# 1NC---Round 1---NDT

## OFF

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#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Decline cascades---nuclear war

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Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should increase prohibitions on patent thickets.

#### 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]

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T Subsets

#### ‘Prohibitions’ and ‘practices’ are plural, requiring more than one

Oxford 21 – Oxford Online Dictionaries, ‘plural’, https://www.lexico.com/en/definition/plural

1Grammar

(of a word or form) denoting more than one, or (in languages with dual number) more than two.

postpositive ‘the first person plural’

#### ‘The’ private sector refers to the group as a whole

Merriam-Webster’s 21 Online Dictionary, ‘the’, https://www.merriam-webster.com/dictionary/the

—used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole

*the* elite

#### It’s the entire segment

US Code 21 – “2 U.S. Code § 658 – Definitions”, https://www.law.cornell.edu/uscode/text/2/658#9

(9) Private sector

The term “private sector” means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.

#### The plan only regulates a subset of industry

#### Vote neg---it’s key to limits and ground: forcing economy-wide change creates unique links and large-scale action AND avoids a proliferation of tiny industry cases with no good generics

### 1NC

Torts CP

#### The United States federal government should substantially increase prohibitions on patent thickets as tortious interference and task the Department of Justice with a non-preclusive public enforcement role.

#### 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

Christopher B. Hockett 14, Lecturer at the University of California, Berkeley Law School, Chair of the Section of Antitrust Law at the American Bar Association, JD from the University of Virginia, “The Evolving Role of Business Torts in Antitrust Litigation” in Business Torts and Unfair Comp Handbook, Third Edition, Lexis

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

### 1NC

T Courts

#### Courts cannot ‘expand’ antitrust law

George Bibikos 19, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

#### Vote neg:

#### Limits---courts explode advantages into unpredictable precedents

#### Ground---mechanism dodges DA links

### 1NC

Antitrust PIC

#### Without expanding its core antitrust laws, the United States federal government should:

#### ---revoke biosimilar licenses in the case of unjustified action by biologic companie manufacturers;

#### ---implement and fund mandatory universal vaccination;

#### ---expedite and fund relevant patent litigation;

#### ---financially induce the pharmaceutical industry to shift funding from patent creation to innovation, including funding for that shift.

#### That solves without antitrust.

Ana Santos Rutschman 20, Assistant Professor of Law at the Saint Louis University School of Law, S.J.D. and LL.M. from the Duke University School of Law, “Regulatory Malfunctions in the Drug Patent Ecosystem,” Emory Law Review, Vol. 70, 2020, accessed via Lexis

This section proposes an ex post intervention aimed at curbing pay-for-delay in the context of biologic-biosimilar competition. Specifically, it argues that the FDA should use its power to revoke biosimilar licenses in cases of unjustified inaction by biosimilar manufacturers. Such an intervention, designed to occur on a faster timeline than antitrust scrutiny, functions as a deterrent for anticompetitive behaviors and creates a signaling mechanism that clears the field for legitimate competitors to emerge.

1. The Proposed Intervention

In its gatekeeping function, the FDA has the ability to grant licenses to market certain pharmaceutical drugs. As a general principle of FDA law, manufacturers of new pharmaceutical drugs, as well as follow-on innovators, 401are barred from bringing unapproved drugs to market, absent a permissive gesture from the FDA. 402The ability to grant licenses is matched by the Agency's ability to revoke licenses, if certain behaviors - or lack thereof - occur. 403

As seen above, certain licenses granted by the FDA cause significant market distortions. 404This is the case of licenses to market biologic products, particularly when a biologic is the first of its kind to receive FDA approval and a statutory exclusivity prevents competitors from entering the market for a period of twelve years, independent of the patent protection status.

So far, the FDA has been engaging in license revocation primarily while exercising its gatekeeping role 405in pursuit of its mission of protecting the public health, 406but it has not done so in connection with its role in distorting competition. 407This Article argues that the Agency can and should revoke licenses granted to biosimilar manufacturers when they fail to bring their products to market within a certain period of time, 408absent a reasonable justification for the delay - defined to mean circumstances that roughly align with the concepts of impracticability, impossibility, or force majeure. 409

