policy, to preserve, protect and help us restore our ecosystems. 177

### Prices ADV---2NC

#### Stats prove

Daniel Drezner 14, IR prof at Tufts, The System Worked: Global Economic Governance during the Great Recession, World Politics, Volume 66. Number 1, January 2014, pp. 123-164

The final significant outcome addresses a dog that hasn't barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.42 They voiced genuine concern that the global economic downturn would lead to an increase in conflict—whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fueled impressions of a surge in global public disorder. The aggregate data suggest otherwise, however. The Institute for Economics and Peace has concluded that "the average level of peacefulness in 2012 is approximately the same as it was in 2007."43 Interstate violence in particular has declined since the start of the financial crisis, as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict, as Lotta Themner and Peter Wallensteen conclude: "[T]he pattern is one of relative stability when we consider the trend for the past five years."44 The secular decline in violence that started with the end of the Cold War has not been reversed. Rogers Brubaker observes that "the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected."43

### Capture ADV

#### It wouldn’t wipe out the grid and definitely wouldn’t cause extinction

Dr. Brian Koberlein 16, PhD, Astrophysicist and Physics Professor at Rochester Institute of Technology, “Super-Flare Super-Hype”, 3/28/2016, https://archive.briankoberlein.com/2016/03/28/super-flare-super-hype/index.html

Our Sun emits solar flares on a regular basis, but what would happen if it released a flare 100,000 times more powerful than the largest flare in recorded history? Could it destroy our power grid, irreversibly change life on Earth, or even strip the atmosphere from our planet? Let the fear-mongering begin!

Superflares are in the news, and with it comes wild claims about their possible threat to human civilization. As with most hyped stories, they focus on just how powerful one could be, and how it might disrupt human civilization rather than the actual science, which is unfortunate because the science is pretty interesting. It’s based on recent work that looked at the flare activity of more than 5,000 Sun-like stars. What they found was that stars where superflares occur tend to have stronger magnetic fields than stars where superflares are less likely. This correlation between superflares and magnetic field strength suggests that superflares are produced by a mechanism similar to regular solar flares.

From solar observations we know that solar flares occur when magnetic field lines near the Sun’s surface “snap” into realignment. The Sun actually rotates differentially, meaning that its equator rotates a bit faster than its poles. As a result, over time the magnetic field at its surface wraps around the Sun a bit. When the magnetic field is twisted up, it can realign quickly, producing a solar flare. For stars with stronger magnetic fields, the resulting realignment has a tendency to be more severe, and thus large solar flares (superflares) are more likely. This work shows that superflares are not a different phenomena, but are solar flares on a larger scale. They also found that superflares can occur on stars with magnetic field strengths similar to the Sun. While superflares are much more likely on stars with strong magnetic fields, the team found that about 10% of the superflares they observed occurred on stars with magnetic fields on par or weaker than that of our Sun. From their observations, they estimate that a superflare could occur on the Sun about once every thousand years or so.

That said, if such a superflare were to occur today it wouldn’t end civilization as we know it. There is some evidence in tree ring data that small superflares might have occurred in 775 and 993 AD, with little effect on human society. In our modern world solar flares do pose some risk to satellites and our electrical power grid, but we have ways of limiting their effect. In a bad-case scenario we might have some infrastructure to rebuild, but it wouldn’t be an extinction-level event.

So there’s no need to worry. Just keep calm and science on.\

## 1NR

### Pharma DA---1NR

#### It’s the most probable existential threat

Thomas Such 21, Writer for the Glasgow Guardian, “How to Wipe Out Humanity”, The Glasgow Guardian, 2/9/2021, https://glasgowguardian.co.uk/2021/02/09/how-to-wipe-out-humanity/

Not only is a virus the key to an unpredictable disease which may one day wipe out humanity, but the origins of said virus are key. My “research” concluded that the most efficient way of killing humanity is to have the disease spread in a semi-developed country such as China; it is far easier for viruses and other diseases to spread in less developed countries - but in order to successfully achieve global transmission, a host country must have the substantial international infrastructure to spread a pandemic worldwide. Using this strategy in my “research”, I was able to play a game of Plague Inc. wherein the spread and threat of Covid-19 seemed minimal by using China as a perfect starting point to wipe out humanity. The key, as it turns out, is the spreading of the virus - something that Covid-19 has proved can be done very easily in our modern globalised society. The journey from China to Italy spreading the plague across Europe took almost 40 years back in the middle ages: in 2020, it took a mere 40 days for widespread outbreaks to begin in Italy spreading across much of Europe.

My research into the historical spread of pandemics and my attempts to create my destroyer of humanity illustrates a significant disparity between what happens in the real world and the measures one may find in a simulator. Political realities and measures many may consider “draconian” or simply unrealistic heavily impact how a pandemic may spread and the eventual impact it will have on humanity. Using Plague Inc., I was able to effectively kill off humanity in around a year using a fast transmission of virus, which also became gradually more lethal. This is essential to ensure the near-universal transmission of the virus, and to penetrate measures such as increased border security and isolated regions once the knowledge of the pandemic spreads. Whilst it is unlikely that humanity will be wiped out any time soon, it became clear to me that instead of nuclear war, alien invasion or the looming threat of global warming; the real threat to humanity and the eventual destruction of our species may come from something as simple as bacteria. While we like to revel in our scientific advancements of the modern era and the ascension of humans as Earth’s alpha species, it becomes clear that, when we adapt, our environment and the threats it poses adapt with us. Plague Inc. showed a clear pathway to killing off humanity - though, luckily, the Covid-19 threat in the program was combated due to immense political pressure, restrictions and record-making vaccine paces. The real threat, however, remains clear: if humanity becomes increasingly lax with preventive and managerial measures, it is obvious what the future may hold for us.

#### It sparks global instability that goes nuclear

Tatsujiro Suzuki 21, Director and Professor at the Research Center for Nuclear Weapons Abolition, Nagasaki University, Former Vice Chairman of Japan Atomic Energy Commission, et al., “Pandemic Futures and Nuclear Weapon Risks: The Nagasaki 75th Anniversary Pandemic-Nuclear Nexus Scenarios Final Report”, Journal for Peace and Nuclear Disarmament, Volume 4, Issue Supplement 1, Taylor & Francis

The Challenge: Multiple Existential Threats

The relationship between pandemics and war is as long as human history. Past pandemics have set the scene for wars by weakening societies, undermining resilience, and exacerbating civil and inter-state conflict. Other disease outbreaks have erupted during wars, in part due to the appalling public health and battlefield conditions resulting from war, in turn sowing the seeds for new conflicts. In the post-Cold War era, pandemics have spread with unprecedented speed due to increased mobility created by globalization, especially between urbanized areas. Although there are positive signs that scientific advances and rapid innovation can help us manage pandemics, it is likely that deadly infectious viruses will be a challenge for years to come.

The COVID-19 is the most demonic pandemic threat in modern history. It has erupted at a juncture of other existential global threats, most importantly, accelerating climate change and resurgent nuclear threat-making. The most important issue, therefore, is how the coronavirus (and future pandemics) will increase or decrease the risks associated with these twin threats, climate change effects, and the next use of nuclear weapons in war.5

Today, the nine nuclear weapons arsenals not only can annihilate hundreds of cities, but also cause nuclear winter and mass starvation of a billion or more people, if not the entire human species. Concurrently, climate change is enveloping the planet with more frequent and intense storms, accelerating sea level rise, and advancing rapid ecological change, expressed in unprecedented forest fires across the world. Already stretched to a breaking point in many countries, the current pandemic may overcome resilience to the point of near or actual collapse of social, economic, and political order.

