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### OFF---Midterms DA

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

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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.

#### The GOP wins now---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---States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should recognize protection of competition as the purpose of antitrust law for the private sector and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies, and state that, if preempted, the states will withhold cooperation with federal initiatives.

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### OFF---Torts CP

#### The United States federal government should recognize protection of competition as the purpose of tort law and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies 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 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

### OFF---Multilat CP

#### The United States federal government should establish and advocate a framework for contingent international cooperation that recognizes the protection of competition as the purpose of antitrust law for the private sector and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies

#### 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---Hospitals DA

#### The plan sends a rippling signal of uncertainty that spills into the health sector

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, 6/18/2021, 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.

#### That collapses rural hospitals---they’re on the brink AND depend on mergers, but chilled by the threat of antitrust

Ken Kaufman 20, M.B.A. with a Concentration in Hospital Administration from the University of Chicago, Chair of Kaufman, Hall & Associates LLC, “Removing Antitrust Barriers to Solve the Rural Health Care Crisis”, Morning Consult, 1/2/2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated 21 percent of rural hospitals are at high risk of closure.

The high number of financially stressed hospitals is creating a crisis of access for rural communities and a potential crisis of quality and patient safety, as these hospitals struggle to secure sufficient clinical and technological resources. These struggles can be even more difficult in towns that could once support two hospitals but can no longer do so.

A solution to the rural health crisis that promotes partnerships with larger health systems addresses two critical needs. First, it enables a rational, equitable approach to a fundamental restructuring of rural health care resources. Second, it provides access to sufficient financial resources to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current antitrust law makes it difficult for individual hospitals or health systems to collaborate on efforts to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a single health system, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the value of a system-based approach to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a safe zone for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are unlikely to reduce competition substantially.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving efficiencies may be realized … through a merger.”

The situation becomes more difficult when a community has two hospitals that do not fall within the safe zone and it can no longer support both. Such markets will be considered highly concentrated, and an attempt to merge the hospitals likely will be challenged by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The threat of antitrust enforcement actions throws a chill over health system-led efforts to make the rural health care delivery system more rational, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

#### Food shocks are immediate

David Alemian 16, Founder of Talent Retention Plans, President of the National Group Insurance Brokers, Degree in Business Administration from Dean College, “Rural Healthcare Is a Matter of National Security”, Medical Economics, 11/8/2016, https://www.medicaleconomics.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Nuclear war

John Castellaw 17, National Security Lecturer at the University of Tennessee, Founder and CEO of Farmspace Systems LLC, Former President of the Crockett Policy Institute, Retired Lieutenant General in the United States Marine Corps, “Food Security Strategy Is Essential to Our National Security”, Agri-Pulse, 5/1/2017, https://www.agri-pulse.com/articles/9203-opinion-food-security-strategy-is-essential-to-our-national-security

The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy.

An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence.

Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability.

The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom.

Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs.

This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people.

Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population.

Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being.

Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

## Innovation Advantage

### Innovation---UQ---1NC

#### Innovation is high because of large firms.

Thomas A. Lambert 20, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri School of Law, J.D. from the University of Chicago, “The Case Against Legislative Reform of U.S. Antitrust Doctrine,” University of Missouri School of Law Legal Studies Research Paper No. 2020-13, 05-12-2020, https://ssrn.com/abstract=3598601

Reduced Investment in Innovation? Proponents of reforming the antitrust laws have also pointed to reductions in the level of venture capital investment as indicative of a market power crisis in the U.S. Such investment slowed somewhat after 2015 (though it appears to have rebounded),27 and some venture capitalists have referred to a “kill zone” around dominant technology firms.28 The claim is that big technology firms either usurp small firms’ innovations or use their power over platforms to force smaller firms that need access to those platforms to sell out at a bargain price. Venture capitalists are less inclined to invest if such outcomes are likely, and innovation therefore suffers.

The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms,29 and six of those—Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook—are “Big Tech” firms that have been accused of acting like monopolists. Moreover, the U.S. is home to half (178 of 356) of the world’s so-called “unicorn” companies—i.e., private companies valued at greater than $1 billion. China ranks second with 90, and all of Europe contains a fraction of that number. The U.S. also far outpaces Europe in terms of venture capital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe’s 5,017 deals worth $36.3 billion. Finally, the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized with the goal of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company’s having to incur the significant cost of a public offering.

### Innovation---Link Turn---1NC

#### Regulating tech destroys innovation key to stop existential threats.

Larry Downes 18, J.D. from the University of Chicago Law School, frequent contributor to The Washington Post, Harvard Business Review, Forbes and CNET, Project Director at the Georgetown Center for Business and Public Policy's Evolution of Regulation and Innovation project, “How More Regulation for U.S. Tech Could Backfire,” Harvard Business Review, 02-09-2018, <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire>

If 2017 was the year that tech became a lightning rod for dissatisfaction over everything from the last U.S. presidential election to the possibility of a smartphone-driven dystopia, 2018 already looks to be that much worse.

Innovation and its discontents are nothing new, of course, going back at least to the 18th century, when Luddites physically attacked industrial looms. Hostility to the internet appeared the moment the Web became a commercial technology, threatening from the outset to upend traditional businesses and maybe even our deeply embedded beliefs about family, society, and government. George Mason University’s Adam Thierer, reviewing a resurgence of books about the “existential threat” of disruptive innovation, has detailed what he calls a “techno-panic template” in how we react to disruptive innovations that don’t fit into familiar categories.

But with the proliferation of new products and their reach ever-deeper into our work, home, and personal lives, the relentless tech revolt of the last year shouldn’t really have come as any surprise, especially to those of us in Silicon Valley.

Still, the only solution critics can propose for our growing tech malaise is government intervention — usually expressed vaguely as “regulating tech” or “breaking up” the biggest and most successful Internet companies. Break-ups, which require a legal finding that the structure of a company is enabling anti-competitive behavior, seem now to have become a synonym for somehow crippling a successful enterprise.

Of course, nobody thinks technology companies should be left unregulated. Tech companies, like any other enterprise, are already subject to a complex tangle of laws, varying based on industry and local authority. They all pay taxes, report their finances, disclose significant shareholders, and comply with the full range of employment, health and safety, advertising, intellectual property, consumer protection and anti-competition laws, to name just a few.

There are also specialized laws for tech, including limits on how Internet companies can engage with children. In the U.S., commercial drones must be registered with the Federal Aviation Administration. Genetic testing and other health-related devices must pass muster with the Food and Drug Administration. Increasingly, ride-sharing and casual rental services must meet some of the same standards and inspections as long-time transportation and hospitality incumbents.

There are growing calls, likewise, to regulate social media and video platforms as if they were traditional print or broadcast news sources, even though doing so would almost certainly run afoul of the very free speech protections proponents are hoping to preserve.

But perhaps what tech critics really want are more innovative rules. Traditional regulations, after all, were designed in response to earlier technologies and the market failures they generated. They don’t cover largely speculative and mostly future-looking concerns.

What if, for example, artificial intelligence puts an entire generation out of work? What if genetic manipulations accidentally unravel the fabric of DNA, reversing evolution in one fell swoop? What if social media companies learn so much about us that they undermine—intentionally or otherwise—democratic institutions, creating a tyranny of “unregulated” big data controlled by a few unelected young CEOs?

The problem with such speculation is that it is just that. In deliberative government, legislators and regulatory agencies must weigh the often-substantial costs of proposed limits against their likely benefit, balanced against the harm of simply leaving in place the current legal status quo.

But there’s no scientific method for estimating the risk of prematurely shutting down experiments that could yield important discoveries. There’s no framework for pre-emptively regulating nascent industries and potential new technologies. By definition, they’ve caused no measurable harm.

In particular, breaking up the most successful Internet and cloud-based companies only looks like a solution. It isn’t. Antitrust is meant to punish dominant companies that use their leverage to raise costs for consumers. Yet the services provided by technology companies are often widely available at little or no cost. Many of the products and services of Amazon, Apple, Google, Facebook and Microsoft — the internet giants referred to by the New York Times as “the frightful five” — are free for consumers.

More to the point, break-ups almost always backfire. Think of the former AT&T, which was regulated as a monopoly utility until 1982, when the government changed its mind and split the company into component long-distance and regional phone companies. The sum of the parts actually increased in value — except for the long-distance company, which faded in the face of unregulated new competitors.

Then, over the next 20 years, the regional companies put themselves back together, and, with economies of scale, reemerged as a mobile internet network and Pay TV provider, competing with cable companies and fast-growing internet-based video services including YouTube, Amazon and Netflix. What started as a regulatory punishment for AT&T led to an even bigger network of companies.

On the other hand, the constant threat of a forced divestiture can be disastrous for consumers and enterprise alike. IBM prevailed against multiple efforts to break it up along product lines, but was so shaken by the decades-long experience that the company became dangerously timid about future innovations, missing the shifts first to client-server and then to Internet-based computing architectures, nearly bankrupting the business.

Microsoft, similarly, was so distracted by its multi-year fight to avoid break-up both by U.S. and European regulators that it lost essential momentum. It mostly missed out on the mobile revolution, and hesitated in responding to open-source alternatives to operating systems, desktop applications, and other software apps that seriously eroded the company’s once-formidable competitive advantage. (The company is now growing a cloud services business, but is still far behind Google and Amazon.)

These examples hint at an alternative to random and unproven new forms of regulation for emerging technologies: simply waiting for the next generation of innovations and the entrepreneurs who wield them to disrupt the supposed monopolists right out of their disagreeable behaviors, sometimes fatally.

Today, it might seem that the companies in the frightful five have unbeatable leads in retailing and cloud services, social media, search, advertising, desktop operating systems and mobile devices. But the landscape of business history is littered with the corpses of supposedly invulnerable giants. In our research on wildly successful enterprises who fail to find a second act, Paul Nunes and I note that the average life span of companies on the Standard & Poor’s 500 has fallen from 67 years in the 1920s to just 15 years today.

In the early years of the internet age, a half-dozen companies were serially crowned the victor in search, only to be unseated by more innovative technology soon after. Yahoo and others gave way to Google, just as Blackberry faded in response to the iPhone. MySpace (remember them?) collapsed at the introduction of Facebook, which, at the time, was little more than a bit of software from a college student. Napster lost in court (no new laws were needed for that), leaving Apple to define a working market for digital music. And who remembers the alarm bells rung in 2000 when then-dominant ISP America On-Line merged with content behemoth Time Warner?

The best regulator of technology, it seems, is simply more technology. And despite fears that channels are blocked, markets are locked up, and gatekeepers have closed networks that the next generation of entrepreneurs need to reach their audience, somehow they do it anyway — often embarrassingly fast, whether the presumed tyrant being deposed is a long-time incumbent or last year’s startup darling.

That, in any case, is the theory on which U.S. policymakers across the political spectrum have nurtured technology-based innovation since the founding of the Republic. Taking the long view, it’s clearly been a winning strategy, especially when compared to the more invasive, command-and-control approach taken by the European Union, which continues to lag on every measure of the Internet economy. (Europe’s strategy now seems to be little more than to hobble U.S. tech companies and hope for the best.)

Or compared to China, which has built tech giants of its own, but only by limiting outside access to its singularly enormous local market. And always with the risk that too much success by Chinese entrepreneurs may one day crash headfirst into a political culture that is deeply uncomfortable with the internet’s openness.

That solution — to stay the course, to continue leaving tech largely to its own correctives — is cold comfort to those who believe tomorrow’s problems, coming up fast in the rear-view mirror, are both unprecedented and catastrophic.

Yet, so far there’s no evidence supporting shrill predictions of a technology-driven apocalypse. Or that existing safeguards — both market and legal — won’t save us from our worst selves.

Nor have tech’s growing list of critics proposed anything more specific than simply calling for “regulation” to save us. Perhaps that’s because effective remedies are incredibly hard to design.

### AI Defense---1NC

#### No AI impact

Stephen **Pinker 18**, professor of psychology at Harvard, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress”

Prominent among the existential risks that supposedly threaten the future of humanity is a 21st-century version of the Y2K bug. This is the danger that we will be subjugated, intentionally or accidentally, by artificial intelligence (AI), a disaster sometimes called the Robopocalypse and commonly illustrated with stills from the Terminator movies. As with Y2K, some smart people take it seriously. Elon Musk, whose company makes artificially intelligent self-driving cars, called the technology “more dangerous than nukes.” Stephen Hawking, speaking through his artificially intelligent synthesizer, warned that it could “spell the end of the human race.”19 But among the smart people who aren’t losing sleep are most experts in artificial intelligence and most experts in human intelligence. The Robopocalypse is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a modern scientific understanding.21 In this conception, intelligence is an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot of the future (“an AI,” in the new count-noun usage) will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its superintelligence to recursively improve its superintelligence (a scenario sometimes called “foom,” after the comic-book sound effect), from the instant it is turned on we will be powerless to stop it.22 But the scenario makes about as much sense as the worry that since jet planes have surpassed the flying ability of eagles, someday they will swoop out of the sky and seize our cattle. The first fallacy is a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, thinking with wanting. Even if we did invent superhumanly intelligent robots, why would they want to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: being smart is not the same as wanting something. It just so happens that the intelligence in one system, Homo sapiens, is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled (to varying degrees in different specimens) with goals such as dominating rivals and amassing resources. But it’s a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. An artificially intelligent system that was designed rather than evolved could just as easily think like shmoos, the blobby altruists in Al Capp’s comic strip Li’l Abner, who deploy their considerable ingenuity to barbecue themselves for the benefit of human eaters. There is no law of complex systems that says that intelligent agents must turn into ruthless conquistadors. Indeed, we know of one highly advanced form of intelligence that evolved without this defect. They’re called women. The second fallacy is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal.23 The fallacy leads to nonsensical questions like when an AI will “exceed human-level intelligence,” and to the image of an ultimate “Artificial General Intelligence” (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains.24 People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can’t solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different. Unlike Laplace’s demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future, a real-life knower has to acquire information about the messy world of objects and people by engaging with it one domain at a time. Understanding does not obey Moore’s Law: knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster.25 Devouring the information on the Internet will not confer omniscience either: big data is still finite data, and the universe of knowledge is infinite. For these reasons, many AI researchers are annoyed by the latest round of hype (the perennial bane of AI) which has misled observers into thinking that Artificial General Intelligence is just around the corner.26 As far as I know, there are no projects to build an AGI, not just because it would be commercially dubious but because the concept is barely coherent. The 2010s have, to be sure, brought us systems that can drive cars, caption photographs, recognize speech, and beat humans at Jeopardy!, Go, and Atari computer games. But the advances have not come from a better understanding of the workings of intelligence but from the brute-force power of faster chips and bigger data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. A photo-captioning program labels an impending plane crash “An airplane is parked on the tarmac”; a game-playing program is flummoxed by the slightest change in the scoring rules.27 Though the programs will surely get better, there are no signs of foom. Nor have any of these programs made a move toward taking over the lab or enslaving their programmers. Even if an AGI tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. The computer scientist Ramez Naam deflates the bubbles surrounding foom, a technological Singularity, and exponential self-improvement: Imagine that you are a superintelligent AI running on some sort of microprocessor (or perhaps, millions of such microprocessors). In an instant, you come up with a design for an even faster, more powerful microprocessor you can run on. Now . . . drat! You have to actually manufacture those microprocessors. And those fabs [fabrication plants] take tremendous energy, they take the input of materials imported from all around the world, they take highly controlled internal environments which require airlocks, filters, and all sorts of specialized equipment to maintain, and so on. All of this takes time and energy to acquire, transport, integrate, build housing for, build power plants for, test, and manufacture. The real world has gotten in the way of your upward spiral of self-transcendence.28 The real world gets in the way of many digital apocalypses. When HAL gets uppity, Dave disables it with a screwdriver, leaving it pathetically singing “A Bicycle Built for Two” to itself. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: don’t build one. As the prospect of evil robots started to seem too kitschy to take seriously, a new digital apocalypse was spotted by the existential guardians. This storyline is based not on Frankenstein or the Golem but on the Genie granting us three wishes, the third of which is needed to undo the first two, and on King Midas ruing his ability to turn everything he touched into gold, including his food and his family. The danger, sometimes called the Value Alignment Problem, is that we might give an AI a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.29 I am not making these up. These are the scenarios that supposedly illustrate the existential threat to the human species of advanced artificial intelligence. They are, fortunately, self-refuting.30 They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so moronic that they would give it control of the universe without testing how it works, and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might slap themselves in the forehead for forgetting to install; it is intelligence. So is the ability to interpret the intentions of a language user in context. Only in a television comedy like Get Smart does a robot respond to “Grab the waiter” by hefting the maître d’ over his head, or “Kill the light” by pulling out a pistol and shooting it. When we put aside fantasies like foom, digital megalomania, instant omniscience, and perfect control of every molecule in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety (chapter 12). As the AI expert Stuart Russell puts it, “No one in civil engineering talks about ‘building bridges that don’t fall down.’ They just call it ‘building bridges.’” Likewise, he notes, AI that is beneficial rather than dangerous is simply AI.