As developed below, this proposal seeks to accomplish four goals. First, it provides a direct fix for a gamesmanship problem within overlapping regulatory regimes. 410Second, it seeks to mitigate the consequences 411of a problem that originates elsewhere in the administrative state, as dozens or hundreds of patents are awarded to a single biologic, enabling tiered litigation strategies. 412Third, it creates a signaling feature, as biosimilar manufacturers seeking FDA approval indicate that they are prepared to either see patent litigation through, or avoid existing patents altogether - as entering into a settlement with the manufacturer of the reference biologic will translate into losing their license. 413And fourth, it restores meaning to the licensing activity of the FDA, which has been stripped of its intended function, as two-thirds of the first nine biosimilars approved by the Agency have not entered the market. 414

The proposal is confined to cases of pay-for-delay involving biosimilars, given the particular characteristics of competition in this field, as well as the costs to patients and health systems affected by the unavailability of biosimilar alternatives in the U.S. market. 415It is not proposed in lieu of antitrust scrutiny, but rather as a checkpoint for a specific type of anticompetitive behavior located outside the core antitrust avenues for patrolling heterogenous anticompetitive behaviors. And finally, the proposal does not address the larger problems of regulatory design and interagency coordination of which pharmaceutical pay-for-delay agreements take advantage, but provides a localized fix designed to diminish the frequency and impact of these agreements.

#### Vaccinations solves disease.

Seth Berkley 17, CEO, Gavi, "Can vaccine stockpiles prevent the next great pandemic?," World Economic Forum, 1-11-2017, https://www.weforum.org/agenda/2017/01/can-vaccine-stockpiles-prevent-the-next-great-pandemic/

In global health, emergency vaccine stockpiles are like the insurance policy you never really wanted to take out; you resent the cost and have mixed feelings about never making a claim. Moreover, given that a stockpile is often a last resort, if you ever fall back on it, you have in some way already failed. Emergency stockpiles can play an essential role both as part of a comprehensive disease control strategy and in maintaining global health security. However, as the global health landscape shifts in the face of mounting pressures, such as climate change, population increases and mass urbanisation, we could see that role diminish, as stockpiles become increasingly less effective, leaving us more vulnerable to global pandemics. Worst case scenario One of the problems is that cities are getting bigger. As more and more people adopt an urban lifestyle and cities continue to swell, not only does the risk of urban epidemics increase - something we haven’t seen much of for decades - but the need for larger emergency stockpiles can increase too. The question is - at what point does this cease to be sustainable? The worst-case scenario is an outbreak in huge cities, such as Mumbai, Beijing or Lagos, where even diseases that are relatively difficult to transmit, like Ebola, could prove difficult to contain. Such so-called mega-cities are a growing trend, particularly in Africa. Population growth may be levelling-off in most parts of the world, but in Africa it is expected to double by 2050 and quadruple by 2100, increasing from 1.2 billion today to 4.4 billion. Image: UN World Cities Report At the same time, more and more people will be driven towards cities. Desert or dry lands, for example, already account for two-thirds of Africa’s landmass, but further desertification is expected to displace 60 million people between 2014 and 2020. Land degradation, rising sea levels, famine or conflict mean more and more people will be competing for less land with one consequence – African cities will swell. As this happens it will not only challenge our ability to cope with large-scale outbreaks, it will potentially make them more common. The combination of more people living in less space and placing more strain on already limited sanitation represents a fertile breeding ground for infectious disease and the insect vectors that spread them. We see this scenario often in times of humanitarian crisis with diseases like cholera, but usually it is restricted to disasters zones or areas of conflict, like Haiti or Syria. In major cities, however, this could mean a return of the urban epidemic and a new era of infectious disease threatening global health security. The sheer scale of cities risks overstretching vaccine supplies, limiting our ability to prevent or respond to outbreaks. And it is from these cities that transcontinental flights originate and risk taking local epidemics and making them global. Preventing the next pandemic Clearly our risk assessments for infectious diseases need to be reevaluated to reflect these global trends. In the case of yellow fever – which saw emergency vaccine stockpiles depleted earlier this year following urban outbreaks in Angola and the Democratic Republic of Congo – the process is already under way. But just how large should these stockpiles be? And for how many cities should we prepare? If more than 14 million people live in a single city, how many doses does it take for an emergency stockpile to remain effective? The answer is that while stockpiles are essential, they are only part of the solution. As cities get bigger, our best defence will be to prevent outbreaks in the first place, by building better public health systems, improving childhood immunisation through better routine immunisation and pre-emptive vaccination campaigns. This will not be easy. Currently one-in-five children are missing out on a full course of the most basic vaccines. Of these 19 million children, a growing number live not just in remote rural communities but urban slums, hiding within plain sight in the heart of cities. Providing these children with vaccines will help prevent large-scale outbreaks by building up immunity within populations. Building stronger health systems will also increase our ability to detect and contain outbreaks when they do occur, including deadly diseases of pandemic potential for which there is no cure or vaccine, such as SARS or pandemic flu. That’s because the public health infrastructure required to attain high levels of vaccination coverage will significantly improve surveillance and the ability of fragile countries to respond. Finding new ways to reach these marginalised communities is no longer simply a matter of doing the right thing. It has become our best insurance policy against the next global pandemic.