In this extraordinary moment, it is timely to reflect on the existence and possible uses of weapons of mass destruction under pandemic conditions – most importantly, nuclear weapons, but also chemical and biological weapons. Moments of extreme crisis and vulnerability can prompt aggressive and counterintuitive actions that in turn may destabilize already precariously balanced threat systems, underpinned by conventional and nuclear weapons, as well as the threat of weaponized chemical and biological technologies. Consequently, the risk of the use of weapons of mass destruction (WMD), especially nuclear weapons, increases at such times, possibly sharply.

The COVID-19 pandemic is clearly driving massive, rapid, and unpredictable changes that will redefine every aspect of the human condition, including WMD – just as the world wars of the first half of the 20th century led to a revolution in international affairs and entirely new ways of organizing societies, economies, and international relations, in part based on nuclear weapons and their threatened use. In a world reshaped by pandemics, nuclear weapons – as well as correlated non-nuclear WMD, nuclear alliances, “deterrence” doctrines, operational and declaratory policies, nuclear extended deterrence, organizational practices, and the existential risks posed by retaining these capabilities – are all up for redefinition.

A pandemic has potential to destabilize a nuclear-prone conflict by incapacitating the supreme nuclear commander or commanders who have to issue nuclear strike orders, creating uncertainty as to who is in charge, how to handle nuclear mistakes (such as errors, accidents, technological failures, and entanglement with conventional operations gone awry), and opening a brief opportunity for a first strike at a time when the COVID-infected state may not be able to retaliate efficiently – or at all – due to leadership confusion. In some nuclear-laden conflicts, a state might use a pandemic as a cover for political or military provocations in the belief that the adversary is distracted and partly disabled by the pandemic, increasing the risk of war in a nuclear-prone conflict. At the same time, a pandemic may lead nuclear armed states to increase the isolation and sanctions against a nuclear adversary, making it even harder to stop the spread of the disease, in turn creating a pandemic reservoir and transmission risk back to the nuclear armed state or its allies.

In principle, the common threat of the pandemic might induce nuclear-armed states to reduce the tension in a nuclear-prone conflict and thereby the risk of nuclear war. It may cause nuclear adversaries or their umbrella states to seek to resolve conflicts in a cooperative and collaborative manner by creating habits of communication, engagement, and mutual learning that come into play in the nuclear-military sphere. For example, militaries may cooperate to control pandemic transmission, including by working together against criminal-terrorist non-state actors that are trafficking people or by joining forces to ensure that a new pathogen is not developed as a bioweapon.

To date, however, the COVID-19 pandemic has increased the isolation of some nuclear-armed states and provided a textbook case of the failure of states to cooperate to overcome the pandemic. Borders have slammed shut, trade shut down, and budgets blown out, creating enormous pressure to focus on immediate domestic priorities. Foreign policies have become markedly more nationalistic. Dependence on nuclear weapons may increase as states seek to buttress a global re-spatialization6 of all dimensions of human interaction at all levels to manage pandemics. The effect of nuclear threats on leaders may make it less likely – or even impossible – to achieve the kind of concert at a global level needed to respond to and administer an effective vaccine, making it harder and even impossible to revert to pre-pandemic international relations. The result is that some states may proliferate their own nuclear weapons, further reinforcing the spiral of conflicts contained by nuclear threat, with cascading effects on the risk of nuclear war.

#### Externally---there’s a bioweapons impact: pharma contains it AND it causes extinction---nuke war doesn’t

Clifford Singer 1, Director of the Program in Arms Control, Disarmament, and International Security at the University of Illinois at Urbana-Champaign, “Will Mankind Survive the Millennium?”, The Bulletin of the Program in Arms Control, Disarmament, and International Security, Spring 2001, Volume 13, Number 1, http://www.acdis.uiuc.edu/research/S&Ps/2001-Sp/S&P\_XIII/Singer.htm

In recent years the fear of the apocalypse (or religious hope for it) has been in part a child of the Cold War, but its seeds in Western culture go back to the Black Death and earlier. Recent polls suggest that the majority in the United States that believe man would survive into the future for substantially less than a millennium was about 10 percent higher in the Cold War than afterward. However fear of annihilation of the human species through nuclear warfare was confused with the admittedly terrifying, but much different matter of destruction of a dominant civilization. The destruction of a third or more of much of the globe’s population through the disruption from the direct consequences of nuclear blast and fire damage was certainly possible. There was, and still is, what is now known to be a rather small chance that dust raised by an all-out nuclear war would cause a so-called nuclear winter, substantially reducing agricultural yields especially in temperate regions for a year or more. As noted above mankind as a whole has weathered a number of mind-boggling disasters in the past fifty thousand years even if older cultures or civilizations have sometimes eventually given way to new ones in the process. Moreover the fear that radioactive fallout would make the globe uninhabitable, publicized by widely seen works such as “On the Beach,” was a metaphor for the horror of nuclear war rather than reality. The epidemiological lethal results of well over a hundred atmospheric nuclear tests are barely statistically detectable except in immediate fallout plumes. The increase in radiation exposure far from the combatants in even a full scale nuclear exchange at the height of the Cold War would have been modest compared to the variations in natural background radiation doses that have readily been adapted to by a number of human populations. Nor is there any reason to believe that global warming or other insults to our physical environment resulting from currently used technologies will challenge the survival of mankind as a whole beyond what it has already handily survived through the past fifty thousand years.

There are, however, two technologies currently under development that may pose a more serious threat to human survival. The first and most immediate is biological warfare combined with genetic engineering. Smallpox is the most fearsome of natural biological warfare agents in existence. By the end of the next decade, global immunity to smallpox will likely be at a low unprecedented since the emergence of this disease in the distant past, while the opportunity for it to spread rapidly across the globe will be at an all time high. In the absence of other complications such as nuclear war near the peak of an epidemic, developed countries may respond with quarantine and vaccination to limit the damage. Otherwise mortality there may match the rate of 30 percent or more expected in unprepared developing countries. With respect to genetic engineering using currently available knowledge and technology, the simple expedient of spreading an ample mixture of coat protein variants could render a vaccination response largely ineffective, but this would otherwise not be expected to substantially increase overall mortality rates. With development of new biological technology, however, there is a possibility that a variety of infectious agents may be engineered for combinations of greater than natural virulence and mortality, rather than just to overwhelm currently available antibiotics or vaccines. There is no a priori known upper limit to the power of this type of technology base, and thus the survival of a globally connected human family may be in question when and if this is [[1]](#footnote-1)achieved.

#### Pharma mergers are surging but face latent risk of antitrust---FTC policy success will be determinative

Ben Beerle 1-21, Partner at Cooley LLP, JD from the University of Michigan Law School, BA from UCLA, et al., “Cooley’s 2021 Life Sciences M&A Year in Review”, JD Supra, 1/21/2022, https://www.jdsupra.com/legalnews/cooley-s-2021-life-sciences-m-a-year-in-6515122/

General trends in life sciences M&A

Although the COVID-19 pandemic that defined 2020 continued to shape much of the life sciences industry in 2021, the way that it did was markedly different. While 2020’s M&A landscape was characterized by whiplash volatility from choppy deal activity in the first half of the year to a surge in volume in the second half, that momentum accelerated in 2021, with no signs of slowing down heading into 2022.