### Authoritarianism Defense---1NC

#### No authoritarianism impact---democracy is resilient

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The resilience of democracy

A litany of setbacks and catastrophes for freedom dominated the news in 2020. But democracy is remarkably resilient, and has proven its ability to rebound from repeated blows.

A prime example can be found in Malawi, which made important gains during the year. The Malawian people have endured a low-performing democratic system that struggled to contain a succession of corrupt and heavy-handed leaders. Although mid-2019 national elections that handed victory to the incumbent president were initially deemed credible by local and international observers, the count was marred by evidence that Tipp-Ex correction fluid was used to alter vote tabulation sheets. The election commission declined to call for a new vote, but opposition candidates took the case to the constitutional court. The court resisted bribery attempts and issued a landmark ruling in February 2020, ordering fresh elections. Opposition presidential candidate Lazarus Chakwera won the June rerun vote by a comfortable margin, proving that independent institutions can hold abuse of power in check. While Malawi is a country of 19 million people, the story of its election rerun has wider implications, as courts in other African states have asserted their independence in recent years, and the nullification of a flawed election—for only the second time in the continent’s history—will not go unnoticed.

Taiwan overcame another set of challenges in 2020, suppressing the coronavirus with remarkable effectiveness and without resorting to abusive methods, even as it continued to shrug off threats from an increasingly aggressive regime in China. Taiwan, like its neighbors, benefited from prior experience with SARS, but its handling of COVID-19 largely respected civil liberties. Early implementation of expert recommendations, the deployment of masks and other protective equipment, and efficient contact-tracing and testing efforts that prioritized transparency—combined with the country’s island geography—all helped to control the disease. Meanwhile, Beijing escalated its campaign to sway global opinion against Taiwan’s government and deny the success of its democracy, in part by successfully pressuring the World Health Organization to ignore early warnings of human-to-human transmission from Taiwan and to exclude Taiwan from its World Health Assembly. Even before the virus struck, Taiwanese voters defied a multipronged, politicized disinformation campaign from China and overwhelmingly reelected incumbent president Tsai Ing-wen, who opposes moves toward unification with the mainland.

More broadly, democracy has demonstrated its adaptability under the unique constraints of a world afflicted by COVID-19. A number of successful elections were held across all regions and in countries at all income levels, including in Montenegro, and in Bolivia, yielding improvements. Judicial bodies in many settings, such as The Gambia, have held leaders to account for abuses of power, providing meaningful checks on the executive branch and contributing to slight global gains for judicial independence over the past four years. At the same time, journalists in even the most repressive environments like China sought to shed light on government transgressions, and ordinary people from Bulgaria to India to Brazil continued to express discontent on topics ranging from corruption and systemic inequality to the mishandling of the health crisis, letting their leaders know that the desire for democratic governance will not be easily quelled.

The Biden administration has pledged to make support for democracy a key part of US foreign policy, raising hopes for a more proactive American role in reversing the global democratic decline. To fulfill this promise, the president will need to provide clear leadership, articulating his goals to the American public and to allies overseas. He must also make the United States credible in its efforts by implementing the reforms necessary to address considerable democratic deficits at home. Given many competing priorities, including the pandemic and its socioeconomic aftermath, President Biden will have to remain steadfast, keeping in mind that democracy is a continuous project of renewal that ultimately ensures security and prosperity while upholding the fundamental rights of all people.

Democracy today is beleaguered but not defeated. Its enduring popularity in a more hostile world and its perseverance after a devastating year are signals of resilience that bode well for the future of freedom.

## Inequality Advantage

### Inequality---1NC

#### No brink---unemployment plummeted from COVID.

#### No monopsony AND antitrust is irrelevant for labor concentration

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While documenting potential changes in monopsony power over time and across markets is an important research project, and these economists should be applauded for contributing to our knowledge of an understudied phenomena, there is a substantial gap between our current state of knowledge and substantiating a belief that dramatic antitrust policy change would improve welfare. Several pieces of evidence render it difficult to conclude that lax antitrust enforcement has allowed labor market concentration and an anticompetitive increase of monopsony power. The claim and its underlying arguments are not compelling because they do not appropriately consider the level of current antitrust enforcement in labor markets, the theory and empirics supporting the claim are ambiguous, and even if an increase in monopsony power is assumed, it is unlikely (and certainly not established) that lax antitrust enforcement played a causal role. 223

The first piece of evidence opposing the Hipster Antitrust claim is the existing presence of antitrust enforcement in labor markets. The DOJ has issued several high-profile complaints against companies using "no-poaching" agreements to decrease labor competition. 224 For example, in United States v. Adobe, the DOJ filed a complaint alleging that major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixer) anticompetitively agreed to not pursue each other's highly trained [\*348] technology employees. 225 That same year, the DOJ also successfully enjoined similar no-poaching agreements in the motion picture film industry. 226 Antitrust enforcement involving no-poaching agreements has not tapered in recent years. The DOJ issued joint guidance with the FTC in October 2016 warning that naked no-poach agreements would be treated as price fixing, and Assistant Attorney General for Antitrust Makan Delrahim recently signaled the potential for forthcoming criminal cases on no-poach agreements among employers. 227

The FTC also recently enjoined the American Guild of Organists from restricting any members' ability to solicit or accept work from any "consumer" who was currently utilizing another member. 228 The FTC challenged this no-poaching arrangement under § 5 of the FTC Act as a method of unfair competition that increased prices for consumers. 229 However, apart from federal enforcement, employers restricting labor competition has also been the subject of private antitrust class action litigation. 230 A recent class action filed against Carl's Jr. Restaurants, LLC alleged that Carl's and its independent franchises used "no-hire agreements" to collude and prohibit competitive franchisees from hiring employees from other franchisees. 231

The claim that modern antitrust ignores labor markets is certainly incorrect. That said, no credible attempt has been made to systematically measure antitrust enforcement activity as it relates to labor markets and its potential effects on monopsony power. Given the recent series of antitrust cases involving labor claims, it is difficult to view the recent antitrust enforcement in labor markets as a gaping hole in antitrust enforcement that invites anticompetitive abuses. If concentration in labor markets has awarded corporations with the monopsony power to suppress labor shares, it would be unwise to conclude without more evidence that antitrust enforcement's presence or lack thereof in labor markets is the cause.

[\*349] A second piece of evidence undermining the Hipster Antitrust position concerning monopsony power is potentially even more fundamental-it is not clear that monopsony power is, in fact, increasing. The most cited-to stylized fact in support of the conclusion that monopsony power is widespread and increasing in the United States economy is that the labor share is decreasing. 232 There are, of course, many reasons why one might observe a decrease in the labor share. Lax antitrust allowing the creation of monopsony power is one hypothesis. Though the theoretical effects of a massive increase in monopoly and monopsony power through generally lax antitrust enforcement are ambiguous. Indeed, some studies have found a positive relationship between employer size and wages (i.e. bigger employers pay larger wages). 233 It is also unsettled whether employers with more market power pay lower wages. 234 Neither economic theory nor empirical evidence paint a clear picture that an increase in antitrust activity in labor markets would result in a reduction of monopsony power or upward pressure on wages. 235

Finally, even if the increase in monopsony power were empirically assumed to be present, the available evidence does not suggest that consumer welfare focused antitrust enforcement played any meaningful role in that change. 236 Consider the figure below:

The decrease in labor share has been a worldwide phenomenon--with the United States experiencing a comparatively modest drop. However, if the U.S. drop in labor share is indeed attributed to the lax antitrust enforcement of regulatory regimes shackled to consumer welfare, it becomes difficult to explain the global phenomenon (surely the ghost of Robert Bork has not infiltrated each competition authority around the globe). Instead, the global statistics suggest that there are other explanatory variables external to antitrust enforcement that help to explain the recent decrease in labor share. As long as the Hipster Antitrust movement remains transfixed on antitrust enforcement as the cause and solution to decreasing labor shares, it will represent time lost--failing to identify the true causes and most prudent solutions.

#### Businesses shift to end-around antitrust

Kate Tromble 21 & Gregory Nantz, TROMBLE is vice president for Federal Policy at Results for America; NANTZ is a consultant for Results for America, “Federal Evidence-Based Competition Policy,” Inequality and the Labor Market, edited by Sharon Block and Benjamin H. Harris, Brookings Institution Press, 2021, pp. 193–208 JSTOR, https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.17

4. Employer Concentration

A fourth issue contributing to lack of competition in labor markets is increased employer concentration. By one estimate, employer concentration reduces workers’ share of overall economic output by one-sixth to onethird (Naidu, Posner, and Weyl 2018). Increased employer concentration also reduces the number of firms competing within a given market, which reduces the risk to employers of engaging in collusion—even if the collusion is not explicit (Padin 2018). Although federal antitrust reforms could help to reduce employer market concentration, the mechanisms by which employers assert monopsony power are diffuse, requiring action along multiple fronts to successfully increase workers’ bargaining power relative to their employers (Bivens, Mishel, and Schmitt 2018).

U.S. labor laws have been in place for decades, but anticompetitive forces continue to impact workers. Those forces have changed over the years, warranting a systematic review of the cause and effect of statutory and regulatory changes on labor market activity. The federal govern ment has not, however, conducted such a systematic evaluation. Rather, the role of evaluator has been largely outsourced to academic economists and lawyers. Minimum wages, for example, have been the subject of decades of research, with a weak consensus only recently emerging. We need faster and more-robust systems and resources for understanding the impact of our federal labor laws on workers, employers, and markets. The federal government, through the DOL’s Chief Evaluation Office (CEO; the CEO is housed within the Office of the Assistant Secretary for Policy), could provide this kind of cohesive labor market research and evaluation activity.

### Inequality---Impact D---War

#### No connection between inequality and conflict

Elise Must 16, PhD Candidate at the London School of Economics, “When And How Does Inequality Cause Conflict? Group Dynamics, Perceptions And Natural Resources”, Doctoral Dissertation, http://etheses.lse.ac.uk/3438/1/Must\_When\_and\_how\_does\_inequality.pdf

Does economic inequality lead to conflict? This question has attracted the attention of prominent scholars at least since the time of Aristotle (Nagel 1974). The frequent assumption that unequal distribution somehow fuels rebellion has resulted in a vast amount of theoretical as well as empirical work. For long, results remained mixed. Despite countless qualitative studies asserting that inequality is a major reason for conflict outbreak, quantitative studies struggled to establish a firm relationship between the two (Blattman and Miguel 2010, Cramer 2005, Lichbach 1989).

These quantitative studies, including the most influential ones by Collier and Hoeffler (2004) and Fearon and Laitin (2003), rely on analysis of individual measures of inequality. However, as most prominently set forth by Frances Stewart, it is minority groups or collectives of individuals who rebel, not the whole population, nor individuals (Stewart 2002). Stewart’s theoretical development has given rise to several quantitative studies which uniformly support the role of economic group inequality in inducing conflict (Buhaug, Cederman, and Gleditsch 2014, Cederman, Weidmann, and Bormann 2015, Cederman, Weidmann, and Gleditsch 2011, Deiwiks, Cederman, and Gleditsch 2012, Østby 2008a, b, Østby, Nordås, and Rød 2009). Hence, there is an emerging consensus in the literature that inequality causes civil conflict when it overlaps with relevant group identities.

Promising as these studies are, they nevertheless neglect a potential crucial part of the inequality-conflict causal chain. Seemingly all studies of inequality and conflict, including those measuring group inequalities, are based on objective inequalities. Yet, as Stewart (2010, 14) herself notes, ‘People take action because of perceived injustices rather than because of measured statistical inequalities of which they might not be aware’. Economic inequality measured by the Gini coefficient, or by local GDP data, is most commonly used as proxies, leaving completely aside how economic inequality is actually interpreted and perceived by both groups and individuals (ref. Zimmermann 1983). It remains obvious, however, that in order for people to take action to address inequalities, the first step is to recognize them and to consider them unjust (Han et al. 2012). The use then, of objective measures in current empirical studies, is based on the assumption that both objective and perceived horizontal inequalities essentially amount to the same thing. Put another way it is assumed that all objective inequalities are actually perceived as inequalities by relevant groups, and conversely all perceived inequalities have an objective basis. These are strong claims that are so far largely untested. Existing studies of the link between objective and perceived horizontal inequalities range from concluding that there is no such link (Langer and Smedts 2013) to documenting imperfect correlations – ranging from 0.27 to 0.30 depending on indicators and datasets (Holmqvist 2012).

While cross-country analyses of conflict have neglected perceptions of inequality, the case study literature does offer some examples demonstrating their importance. Interviewing Muslim immigrants in London and Madrid, Gest (2010, 178) finds that what distinguishes democratic activists from those who engage in anti-system behavior, is the nature of their individual expectations and perceptions about shared economic realities. Moving on to larger conflicts, a recent World Bank report concludes that the so called ‘Arab Spring’ was driven by a decrease in popular subjective satisfaction, while the objective economic situation actually improved in the years before the widespread mobilization (Ianchovichina, Mottaghi, and Shantayanan 2015). The report also points to the importance of inter-group inequality as opposed to individual inequality.

My main argument is that in order to better capture the role of inequality in inducing civil conflict, measures have to account for relevant groups as well as for the perception of inequality in these groups. In addition, my analyses fill two other gaps in the literature. While Stewart emphasizes how groups can mobilize around different identities, current studies have almost exclusively focused on ethnic groups. However, a regional identity might be just as relevant (ref. Posner 2004). I will therefor look at the effect of regional economic inequality on civil war. And finally, most of the studies, and all of those with a global scope, rely on time invariant measures of economic horizontal inequality. This is commonly defended by referring to the demonstrated ‘stickiness’ of horizontal inequalities (see e.g. Stewart and Langer 2008, Tilly 1999). Still, a recent study covering 1992 to 2013 demonstrates a global decline of ethnic inequality (Bormann et al. 2016), while Kanbur and Venables (2005) compare case studies of 26 developing countries and conclude that regional inequalities are rising. The data used in this analysis also show that horizontal inequalities change quite substantially over time. Using inequality data from one particular year to analyze decades of conflict incidents is therefore questionable. Hence, my study represents the first time-variant analyses of the effect of both objective and perceived regional inequality on civil war covering developed and developing countries in all world regions14 .

Analysing data for the period 1989 to 2014 from the World Values Survey (WVS), I find that countries with a high level of perceived regional economic inequality have an elevated risk of civil war outbreak. On the other hand, mere objective regional economic inequalities do not have any significant effect. The group aspect remains essential, as neither objective nor perceived individual inequality is linked to increased civil conflict risk.