### 1NC

Bedoya DA

#### Bedoya’s nomination as FTC Commissioner will pass and end immigrant surveillance

Karen Hoffman Lent 21, Partner at Skadden, Arps, Slate, Meagher & Flom, Kenneth Schwartz, Partner at Skadden, Arps, Slate, Meagher & Flom, and Meghan McConnell, Associate at Skadden, Arps, Slate, Meagher & Flom, “Privacy Expert Bedoya To Bring Fresh Perspective to FTC”, New York Law Journal, 11/8/2021, https://www.law.com/newyorklawjournal/2021/11/08/privacy-expert-bedoya-to-bring-fresh-perspective-to-ftc/?slreturn=20220123112923

On Sept. 13, 2021 President Biden nominated Alvaro Bedoya as a Commissioner to the Federal Trade Commission (FTC). If confirmed, Bedoya would replace the recently departed Commissioner Rohit Chopra who now heads up the Consumer Financial Protection Bureau. As a privacy expert, Bedoya will provide a fresh perspective to the agency charged with antitrust enforcement and consumer protection.

Bedoya was born in Peru and grew up in upstate New York. He earned his B.A. from Harvard College and his J.D. from Yale Law School where he received the Paul & Daisy Soros Fellowship for New Americans. After graduating from law school, he spent two years as an associate at WilmerHale before departing to work in the U.S. Senate. A long-time aide to Sen. Al Franken, Bedoya was the first chief counsel for the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. During his tenure he worked on the USA FREEDOM Act and other privacy and surveillance issues related to biometrics and location tracking. Those who worked with Bedoya on Capitol Hill characterize him as willing to engage with industry and to maintain an open dialogue. See Margaret Harding McGill, Privacy Advocate Will Be New Big Tech Threat at FTC, Axios (Sept. 14, 2021).

Currently, Bedoya serves as the founding director of the Center on Privacy and Technology at Georgetown Law, a think tank focused on privacy and surveillance and their impact on civil rights. He is also a visiting professor at Georgetown Law. His nomination to the FTC comes at a time when data privacy and data security—and their impact on competition and civil rights—have emerged as pressing issues in Washington. In a statement that congratulated Bedoya on his nomination and touted his expertise, FTC Chair Lina Khan noted that Bedoya’s “expertise on surveillance and data security and his longstanding commitment to public service would be enormously valuable to the Commission as we work to meet this moment of tremendous need and opportunity.” See Press Release, Fed. Trade Comm’n, Statement of FTC Chair Lina M. Khan on the Nomination of Alvaro Bedoya to Serve as a Commissioner (Sept. 13, 2021).

Bedoya on Privacy

In 2016, Bedoya and a team from the Georgetown Center on Privacy and Technology released a report studying police use of facial recognition programs across America and proposing policy recommendations. See Alvaro Bedoya et al., The Perpetual Line-Up: Unregulated Police Face Recognition in America, Ctr. on Priv. & Tech. (Oct. 18, 2016). According to the report, one in two American adults—or 117 million people—are in a police facial recognition database. Id. The report exposed the existence of few guardrails to prevent the programs’ misuse or to ensure the accuracy of the databases, and highlighted the disproportionate impact facial recognition programs have on people of color, particularly African Americans. Id.

Bedoya’s academic writings have focused on the intersection of civil rights and privacy, primarily the impact that privacy and surveillance have on marginalized communities. Bedoya has been critical of the way in which data collection and tracking have a disparate impact that “varies greatly by race, class and power.” Alvaro Bedoya, A License to Discriminate, N.Y. Times (June 6, 2018). He has argued that privacy is a civil right because it is about “human dignity.” Alvaro Bedoya, Privacy as a Civil Right, 50 N.M. L. Rev. 301, 306 (2020). Bedoya has also criticized the U.S. Immigration and Customs Enforcement’s (ICE) use of surveillance to track immigrants, cautioning that “[s]urveillance of immigrants has long paved the way for surveillance of everyone.” Alvaro Bedoya, Deportation Is Going High-Tech Under Trump, The Atlantic (June 21, 2017).