This frenetic deal activity – pharmaceutical and life sciences transactions as a whole were up 46% in deal value and up 52% in deal volume from 2020 – was driven by a number of key macroeconomic and sector-specific trends that we expect to continue into 2022, including:

* Robust deployment of cash by big pharmaceutical buyers, including record cash flow generated by COVID-19 vaccines.[1] Major all-cash acquisitions have followed, such as Arena Pharmaceutical’s agreement to sell to Pfizer for $6.7 billion, Acceleron Pharma’s agreement to sell to Merck for $11.5 billion and Sanofi’s agreement to acquire Kadmon for $1.9 billion. With COVID‑19 treatments from Pfizer, Merck and potentially others hitting the market soon, we expect Big Pharma to continue to parlay this cash flow into growth in other areas of strategic focus.
* Midsize pharmaceutical buyers pursuing opportunistic acquisition strategies, with robust capital markets and high valuations having limited the pool of attractive assets available in recent years. These players have looked further afield to add new capabilities and pipeline assets. Examples of this strategy include Horizon Therapeutics’ acquisition of Viela Bio for $3 billion to strengthen its early‑stage R&D capabilities and expand its pipeline, and Jazz Pharma’s acquisition of GW Pharma for $7.2 billion to enhance product diversification by adding the first and only FDA‑approved prescription cannabidiol medicine to its portfolio.
* Increased focus on digitization, with life sciences companies placing a premium on innovative and tech‑driven assets. A survey conducted at the beginning of 2021 found that 61% of surveyed life sciences executives believed they had overperformed on digital transformation during the pandemic relative to their competitors and 67% expected to increase that investment.[2] Examples of this strategy coming to bear in 2021 included Thermo Fisher Scientific’s acquisition of PPD for $17.4 billion in a bid to acquire cutting edge research capabilities.
* Private equity’s increased interest in life sciences, with PE buyers accounting for 47% of deal volume in the first half of 2021, compared to a long‑term average of approximately 35%. A notable example was a consortium of PE funds agreeing to acquire a majority stake in Medline for $34 billion.
* Complex deal structures rising in prominence, from spinoff transactions – which we anticipate will continue to play a central role in M&A transactions in 2022 as large pharma companies focus on core competencies of their businesses – to continued use of earnout structures and other creative bridges for valuation and risk sharing, such as Vividion Therapeutics’ $2 billion agreement to sell to Bayer that featured up to $500 million in potential milestone payments. DeSPAC transactions also hit an all‑time high in early 2021 – and will likely continue to be a path utilized by early-stage life sciences companies to access the public markets, despite late 2021’s cool-down of the SPAC market.

Certain headwinds and other complicating factors, however, may have tamped down M&A activity in 2021, including:

* Antitrust regulators continuing to produce uncertainty, with the Federal Trade Commission announcing a number of key policy changes – the full impact of these policy changes on transactions remains to be seen.

#### Companies are cash rich, primed for a flurry of acquisitions that’ll drive R&D, but it requires strong market confidence

PL 2-1 – The Pharma Letter, “January 2022 Pharmaceutical M&A Round-Up”, 2/1/2022, https://www.thepharmaletter.com/article/january-2022-pharmaceutical-m-a-round-up

The first month of the year is often one of the busiest for the announcement of mergers and acquisitions (M&A) in the pharmaceutical sector.

As well as being a busy month for the announcement of licensing agreements and complete response letters, January 2022 has proved fairly significant for M&A deals, with two acquisitions exceeding $1 billion in value.

One was provided by UCB (Euronext: UCB) in its $1.9 billion buy of USA-based biotech Zogenix (Nasdaq: ZGNX) to broaden the Belgian drugmaker's portfolio for rare forms of epilepsy. The other, and the month's biggest deal, was Samsung BioLogics paying $2.3 billion to US biotech Biogen (Nasdaq: BIIB) to take full ownership of the Korean firm's Samsung Bioepis joint venture, which has become one of the world's leading manufacturers of biosimilar drugs.

Smaller deals were announced by Germany's Merck KGaA (MRK: DE), among others. Our table below details the acquisitions announced and reported on by The Pharma Letter during January.

Historically, North American and European companies have been associated with being behind the biggest M&A deals in pharma and biotech, but the entry of major Asian players into the industry globally in recent years is starting to show. Japanese and Korean firms are among the companies that have entered the M&A market this month, as well as those from the USA and Europe. It will be fascinating to see to what extent this trend continues throughout the year as drugmakers bolster their R&D efforts by acquiring new drugs and platforms.

The pie chart below reflects the geography of companies doing the buying, together with the number of deals, in 2022 so far, and will provide more of a telling picture as the months progress.

Strategies to targeting future growth, as well as levels of confidence in the industry as a whole, can often be seen by looking at how much companies are spending on M&A deals, and how this compares to other years. Our table below looks at the cumulative totals from each month compared to the same month in the previous two years.

Although more money has been spent than in the first month of 2020 and 2021, pharma's very biggest companies have not done any major deals in January of this year. Factors behind this could be the spread of the Omicron variant and major deal-making event the JP Morgan Healthcare Conference taking place virtually once more, rather than in person.

The rest of the year could be a different story. Companies that have reaped the rewards of developing successful COVID-19 vaccines and treatments will have cash reserves to dip into, and excitement at burgeoning technologies such as mRNA and cell and gene therapies is likely to lead to a flurry of deals in those spaces.

#### Nothing concrete has been implemented---the question is what will actually get through

Alden Abbott 1-26, Senior Research Fellow at the Mercatus Center at George Mason University, and Andrew Mercado, Adjunct Professor and Research Assistant at George Mason University's Antonin Scalia Law School, Master's Degree in Economics from George Mason University, “Developments in Competition Policy During the First Year of the Biden Administration”, Mercatus Center Policy Briefs, 1/26/2022, https://www.mercatus.org/publications/antitrust-and-competition/developments-competition-policy-during-first-year-biden

Conclusion

Competition policy developments in the first year of the Biden administration have a common theme. Very few concrete, actionable steps have been taken, but the groundwork has been laid for far greater government intervention to curtail disfavored types of business conduct. By bringing interventionist individuals into top positions at the antitrust agencies and releasing an executive order focused primarily on directing federal agencies to intervene to a greater extent in the economy, the new administration has made it clear that more aggressive antitrust enforcement actions—and novel competition rulemaking proposals—are in the offing. What’s more, growing fervor in the halls of Congress has led to bipartisan support for bills that would expand the power of antitrust agencies to limit or block mergers and other transactions by dominant firms. These developments all point to what may be the largest antitrust policy shift in nearly half a century, one that could significantly reshape the fabric of the economy and the welfare of consumers. Year two of the Biden administration will provide greater insights regarding the extent to which such a dramatic policy transformation will actually come to pass.

#### Current antitrust is all pronouncement and no law---it’ll all get jammed up in court AND businesses know that, so it hasn’t effected mergers---the plan is a unique break

John Ingrassia 22, Senior Counsel at Proskauer Rose LLP, JD from Hofstra University School of Law, BA from Pace University, “How to Navigate the Coming Antitrust Policy Tests”, JD Supra, 1/5/2022, https://www.jdsupra.com/legalnews/how-to-navigate-the-coming-antitrust-7543303/

2021 will be remembered in antitrust law. Not since the 1970s has there been so much chatter over the fundamental purposes of antitrust policy, or such potential for actual sea change.