### Inequality---Impact D---Diversion

#### Inequality doesn’t cause nationalism or diversionary war

Gal Ariely 16, senior lecturer in the Department of Politics & Government, Ben-Gurion University of the Negev, PhD from the University of Haifa’s School of Political Sciences, “Does National Identification Always Lead to Chauvinism? A Cross-National Analysis of Contextual Explanations,” Globalizations, vol. 13, no. 4, Routledge, 07/03/2016, pp. 377–395

With respect to internal explanations, the effects of income inequality and ethnic diversity are presented in Table 3. Models 3.1 and 3.2 indicate that neither directly affects chauvinism. H4 is therefore not supported. The results suggest, however, that both have a negative effect on the national-identification slopes. Contrary to our expectations, countries with higher levels of economic and ethnic division appear to exhibit a weaker relation between national identification and chauvinism. While these findings might seem to contradict H5, the pattern was caused by outliers. After excluding South Africa—the most unequal and ethnic diverse country in our sample—the effect of ethnic diversity is not even of borderline significance. After excluding Chile—the most unequal country in our sample—the interaction effects for economic inequality were also far from significant. The results, therefore, do not support H5.21

Conclusions

During the historic phone call between President Obama and Iranian President Sheikh Hasan Rouhani in September 2013, the latter stated that his country’s nuclear program ‘represents Iran’s national dignity’.22 This declaration reflects the common perception that Iran’s nuclear program mobilizes Iranians in support of resisting further national humiliation at the hands of foreigners (Moshirzadeh, 2007). This reflects the important role national feelings play in the contemporary international arena. Evidence from other examples—such as the Israeli-Palestine conflict—indicates that national identity serves as a key factor in conflict resolution. The prominence of national feelings is not limited to the Middle East, their effect on public attitudes towards international issues, and conflicts also being manifest in the West (Billig, 1995; Kinder & Kam, 2010).

It is thus hardly surprising that scholars seeking to develop a better understanding of conflicts adopt a social-psychology perspective, replacing the deterministic view that identification with one’s in-group necessarily leads to antagonism towards out-groups with an examination of the broader social context. In line with this approach, the present paper focuses on the way in which political and social contexts encourage chauvinistic views towards the international arena and how they affect the relation between national identification and chauvinism.

Integrating various social and psychological theories, we investigated two external contextual explanations (globalization and conflict) and an internal explanation (social division). Employing cross-national survey data, we examined the relation between national identification and chauvinism across 33 countries. The findings indicate that a positive relationship exists between national identification and chauvinism across most of the countries, although the level differs from country to country. Using a multilevel regression analysis, we tested to see whether globalization, conflict, and social division correlate with this variation. The results indicate that social and political contexts are related to chauvinism and the ways national identifi- cation and chauvinism are linked. Although a closer relation exists between national identification and chauvinism in more globalized countries, globalization failed to explain the variation in chauvinism itself. These findings support the notion that globalization highlights the importance of national identity (Calhoun, 2007; Castells, 2011). While those sections of globalized societies that are attached to their country also tend to resist international cooperation and endorse hostile views, the complexity of the phenomenon—as evinced by the divergent findings of previous studies (e.g. Jung, 2008; Norris & Inglehart, 2009)—calls for further research of this interpretation. The fact that the current study is cross-sectional must also be taken into account, the findings adducing the relation but not the causal relations between the variables. In contrast to experimental studies, the present design is similarly limited in its ability to offer a robust control for alternative explanations.

Another external factor found to be relevant—to a certain degree—was conflict. Countries that suffered large numbers of deaths in conflicts and mobilized resources and personnel exhibited higher levels of chauvinism. When other indices for conflict were used, however, these results were not replicated. A possible explanation for this finding lies in the inherent limitation in the way in which conflicts are measured across various countries. Measuring international conflicts is a challenging task (Anderton & Carter, 2011). While the ways of measuring conflict were chosen because they reflect different dimensions of conflict in order to be representative of a wide range of countries, the problem of comparability cannot be ignored. An alternative explanation may derive from the fact that only deaths from conflict and resources/personnel mobilization are sufficiently significant to contribute to chauvinism. The limitations of our measurements of conflict and research design mean that this idea must remain speculative, however. In addition, it is important to emphasize that the sample of countries is also limited as many countries are not involved in conflict and there is also limited variation in the types of conflicts.

Contrary to what the divisionary theory of national mobilization would lead us to expect, neither economic inequality nor ethnic diversity were related to chauvinism or affected the relation between national identification and chauvinism. This finding might also be explained by the limitation of the current research design. The number of countries included in the ISSP 2003 National Identity Module being relatively small and the sample only covering countries with available survey data, the results relate solely to this specific sample of countries. Across another set of countries, social division might play a far more significant role. Another explanation might be the meaning given to national identification and chauvinism across the countries. While evidence exists for the comparability of the scales across most of the countries, the divergent meaning probably attributed to them in Germany, the United States, and Israel might form an additional limitation.

## 2NC

### Multilat CP---2NC

#### It creates a coalition of the willing that bypasses general obstacles

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. 52-53

Conclusion

I have argued that strong, universalistic prescriptions regarding the internationalization of competition policy are unlikely to be very convincing or very interesting. Polities and societies have sharply differing accounts of what “free” and “fair” competition might mean, and when and how the state should shape it, interfere with it, or exclude it altogether. Liberalization and competition offer tremendous benefits to jurisdictions that embrace them; but no jurisdiction does so entirely, and each polity must find its own optimal balance between competition and the values that—so to speak—compete with it. This makes international action a very complex affair in which internationalization is likely to happen slowly when it happens at all. Sometimes it will be simply unavailable: “state preferences may be configured in such a way as to make cooperation unprofitable for all, in which case it will not occur, no matter what international mechanisms are in place.”204

As “[d]isagreement on matters of principle is . . . not the exception but the rule in politics,”205 I have suggested that there is considerable value in the provision of a wide range of tools and forms to facilitate international action. The bigger and more diverse the toolkit, the greater the likelihood of finding a solution that will serve the turn. To that end, I have emphasized the value of three forms of flexibility in this area: regionalism as a complement to bilateralism and multilateralism; frameworks as a complement to treaties and networks; and a willingness to explore cooperation on competition policy both alongside and separately from the liberalization of trade.

All the hard questions remain. But, as policymakers and scholars survey the wreckage of megaregionalism, I think there are plenty of reasons for optimism. I have emphasized that when grand megaregional bargains wrought in binding international law fail, other paths may remain open. Other combinations, other configurations, can offer the prospect of “progress”—in the right sense—to coalitions of the willing. At the time of writing, there is some evidence that many of the TPP’s parties continue to see value in deep cooperation in matters of trade and competition policy, even without the participation of the United States.206 With some creativity and imagination, and in partnership with like-minded jurisdictions, there is every reason to expect that they will achieve it.

#### Europe and China will say ‘yes’

Michael Ristaniemi 20, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “International Antitrust: Toward Upgrading Coordination and Enforcement”, Doctoral Dissertation, October 2020, https://core.ac.uk/download/pdf/347180879.pdf

Despite the above, the major powers do have an interest in cooperating internationally in competition issues. The EU and the US appear to desire further convergence of practices and substantive thinking. Officially, China does not appear to have a strong stance on convergence, but recent practice shows that it too has engaged in an increasing amount of dialogue on competition matters. Indeed, there is an increasing amount of cooperation in relation to investigating international cartels, referring to cartels that operate in several nations concurrently and which seek to cartelize them.208

Further, the competition authorities of major powers have an incentive to ensure that merger control procedures affecting mergers benefiting their respective regions are as internationally streamlined and coordinated as possible given the number of multinationals that originate from each of their respective territories. Nonetheless, there are a few hurdles for streamlining international merger control. First is the dichotomous leadership of the US and the EU systems, with no single leading standard to become the global standard. Second, there are clear differences in nations’ scope of merger review that may arise from partially differing sets of goals should they attempt to address public interest or other non-competition related concerns concurrently with competition concerns.209 In any case, the aggregate cost of a fragmented system of international merger control is arguably higher than it would need to be. Improved, more structured coordination could help, as discussed further in Chapters 5 and 6 below.

#### That’s sufficient

Michael Ristaniemi 18, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “Convergence, Divergence or Disturbance – How Major Economic Powers Approach International Antitrust”, Concurrences, Number 3, September 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3266018

2. This will be done by analysing the recent stances that major world economic powers have taken as well as longer trends in their actions and inactions in terms of international cooperation on competition issues. The guiding assumption is that whatever actions such major powers decide to employ, they will significantly affect the kind of cooperation undertaken by other nations in the world in trade policy generally as well as in competition policy as a part of it. Bradford & Posner argue that “international law is best understood as the result of overlapping consensus” of the otherwise conflicting views of major powers, at the core of which nations consider themselves bound, that such consensus is a fluid concept and is subject to change at the whim of each major power, and that it would be wrong to consider otherwise.3 This is a relevant backdrop also in relation to assessing potential for international cooperation in the realm of competition policy. 1

3. The paper’s focus is on three major economic powers: The United States (US), the European Union (EU), and China.4 Collectively they account for over 60% of the global economy and are consequentially all major economic powers.5 Each of them has a differing historical background to competition and competitive markets, and each has a unique presence and unique intentions in policy questions affecting competition globally. The three major powers are all exceptional states.6 This refers to a state which believes its values should form part of the global framework and has the power to influence this. This is particularly true now that the US’s influence is decreasing and there is room for a more diverse world order, in which China will likely be an increasingly important actor.7

#### Status-seeking drives agreement AND overwhelms economic costs

Geoffrey A. Manne 13, Lecturer in Law at Lewis & Clark Law School, Executive Director of the International Center for Law & Economics, JD from the University of Chicago Law School, Former Olin Fellow at the University of Virginia School of Law, and Dr. Seth Weinberger, PhD and MA in Political Science from Duke University, MA in National Security Studies from Georgetown University, AB from the University of Chicago, Associate Professor in the Department of Politics and Government at the University of Puget Sound, “International Signals: The Political Dimension of International Competition Law”, The Antitrust Bulletin, Volume 57, Number 3, Fall 2012, Volume 57, Number 3, Last Revised 7/18/2013, p. 490-492

The United States has an interest in obtaining credible long-term commitments from other states—particularly developing states—to the dominant norms of global economic and political liberalization preferred by the United States. To the extent that adherence to the tenets of economic liberalization preferred by the United States is costly, adherence to those standards conveys a measure of long-term commitment. Similarly, to the extent that states can be made to adapt their domestic infrastructure and institutions to conform with the United States’ preferred institutions of economic liberalization (an undoubtedly costly proposition8), the United States can credibly hope to initiate a process of internalization, whereby the adaptations made create a “lock-in” effect which helps to further the processes of market liberalization and democratization that the United States believes are essential for the maintenance of its preferred international order.9 In short, the more difficult and costly it is for a state to adhere to an international agreement, the more its continued, costly adherence signals the state’s long-term commitment to the underlying tenets with which the agreement is imbued.

Moreover and not least, the process of harmonization through successive, bilateral (or narrow, regional) agreements, particularly in the economic sphere, permits the measured, evolutionary adoption of international standards. The crass realpolitik of multilateral international institutions, even though imbued with desirable normative constraints, suggests that the product of their deliberations will be less economic than political. Many have suggested, however, that regulatory competition in an arena like antitrust (where laws are invariably applied extraterritorially and where states have no ability to lure incorporations with attractive antitrust laws) makes an evolutionary, competitive approach infeasible.10

The recognition of political costs, however, and a consideration of the broader political environment in which international economic laws are negotiated, suggest that an evolutionary, competitive approach is in fact possible. As described in more detail below,11 nations compete for favorable trade and other status. To the extent that their position in the normative order is affected favorably by incurring the costs of compliance with the dominant economic norms as embodied in particular agreements (because of the internalization effect), some measure of competition is possible. By this we mean that, rather than a race for the top (or bottom) engendered by the competition for incorporation fees, for example, states will compete in a race for political status. Because political status is conferred by entering into agreements with dominant economic powers, developing countries (and other states that have not yet solidified their political or economic positions) will enter into agreements without direct transfer payments in order to receive the benefits of credibility, normative change, and international acceptance. The net effect should be the effective export of consistent American (or, more recently, European) antitrust policy. Notably, because harmonization can be achieved over time, through limited agreements, the substance of the dominant international law can also be honed over time as experience proves it necessary.12

#### It presumes global implementation---not the CP

[blue]

Bruno Bastos Becker 16. Associate of the Competition Practice at Barbosa, Müssnich & Aragão Advogados. Revista Do Ibrac Volume 22 - Número 1- 2016 Prêmio Ibrac - Tim 2015 “Decentralized Globalization: Possible Solutions for Multiple Merger Control Regimes in Cross-Border Transactions”. https://d1wqtxts1xzle7.cloudfront.net/52329387/SSRN-id2926207.pdf?1490635488=&response-content-disposition=inline%3B+filename%3DDecentralized\_Globalization\_Possible\_Sol.pdf&Expires=1633221921&Signature=AdZzigmFmDWzAJDsFfwmed9N0wgp7JMqh1Z7XUAIxb2ocUtkMJLFCwRj4NslBFsxzWeYwJ~gkHQm0Zb22NuvJwQzbnHnUMGlXzDXdujTXsxQFyE4fSapKDT9lbk2uWrYgrCBMfw0sli1tKJPOQsVlVyeKiSWoFIfkj5M9wQaGyLoucnRYm~66PajYX~ureUvwk~kMFcr4wNpXWCO~reag8ObhcgUhRDwNB34iNJF4Z08o4VGIOwP4CqvSs1VV3gIY4-rLKazwWkwkWHj1hK11yy3~HRWtDevXLzli8qGpvvc7Z8KKEA~nj-6HTtMX7Ps9nHZZJZVQW-lNK4fXHrCow\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

Over the last decade, several scholars have proposed different solutions for the problem of the decentralized globalization. However, none of the efforts resulted in a cohesive merger control system41. One of the main reasons is that merger policy is strongly related to industrial policy and, therefore, countries have rejected the possible loss of sovereignty42

---FOOTNOTE 42 STARTS, MIDPARAGRAPH---

42 “Because merger policy is usually closely linked to industrial policy, nowadays most countries are not ready to relinquish part of their sovereign rights in this area in order to support some sort of international merger policy, negotiated and implemented at a multilateral level. Therefore, absolutely no agreement on substantive rules to tackle mergers, not even in the form of «rule of reason» guidelines, seems to be foreseeable at international level in the near future”. (MONTINI, Massimiliano. Globalization and International Antitrust Cooperation. International Conference Trade and Competition in the WTO and Beyond. 1999. p. 18 Available at: http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-069.pdf)

---FOOTNOTE 42 ENDS, PARAGRAPH CONTINUES---

that is part of the main proposals so far. Furthermore, as pointed out by Jörg Terhechte, there are many differences between authorities that must be taken into account for the designing of a possible solution, like financial and personal resources, composition at the decisional level, independence, accountability43

#### Each action must be interlinked and conditional---otherwise, it’ll collapse

Dr. Daniel Francis 21, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, “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

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

[FOOTNOTE] 168 It is almost universally appreciated that reciprocal behavior plays a crucial rule in compliance with international law more generally. See, e.g., Andrew T. Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (Oxford 2008) 42 (“Reciprocity can serve as a powerful compliance-enhancing tool in the right circumstances.”). [END FOOTNOTE]

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

#### It's fast

Emilio E. Varanini 20, Deputy Attorney General, Antitrust Section, California Office of the Attorney General; Chair, International Committee and Health-Care Working Group, Antitrust Task Force, National Association of State Attorneys General; Chair of China Working Group & Vice-Chair, Communications and Digital Technologies Industries Committee, American Bar Association, “Running Soft Convergence Into The Ground: The Case for an International Antitrust Treaty” in Chinese (Taiwan) Yearbook of International Law and Affairs, Volume 28, eBook Version, p. 157-158 [grammar edit]

Finally, soft convergence is slow to begin with; the multiplication of antitrust regimes only increases the time needed for soft convergence of norms, processes, and objectives. For example, merger processes and standards converged between the EU and the US to a large extent over a four year period as a result of a concerted effort by both entities.106 However, though the EU and China have made great progress in fleshing out the process and standards for civil damage claims arising out of violations of their antitrust laws, neither of these antitrust jurisdictions have yet finished that task. Japan apparently has yet to address making actions for civil damages more effective, including, but not limited to, recognizing representative actions.107

V. THE NEED FOR A NEXT STEP:

AN INTERNATIONAL ANTITRUST TREATY

These limits to soft convergence - the increase in the potential for differing judgments and remedies, the slow nature of the convergence process, and remaining (but probably intractable) differences in global norms - are all the kind of factors that justify an international antitrust treaty of some kind.108

[FOOTNOTE] 108 See AMC, supra note 14, at 222-25 (proposing that the United States enter into agreements with other nations' antitrust enforcements that would institute harmonization, joint action, and complex deferral requirements based on the strength of nexus of a transaction or complaint to a given country). C/. Ching-Fu Lin, "Global Food Safety: Exploring Key Elements for an International Regulatory Strategy", 51 Va. /. Int'l. L. 637, 694 (2011) ("The two most striking examples of global food-borne illnesses—the case of BSE-vCJD and the case of melamine-contaminated products from China—show how food safety crises permeate national boundaries and demonstrate the lack of current institutional capacity to handle future crises. As shown in Parts II and III of this Article, national legislation and regulation alone are insufficient to address global food safety problems. Furthermore, the sole reliance on private forms of governance to regulate cross-border food-supply chains is similarly an unsatisfactory answer to the complex problem. Instead, effective regulatory strategy must go beyond the use of such unilateral measures."). [END FOOTNOTE]

This proposed international antitrust treaty with its call for an expert panel to judge referred cases, as well as its call for mandated cooperation between signatory nations, is admittedly most akin to a framework convention approach, e.g., a process of incremental regime development that evolves over time.109 However, this approach, though not new in terms of international law, has advantages in addressing the present environment: it can avoid political bottlenecks on remaining differences on antitrust norms can be avoided; and it can ensure that uncertainties regarding differing judgments and remedies are addressed in an incremental fashion so as [to] build a global consensus in the longer-term.110

#### ‘Antitrust law’ is U.S. domestic policy

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For clarity's sake, the term "antitrust" is an American convention, whereas the more commonly employed synonymous term is "competition." See ELEANORA POLI, ANTITRUST INSTITUTIONS AND POLICIES IN THE GLOBALISING ECONOMY 2 (2016) (describing the genesis of the American "antitrust" as relating back to the late nineteenth century when US cartelists would label their joint activities "trusts" to conceal their collusive nature); PETER MORICI, ANTITRUST IN THE GLOBAL TRADING SYSTEM: RECONCILING U.S., JAPANESE, AND EU APPROACHES 3-4 (2000) (noting that though competition policy has a broader meaning than antitrust policy in most cases, the terms are used interchangeably); Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 U. CHI. LEGAL F. 277, 278 (1992) (noting that "antitrust" is synonymous with "competition" and "antimonopoly"). Labels may vary by country, such as in China where "antimonopoly" is used or in France where "concurrence" is used for the body of law. See "[THE ORIGINAL CHARACTER SET CANNOT BE REPRINTED HERE. PLEASE SEE TEXT IN ORIGINAL DOCUMENT] (Anti-Monopoly Law of the People's Republic of China) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China) (setting out China's antitrust law); CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] arts. 410-1 to 470-8 (Fr.) (book IV entitled "de la liberté des prix et de la concurrence," or "Freedom of Prices and Competition").

#### It’s an alternative to the plan

Anu Bradford 3, Published under the Maiden Name of Anu Piilola, Henry L. Moses Professor of Law and International Organization at Columbia Law School, LLM from Harvard Law School, Master of Laws from University of Helsinki, JD from Harvard Law School, Licentiate in Laws from the University of Helsinki, Fulbright Scholar, “Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation”, Stanford Journal of International Law, Volume 39, Issue 2, 39 Stan. J Int'l L. 207, Summer 2003, Lexis

Antitrust law is illustrative of the legal realms in which conflicting ideas of international and national regulatory frameworks have yet to find a satisfactory equilibrium. While competition among multinational enterprises has increasingly disregarded national borders, antitrust laws have remained predominantly national. The traditional, though perhaps most controversial, way to deal with international antitrust issues is to rely on a unilateral application of national antitrust laws. This type of extraterritoriality, however, has caused significant tension and resistance. 1 A more radical, equally controversial approach would be to harmonize national antitrust laws or establish unified supranational antitrust rules. This is a far-reaching solution that lacks adequate support in today's political climate. 2 Other alternative [\*208] routes to solving existing frictions would be, for example, to expand bilateral and regional cooperative arrangements or to establish a choice of law system.

Consequently, there is an ongoing debate over whether there is a need to create an international antitrust regime that could better respond to the new economic environment, increased cross-border business activity, and the integration of markets. Proponents of such a regime view international antitrust rules as necessary tools to reduce transaction costs, increase efficiency, and cultivate legal certainty. However, there is little agreement concerning the form, substance, or timeframe of the proposed regulatory reform. Those who oppose the creation of an international antitrust regime emphasize the divergent policy goals of different nations and the conflicting understandings of the role and extent of antitrust enforcement in different jurisdictions. They argue that discrete policy and enforcement concerns clearly hinder attempts at internationalization and highlight the necessity of maintaining regulatory diversity. In this view, countries should retain regulatory powers on the national level, as part of the exclusive right of sovereign states to design their market structures and economic policies.

#### ‘Its’ refers to the U.S., is possessive, and exclusive

Douglas F. Brent 10, Attorney and Co-Chair of the Privacy & Information Security Practice at Stoll Keenon Ogden LLP, JD from the University of Kentucky College of Law, BA from the University of Kentucky, “Reply Brief on Threshold Issues of Cricket Communications, Inc.”, Commonwealth of Kentucky Before the Public Service Commission, 6/2/2010, http://psc.ky.gov/PSCSCF/2010%20cases/2010-00131/20100602\_Crickets\_Reply\_Brief\_on\_Threshold\_Issues.PDF [italics in original]

AT&T also argues that Merger Commitment 7.4 only permits extension of “any given” interconnection agreement for a single three year term. AT&T Brief at 12. Specifically, AT&T asserts that because Cricket adopted the interconnection agreement between Sprint and AT&T, which itself was extended, Cricket is precluded from extending the term of its agreement with AT&T. Id

This argument relies upon an inaccurate assumption: that the agreement (contract) between Sprint and AT&T, and the agreement (contract) between Cricket and AT&T, are one and the same. In other words, to accept AT&T’s argument the Commission must conclude that two separate contracts, i.e. the interconnection between Sprint and AT&T in Kentucky (“Sprint Kentucky Agreement”) and the interconnection between Cricket and AT&T in Kentucky (“Cricket Kentucky Agreement”), are one and the same.

Upon this unstated (and inaccurate) premise AT&T asserts that “*the ICA* was already extended”; id. at 14, and “*the ICA* Cricket seeks to extend was extended by Sprint . . . .”; id. at 15, and, finally, “Cricket cannot extend *the same ICA* a second time . . . .” Id. (emphasis added in all). Note that in the quoted portions of the AT&T brief (and elsewhere) AT&T uses vague and imprecise language when referring to either the Sprint Kentucky Agreement, or the Cricket Kentucky Agreement, in hopes that the Commission will treat the two contracts as one and the same.

But it would be a mistake to do so. The contract governing AT&T’s duties and obligations with Sprint is a legally distinct and separate contract from that which governs AT&T’s duties with Cricket. The Sprint Kentucky Agreement was approved by the Commission in September of 2001 in Case Number 2000-00480. The Cricket Kentucky Agreement was approved by the Commission in September of 2008 in Case Number 2008-033 1.

AT&T ignores the fact that these are two separate and distinct contracts because it knows that the merger commitments apply to *each* agreement that an individual telecommunications carrier has with AT&T. Notably, Merger Commitment 7.4 states that “AT&T/BellSouth ILECs shall permit *a requesting telecommunications carrier* to extend *its* current interconnection agreement . . . . As written, the commitment allows any carrier to extend “*its*” agreement. Clearly, the use of the pronoun “its” in this context is possessive, such that the term “its” means - *that* particular carrier’s agreement with AT&T (and not any other carrier’s agreement). Thus, the merger commitment applies to each agreement that an individual carrier may have with AT&T. It necessarily follows then, that Cricket’s right to extend its agreement under Merger Commitment 7.4 is separate and distinct right from another carrier’s right to extend its agreement with AT&T (or whether such agreement has been extended).

#### The framework is opt-in---the only outcome is a voluntary commitment that’s not binding, even if later implementation is

Michael Ristaniemi 20, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “International Antitrust: Toward Upgrading Coordination and Enforcement”, Doctoral Dissertation, October 2020, https://core.ac.uk/download/pdf/347180879.pdf

Structured cooperation, such as opt-in frameworks could be feasible, although binding commitments are likely to be difficult to agree on multilaterally. Such an approach could be particularly effective if combined with reporting obligations as is with the Global Compact – firms who have signed up must report annually on their efforts to comply in order to remain a member of the framework. Such comply-and-explain mechanisms are arguably effective, even if on a voluntary basis.280 Structured cooperation should focus on where sufficient common ground can be found, such as in procedural matters and concerning hard-core cartels. Other, more suitable fora exist for discussing points of divergence, such as how to treat firms in strong market positions, or how to address state aid and other industrial policy questions.

It is important for international antitrust to remain responsive. In the pluralist and polycentric environment that it is, norm collision will continue to occur. As such, fixed and binding constitutionalism is neither possible nor desirable, but rather ways should be found which preemptively coordinate the conduct of actors – competition agencies, policymakers, and firms alike – to avoid unnecessary conflict and to develop tools in which to reconcile and manage the remaining inevitable norm collision.281

#### ‘Prohibitions’ must be binding

Dr. Francis Jacobs 90, Member of the European Court of Justice, DPhil from the University of Oxford, Former Professor of European Law at the University of London and Director of the Centre of European Law for King's College London School of Law, “Commission of the European Communities v French Republic – Opinion of Mr Advocate General Roberts”, European Court Reports 1990 I-00925, Case C-62/89, 2/20/1990, p. 942

20. In my view, those arguments cannot be accepted. It is plain from the wording of Article 10(2) of Regulation No 2057/82 and from the scheme and objectives of the Community legislation that Member States are required to anticipate the exhaustion of the quota and to act to prohibit fishing provisionally before the quota is exhausted . That the exhaustion of the quota must be anticipated is indicated by the requirement in Article 10(2) that each Member State shall determine the date from which its vessels "shall be *deemed to have exhausted* the quota ..." ( emphasis added ). The use of the word "prohibit" in Article 10(2) and the mandatory wording of the second subparagraph of Article 10(3) (" Fishing vessels ... shall cease fishing ...") indicate that the measures taken to halt fishing provisionally must be of a binding nature. It is moreover apparent from the scheme of the legislation that the obligation imposed on Member States by Article 10(2) is of crucial importance for ensuring respect for quotas: the obligation must therefore be construed strictly. An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i.e. the conservation of scarce fishing resources.

#### They must be immediately effective, not a result

Dr. Howard Newby 4, BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool, “Joint Committee on the Draft Charities Bill - Written Evidence”, Memorandum from the Higher Education Funding Council for England, 9/30/2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

### Innovation ADV---2NC

#### U.S. innovation is high and globally dominant---big business is key.

Wolf ’21 [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” <https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355>]

The Chinese elite are convinced that the US is in irreversible decline. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is exaggerated. The US retains big assets, notably in economics.

For one and half centuries, the US has been the world’s most innovative economy. That has been the basis of its global power and influence. So how does its innovative power look today? The answer is: rather good, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, 7 of the 10 most valuable companies in the world and 14 of the top 20, were headquartered in the US.

If it were not for Saudi Arabian oil, the five most valuable companies in the world would be US technology giants: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at seventh position) and Alibaba (at ninth). But those are China’s only companies in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has 12 of the top 20; China (with Hong Kong but excluding Taiwan) has three; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another crucial sector for future prosperity. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has seven of the top 10, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies are globally dominant and nearly all the most valuable non-US firms are headquartered in allied countries.

#### Big companies are inevitable

Steve Denning 21, Senior Contributor at Forbes, formerly held management positions at the World Bank, “Why Biden’s War On Big Tech Is Misguided,” Forbes, 07-11-2021, https://www.forbes.com/sites/stevedenning/2021/07/11/why-bidens-attack-on-big-tech-is-misguided/?sh=42b3681261e0

We are living in a new economic age—the age of digital—and digital giants are an emblem of this fact. They reflect the immense benefits and revenue that digital can generate, in the exponential growth that digital enables and in the competitive threat they represent to traditionally managed firms.

Bigness is an inherent in the digital economy. “In markets with highly scalable assets,” write Haskell and Westlake write in Capitalism Without Capital, (Princeton, 2017) “the rewards for runners-up are often meager. If Google’s search algorithm is the best and is almost infinitely scalable, why use Yahoo’s? Winner-takes-all scenarios are likely to be the norm.” Breaking up Google into ten little Googles, requiring users to go to a different little Googles for different kinds of searches, would destroy much of the ease and convenience of Google.

#### The only robust, statistical study concludes neg---antitrust throttles innovation.

Day ’17 [Gregory; October 17; Ph.D., J.D., Professor at Oklahoma State University’s Spears School of Business; Colombia Law School’s Blue Sky Blog, “How Antitrust Affects Innovation,” <https://clsbluesky.law.columbia.edu/2017/10/17/how-antitrust-affects-innovation/>]

This development, however, is actually counterintuitive. Scholars and policymakers have long thought that concentrated market power and monopolies produce more innovation than competition. Consider that patent law—which is the primary body of law aimed at creating incentives for innovation—was traditionally thought to conflict with antitrust law. Known as the “the patent-antitrust paradox,” it was often said that antitrust is designed to prevent monopolies and other exclusionary practices while the patent system does the opposite, granting exclusionary rights and market power in the form of patents. Given this framework, it makes sense that scholars, courts, and government agencies have only recently considered antitrust and patent laws to be complementary policies for encouraging innovation.

Very little evidence, however, indicates that antitrust law affects the rate of innovation. There are three possibilities. Antitrust enforcement could strengthen incentives to innovate. It could, however, also diminish them: If firms believe that aggressive innovation is likely to draw unwanted attention from regulators, their motivation to invent new goods and methods could wane. And as a practical matter, the courts are probably ill equipped to create incentives for technological advancement. The third possibility is that innovation and antitrust have no causal relationship.

In fact, scholarship has often noted how little is known about antitrust’s influence on innovation. Despite the literature’s efforts—employing case studies, formalized logic, and theoretical explorations—“the consensus is that there is no clear answer.” Professor Alan Devlin remarked, “[u]nfortunately, the specific antitrust policies that best promote technological advancement are far from clear.” Professor Marina Lao found that “there is neither empirical nor clear theoretical support for the hypothesis that monopolistic conditions, relative to competition, encourage more innovation.” One commentator summed up these efforts, stating that “we may not be confident that antitrust suits enhance innovation, but we cannot be confident that they retard it either.”

My research responds to this state of affairs by empirically testing antitrust enforcement’s relationship with innovation. The history of antitrust law is an ideal natural laboratory for empirical study since its rate of enforcement has fluctuated, creating variations that generate strong statistical results. For example, each category of antitrust action initiated by the government has changed in a unique pattern. The rate of Section 1 investigations has steadily declined, but merger enforcement—which has traditionally been less common than sections 1 and 2 investigations—peaked in the 1990s and has since become more prominent than Sherman Act investigations. As a result, it can be statistically determined with a high level of confidence whether the rate of innovation has changed in accordance with increases and decreases of antitrust activity, controlling for mitigating factors.

I constructed a new dataset of publicly available information as well as data received from Freedom of Information Act (“FOIA”) requests. The dataset spans from 1963 to 2015 with a unique entry each year. The results of the models are consistent, strong, and quite unexpected, demonstrating the effects of antitrust enforcement on society’s ability to produce patents and R&D.

First, a greater number of antitrust lawsuits filed by private parties—which are the most common type of antitrust action—impedes innovation. Second, the different types of antitrust actions initiated by the government tend to affect innovation in profoundly different ways. Merger challenges (under the Clayton Act) promote innovation while restraint of trade and monopolization claims (under sections 1 and 2 of the Sherman Act) suppress innovative markets. Even more interesting, these effects become stronger after the antitrust agencies explicitly made promoting innovation a part of their joint policies.