Half a century ago, Robert Bork and the Chicago School argued that antitrust law had lost its way and should focus on consumer welfare. Bork's view was that antitrust enforcement was getting in the way of legitimate competition, and the U.S. Supreme Court was quick to embrace the consumer welfare standard.

Now, Federal Trade Commission Chair Lina Khan and the new Brandeisians argue that antitrust law has again lost its way and must shed the constraints of the consumer welfare standard.

Khan's view is that consolidation has gone unchecked in the American economy, resulting in structural harms to competition that the consumer welfare standard is unable to address.

She believes the agency has historically defined markets too narrowly to effectively police broader economic impacts of sustained consolidation, and favored gerrymandered remedies over outright challenges.

Khan has imposed sweeping changes aimed at chilling merger activity and shaping the future of merger enforcement. Against dissents from Republican Commissioners Christine Wilson and Noah Phillips, and charge of going rogue from the U.S. Chamber of Commerce, the FTC stripped away long-standing exemptions and interpretations that streamlined merger review.

The action came in response to an unprecedented merger wave — 3,845 acquisitions filed with the agencies in the first 11 months of 2021, substantially more than most full years.

The changes are having an impact, making investigations more intrusive, lengthy and less predictable. Still, policy precedes practice, and while the FTC has been heavy on policy, it has yet to test those policies in the courts.

The tests may come in the next year. Meanwhile, we can also expect the FTC and the U.S. Department of Justice under Assistant Attorney General Jonathan Kanter's leadership, to not only continue the trajectory of policy changes but also begin the task of entrenching them in agency practice.

Here, we review the year in FTC policy moves, what they mean and how to navigate the newly laid minefields.

Warning Letters After the Close of HSR Waiting Periods

In an unprecedented move, the FTC recently began issuing letters to parties in transactions

the agency may intend to investigate after expiration of the Hart-Scott-Rodino Act waiting period. According to the agency in an Aug. 3, 2021, blog, this is the result of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."

Wilson, however, said on Twitter on Aug. 12, 2021, that she was "gravely concerned that the carefully crafted HSR framework is suffering a death by a thousand cuts," following her Aug. 9 statement that said "For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings."

The FTC's jurisdiction to review transactions is independent of the HSR reporting requirements, with the power to investigate any transaction before or after closing, whether subject to reporting or not, and whether the HSR waiting period has expired or not.

There are examples of the agencies reviewing nonreportable transactions, and even investigating reportable transactions after expiration of the HSR waiting period, though they are rare.

The warning letters do not assert new authority not already existing under law, but notifying parties that an investigation may remain open post-HSR clearance implicates finality and certainty of investigations, but not every transaction gets a warning letter. Those with no issues go through unscathed. Those with clear issues are investigated.

The deals that might pose some issues, but not enough to draw an investigation, might trigger the newly minted warning letter. To show the letters have teeth, the FTC will sooner or later have to challenge a deal post-HSR waiting period, putting it to the test before courts, where it is likely to face hurdles to the extent the deal did not warrant a full investigation in the first instance.

Still, the practice is ushering a change in how provisions are drafted in deal documents. A buyer asserting that it is not required to close over the — arguably — still-pending investigation may face an uphill battle depending on how the closing conditions are drafted, for they typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations or issuance of warning letters.

So careful buyers seek closing requirements that no investigations are threatened and that no warning letters have been issued. Recent examples include the 3D Systems Corp.'s agreement to acquire Oqton Inc. and Universal Corp.'s agreement to buy Shank's Extracts Inc.

The parties' agreements provided that if a warning letter is issued, the investigation would be treated as closed 30 days after receipt of such letter. Buyers may want to consider similar provisions until more emerges on how the FTC will proceed with warning letter transactions.

More Intensive Merger Investigations

The FTC announced plans on Aug. 3, 2021, to make the second request process both "more streamlined and more rigorous." The changes include the following:

Merger investigations will address additional potentially impacted competition, such as labor markets, cross-market effects, and the impact on incentives of investment firms.

Modifications to second requests will be more limited.

The agency will require parties to provide more information relating to their use of e- discovery in responding to the investigation.

Additional information will be required with respect to privilege claims.

The FTC said these changes are in recognition that "an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."

Possibly in response to such steeped up investigative techniques and resistance to find common ground with merger parties, Sportsman's Warehouse Holdings Inc. and Great Outdoors Group LLC abandoned their proposed merger at the end of 2021, citing indications that the FTC would be unlikely to approve the outdoor sporting goods transaction.

The changes, though, do little to streamline the second request process. They make it more complex, burdensome and time-consuming.

Perhaps most notable is the use of the process to delve into labor markets. Republicans Wilson and Phillips argued that FTC leadership may have themselves to blame for the merger review crunch, saying in a Nov. 8, 2021 statement:

If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes.

More Onerous Consent Decree Provisions

Where merger parties settle a challenge rather than litigate, the consent decree process sets out the parties' obligations. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions.

The FTC rescinded this long-standing policy, noting that it:

Returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged.

The agency will also require divestiture buyers to agree to prior approval for any future sale of the assets they acquire. Khan explained the move was to avoid "drain[ing] the already strapped resources of the Commission" on "repeat offenders."

The FTC included the new provision in its Oct. 25, 2021, consent decree settling a proposed transaction by DaVita Inc., a dialysis service provider. DaVita is now required to receive prior approval from the FTC of 10 years before any new acquisitions, a dialysis clinic business in Utah being in question.

This is a significant change and will chill not only settlements with the FTC, but also M&A transactions at the outset where such provisions are commercially untenable. Wilson and Phillips noted in dissent that "a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers."

The FTC clearly aims to chill M&A activity, and merger agreements that provide more optionality to abandon deals will become more common, though parties intent on pushing their deal through may see a consent decree with 10-year approval provisions as less palatable than litigating, and force the FTC to cave or go to court.

Withdrawal of the Vertical Merger Guidelines

In another party-line vote, the FTC withdrew the vertical merger guidelines, which were issued just last year. Democratic commissioners criticized the guidelines as based on "unsound economic theories that are unsupported by the law or market realities," and reflecting a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."

Vertical transactions are between firms at different levels in the supply chain. Historically, antitrust enforcement of exceptional vertical mergers were rare and difficult given the previously presumed efficiencies. Vertical mergers can eliminate double marginalization, in which firms at each level mark up prices above marginal cost. Elimination of one markup results in lower prices and can be pro-competitive.

Khan, however, argues the guidelines' "reliance on [elimination of double marginalization] is theoretically and factually misplaced." Going forward, "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."

This too drew a strong rebuke from the Republican commissioners, who said "The FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them."

The commission's challenges to chipmaker Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd. alleged the transaction would combine one of the largest chip producers with a firm that has essential design technology — critical inputs.

In a Dec. 2, 2021, statement, the FTC said the acquisition "would distort Arm's incentives in chip markets and allow the combined firm to unfairly undermine Nvidia's rivals."

The FTC's lawsuit should "send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations," FTC Bureau of Competition Director Holly Vedova said in the statement.

Given that vertical mergers will be closely scrutinized as a matter of course, parties need to consider concerns the FTC may identify and prepare strong counters — other than elimination of double marginalization.

For example, parties could argue that the transaction expands access to products and expands consumer choice. Parties willing to go the distance with a vertical merger should also remain mindful that the guidelines have never been cited or relied on by a court, and it is the established jurisprudence on vertical transactions that will carry the day.

Rescinding the Consumer Welfare Standard

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as coterminous with promoting consumer welfare under the Sherman and Clayton Acts.

In a July 19, 2021, statement, the FTC called the rescinded policy was "bind[ing] the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act."

Still, the consumer welfare standard has been entrenched in antitrust jurisprudence for decades, and the FTC cannot change that. The immediate impact is thus more likely to be seen in administrative actions in the FTC's own court.

In a dissenting statement, Republican commissioners countered that FTC leadership does not propose a replacement standard and "that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions," adding that, "unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles."

Labor Market Scrutiny

Government investigations and private litigation relating to no-poach and wage-fixing agreements are ballooning, and criminal indictments are now a reality.

Encouraged by President Joe Biden's executive order on competition, the FTC and the DOJ have doubled down on investigating labor markets. Merger investigations now routinely include requests for employee compensation data, inquiries regarding noncompete and nonsolicit agreements, and are more likely to delve into both the merger's effects on labor, and the parties' prior labor practices.

The DOJ's challenge to Penguin Random House LLC's proposed acquisition of Simon & Schuster Inc. focuses on harm to the labor market — for authors.

In his first public comments, the DOJ's Kanter said:

We will fight for American workers including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these not only to continue but to increase.

Khan echoed the sentiment, saying:

Competition and conduct can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers who are especially vulnerable and subject to the whims of a boss we can't equally or practically escape.

Antitrust compliance policies now must extend to addressing practices with respect to employee recruiting and compensation. Antitrust compliance training must extend beyond the sales team, and include HR. Businesses are reviewing and revising their compliance policies, and beginning new antitrust training programs to ensure that they are not subjected to claims of depressed wages and barriers to worker mobility.

Looking Ahead to the Year to Come

The year 2021 has been like no other for antitrust enforcement. While the FTC's various policy pronouncements are clearly intended to chill merger activity, it does not appear to have had the intended outcome.

HSR filings continue at off-the-charts levels. Amid this strong showing of M&A activity, the advice is to keep moving transactions forward, stay ahead of the new tacks the agencies might take, and account for newly injected risk and uncertainty.

Looking ahead, expect another energetic year. So far, the FTC's policy changes have not seemed to slow the pace of merger activity, but the frenzy cannot last forever. Nonetheless, merging parties are now going into the merger review process with eyes open, knowing it is likely to be more intense and uncertain. Parties to vertical transactions will no longer ride easy on double marginalization theories, and parties will be handing over their HR and payroll files.

At the same time, the heavy resistance to these changes will continue, if not strengthen, and will play out not just in courts and the halls of Congress, but will also spill into the political mainstream.

#### Nothing will pass the conservative courts---only the plan’s success signals a sea change in the law

Tara L. Reinhart 21, Partner for Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP, J.D. from the Catholic University of America Columbus School of Law, B.A. from the University of North Carolina, et al., “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb”, JD Supra – Newstex Blogs, 10/6/2021, Lexis

Practical Limitations on Implementation of Chair Khan's Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as 'robust,' and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan's memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan's vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2[2]

Moreover, Chair Khan's plan to revise the merger guidelines and her desire to target 'facially illegal deals' will also face constraints based on current law. First, the antitrust guidelines typically incorporate existing legal standards, making radical change difficult to achieve. The 1982 Guidelines, which impactfully affected merger enforcement with the implementation of the hypothetical monopolist test, provide the last dramatic revision. Whether courts will accept major revisions at this stage will be an open question. Second, agency merger review is shaped by the existing review process enacted by the Hart-Scott-Rodino Act, regardless of whether the FTC believes a deal is facially illegal. Unlike regulators in other jurisdictions, the FTC must file a lawsuit and prevail in court if the agency wants to block a pending transaction.

Relatedly, Ms. Khan's ability to implement her ambitious agenda will be subject to the fact that changing these legal frameworks will depend on either Congressional action, which is far from certain, or litigation victories, which require the commitment of significant resources at a time when the FTC claims to already be stretching its capacity. Despite her recognition of the demands already imposed on FTC staff and plan for 'intentional' resource allocation, Chair Khan envisions the FTC undertaking increased vigilance and a more assertive agenda. If the existing resource constraints grow in response to Chair Khan's enhanced enforcement ambitions, the FTC could face difficulty balancing its investigatory agenda with the ability to litigate those cases, particularly considering the complex nature of antitrust matters, which often take years to resolve and require millions of dollars for experts and other related costs as well as a large team of attorneys and staff to manage. In addition, though Chair Khan referenced her hope for increased cross-bureau coordination in cases, it is unclear that such coordination would be efficient or create the capacity needed to fulfill the new agenda, especially when attorneys from other government divisions have already been recruited to help reduce burdens on matters of antitrust enforcement.

Finally, Chair Khan's desire to expand the agency's regional footprint and supplement the staff with various nonlawyer roles may further strain the budgetary resources needed to keep pace with the new agenda and present their own management challenges. Whether funding from Congress is imminent, whether it would be used to onboard lawyers or the other potential staff Ms. Khan desires, and how quickly hiring could reach the scale necessary to support the FTC's newly announced enforcement priorities are not yet clear.

Conclusion

Given the challenges to implementing the generalized policy goals set by Chair Khan, we do not expect an immediate fundamental sea change in antitrust enforcement. The practical obstacles described above mean that Chair Khan's FTC will be unable to contest every instance of what the agency might perceive to be unlawful conduct or unfair competition. We expect that the FTC will need to continue to be selective in the cases that it brings, which may mean that in the near-term, it will focus available resources on sectors of the economy perceived as involving 'the most significant actors,' such as large technology firms that Chair Khan has frequently referenced, particularly to the extent they engage in transactions that implicate the novel considerations under the proposed 'holistic' approach to identifying antitrust harms.3[3] We still expect to see some matters receive extensive investigations and proceed to litigation, and the outcomes of these matters will likely partially signal the success of the new agenda.

#### M&A’s strong because they think they can beat back proposed rules

Economist 1-15, "The Growing Demand for More Vigorous Antitrust Action," The Economist, 01/15/2022, https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action.

Unlike their Chinese counterparts, Western businesses will not take this lying down, let alone vow “comprehensive self-examination and rectification”, as Meituan, a food-delivery giant, did after being fined $530m by samr in October. America’s tech giants are deploying high-powered lobbyists to scupper or water down rules before they see the light of day. In November the us Chamber of Commerce sent three strongly worded letters to the ftc accusing Ms Khan of overstepping her brief and dismantling procedural safeguards at the agency. It will be “active in litigating”, vows Mr Bradley, its policy chief.

Meta, Illumina and Penguin Random House are fighting regulators in court. Judges used to the consumer-welfare standard may resist attempts to redefine it. Corporate lawyers will remind them that, by prioritising outcomes other than price, the neo-Brandeisians “want people to pay for [their] policy preferences”, as the chief counsel at a big tech firm puts it.

Big firms argue that, as they expand into adjacent markets, they increasingly compete with one another. This is especially true of big tech, whose rise has fuelled the Brandeisian revival. Amazon is the third-biggest online advertiser behind Alphabet and Meta. Apple is building a search engine to challenge Google. Google’s cloud-computing division is taking on Amazon Web Services and Microsoft’s Azure. Meta is getting into e-commerce. The research papers cited in Mr Biden’s executive order date back half a decade. Concentration in America may since have plateaued.