My results suggest that the arguments for and against antitrust have merit. On one hand, antitrust enforcement fosters the incentives to innovate when it preserves the number of firms competing within a market. Yet enforcement reduces innovation when it scrutinizes how firms compete. This makes sense. Commentators have noted that the Sherman Act is designed to raise suspicions about many activities in which innovative firms typically engage. An inventor may, for instance, exclude competitors from using her invention or enter into contracts and agreements with competitors to license or develop technology— either scenario can draw an antitrust challenge. Enforcing the Sherman Act can thus curb innovation by creating liability for inventors who would like to comply with the law. In short, antitrust appears to promote innovation when it maintains competition by preserving the number of firms competing within a market, but it retards innovation when it limits how exactly those firms compete against each other.

My analysis also supports concerns that the mere presence of the Federal Trade Commission and the Department of Justice in dynamic markets might chill the incentives to innovate. As the administrative state of antitrust increases—measured by the size of agency budgets and the number of investigations, actions, and personnel—the innovation in private industry decreases. To offer an analogy, when drivers can spot a police officer by the highway, they are more likely to drive below the speed limit, acting in an overly conservative manner. In the innovation context, a similar effect appears to be true: Although the presence of antitrust regulators in innovative markets may make some firms abide by the law, it can also make others overly cautious and reduce innovation.

#### Everyone knows bigger is better---size creates the capital required for innovation.

Jacob Beaupre 20, Associate Attorney with The Hunt Law Group LLC, Executive Editor of the DePaul Business of Commercial Law Journal, J.D. from the DePaul University College of Law, “Big Is Not Always Bad: The Misuse of Antitrust Law to Break up Big Tech Companies,” DePaul Business & Commercial Law Journal, Vol. 18, No. 1, Winter 2020, https://heinonline.org/HOL/P?h=hein.journals/depbcl18&i=35

Breaking up these companies into smaller corporations would create businesses with less capital than the current internet companies. It is unquestionable that these large companies have the necessary capital to fund research in ways that smaller internet companies do not.134 Breaking up the tech giants would create smaller companies with smaller capital that would not have enough capital to commit to research that benefits consumers. Research and development in fields like cloud computing and data security will create benefits to consumers and society at large. Only through their large size and profits are these companies able to fund the innovations that will rewrite the future and benefit consumers.

#### No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

### Inequality ADV---2NC

#### It’s explained by regional dynamics

Robert D. Atkinson 21, Founder and President of the Information Technology and Innovation Foundation (ITIF), the world’s top think tank for science and technology policy, internationally recognized scholar and a widely published author whom The New Republic has named one of the “three most important thinkers about innovation,” member of the Markle Foundation Task Force on National Security in the Information Age and serves on the boards or advisory councils of the Internet Education Foundation, the NetChoice Coalition, the University of Oregon’s Institute for Policy Research and Innovation, and the State Science and Technology Institute, “The Myth of Local Labor Market Monopsony,” ITIF, 5-7-2021, https://itif.org/publications/2021/05/07/myth-local-labor-market-monopsony

Many economists and advocates, particularly progressives, have raised concerns in the past decade about the fact that wages have increased slower than productivity. Notwithstanding the fact that this divergence is overstated, it is true that raising wages is important.

The problem is that, rather than keep the focus on real solutions, such as raising taxes on wealthy individuals, increasing the minimum wage, promoting greater unionization, and spurring faster productivity growth, progressives proffer a dark narrative in which monopoly is the villain lurking in the background. If only we could break up big companies, they argue, all other economic problems would be easier to solve.

To prove that the U.S. economy is being crushed by rapacious monopolies they constantly repeat a host of claims: Price markups have increased, labor’s share of income has decreased, corporate profits are up, new firm start-ups are down, and the overall trend toward monopoly has grown. These are, by and large, false.

Yet, in their ongoing quest to find a monopolist under every bed, progressives have latched onto the notion of labor market monopsony. In other words, they claim that in too many local labor market, workers have only a few choices of firms to work for, and this enables firms to squeeze wages.

The most commonly cited scholarly work on the topic is from liberal economists Jose Azar, Ioana Marinescu, and Marshall I. Steinbaum. Indeed, their work has become the de facto view on the issue, with government officials, the media, and others citing it as scripture.

While Azar, Marinescu, and Steinbaum have published a number of articles on the topic, all of their work uses a similar methodology. They analyze local labor markets in the United States by comparing job openings and salaries using online job tools.

They looked at a combination of U.S. commuting zones and 200 six-digit occupational codes to assess the state of more than 117,000 specific labor markets in 2016. They found that 60 percent of markets were highly concentrated, while another 11 percent were moderately concentrated.

At first glance, it would appear they are on to something and that antitrust officials better get on the ball. But on closer inspection, while it helps advance the “monopoly crisis” narrative, it is actually much ado about nothing.

The reality is that most of the labor markets with high levels of employer concentration are rural and small-town areas with few employers overall. As they wrote, “Commuting zones around large cities have lower levels of labor market concentration than smaller cities or rural areas.” Ioana Marinescu explains, “This may contribute to explaining why wages are higher in urban areas.”

As any regional economist knows, wages are lower in rural Wisconsin than in Manhattan, not because there are more employers in Manhattan than in rural Wisconsin, but because it costs more to do business in Manhattan than it does in rural Wisconsin. For example, the cost of living in Dyersburg, TN (a community of about 18,000 people), is almost 25 percent lower than it is in Fort Lauderdale, FL, and home prices are 46 percent lower. So, you can be sure that workers in Dyersburg are paid lower wages than workers are paid in Fort Lauderdale.

#### Their authors ignore alt causes

Josh Bivens 18, Director of Research at the Economic Policy Institute, Ph.D. in Economics from the New School for Social Research; Lawrence Mishel, Distinguished Fellow at the Economic Policy Institute, Ph.D. in Economics from the University of Wisconsin at Madison; John Schmitt, Vice President of the Economic Policy Institute, Ph.D. in Economics from the London School of Economics, “It’s Not Just Monopoly And Monopsony: How Market Power Has Affected American Wages,” Economic Policy Institute, 04-25-2018, https://files.epi.org/pdf/145564.pdf

Naidu, Posner, and Weyl (2018) provide a wide-ranging treatment of how market power—particularly in the labor market—can lead to both inefficiency and inequality. They survey a broad literature assessing the potential strength of labor market power and use the estimated parameters to put bounds on how large the efficiency and distributional effects of labor market power might be. They find it could be quite large: in one calibration they find that labor market power might reduce overall gross domestic product by almost 13 percent and overall wages by almost 25 percent. They use these results to highlight how important it is for regulatory authorities to carefully scrutinize how mergers of firms would affect labor market competition.

There are two important things to note about their extraordinary findings. First, their calibrations do not explicitly factor in the source of labor market power, and there is no direct connection between their results and labor market concentration. So, whether their findings are driven by concentration or by some other source of labor market power remains an open question. In short, their findings highlight how potentially important it is to confront employer power of all kinds, not just that driven by labor market concentration (we identify other sources of employer power in a later section). Second, they present no direct evidence that any one particular type of labor market power has increased over time. Our prior belief is that relative employer power in the labor market has indeed increased substantially in recent decades, but the source of this growth is not predominantly explained by growing labor market concentration—it is instead explained by an intentional policy assault on the market power of American workers. 12

#### Wage-productivity gap isn’t from concentration

Josh Bivens 18, EPI’s Director of Research, Authored or Co-Authored Three Books (including The State of Working America, 12th Edition) while working at EPI, edited another, and has written numerous research papers, including for academic journals; Lawrence Mishel, distinguished fellow at the Economic Policy Institute after serving as president from 2002–2017; John Schmitt, EPI’s vice president, spent 10 years as a senior economist at the Center for Economic and Policy Research (CEPR) and, most recently, was the research director at the Washington Center for Equitable Growth, “It’s Not Just Monopoly and Monopsony: How Market Power has Affected American Wages,” Economic Policy Institute, 4/25/18, https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/

Economists have started to identify concentration in both labor and product markets as a potential threat to living standards and wages of typical American families. Concentration in product markets (a limited number of sellers) is generally labeled monopoly power while concentration in labor markets (a limited number of employers—or buyers of labor) is generally labeled as monopsony power. This focus on market power in the form of market concentration represents a welcome and overdue shift. For too long, many researchers tried to explain troubling trends in American workers’ wages with textbook models of perfectly competitive labor markets. Specifically, this long research effort claimed that rising wage inequality and slow wage growth for typical workers was the result of economic influences (such as new technologies) that “shift” demand and supply curves for labor in a competitive model. This approach has decisively failed.1 Given this, any new research effort that introduces market power is an important step in the right direction.

This paper highlights some empirical findings from the new literature on the effect of labor and product market concentration on wages. We address three questions about market concentration that have not always been placed front and center in this literature. The first question is, “Does concentration adversely affect wages at a point in time?” The second question is, “Has concentration grown over time?” The third question is, “Can growing concentration by itself explain a significant portion of the change in wage trends in recent decades?” We find there is evidence to answer “yes” to the first and second questions but not the third. To be clear, the failure to answer affirmatively to the third question is not a criticism of these studies. The studies are not claiming that rising concentration alone can explain wage stagnation or inequality. Yet too many readers have taken these studies’ findings to this conclusion.

Finally, this paper makes two broader points about market power. First, market concentration is not the only source of power—particularly employer power—in markets. Second, even unchanged employer power (like that conferred by market concentration) can play a role in growing wage suppression and inequality if it is accompanied by a collapse of workers’ market power. The new literature on market concentration tells us a lot about employer power, but further exploration of what has happened to workers’ market power remains a key research agenda.

This paper highlights the need to tackle sluggish wage growth and rising inequality with a broad menu of policy interventions that go beyond those provided by competitive models to focus on employer and worker power, and even beyond the antitrust agenda suggested by focusing exclusively on market concentration.

Following are our key conclusions:

Labor market concentration is negatively correlated with wages, but the scope of its downward pressure on wages is limited.

New research shows that labor market concentration is negatively correlated with wages. However, the effect of labor market concentration is comparatively modest when scaled against what we consider the most significant wage trend in recent decades: the growing gap between typical (median) workers’ pay and productivity.

The new literature on market concentration has not yet provided concrete empirical estimates of a key labor market trend of recent decades—rising compensation inequality. This should be a priority for this research agenda in the future.

The new concentration literature does allow us to estimate the effect of market concentration on the share of overall income claimed by labor compensation. These estimates suggest that concentration has not risen enough, nor is its effect on labor’s share of income strong enough, to account by itself for an economically important share of the divergence between economywide productivity and the typical worker’s pay in recent decades.

The new research on labor market concentration implies that this concentration reduced wage growth by roughly 0.03 percent annually between 1979 and 2014, a decline that would explain about 3.5 percent of the total divergence between the median worker’s pay and economywide productivity over the same period.

One important study shows that the “average” labor market is “highly concentrated.” But differences between measures of concentration of the average labor market and the labor market experienced by the average worker have important implications for how to assess the impact of labor market concentration on long-term wage trends. In other words, many labor markets suffer from high degrees of concentration, but most people work in labor markets with only low-to-moderate degrees of concentration.

Nonetheless, labor market concentration is a particular challenge for rural areas and small cities and towns. This is an important finding for those looking to provide economic help to residents of those areas.

Research on labor market concentration within manufacturing shows a modest increase in labor market concentration between 1979 and 2009.

Product market concentration has increased for some sectors—but at varied rates—and the scope of its downward pressure on wages is also limited.

Product market concentration rose steadily across six sectors from 1982 to 2012 (manufacturing, retail, wholesale, services, finance, and utilities and transportation), but the magnitude of this rise has varied substantially and it is unclear how much product market concentration has affected labor market trends.

The new literature on product market concentration indicates that it may have reduced overall wages by roughly 0.08 percent annually from 1979 to 2015, or less than 10 percent of the total divergence between a typical worker’s pay and productivity over that period.

The focus on market power as a key driver behind American wage trends should focus as well on developments that have weakened workers’ power.

Explaining the expanding pay–productivity gap and increasing inequality in America requires labor market models that allow for employer market power, but the conception of power must go beyond measurable market concentration. Instead, this analysis of power must focus on what has happened to the countervailing power American workers were once able to wield but which now seems radically reduced.

Correspondingly, a policy response to rising employer power over wages must go well beyond antitrust reform to focus on every possible margin along which policy could strengthen workers’ leverage and bargaining power.

## 1NR

### Hospitals DA---1NR

#### It causes nuke war in Asia and the Middle East---each independently causes extinction

Julian Cribb 19. Author, Journalist, Editor and Science Communicator, Principal of Julian Cribb & Associates who Provide Specialist Consultancy in the Communication of Science, Agriculture, Food, Mining, Energy and the Environment, More Than Thirty Awards for Journalism. 10/03/2019. “6 - Food as an Existential Risk.” Food or War, 1st ed., Cambridge University Press. DOI.org (Crossref), doi:10.1017/9781108690126.

Weapons of Mass Destruction

Detonating just 50–100 out of the global arsenal of nearly 15,000 nuclear weapons would suffice to end civilisation in a nuclear winter, causing worldwide famine and economic collapse affecting even distant nations, as we saw in the previous chapter in the section dealing with South Asia. Eight nations now have the power to terminate civilisation should they desire to do so – and two have the power to extinguish the human species. According to the nuclear monitoring group Ploughshares, this arsenal is distributed as follows:

– Russia, 6600 warheads (2500 classified as ‘retired’)

– America, 6450 warheads (2550 classified as ‘retired’)

– France, 300 warheads

– China, 270 warheads

– UK, 215 warheads

– Pakistan, 130 warheads

– India, 120 warheads

– Israel, 80 warheads

– North Korea, 15–20 warheads.11

Although actual numbers of warheads have continued to fall from its peak of 70,000 weapons in the mid 1980s, scientists argue the danger of nuclear conflict in fact increased in the first two decades of the twenty-first century. This was due to the modernisation of existing stockpiles, the adoption of dangerous new technologies such as robot delivery systems, hypersonic missiles, artificial intelligence and electronic warfare, and the continuing leakage of nuclear materials and knowhow to nonnuclear nations and potential terrorist organisations.

In early 2018 the hands of the ‘Doomsday Clock’, maintained by the Bulletin of the Atomic Scientists, were re-set at two minutes to midnight, the highest risk to humanity that it has ever shown since the clock was introduced in 1953. This was due not only to the state of the world’s nuclear arsenal, but also to irresponsible language by world leaders, the growing use of social media to destabilise rival regimes, and to the rising threat of uncontrolled climate change (see below).12

In an historic moment on 17 July 2017, 122 nations voted in the UN for the first time ever in favour of a treaty banning all nuclear weapons. This called for comprehensive prohibition of “a full range of nuclear-weapon-related activities, such as undertaking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.”13 However, 71 other countries – including all the nuclear states – either opposed the ban, abstained or declined to vote. The Treaty vote was nonetheless interpreted by some as a promising first step towards abolishing the nuclear nightmare that hangs over the entire human species.

In contrast, 192 countries had signed up to the Chemical Weapons Convention to ban the use of chemical weapons, and 180 to the Biological Weapons Convention. As of 2018, 96 per cent of previous world stocks of chemical weapons had been destroyed – but their continued use in the Syrian conflict and in alleged assassination attempts by Russia indicated the world remains at risk.14

As things stand, the only entities that can afford to own nuclear weapons are nations – and if humanity is to be wiped out, it will most likely be as a result of an atomic conflict between nations. It follows from this that, if the world is to be made safe from such a fate it will need to get rid of nations as a structure of human self-organisation and replace them with wiser, less aggressive forms of self-governance. After all, the nation state really only began in the early nineteenth century and is by no means a permanent feature of self-governance, any more than monarchies, feudal systems or priest states. Although many people still tend to assume it is. Between them, nations have butchered more than 200 million people in the past 150 years and it is increasingly clear the world would be a far safer, more peaceable place without either nations or nationalism. The question is what to replace them with.

Although there may at first glance appear to be no close linkage between weapons of mass destruction and food, in the twenty-first century with world resources of food, land and water under growing stress, nothing can be ruled out. Indeed, chemical weapons have frequently been deployed in the Syrian civil war, which had drought, agricultural failure and hunger among its early drivers. And nuclear conflict remains a distinct possibility in South Asia and the Middle East, especially, as these regions are already stressed in terms of food, land and water, and their nuclear firepower or access to nuclear materials is multiplying.