This resistance ensures that the competition authorities’ multipronged assault on big business will take time to play out. The new trustbusting zeal also rubs up against a rekindled affection for national champions, which are by definition big and powerful. European bosses urge Ms Vestager to take into account how competitive global markets are, not just the eu’s, when deciding on mergers. The single-market commissioner, Mr Breton, is receptive to such ideas. Even Ms Vestager, who ignored Franco-German calls to permit the creation of the Alstom-Siemens rail champion, now speaks warmly of the battery consortium.

That may be why, for all the antitrust commotion, M&A activity remains strong in Europe and America, as companies take advantage of cheap capital and a surfeit of pandemic-distressed targets. Chinese tech titans have shed a collective $1.4trn in stockmarket value since China started turning the screws on them in earnest last February. America’s five biggest tech firms have added $2.1trn in the same period. The neo-Brandeisians may have “achieved political success prematurely”, suggests Mr Furman from Harvard.

#### Action in other sectors spills into pharma AND they’ll definitely think it’s possible, stunting consolidation

Raymond J. Keating 21, Chief Economist for the Small Business & Entrepreneurship Council and Adjunct Professor in the MBA Program at the Townsend School of Business at Dowling College, “Antitrust Fictions (and Actions) Will Have Real, Negative Economic Consequences,” SBE Council, 6/18/21, https://sbecouncil.org/2021/06/18/antitrust-fictions-and-actions-will-have-real-negative-economic-consequences/

It needs to be understood that while supposedly targeting so-called “Big Tech,” these intrusive regulations and substantial costs would fall on competitors as well, thereby actually discouraging competition in technology markets. For good measure, moving ahead with his kind of hyper-antitrust regulation of tech firms lays the groundwork for doing so in other industries, such as in retail, energy, health and medical sectors, and so on. This is what Senate anti-trust crusaders hope to accomplish.

The message is clear: Beware entrepreneurs, businesses and investors if you become too successful or if you cross certain political constituencies. The government stands ready to punish you via intrusive and costly regulation.

#### Abrupt shifts in any area ripple into pharma---it’s all interlinked because antitrust is underwritten by generalist common law

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A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

#### That causes companies to preemptively pull the plug on mergers---the possibility of enforcement injects huge uncertainty in unrelated sectors

Clyde Crews 19, Vice President for Policy and Senior Fellow at the Competitive Enterprise Institute, and Ryan Young, Senior Fellow at the Competitive Enterprise Institute and M.A. in Economics from George Mason University, “The Case against Antitrust Law”, Competitive Enterprise Institute, 4/16/2019, <https://cei.org/studies/the-case-against-antitrust-law/>

Uncertainty. Antitrust regulation creates an enormous amount of economic uncertainty. Nobody knows how it will be used at a given time. If antitrust statutes are interpreted literally, potentially any firm, no matter how small, can be charged with an antitrust violation—or for dominating its relevant market, however defined. If a business sells goods at a lower price than its competitors, it can be charged with predatory pricing. If it sells goods at the same price as its competitors, it can be charged with collusion. And if it sells goods at a higher price than its competitors, it can be charged with abusing market power.

A century of case law has evolved some guidelines, but judicial precedents can be overturned any time a new case is brought. There are few bright-line legislative or judicial standards for antitrust enforcement. It is mostly guided by a mix of inconsistently enforced judicial precedents, regulators’ personal discretion, and political factors unrelated to market competition. Even the mere threat of antitrust enforcement can have a preemptive chilling effect on innovation, business strategies, and potential efficiency-enhancing arrangements.

Rent-seeking. Neo-Brandeisians rightly want to reduce rent-seeking, but they routinely propose policies that will backfire because of a common misunderstanding of how governments work in practice. Government employees do not operate with only the public interest in mind. They are human beings, with the same incentives and flaws as other human beings. They want to increase their budgets and power and enjoy the publicity that accompanies big cases. It also makes regulators especially vulnerable to what is known as a Baptist-and-boot-legger dynamic. In Clemson University economist Bruce Yandle’s classic example, a moralizing Baptist and a profit-seeking bootlegger will both favor a law requiring liquor stores to close on Sundays, though for different reasons. A true-believing “Baptist” in Congress or at the Justice Department or the FTC would be inclined to listen seriously to the entreaties of corporate “bootleggers” who can come up with virtuous-sounding reasons for why regulators should give their businesses special favorable treatment.36

Oracle, one of Microsoft’s rivals, ran its own independent Microsoft investigation during that company’s antitrust case, for what it alleged were Baptist-style reasons. “All we did is try to take information that was hidden and bring it to light,” said Oracle CEO Larry Ellison. “I don’t think that was arrogance. I think it was a public service.”37 Former Sen. Orrin Hatch (R-UT), who counted Oracle among his constituents, was one of the loudest anti-Microsoft voices in Congress. Around that time, he also received $17,500 donations from executives at Netscape, AOL, and Sun Microsystems. Perhaps heeding Hatch’s admonition that, “If you want to get involved in business, you should get involved in politics,” Microsoft expanded its presence in Washington from a small outpost at a Bethesda, Maryland, sales office to a large downtown Washington office with a full-time staff plus multiple outside lobbyists.38 Microsoft quickly went from a virtual non-entity in Washington to the 10th-largest corporate soft money campaign donor by the 1997-1998 election cycle. Sen. Hatch’s campaign was among the beneficiaries.39

The lines between Baptist and boot- legger can be blurry, and some actors play both parts. But such ethical dynamics are an integral part of antitrust regulation in practice.

Government usually stifles competition. If antitrust regulation is to be retained, it should not be a first-resort policy. If a company has an overwhelming competitive advantage, it is important to first ask what is causing it. If the advantage is due to superior performance, then consumers are not being harmed.

In most cases, dominance does not last long, as evidenced by how quickly any list of America’s largest companies changes from year to year. If a company does remain dominant for a long period of time, one of two possibilities must be true. The first option is that it continues to be consumers’ preferred option. The second is that it is engaging in rent-seeking behavior. In the first case, there is no need for an antitrust intervention. In the second case, the solution is not antitrust regulation, but to take away the government’s power to tilt the scales in rent-seekers’ favor.

Think long term. Robert Bork, though famous for his antitrust skepticism, still favors some antitrust regulation. He merely favors a more restrained usage than the Brandeis school. As he writes in The Antitrust Paradox, “Antitrust is valuable because in some cases it can achieve results more rapidly than can market forces. We need not suffer losses while waiting for the market to erode cartels and monopolistic mergers.”40

Bork’s statement is problematic for several reasons. How do regulators and judges know which cases are causing consumer harm and which are not? How do they decide which cases to pursue? Cases also often take years to resolve. Assuming regulators identify a valid case, how would they, and the judges who hear the case, know if market activity could address the problem by the time the case is decided? Do the benefits of regulatory action exceed the court and enforcement costs? Are the affected companies in a position to capture the regulators?

More to the point, does the short-term benefit come at a greater long-term cost? An enforcement action now could have a deterrent effect on future mergers, contracts, and innovations, including in unrelated industries. The consumer harm from these could well exceed the short-term benefits of a short-term improvement on market outcomes—assuming that regulators are consistently capable of such a feat.

#### The FTC will jump on the plan as an opportunity for cross-industry enforcement

Dr. Babette E.L. Boliek 11, Ph.D. in Economics from the University of California, Davis, J.D. from the Columbia University School of Law, Professor of Law at Pepperdine University, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011 Lexis

The analysis of the relevant jurisdiction is broken into two rival camps: (1) regulatory jurisdiction and (2) antitrust jurisdiction. The first camp, regulatory jurisdiction, the more complex of the two, is further divided into two subparts of particular concern (a) legacy-based regulation and (b) "satellite jurisdiction." The first subpart of regulatory jurisdiction, legacy-based regulation, refers to the FCC's congressionally designated core industry. The concern with legacy-based regulation is that the FCC will engage in *procedural opportunism*: that is, the agency may exploit the service classification process to extend its own regulatory authority.

The second subpart of regulatory jurisdiction analyzed is "satellite jurisdiction." 30 This is a new and unique grouping of various theories of regulatory jurisdiction. This novel grouping brings keen focus to those exertions of FCC authority that are the most legally and politically troubling--areas where the FCC may engage in substantive opportunism. These areas include certain uses of the FCC's Title I service classification, its spectrum licensing authority, and the FCC's authority to approve mergers in the telecommunications arena. 31

In contrast to regulatory jurisdiction, however, antitrust jurisdiction is not tethered to categorical classifications but, when triggered, is plenary over all private commercial actors. 32 The jurisdictional question for antitrust authorities is not in what legacy-based category Internet access properly exists, but whether an Internet access provider, in a properly defined market, is acting or is likely to act counter to competitive norms. Antitrust jurisdiction is largely conduct-based and not limited [\*1636] to technical distinctions between industries 33 but, rather, assessed against anticompetitive conduct within relevant markets.

#### That’ll specifically target pharma---they’re next in line

Eric Cortellessa 21, Investigative Editor of the Washington Monthly, Graduate of Northwestern University’s Medill School of Journalism, “The Conservatives Out to Stop the New Bipartisan Antitrust Movement”, Washington Monthly, July / August 2021, https://washingtonmonthly.com/magazine/july-august-2021/the-conservatives-out-to-stop-the-new-bipartisan-antitrust-movement/

That’s when the Alliance on Antitrust sprang into action, putting out a series of statements in conservative media warning Republicans against the idea. One of the Alliance’s members, Josh Withrow, then of FreedomWorks, for example, told The Washington Times that expanding the scope of antitrust enforcement to take on Big Tech would open a “Pandora’s box that could have dire consequences throughout our economy.” The group also sent a letter to the House antitrust subcommittee making a similar point, arguing that the “economic consequences of many of the recent proposals,” such as creating more stringent merger prohibitions, would “make the American economy and consumers substantially worse off across a wide array of industries.”

As it happens, this professed concern—that cracking down on tech monopolies would punish other industries—aligns with the interests that fund the Alliance and its member organizations. Most of these groups receive financial support from Big Tech—including the Committee for Justice, which gets donations from Google, according to the tech company’s political engagement disclosures—but also from monopolistic corporations in other sectors such as oil and gas, Big Ag, telecom, banking, and pharmaceuticals. These corporations will themselves soon face antitrust enforcement—and potentially major reductions in profits—if something isn’t done now to stop Congress from creating new and stricter laws against companies amassing too much market power.

#### Disease has all the required biological conditions AND creates existential knock-on effects

Dennis Pamlin 15, Executive Project Manager, Global Risks, Global Challenges Foundation, & Stuart Armstrong, James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. “12 Risks That Threaten Human Civilisation: The Case For a New Risk Category”. Global Challenges Foundation, February 2015, <https://www.researchgate.net/publication/291086909_12_Risks_that_threaten_human_civilisation_The_case_for_a_new_risk_category>

Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261

These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic.

Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267

There are other grounds for suspecting that such a high-impact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme.

Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275

Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade).

Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics).

#### Cognitive biases systematically underrate disease risks

Hin-Yan Liu 21, Kristian Lauta, and Matthijs Maas, Faculty of Law, University of Copenhagen, “Apocalypse Now?: Initial Lessons from the Covid-19 Pandemic for the Governance of Existential and Global Catastrophic Risks”, Journal of International Humanitarian Legal Studies, Volume 11, Issue 2, 12/9/2020, DOI:10.1163/18781527-01102004

Our cognitive biases also tend towards direct-causal near-term events, thereby marginalising tangential, second-order, or cumulative effects that may instead constitute an existential risk. From this view, pandemics are considered as diseases that directly kill human beings, rather than those which might trigger the demise of humanity in more circuitous fashion (for example, by a disease that targets and devastates staple crops in “pandemic” proportions).39 Thus, while existential risk research leans towards the spectacular one-hit knock-out events, such as asteroid strikes and all-out nuclear war, such direct existential risks can only be but a subset when it comes to threats for humanity as a whole. To counteract this type of bias, we would need to develop appropriate models and approaches to monitoring existential risks that focus on existential outcomes (as opposed to existential hazards) that flow from other events or emerge through the interaction lower level activity that might, taken together, constitute an existential risk.

Finally, our cognitive biases struggle to cope with historically recurring, but statistically rare events.40 In this vein, Wiener argues that public assessments of risks may neglect extremely rare catastrophic risks, due to factors such as psychological unavailability, mass numbing, and under-deterrence; critically, he argues that in such contexts, foresight and anticipation are critical, and that the inability to learn from experience (‘adaptive learning’) offers an even stronger case for precaution than mere uncertainty as such.41 This is directly pertinent to pandemics, given the ample historical record of plagues that repeatedly killed off significant proportions of the human population. Given accessible records of past catastrophe, our collective susceptibility to such known hazards is especially incongruous from an existential risks perspective: it is one thing to be caught out by a wholly novel threat, and quite another to be toppled by something that we knew about all along. Thus, the failure to have a global asteroid defence programme in place is congruent with our failure to prepare for Covid-19: these are both statistically rare events at any given time, despite a clear record of such events taking place in the past with cataclysmic effect.

#### Decline allows the Chinese sector to overtake American pharma---extinction

Scott Moore 20, Director of the Penn Global China Program at the University of Pennsylvania, Foreign Policy, “China’s Biotech Boom Could Transform Lives—or Destroy Them,” 11/8/2020, <https://foreignpolicy.com/2019/11/08/cloning-crispr-he-jiankui-china-biotech-boom-could-transform-lives-destroy-them/>

When James Clapper, the U.S. director of national intelligence at the time, appeared before Congress in early January 2016 for an annual briefing of threats to the United States, he didn’t lack for material. Just a few weeks earlier, North Korea had tested a nuclear device, and Russia had begun deploying cruise missiles that appeared to violate a crucial arms-control agreement. But to the surprise of many experts, Clapper devoted a good chunk of his time to describing a much more exotic threat: biomedical research. Specifically, [Clapper warned](https://thebulletin.org/2016/04/how-genetic-editing-became-a-national-security-threat/), “Research in genome editing conducted by countries with different regulatory or ethical standards than those of Western countries probably increases the risk of the creation of potentially harmful biological agents or products.”

Clapper’s statement didn’t explicitly mention China—but it didn’t need to. As his testimony went on to make clear, while in the 20th century the United States and Soviet Union held the keys to preventing planetary catastrophe, in the 21st the principal players are the United States and China. And while in a previous age keeping Pandora’s box closed meant preventing nuclear war, today it’s about preventing biotech dangers.

In just the past few years, the development of inexpensive gene-editing techniques has democratized biomedical research, producing a biotech bonanza in places such as China and creating a whole new category of security threats in the process, from the use of genetic information to persecute dissidents and minority groups to the development of sophisticated bioweapons.

When it comes to the United States, China, and technology, artificial intelligence tends to grab most of the attention. But policymakers need to come to grips with the even bigger threat of biotechnology—and soon. Fortunately, though, shared concerns about China’s role in biotechnology also provide a rare chance for meaningful and productive engagement in shaping the rules of a new world.