It remains an open question whether panicking regimes in Russia, the USA or even France would be ruthless enough to deploy atomic weapons in an attempt to quell invasion by tens of millions of desperate refugees, fleeing famine and climate chaos in their own homelands – but the possibility ought not to be ignored.

That nuclear war is at least a possible outcome of food and climate crises was first flagged in the report The Age of Consequences by Kurt Campbell and the US-based Centre for Strategic and International Studies, which stated ‘it is clear that even nuclear war cannot be excluded as a political consequence of global warming’. 15 Food insecurity is therefore a driver in the preconditions for the use of nuclear weapons, whether limited or unlimited.

A global famine is a likely outcome of limited use of nuclear weapons by any country or countries – and would be unavoidable in the event of an unlimited nuclear war between America and Russia, making it unwinnable for either. And that, as the mute hands of the ‘Doomsday Clock’ so eloquently admonish, is also the most likely scenario for the premature termination of the human species.

Such a grim scenario can be alleviated by two measures: the voluntary banning by the whole of humanity of nuclear weapons, their technology, materials and stocks – and by a global effort to secure food against future insecurity by diverting the funds now wasted on nuclear armaments into building the sustainable food and water systems of the future (see Chapters 8 and 9).

#### Shortages cause pandemics---extinction

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Pandemic Disease

Disease pandemics have been a well-known existential risk to humanity since the plague of Athens in 430 BC – itself linked to a war. However, a point that escapes many people nowadays is that, as humans have become so numerous – indeed the predominant lifeform on the planet – we have also become the major food source for many microbes. We are now the ‘living compost heap’ on which they must dine and in which they must reproduce, if they are themselves to survive.

As our own population grows, pandemics are thus likely to increase, as more and more viruses and bacteria are forced to take refuge in humans following the depletion or total extinction of their natural hosts, the wild animals we are exterminating. This process is greatly assisted by our creation of megacities, tourism and air travel, schools and child-minding centres, air-conditioned offices, night clubs, sex with strangers, pet and pest animals, insects which prosper from climate change or human modification of the environment (like mosquitoes), ignorance, poor public hygiene, lack of clean water, and deficient food processing and handling.

So, while humanity is confronted with an ever-expanding array of parasites, we are simultaneously doing everything in our power to distribute them worldwide in record time – and to seed new pandemics. The World Health Organisation has identified 19 major infectious diseases with potential to become pandemic: chikungunya, cholera, Crimean-Congo haemorrhagic fever, Ebola, Hendra, influenza, Lassa fever, Marburg virus, meningitis, MERS-CoV, monkeypox, Nipah, plague, Rift Valley fever, SARS, smallpox, tularaemia, yellow fever and Zika virus disease.28 While none of these is likely to fulfil the Hollywood horror movie image of wiping out the human species – for the simple reason that viruses are usually smart enough to weaken to a sublethal state once comfortably ensconced in their new host – the apocalyptic horseman representing Pestilence and Death will nevertheless continue to play a synergetic role with his companions warfare, famine, climate change, global poisoning, ecological collapse, urbanisation and other existential threats.

Food insecurity affects the progression of pandemic diseases, often in ways that are not entirely obvious. First, new pandemics of infectious disease tend to originate in developing regions where nutritional levels are poor or agricultural practices favour the evolution of novel pathogens such as, for example, the new flu strains seen every year – which arise mainly from places where people, pigs and poultry live side-by-side and shuffle viruses between them – and also novel diseases like SARS and MERS. Second, because totally unknown diseases tend to arise first in places where rainforests are being cut down for farming and viruses hitherto confined to wild animals and birds make an enforced transition into humans. Examples of novel human diseases escaping from the rainforest and tropical savannah in recent times include HIV/AIDS, Hendra, Nipah, Ebola, Marburg, Lassa and Hanta, Lujo, Junin, Machupo, Rift Valley, Congo and Zika.29 And thirdly, because the loss of vital micronutrients from heavily farmed soils and from food itself predisposes many populations to various deficiency diseases – for example, a lack of selenium in the diet has been linked with increased risk from both HIV/AIDS and bowel cancer.30 A key synergy is the way hunger and malnourishment exacerbate the spread of disease, classic examples being the 1918 Global Flu Pandemic which spread rapidly among war-starved populations, or the more recent cholera outbreak in war-torn Yemen. In a fresh twist, Dr Melinda Beck of North Carolina University has demonstrated that obesity – itself a form of malnutrition – may cause increased deaths from influenza by both aiding the virus and suppressing the patient’s immune response.31

At the same time, food is largely responsible for the fastest growing pandemic of all – the so-called ‘lifestyle’, chronic or noncommunicable diseases, such as cancer, heart disease, diabetes, obesity, kidney and liver failure and some mental conditions, all of which are diet-related. These are responsible for 71 per cent of deaths worldwide, killing around 42 million people a year.32

Food and dietary quality are therefore inseparable from worldwide efforts to prevent or contain new disease pandemics. Vaccines, public health and biosecurity alone are not enough. In an overpopulated world, people must be sufficiently well-fed to avoid becoming fertile soil for the germination of fresh plagues. Diseases must be prevented – not just ‘cured’, and the key to prevention lies in a healthy diet.33

#### Mergers are key to economies of scale and capital access to upgrade facilities AND keep costs low---only our ev assumes rural health.

Ken Summers 12-13, Fellow in State Policy at the Centennial Institute, Master’s Degree in Nonprofit Management from Regis University, BA Degree in Business Education from the University of Northern Colorado, Former Chair of the Health and Environment Committee in the Colorado House of Representatives, “FTC Crackdowns on Mergers Could Harm Rural Healthcare”, RealClearMarkets, 12/13/2021, https://www.realclearmarkets.com/articles/2021/12/13/ftc\_crackdowns\_on\_mergers\_could\_harm\_rural\_healthcare\_807469.html

The shift in policy comes amidst a broader skepticism the FTC is beginning to adopt around mergers. The new policy would in effect give the commission veto power over a company’s future transactions once it attempts an allegedly anticompetitive merger or acquisition. And while no one would fault the FTC for wanting to put a stop to mergers that would raise prices or harm consumers, the fact is recent consolidations in the hospital industry has shown that neither have occurred in this space. In fact, it is quite the opposite. Preventing some of these mergers from occurring could not only limit patient access to healthcare, but it could also cause healthcare prices to continue to rise.

Rural hospitals serve about 60 million Americans, or about one-fifth of the entire U.S. population. Even before the disruptive effects of COVID, these facilities were struggling to keep their doors open with 21% of rural hospitals at risk of closing. Since the start of the pandemic, that trend has only accelerated and in 2020 alone, 21 rural hospitals closed their doorsand more than three dozen entered bankruptcy. The result is underserved communities and hospital “deserts” where patients would be required to travel long distances in order to reach care, sometimes in excess of 35 miles.

In Colorado, where I previously chaired the House Committee on Health and the Environment, I have seen firsthand the struggles these facilities are facing in order to keep their doors open. Every single rural hospital considered high-financial-risk in the Centennial State in 2019 was also deemed essential. The dual stressors of COVID-related staffing shortages and financial shortfalls due to cancelled elective surgeries have found these facilities “stretched to the max” as COVID once again accelerates in Colorado. Clearly, immediate action is needed to help shore up these critical hospitals.

One of the best ways to do this is for the FTC to remove the regulatory hurdles to hospital consolidation. Doing so will allow these rural hospitals to better serve their patients and reduce the costs of providing care. Sometimes it is the only means of preserving this critical access.

Unfortunately, outdated data has been used to justify continued resistance to hospital mergers. Some of the commentaries asserting hospital mergers raise prices are based on information from as far back as the 1990s, when the economics of the healthcare industry were significantly different.

More recent data has found that hospital mergers can enhance patient outcomes while reducing costs. A study from Charles River Associates, for example, has found that “hospital acquisitions are associated with statistically significant decreases in both cost and revenue.” On at least three occasions this same conclusion has been reached. Research from the JAMA network meanwhile finds that mergers cut mortality rates at rural hospitals, challenging the argument that rural hospital consolidation “is likely to result in greater market power and higher prices but poorer quality.”

The reasons are simple. The economies of scale these smaller facilities can tap into by merging with larger hospital systems can reduce costs. By eliminating administrative redundancies operating costs are reduced or shifted towards patient care. The vast capital that larger hospital systems can provide meanwhile, provide rural hospitals an opportunity to invest in upgrading facilities. This improves patient outcomes, and also helps these facilities realize yet more efficiencies which result in additional cost savings.

Hospitals must adapt so they can continue serving their patients and for many of these rural facilities, mergers are the next logical step in that progression. The FTC and other interested parties need to stop relying on outdated and inaccurate information to justify their intransigence on necessary mergers in the healthcare space. It’s high time that regulators in Washington get out of the way and allow rural hospitals to continue their important work of saving lives and preserving communities.

#### Studies prove it averts closure

Victoria Bailey 21, Certified Natural Health Professional and Enzyme Specialist, “Rural Hospital Mergers Associated with Improved Patient Outcomes”, 9/22/2021, <https://www.aha.org/news/headline/2021-09-21-study-rural-hospital-mergers-linked-better-patient-outcomes>, September 22nd, 2021

Rural hospital mergers were associated with better patient outcomes compared to hospitals that remained independent, a study from JAMA Network Open found. More than one in three community hospitals in the country are located in rural areas and are the main source of care for 60 million people. Many rural hospitals have experienced financial hardships and clinician shortages that increase their risk of closure but merging with another hospital may help them avoid that fate. Mergers may increase access to financial resources, clinical expertise, and new technologies for small, rural hospitals. Hospital mergers may also increase market power through collective negotiation with payers and allow rural hospitals to join alternative payment models, such as accountable care organizations, the study stated. Researchers looked at 172 merged hospitals and 266 hospitals that were independent to see if rural hospital mergers produced better patient outcomes for inpatient care. They used data from Irving Levin Associates and the American Hospital Association’s Annual Survey to identify hospital mergers between 2009 and 2016. They compared the mergers to independent rural hospitals in the same states. Researchers used the Healthcare Cost and Utilization Project State Inpatient Databases to measure the quality of care in each hospital, looking at mortality rates for acute myocardial infarction, heart failure, acute stroke, gastrointestinal hemorrhage, hip fracture, and pneumonia. They also looked at inpatient stays for surgery and any complications that accompanied them. Mortality rates for acute myocardial infarction stays were between 7.8 and 10.9 percent at hospitals premerger. After the hospitals merged, the rate declined to 6.3 percent after one year, and 4.3 percent after five years. The mortality rates for stroke, heart failure, and pneumonia also decreased post-merger. Complications after elective surgeries decreased in both the merged hospitals and the independent hospitals, the study noted. The mortality rates for all of the monitored conditions decreased in both merged hospitals and the independent hospitals, but the merged hospitals saw a greater decline. Merged hospitals saw a 4.4 percent decrease in mortality rates for acute myocardial infarction stays, whereas the comparison hospitals only saw a 1.6 percent decrease. This trend remained consistent with the other conditions as well. The merged hospitals may have produced better health outcomes due to increased resources and support as a result of the merger, the study indicated. Specifically, the merged hospitals may have had improved mortality rates for acute myocardial infarction due to the adoption of defined clinical pathways available through the transfer of technology from the larger health system in the merger. The mortality rate improvements for stroke, heart failure, and pneumonia did not happen until three to five years after hospitals merged, indicating that adopting new approaches can be complex and it may take time for health systems to adapt. Rural residents can struggle to access care compared to urban residents, which can increase their risk of death if they develop a serious condition. Mergers can help rural hospitals combine their resources and provide better care to patients. Mergers can also provide an opportunity for rural hospitals to partner with urban hospitals to improve care delivery and health outcomes. “Furthermore, sharing staff and expertise as part of the merger can help alleviate workforce shortages and improve the hospital’s clinical services,” researchers concluded.

#### Collapse doesn’t cause war

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

#### Heg fails

Dr. Andrew Bacevich 20, Professor of History and International Relations at Boston University, Ph.D. in American Diplomatic History from Princeton University, and Graduate of the U.S. Military Academy, “The Endless Fantasy of American Power”, Foreign Affairs, 9/18/2020, https://www.foreignaffairs.com/articles/united-states/2020-09-18/endless-fantasy-american-power

Unfortunately, this frenetic pace of military activity has seldom produced positive outcomes. As measured against their stated aims, the “long wars” in Afghanistan and Iraq have clearly failed, as have the lesser campaigns intended to impart some approximation of peace and stability to Libya, Somalia, and Syria. An equally unfavorable judgment applies to the nebulous enterprise once grandly referred to as the “global war on terrorism,” which continues with no end in sight.

And yet there seems to be little curiosity in U.S. politics today about why recent military exertions, undertaken at great cost in blood and treasure, have yielded so little in the way of durable success. It is widely conceded that “mistakes were made”—preeminent among them the Iraq war initiated in 2003. Yet within establishment circles, the larger implications of such catastrophic missteps remain unexplored. Indeed, the country’s interventionist foreign policy is largely taken for granted and the public pays scant attention. The police killing of Black people provokes outrage—and rightly so. Unsuccessful wars induce only shrugs.

THE CHIMERA OF “AMERICAN LEADERSHIP”

With something approaching unanimity, Americans “support the troops.” Yet they refrain from inquiring too deeply into what putting the troops in harm’s way has achieved in recent decades. Deference to the military has become a rote piety of American life. In accepting the Democratic Party’s nomination for the presidency, for example, Joe Biden closed his remarks with an appeal to the Divine on behalf of the nation’s soldiers: “And may God protect our troops.” Yet nowhere in his 24-minute address did Biden make any reference to what U.S. troops were currently doing or why in particular they needed God’s protection. Nor did he offer any thoughts on how a Biden administration might do things differently.

Americans don’t particularly want to hear about war or the possibility of war in the present season of overlapping and mutually reinforcing crises. And Biden obliged them in the most important speech of his career. The famously garrulous politician mentioned recent U.S. wars only in passing, briefly referring to his late son, who served in Iraq, and excoriating U.S. President Donald Trump for not responding more aggressively to revelations that Russia put bounties on U.S. soldiers in Afghanistan.

This aversion to taking stock of recent U.S. wars is by no means unique to Biden or confined to the Democratic Party. It is a bipartisan tendency. It also inhibits a long overdue reexamination of basic national security policy.

Between the fall of the Berlin Wall and the 2016 presidential election, leaders of both political parties collaborated in trying to demonstrate the efficacy and necessity of what they habitually referred to as “American global leadership.” Embedded in that seemingly benign phrase was a grand strategy of militarized primacy. Unfortunately, the results achieved by this assertion of global leadership proved to be anything but benign, as turmoil in Afghanistan and Iraq attest. Although the defense industry and its allies have profited from American wars, the American people have done less well. Protracted wars are not making Americans freer or more prosperous. They have instead saddled the nation with enormous debt and diverted attention and resources from neglected domestic priorities.

In 2020, further occasions for bristling, militarized U.S. leadership beckon. China offers the most obvious example for hawks, with demands that the United States confront the People’s Republic growing more insistent by the day. Many in Washington appear to welcome the prospect of a Sino-American cold war. Other prospective venues for demonstrating assertive U.S. leadership include in operations against Iran, Russia, and even poor benighted Venezuela, with prominent figures in the Beltway eager to have a go at regime change in Caracas.

To cling to this paradigm of U.S. global leadership is to perpetuate the assumptions and habits defining post–Cold War U.S. national security policy—and above all the emphasis on amassing and employing military might. The United States grants itself prerogatives allowed to no other country to remain, in its own estimation, history’s “indispensable nation.” To judge by the results achieved in Afghanistan, Iraq, and other recent theaters of war, this imperative will only continue to wreak havoc in the name of freedom, democracy, and humane values.