China’s starring role in preventing the 21st century’s biotech perils stems from its skyrocketing investment in biomedical research. Historically, Western countries, and especially the United States, have been the epicenter of research in the life sciences. The United States alone accounted for some [45 percent](https://itif.org/publications/2018/03/26/how-ensure-americas-life-sciences-sector-remains-globally-competitive) of biotech and medical patents filed in the 14-year period ending in 2013. But now, thanks to heavy state-backed investment, China is catching up. Economic plans instituted in 2015 call for the biotechnology sector to account for more than 4 percent of China’s total GDP by 2020, and [estimates suggest](https://www.nature.com/articles/d41586-018-00542-3) that as of 2018, central, provincial, and local governments had already invested over $100 billion in the life sciences. Chinese venture capital and private equity investment in the life sciences, meanwhile, totaled some $45 billion just from 2015 to 2017.

China has also invested considerable effort in competing with countries like the United States for biotech talent. Of some [7,000 researchers recruited](http://www.nature.com/articles/d41586-018-00542-3) under the Thousand Talents Plan since 2008, more than 1,400 specialized in the life sciences. A leading American geneticist, Harris Lewin, has [warned](https://www.wired.com/story/wildebeest-okapi-giraffe-ibex-come-peruse-their-genomes/) that the United States is “starting to fall behind … the Chinese, who have always been good collaborators, [are] now taking the lead.”

For the United States and other Western countries, China’s growing role in biomedical research is raising plenty of concern. Several Chinese researchers have shown a willingness to ignore ethical and regulatory constraints on genetic research. In 2018, He Jiankui became a poster child for scientific irresponsibility when he announced he had edited the genes of two twins in utero without following basic safety protocols. He [reportedly dismissed](https://dev.biologists.org/content/146/3/dev175778) them as guidelines, not laws.

Yet the reaction at home was not what He had hoped for. His research had been made possible by the relatively lax standards of Chinese universities, even as he had kept the true nature of it secret from many involved – while discussing it with a [small group](https://www.nytimes.com/2019/04/16/health/stanford-gene-editing-babies.html) of Western bioethicists and scientists, who stressed their disapproval. It’s not uncommon in China to break the rules and be lauded for the results anyway, whatever the field. For He, though, the vast international attention that came after the story broke cost him his career and possibly [his freedom](https://www.nytimes.com/2019/01/21/world/asia/china-gene-editing-babies-he-jiankui.html?module=inline). Chinese media rushed to stress [official disapproval](https://www.sciencemag.org/news/2019/08/untold-story-circle-trust-behind-world-s-first-gene-edited-babies) of the experiments. Even the [overt purpose](https://www.statnews.com/2019/04/15/jiankui-embryo-editing-ccr5/) of the editing – to ensure that the babies, born to HIV+ mothers, enjoyed protection against the virus – turned out to be scientifically weak.

As China’s biotech sector grows, so too do fears that Chinese researchers like He will be more willing to push the limits of both science and ethics than those in the United States. Earlier this year, Chinese researchers recorded another mind-bending milestone when they [implanted](https://www.technologyreview.com/s/613277/chinese-scientists-have-put-human-brain-genes-in-monkeysand-yes-they-may-be-smarter/) human genes linked to intelligence into monkey embryos—and then said that the monkeys performed better on memory tests.

The dominance of the party-state in China raises serious concerns around biotechnology, especially because it carries increasingly ethnonationalist tone. When in 2018 Chinese researchers created the world’s first primate clones, for example, they dubbed them Zhong Zhong and Hua Hua, from the term zhonghua meaning “The Chinese Nation”—an oddly jingoistic moniker for a pair of monkeys. Chinese government policies often blur the line between eugenics and education, lumped together as improving the “quality” (suzhi) of the population, which received another stamp of official [endorsement](https://twitter.com/globaltimesnews/status/1191681436635451392) following the recent Fourth Plenum. These programs are carried out through the country’s huge so-called family planning bureaucracy—originally established to enforce the one-child policy.

Moreover, Beijing is increasingly extending its formidable social control apparatus into the realm of genetics. While there are considerable restrictions on private firms sharing biomedical data, largely because of an ugly history of [popular discrimination](https://www.theatlantic.com/china/archive/2013/12/chinas-struggle-with-hepatitis-b-discrimination/281994/) against hepatitis carriers, the government has no such restrictions. A [New York Times report](https://www.nytimes.com/2019/02/21/business/china-xinjiang-uighur-dna-thermo-fisher.html) earlier this year suggested, for example, that Chinese authorities had assembled a vast trove of genetic data on Chinese citizens without their consent, with the Uighur minority group having been specifically targeted.

Beijing’s brand of bio-nationalism also directly threatens the United States. U.S. officials have been [warning](https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html) universities and research institutions that the biotech sector is a focal point for Chinese industrial espionage activities in the United States. And this past August, a senior Defense Department official warned Congress that China’s growing role in pharmaceutical manufacturing could allow it to disrupt deliveries of critical battlefield medicines, or potentially even [alter them to harm](https://www.washingtonpost.com/opinions/we-rely-on-china-for-pharmaceutical-drugs-thats-a-security-threat/2019/09/10/5f35e1ce-d3ec-11e9-9343-40db57cf6abd_story.html) U.S. forces.

Yet the biggest risks posed by biotech, for China, the United States, and other countries, pertain to nonstate actors. A critical feature of modern biotech, in contrast to technology like nuclear weapons, is that it’s cheap and easy to develop. A technique known as CRISPR, which the Chinese researcher He used in his illicit gene-editing work, makes it practical for just about anyone to manipulate the genomes of just about any organism they can lay their hands on. CRISPR makes it much simpler to skirt ethical restrictions and terrifyingly straightforward for terrorist groups to develop fearsome biological weapons.

Researchers have already [shown](https://doi.org/10.1371/journal.pone.0188453) it’s possible to reconstruct the smallpox virus, which was eradicated in the real world in the 1970s, for as little as $200,000 using DNA fragments you can order online. If a terrorist or rogue state were to successfully do so, virtually no one alive would have any resistance to the virus—and most stockpiles of the vaccine were destroyed long ago. There is an organization, the [International Gene Synthesis Consortium](https://genesynthesisconsortium.org/), that tries to screen suspicious orders for DNA fragments that might be used to build such bioweapons. And while most of the world’s major DNA synthesis firms belong to the consortium, membership is completely voluntary, and there’s also a [thriving and entirely unregulated](https://www.wired.com/story/synthetic-biology-vaccines-viruses-horsepox/) black market—much of it based in China.

All of this means that biosecurity standards in places like China matter more than ever. After all, if a major bioweapon were to be unleashed, it’s unlikely that any major, globally integrated country could escape unharmed. Fortunately, there are growing signs China is open to better regulation of its biotech sector. In February, the Chinese government announced that “[high risk](https://www.statnews.com/2019/02/27/china-unveils-new-rules-on-biotech-after-gene-editing-scandal/)” biomedical research would be overseen by the State Council, China’s equivalent of the cabinet—a sign of the concern with which Beijing views incidents like the He Jiankui CRISPR scandal. In a further sign of this concern, in August, the Chinese Communist Party announced the creation of a [new committee](http://www.nature.com/articles/d41586-019-02362-5) to advise top leaders on research ethics.

1. [↑](#footnote-ref-1)