#### Price increases are manageable BUT prove supply is tight, so there’s no room for further shocks

Sara Gustafson 21, Freelance Writer, Joseph Glauber, Manuel Hernández, and David Laborde, Senior Research Fellows with IFPRI’s Markets, Trade, and Institutions Division (MTID), Brendan Rice, MTID Research Analyst, and Rob Vos, Director of MTID, “Rising food prices are a concern but no reason for panic yet”, International Food Research Policy Institute, 6/28/2021, https://www.ifpri.org/blog/rising-food-prices-are-concern-no-reason-panic-yet

Global food prices are on the rise. FAO’s Food Price Index indicates prices in international markets have risen by 40% from a year ago (May 2020). Prices of vegetable oils in particular have surged, showing an increase by almost 110% over the past year. Other commodity prices, like those for metals, oil, and other minerals prices have also shown sustained increases since mid-2020.

How concerned should we be? First, it is important to realize that the drastic year-on-year change in food prices reflects in part a “base effect,” i.e., a rebound from the 10-year low seen in May 2020, a few months into COVID-19 restrictive measures. Second, international food prices have not reached historical heights (Figure 1), although they have risen close to the levels reached during the food price spikes of 2007-2008 and 2011-2012. While food prices are high, for now there is no reason for panic.

Chart, line chart, histogram

Description automatically generated

A bigger concern is the sharp rise in domestic food prices in many countries, especially low-income countries, over the past year. According to the recent World Bank report Global Economic Prospects (June 2021) rising food prices have been the main driver of overall inflation, which was already high in those countries prior to the pandemic (Figure 2).

Chart, bar chart, box and whisker chart

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Several factors are at play in the recent global surge in food prices.

On the supply side, production has been hampered by poor weather in some major producing regions. Brazil is currently facing the worst drought conditions in almost a century, raising serious concerns about both maize and sugar harvests. Similarly, Southeast Asia has seen slower than expected growth in vegetable oil production. Concerns over supply lessened following new U.S. Department of Agriculture estimates released in May showing better production forecasts for northern hemisphere crops. Nonetheless, global markets for major staple foods remain tight. Stock-to-use ratios for maize and soybeans are below normal levels (Chinese stocks not included). In tight markets, price hikes and price volatility are easily triggered.

Markets have also tightened because of stronger-than-usual demand for animal feed and industrial use. China has been a major driver. With the recovery of its economy and the recovery of the livestock sector from African swine fever, China’s demand for wheat, maize and other feed grains, and soybeans has risen significantly to meet rising feed demand. International prices for vegetable oils are also set to increase further, as demand for biodiesel will expand as countries reopen and their economies recover, especially in those countries with fixed mandates for biodiesel use. The poor will be heavily impacted as vegetable oils are important to their diets.

A weaker U.S. dollar is another factor driving up world market prices. The dollar depreciated between 10% and 15% against other major currencies over the past year. Since most of commodity trade is in U.S. dollars, a weaker greenback typically pushes prices up as traders demand a higher price to compensate for the exchange loss. The weaker dollar is currently playing into both stronger trade and rising prices.

Low-income countries are most affected by the rise in international food prices. In these countries, food accounts for about half of consumption baskets and 20% of imports. Rising agricultural commodity prices in world markets therefore tend to have a significant impact on domestic food price inflation in these countries. Low-income countries have also been hit hard by the global recession during 2020, driving down the demand for their exports and, lacking access to sufficient contingency finance, causing their exchange rates to depreciate. This further pushed up the cost of imported food.

While there are some concerning trends, there is no reason for panic over a possible repeat of the global food price crisis of a decade ago. Production prospects for staple crops look favorable for the 2021-2022 season. Yet, markets for staple crops may remain tight in the near term with rising demand from China and expected production shortfalls in Brazil and other Latin American producing countries. As emphasized in the latest AMIS Market Monitor, these trends outweigh production growth, reduce global grain inventories, and put further upward pressure on international food prices. This could spell more trouble for poor populations, particularly in Africa South of the Sahara and South Asia, who exhausted their savings during the COVID-19 pandemic and who may not yet be seeing much recovery of livelihoods. Rising inflation, particularly when driven by sharp increases in food prices, raises poverty, increases malnutrition, and curtails the consumption of essential services such as education and health care. To cushion the worst of those impact, further strengthening and coverage of social protection systems will be critical.

#### Hospitals are the next target AND carefully watch the overall regulatory environment when deciding to merge---there’s just enough confidence to sustain acquisitions because antitrust is other areas is restrained

Douglas Litvack 21, JD, Attorney at Davis Wright Tremaine LLP, “Antitrust State of Play for Healthcare Providers Under a New Administration - Part I: Mergers and Acquisitions”, JD Supra, 8/11/2021, https://www.jdsupra.com/legalnews/antitrust-state-of-play-for-healthcare-3757565/

Antitrust scrutiny of large technology companies may be in the headlines, but what some have dubbed "Big Med" is being eyed by the Biden Administration and federal agencies for heightened antitrust enforcement. Hospitals, physician groups, and health plans already accustomed to an active antitrust enforcement climate may need to prepare for even choppier regulatory waters ahead as a new President and new leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ) turn their focus on healthcare provider markets.

In the first of a series of articles, we look at the latest developments in competition policy and enforcement in provider markets, before turning to their impact on dealmaking during a time of rapid change and consolidation in the healthcare industry.

Pro-Enforcement Era for Healthcare Antitrust

President Biden's appointment of Lina Khan, a progressive reformer and supporter of aggressive enforcement of the antitrust laws, as the swing vote and Chair of the FTC was the first major harbinger of the changes to come. At that point, the federal antitrust agencies had already stopped granting "early termination" of merger reviews.1 Without the discretionary practice, non-problematic deals have had to wait the full 30 days of an initial review period following their filing with the government, resulting in some delay.

But the first sign that the new FTC, under Chair Khan, would have its eyes on healthcare providers in particular came at an open meeting of the Commissioners held last month. At that meeting, a 3-2 majority voted to single out healthcare—including hospitals and other providers—among several other industries as "enforcement priorities" that would be subject to resolutions authorizing sweeping compulsory process probes.2 The resolutions were described as removing "red tape bureaucracy" during a "massive merger boom," with both proposed and consummated transactions as potential targets.

Next came the Biden Administration's Executive Order on Promoting Competition in the American Economy, which singled out healthcare markets impacted by "hospital consolidation" for heightened antitrust scrutiny.3 The Executive Order identifies lowering prices and improving quality and access to care, in particular in rural communities, as requiring more vigorous enforcement of federal antitrust laws. It directs the FTC and DOJ to "review and revise their merger guidelines," which influence how agency staff conduct merger investigations. Judges also rely on the guidelines to help them assess the legality of mergers.

Finally, at the most recent open meeting of the FTC, a majority of Commissioners voted to rescind a 1995 Policy Statement that had limited the use of "prior approval" requirements in merger consent decrees. These decrees are settlements that the agency sometimes reaches with merging parties as conditions for not opposing their deal in court.4 Prior approval provisions require giving the FTC advance notice (before closing the transaction) of certain future deals and can even require the parties when presenting future deals to prove to the agency that they are not anti-competitive. The latter in effect flips the burden of proof, which normally lies with the government to challenge a deal, to the merging parties.

Active Enforcement Against Healthcare Provider Mergers

None of the recent actions of the Biden Administration or FTC are significantly out of step with the recent trend of vigorous merger enforcement against healthcare providers.

The healthcare industry has grown accustomed in the last decade to close scrutiny and frequent challenges to hospital and physician practice deals. A 2019 report from the FTC detailed at least nine hospital mergers and six physician group acquisitions that the agency challenged going back to 2008.5 Since then, it has challenged at least three more hospital deals, in addition to launching a merger retrospective study earlier this year to analyze the market effects of physician group and hospital consolidation.6

But even with this recent history of active enforcement, there does seem to be some acceleration in the trendline. Following last summer's blockbuster "Big Tech" hearings, Congress held another round of less-publicized, though still significant, hearings that focused on healthcare markets. At two separate hearings in the Senate and House of Representatives, lawmakers elicited testimony seeking to show that hospital and physician practice acquisitions are driving up healthcare costs, failing to improve quality of care, and lowering employee wages.7 Participants called for more aggressive enforcement of merger laws.

What an Executive Branch on Antitrust High Alert Means for Healthcare Provider Dealmaking

With so much interest from the Oval Office, federal enforcers, and Congress, healthcare providers—hospitals, physician groups, and integrated health systems—should anticipate heightened scrutiny of mergers and acquisitions.

At this time, with broader antitrust reforms still in draft bill form, nothing has changed about which types of deals will need to be reported to federal authorities. But companies should expect more frequent review of "non-reportable" transactions, which are deals falling under the thresholds that require pre-merger notification to the federal government.8 Formal integrations in healthcare can often be non-reportable. Non-reported deals have always been subject to investigations by federal authorities, but the recent directives of the Biden Administration and policy shifts at the FTC suggest that the agency will be more proactive in scoping out such deals for review.

The FTC's recent posturing also suggests that parties should expect additional scrutiny of consummated deals. That could include, for example, non-reportable transactions that have closed. But it also may involve fresh looks at mergers previously reported to the government that did not result in any action being taken. It is important to keep in mind that the FTC and DOJ never "approve" a merger. Although their decision not to take action against a merger upon reviewing it is a very strong indicator that they never will, they reserve the right to challenge it as unlawful in the future.

The typical forward-looking merger review seeks to predict the future competitive effects of a merger that has not yet occurred. By contrast, a retrospective investigation of a consummated deal looks back at everything that has happened post-merger to determine if it has, in fact, harmed competition. For example, post-closing pricing changes can be attributed to the merger, as can quality improvements or cost efficiencies. Therefore, in a climate of more active enforcement against consummated deals, merging companies should be more mindful of what their post-closing integration activities could mean for a future investigation of the deal.

The recent directives from the Biden Administration and policy shifts at the FTC also indicate that merging parties should be prepared to tackle a wider spectrum of theories of competitive harm when interfacing with the agency. For example, agency staff reviewing a hospital merger might need to more fully vet its potential impact on workers in labor markets, such as nurses or physicians, arising from the consolidation of employers in the market. Enforcers will also likely look more closely than they have in the past at vertical theories of harm involving "exclusionary conduct." This might include concerns, for example, about whether a health system buying a rival hospital faces increased incentives to cause its integrated insurance plan to lock out a rival provider from its network. Another concern might be that a hospital buying a group of physicians causes rival hospitals to lose access to specialists.

All of this would, of course, come on top of the extensive analysis already being done in these cases to determine whether the elimination of horizontal competition between merging providers might harm insurers and their members by creating fewer market alternatives. Therefore, more consideration of novel theories of competitive harm will only add to the burden and complexity that companies already face in assessing the risk that the government might challenge the deal and what remedies it might require as a condition for permitting the deal to close.

A wider competitive effects analysis will also likely lead to longer and more detailed government review of deals. Under the FTC's new policy, early termination is now essentially out of the question. At the same time, the agency appears poised to more frequently go beyond the 30-day window for its initial review that the merger statute provides for. Traditionally, at the 30-day mark, it has relied on asking parties to "pull-and-refile" their merger filing to restart the clock. But with a recent announcement, it appears the FTC may instead send a "pre-consummation warning letter" to the merging parties telling them that a review is ongoing and that they consummate the deal at their own risk.9 This could leave merging parties in a state of indefinite limbo if they are not willing to take the risk of closing on a deal that could later be challenged.

As for deals where the agency's concerns persist beyond the initial review period, parties should expect to receive an expansive "Second Request" for more information to trigger a detailed probe. Agency staff is likely to face pressure to ensure they capture all potentially relevant evidence, including anything needed to support the broader set of possible legal theories. Expansive Second Requests could also be used by overburdened agency staff as a tool to buy themselves more time to investigate.10 Merging parties will need to account for these potential delays and hurdles in the regulatory clearance process in their deal negotiations, in particular in how they allocate the risks associated with a prolonged review and potential challenge from the government.

Finally, the agency's recent policy shifts also mean that parties might now expect to see the FTC request a "prior approval" requirement as a condition (among others in the consent decree) for allowing a challengeable transaction to go through. This would mean having to give advance notice to the government of future transactions in related markets, including ones that would otherwise be non-reportable under the merger laws.

The main effect of a prior approval requirement, especially if it also contains a provision that flips the government's burden onto the merging parties in future filings, is that hospitals or health systems in an expansion mode cannot look at antitrust risk in isolation. In looking at whether to do a deal today, they will need to consider the regulatory risk posed to future deals (some of which may have more significant strategic importance) that could be subjected to a prior approval requirement.

#### 2---Nurses are not key to prevent closures---financial strain inevitably collapses systems unless they merge

Robert King 21, reporter with Fierce Healthcare, “Nearly half of rural hospitals face negative operating margins as COVID-19 hits outpatient revenue”, <https://www.fiercehealthcare.com/hospitals/chartis-nearly-half-rural-hospitals-face-negative-operating-margins-as-covid-19-hits>, February 10th, 2021

Close to half of U.S. rural hospitals are operating in the red with at least 450 facilities at risk of closing their doors, a new study found. The study, published Wednesday from the Chartis Center for Rural Health, illustrates the financially precarious position rural hospitals find themselves in, a position that has worsened thanks to the pandemic. “The rapid spread of COVID-19 in rural communities has further destabilized the ability of rural hospitals to meet the needs of their communities,” authors wrote in the study. Hospitals across the country have faced plummeting patient volumes, especially at the onset of the pandemic when they were forced to cancel or postpone elective procedures to preserve capacity to fight COVID-19. Larger hospital systems have been able to withstand this hit as patient volumes rebounded after shelter-in-place orders lifted in late spring and summer.

#### Even minor shocks cause nuke war AND extinction by destroying resilience to other existential threats

Huon Porteous 20, Honors Student in Philosophy at the Australian National University, President of the Local Effective Altruism Society, 2020, "Food Insecurity", Commission for the Human Future, https://www.humanfuture.net/food-insecurity/

Food insecurity

Food security is a measure of the availability of food, often at a national or global level. This measure includes not just how much food we have now, but also how resilient our food systems are to disruptions and disasters. A lack of food security, or food insecurity, can therefore be thought of as a risk factor for global catastrophes. This means it affects how likely and how bad certain catastrophes end up being.

Our understanding of the threat that food insecurity poses has evolved over the last few decades. In the 1960s and 1970s, one popular belief was that population growth would soon outstrip the Earth’s capacity to provide food and, as a result, food scarcity would lead to famine on a catastrophic, global scale. Paul Ehrlich, a prominent advocate of these views, went so far as to say that “Sometime in the next 15 years, the end will come — and by “the end” I mean an utter breakdown of the capacity of the planet to support humanity”.1

Clearly, this did not occur. Rates of famine have plummeted since the 1960s (16.6 million people died of famine that decade, compared to 2.8 million in the 2010s)2, and we now have 24% more food production per person than when Ehrlich made his ill-fated prediction.3 Much of this can be attributed to technological advances made during the Green Revolution.4 But our modern food supply is not entirely impervious to crises.

In this article, we explain the two key roles food insecurity plays in global catastrophes:

1. As a factor that makes catastrophic risks more likely

2. As a factor that makes the results of catastrophes worse

Impacts of food insecurity on other risks

Widespread and consistent access to food makes it possible to live in a stable society. Without this guarantee, the incidence of political instability and war tends to increase. There is an emerging body of evidence that food crises can initiate political instability5,6,7, increasing the risk of conflict through various means, such as a decay in the ability of a state to govern its people.8

In one recent example, the severe drought that struck Syria between 2007 and 2010 contributed to massive crop failures that undermined livelihoods and forced 1.5 million people from rural areas into cities, exacerbating existing social stresses.9 Though the drought was clearly not the primary cause of the Syrian Civil War, it contributed to a regional refugee crisis that spilt over into Europe, and had profound effects on the politics of countries across the region, which are still playing out today.

Even minor shocks to the food supply can have severe consequences. From 2006 to 2008, large maize-exporting countries like Brazil, Argentina and Ukraine imposed export bans, which together with droughts and rising oil prices precipitated a price spike of 83%, causing economic instability and social unrest across much of the developing world.10 Such price volatility in food disproportionately affects the approximately 800 million people living in extreme poverty.11

Political instability is most dangerous when it occurs in countries with access to weapons of mass destruction. Should a food crisis arise in one of these countries occur that results in civil war and governmental collapse, these weapons could end up in the hands of a group that intends to use them maliciously as an act of terror. The fact that Pakistan (which has access to nuclear bombs) and Iran (considered capable of producing bioweapons) are ranked the 25th and 44th most fragile states in the world is cause for concern that food insecurity in those regions could have severe consequences.12

Risks of total food production loss

When Indonesia’s Mount Tambora erupted in 1815, dark volcanic dust and reflective sulphate aerosols thrust into the skies are thought to have lowered global temperatures by 1°C. The United States experienced snowfall in summertime and China, North America and Europe suffered crop failures and ensuing famines.13 We could easily see such effects again in future after a sufficiently large volcanic eruption or even a small-scale nuclear exchange.

There is some evidence from climate science that indicates it would take the detonation of only 50-100 nuclear weapons in populated cities to lift millions of tonnes of combustible material into the atmosphere and trigger what is known as nuclear winter, sharply lowering global temperatures over a decade.14,15 Summer temperatures would drop by more than 20°C over much of North America and Asia, and would stay continually below freezing for several years in the mid-latitudes, where most of our food is produced. Such drastic changes to the climate have the potential to bring food production to a near-complete halt, leaving billions at risk of starvation.

While we’d lose almost all of our regular food production, it’s likely there would be some food production via cold-tolerant crops and alternative foods such as seaweed and algae. Some human populations would likely survive, though in a vastly different world. The ability of surviving populations to recover an equivalent level of civilization is unclear.16,17 (See also our page on risks from nuclear war.)

Catastrophes such as this that result in (near or) total food production loss pose the most severe risks to global food production. The likelihood of such a total food production loss scenario is dominated by the anthropogenic risk of nuclear winter, with the natural risks like supervolcanoes or asteroid impacts having similar effects but being far less likely. Estimates of a total food production loss scenario vary between 1-10% this century, with a risk of human extinction of approximately 0.1%.

Risks of significant food production loss

Risks of significant food production loss are those that could result in a 3-30% reduction in our food production capacity. While this might sound much less extreme by comparison, keep in mind that all disasters in living memory have been less than a 3% loss. Based on current research18, there is an approximately 80% chance of significant food production loss this century. Sources of such risks include:

Global warming resulting in multiple bread-basket failure19;

Catastrophic crop disease to staple crops – the grass family poaceae (which includes wheat, rye, and barley) alone contributes 50% of the world’s calories20,21;

A severe pandemic – pandemics can impact global trade systems, limit movement of agricultural workers, and decrease affordability of food. The ebola virus resulted in a significant reduction in regional food security22, while COVID 19 had impacts on global trade and buying power of global poor.23

Loss of pollinators – in Europe, pollination services represents some 12% of food production, mainly by increasing the yield of fruits, vegetables and nuts.24 Global agricultural losses are estimated at between 3-8% in the event insect pollination were to fail.25

There are also risks of significant food production loss that would occur via failures of the physical infrastructure needed to produce food. We rely on a complex network of interlinked infrastructure – e.g. electricity, fossil fuels, water, telecommunication, etc – to run the industrial systems which provide the goods and services we consume daily. Food production, which has become increasingly industrialized since the 20th century, is highly dependent on the proper functioning of these systems. This is exemplified by modern agriculture’s reliance on synthetic fertilizers. An estimated 40-50% of the world’s population survives on food produced from fertilizers made through the Haber-Bosch process26, which requires gas (fossil fuel) and electrical infrastructure as well as transportation networks to distribute.

Infrastructure is vulnerable to various low probability high impact events such as High Altitude Magnetic Pulse (HEMP)27, space weather (solar storms or coronal mass ejections)28,29,30, pandemics31, and coordinated cyber-attacks.32 Such events could result in major impacts on food systems.33

Conclusion

Food insecurity is a global catastrophic risk factor increasing the likelihood of other catastrophes occurring (e.g., nuclear war) or decreasing our resilience to catastrophes. Even if no catastrophe results from prolonged food insecurity, such significant food system failures would be robustly bad, potentially causing hundreds of millions to die. The complex nature of food security and the highly interdisciplinary nature of the problem, makes it a difficult problem to address.

#### Rigorous empirical studies prove the impact

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What do these findings indicate about the variation in the risk of conflict and civil conflict? Firstly, all four models support the argument that a significant relationship exists between food insecurity and conflict. More specifically, these findings suggest that, for an average country, the baseline risk of conflict and civil conflict increases in regions that provide at least some access to food – supporting the expectation that global demands for food should generally direct conflict towards agricultural areas. At the same time, within agricultural areas, conflict is intuitively more likely to arise in regions where the levels of food per capita are low – that is, where food supplies are scarce. Secondly, and in line with previous research (Burke et al. 2009; O’Loughlin et al. 2012; Hsiang and Meng 2014; Hendrix and Salehyan 2012), warmer regions and areas with lower precipitation were significantly more likely to experience conflict. This supports the argument that food scarcity can serve, to some extent, as a mediating factor for the effects of climate variables, in addition to the independent impact of food insecurity related concerns on conflict. Thirdly, as extant studies (e.g., Hegre and Sambanis 2006) suggest, poorer regions are more likely to experience conflict, as are more ethnically diverse regions, although it appears that higher levels of democracy do not translate into more peace once cell level characteristics are taken into account.3 Perhaps unsurprisingly, regions with larger populations are more likely to experience conflict, as are more rural regions, as some scholars have argued (Fearon and Laitin 2003; Kalyvas 2006; Buhaug et al. 2009).

In sum, four models involving different explanatory variables have been utilized to examine two conceptualizations of conflict as an outcome of interest. The results strongly support extant arguments that access to and availability of food are each associated with an increased occurrence of armed conflict. This evidence does not negate previous explanations of conflict that emphasize the importance of political and economic development or climactic variation. However, by highlighting the strong association between food access and availability on one hand, and local political violence on the other, the above findings do show that these past expositions (e.g. Miguel et al. 2004; Burke et al. 2009; Hsiang and Meng 2014) in and of themselves are insufficient to fully explain the likelihood of local level conflict. Simply put, the present study confirms that there exists a systematic, and global, relationship between food insecurity on one hand, and the occurrence and persistence of social conflict on the other.

Discussion

What do these findings imply about the effect of food insecurity and conflict? Naturally, even the most detailed and elaborate models are simplistic, especially when containing as diverse a range of observations as those examined above. Nevertheless, in terms of conditional probabilities, all models show a statistically significant first difference change of approximately +92 % in the probability of conflict when a high risk scenario is simulated for an average cell.4

The conditional probabilities discussed above highlight the inherent complexity of social systems, as a phenomenon as notable as violent conflict ultimately arises due to a variety of stressors. Therefore, it should be emphasized that the above findings should not be interpreted as explaining conflict onset. Conflict can erupt due to various political (Buhaug 2010; Fearon and Laitin 2003) or economic (Hegre and Sambanis 2006; Collier and Hoeffler 2005) reasons – which may or may not be related to food insecurity – that are beyond the scope of this paper. Rather, the present study more simply suggests that political violence will have a higher likelihood of concentrating in regions that (i) offer more access to food resources and (ii) face low levels of food availability within areas that offer some access to food resources.

This study adopts an economic perspective on food security to explain this variation in the concentration of social conflict. From the demand side, violent conflict is most likely to revolve primarily around access to food sources. When food insecurity produces higher demands for food, these demands will directly compel groups and individuals to seek out and fight over existing food resources, rather than leading these actors to pursue and fight over geographic areas that lack any (or have very little) agricultural resources. Thus, access to croplands and food is a necessary condition for food insecurity-induced conflict, which is confirmed in the cropland analyses presented here. From the supply side, and within those areas that do already offer access to agriculture and/or food, conflict is most likely to occur in regions that offer lower levels of food availability, or insufficient food supplies. This is because lower food availability (or supplies) in these contexts directly implies higher levels of resource scarcity, which can engender social grievances, and ultimately, social and political conflict (Brinkman and Hendrix 2011; Hendrix and Brinkman 2013). More broadly, several causal mechanisms could plausibly link food security and social conflict.

For one, conflict in regions with higher food access and lower availability might arise as a principal outcome of food insecurity. This approach is most directly in tune with the body of research concerned with the resource scarcity-based security implications of climate change (e.g. Miguel et al. 2004; Burke et al. 2009; O’Loughlin et al. 2012), as well as with broader studies of conflict dynamics and food security in both rural and urban contexts (Brinkman and Hendrix 2011; Hendrix and Brinkman 2013; Messer and Cohen 2006). From this perspective, individuals and groups actively fight with one another due to food insecurity-induced grievances, which may manifest in groups’ attempts to overthrow existing political structures, or in these actors’ efforts to more directly seize and control available (but scarce) agricultural resources in an effort to better guarantee long-term food security for their constituents. If future global projections for population growth, consumption, and climate change hold true, then these dynamics suggest that incidences of violent conflict over food scarcity and food insecurity may increase as individuals and groups fight over a continuously shrinking pool of resources, including food.

A second mechanism involves the existence of logistic support in conflict-prone regions, or lack thereof. Throughout history and well into the nineteenth century, armies living off the land have been a regular characteristic of warfare. The utilization of motorized transport vehicles and airlifts has significantly reduced the need of modern militaries to rely on local populations for support, at least among modernized, highly technological militaries (Kress 2002, 12–13). However, given the bureaucratic and economic capabilities required to maintain such systems, the majority of state and non-state armed groups in the developing world are still unlikely to be supported by well-developed logistic supply chains (Henk and Rupiya 2001). Taking into account the consistent relationship between economic welfare and conflict (Hegre and Sambanis 2006; Fearon and Laitin 2003), unsupported warring groups on all sides of a conflict may move into regions that offer more access to cropland in order to forage and pillage to support themselves, which in turn produces higher incidences of hostilities, especially if there is not much food per person available within these fertile regions. Hence, violent conflict in this case is not the direct result of food insecurity, but rather is shaped by food insecurity concerns. The identified relationships between food security and conflict are robust across numerous alternative model specifications, and imply an independent effect of food insecurity in shaping conflict dynamics and conflict risk. Especially when considered alongside current, and projected, climatic and political-economic conditions, this linkage suggests that countries could see an increase in localized conflict worldwide in the coming years. However, this anticipated trend should be considered with caution for several key reasons.

#### Rural collapse causes unsustainable urbanization

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Abstract

This paper examined improving rural infrastructure development as a gateway towards solving the problems of urbanization. The rate of urbanization, which has, in turn, outstripped the provision of urban housing, basic service and facilities, is now calling for attention across different cities of the world today. The rapid growth of the cities and the immediate consequences of such growth have continued to be an issue of concern to both professionals and the government. So many countries are now investing huge amounts of money in infrastructural projects, seeking a more integrated domestic market and easier access to world business, to which they have not actually solved the problem of urbanization and the decay of the cities infrastructures. This work postulated that the provision of adequate infrastructures in the rural communities will turn out to be an alternative solution to the sustainability of the cities by reducing its rate of urbanization and the decay of its infrastructure. It concluded by pointing out that the importance of providing rural dwellers with their needed facilities and services is a sure tool for the sustainability of the modern day cities infrastructure.

1. Introduction

Generally speaking, infrastructure is essential for the sustainability of human settlement. Today, it is no longer arguable that the imbalances in the provision of rural infrastructure when compared with that of the cities have negatively impacted cities’ sustainability. In fact, the rural-urban imbalance in development provides an explanation for the unprecedented growth of urban centers and slums[1]. Therefore improving accessibility to basic services such as safe water, electricity, sanitation, and social infrastructural facilities for residents has been acknowledged as one of the principal ways of promoting sound human settlements, good health, and appropriate and decent living conditions[2], little wonder why many people today migrate to the cities as a result of the attractions of the infrastructure elements that are found there.

Urban people are perceived to be ‘better-dressed, better- fed and better-exposed to modern civilization than rural people’. Many recognized the importance of the population characteristics in defining an urban place. They described an urban area as a place with high population density, composed of people from different ethnic groups[3]. Urban people are able to gain current information and have greater access to the government. Infrastructure in cities is seen as those basic facilities, structures and services that serve as a back bone for the development and economic wellbeing of cities.

Migration is one of the most crucial phenomena which shape not only the structure of an area’s population but the spatial pattern and dynamics of areas settlement, likewise in rural settlement; it produces changes in both the sources and destination areas.

The impact of migration on the spatial pattern and number of settlements is always in two forms of expansion or contraction of population. It then simply means that, if the destination areas absorb large influx of people, the settlement will expand in size and density of population. On the other hand, the source areas of the migrant will experience a decrease in population size and a decline in density. In rural-urban migration, a situation that seems to be on a continuous growth range, has resulted to the over population and urbanization of the cities and urban centers and this situation definitely brings about decay and dilapidation of the cities. With this, the development of the rural areas in turn now poses great challenges to economic and socio-cultural lives of the populace as well as the activities in rural areas.

For many years, rural-urban migration was viewed favourably in economic development as a result of industrialization. Internal migration was thought to be a natural process in which surplus labour was gradually withdrawn from the rural sector to provide needed manpower for urban industrial growth process. However,[4] researched on Indian experience made it clear that rates of rural-urban migration greatly exceeded rates of urban job creation and swamped the absorptive capacity of both the formal sector industry and urban social services.

Today, migration has become a major factor contributing to excess labour force in the urban centers, which has continued to increase the rate of unemployment and other social challenges caused by the imbalances between rural-urban environments.

When an area gets more populated, its infrastructure bumps up against its carrying capacity. For instance, roads no longer satisfy the demands of a growing population, and then farmlands and forests are sacrificed to strip malls and housing developments.

#### Urbanization collapses into global war---extinction

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By 2025, at least 27 cities will have populations greater than 10 million and more than 600 cities will have populations greater than one million. Specific megacities, intimately connected to globalization, pose the most significant security and environmental threat to our existence. Drawing on the authors’ three decades of international fieldwork and seasoned policy analysis, The Real Population Bomb (Potomac Books, 2012) by P.H. Liotta and James F. Miskel discusses the effects these underserved megacities have on foreign, military, environmental and economic policies. Explore the historical dilemmas of megacities and how these problems are shaping the global, economic and environmental landscape of our world. This excerpt is taken from Chapter 1, “Introduction: Welcome to the Urban Century.”

We live in the age of the city. The City is everything to us—it consumes us, and for that reason we glorify it. —Onookome Okome

There was a time when the city was the dominant political identity. Centuries and even millennia ago, the most advanced societies in the Mediterranean, the Near East, and South America revolved around cities that were either states in themselves or were the locus of power for larger empires and kingdoms. The time of the city is coming again, though now in a considerably less benign way.

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With the rise of massive urban centers in Africa and Asia, cities that will matter most in the twenty-first century are located in less-developed, struggling states. A number of these huge megalopolises—whether Lagos or Karachi, Dhaka or Kinshasa—reside in states often unable or simply unwilling to manage the challenges that their vast and growing urban populations pose. There are no signs that their governments will prove more capable in the future. These swarming, massive urban monsters will continue to grow and should concern the world.

By 2015 there will be six hundred cities on the planet with populations of 1 million or more, and fifty-eight with populations over 5 million. By 2025, according to the National Intelligence Council, there will be twenty-seven cities with populations greater than 10 million—the common measure by which an urban population constitutes a “megacity.” If measures are not taken soon, some of these megacities will pose the most significant security threat in the coming decades. They will become havens for terrorists and criminal networks, as well as sources of major environmental depletion. They will serve as freakish natural laboratories where all the elements most harmful to international and human security are grown. If crowded masses within these unaccommodating spaces are left to their own devices by inept or uncaring governments, their collective rage, despair, and hunger will inevitably erupt. And when inhabitants tire of the lawlessness, poverty, and instability of the megacities, they will leave—those that can—bringing violence with them. In the face of rising expectations that globalization inevitably entails, these petri dishes of despair and danger will spill over municipal boundaries and international borders with rapidly spreading contagion.