Capitol Hill and Digital Privacy

Privacy advocates have long called on Congress to enact a federal privacy law. Despite decades of discussions and proposals, there is no federal law protecting consumer privacy. With 6 in 10 Americans believing data collection is impossible to avoid in daily life, see Brooke Auxier et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information, Pew Rsch. Ctr. (Nov. 15, 2019), consumers are taking an interest in how their data is handled. Technology companies and the data they control have received a renewed focus.

Lawmakers on Capitol Hill and the enforcement agencies have increasingly questioned whether and to what extent digital platforms’ use and control of data impacts privacy and competition. The House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, on which Chair Khan served prior to joining the FTC, conducted a 16-month investigation of digital markets, culminating in a lengthy report, entitled Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (Staff Report). The report drew a link between privacy and antitrust laws: “The persistent collection and misuse of consumer data is an indicator of market power in the digital economy.” Staff Report at 51 (citing Howard A. Shelanski, Information, Innovation, and Competition Policy for the Internet, 161 U. Pa. L. Rev. 1663, 1687 (2013)).

The Staff Report led to a legislative effort to crack down on technology companies and ultimately resulted in a bipartisan rollout of a package of bills squarely aimed at large technology companies. The package advanced through committee in the House but is still awaiting a vote. See Press Release, House Comm. on the Judiciary, Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation (June 24, 2021). Recently, House Democrats released a proposal as part of President Biden’s Build Back Better agenda that would provide the FTC with $1 billion to set up a bureau dedicated to privacy and data protection. While its future is uncertain amid budget reconciliation negotiations, it underscores Congress’s renewed focus on and commitment to data privacy-related issues.

FTC and Privacy

The FTC regulates consumer privacy and data protection under §5 of the FTC Act, which gives the agency authority to bring enforcement actions against unfair and deceptive practices. 15 USC §45(a). In the early days, unfair and deceptive practices typically involved false or misleading claims as to how a company handled consumer data, but privacy enforcement has evolved into “a body of standards that seek to protect consumers’ reasonable expectations of privacy.” Erika M. Douglas, The New Antitrust/Data Privacy Law Interface, Yale L.J. Forum, 647, 652 (Jan. 18, 2021) (Douglas). In addition to §5, the agency is charged with enforcing a number of privacy laws, including the Gramm-Leach Bliley Act, CAN-SPAM Act, Children’s Online Privacy Protection Act, and the Fair Credit Reporting Act. One provision of President Biden’s wide-ranging July 2021 executive order, which outlined a “whole of government” approach to promoting competition, encourages the FTC to crack down on “unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy” in order to “address persistent and recurrent practices that inhibit competition.” Executive Order on Promoting Competition in the American Economy, WhiteHouse.gov, §5(h)(i) (July 9, 2021).

A New Direction

In the recently issued FTC Report to Congress on Privacy and Security, the FTC indicated a shift in how the FTC views—and plans to approach—privacy issues moving forward. See Fed. Trade Comm’n, Report to Congress on Privacy and Security (Sept. 13, 2021) (Privacy Report). The Privacy Report highlights four areas in which the FTC plans to focus its efforts, including “integrating competition concerns” into privacy and data security issues, remedies, digital platforms, and algorithms. Id. at 3-6.

Speaking specifically to the intersection between antitrust and privacy issues, the Privacy Report warns that “violation of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental effect on competition.” Id. at 4. Chair Khan is expected to use §5’s unfair competition clause to turn up the heat on antitrust enforcement, but a new perspective under which the FTC views its privacy enforcement role raises some interesting issues and implications for antitrust law, particularly where the FTC seeks “competition-based remedies” in consumer protection cases. Id. Unsurprisingly, the Commissioners disagree over this approach. Chair Khan’s statement highlighted the connection, emphasizing that “concentrated control over data has enabled dominant firms to capture markets and erect entry barriers.” Press Release, Fed. Trade Comm’n, Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021). But on the other side of the political spectrum, Commissioner Phillips explained that the report “overstates the synchrony between competition and privacy.” Press Release, Fed. Trade Comm’n, Dissenting Statement of Commissioner Noah Joshua Phillips (Oct. 1, 2021). Though we do not know much about Bedoya’s approach to antitrust enforcement, we can expect that his privacy background will shape how he views competition issues and appropriate remedies.

Privacy and Antitrust

With a renewed emphasis on the overlap between these two policy areas, we can expect to see privacy concerns and considerations raised more often in enforcement actions. But just how privacy applies to antitrust enforcement in practice remains to be seen. Tension between antitrust and privacy can arise when their goals do not align. Privacy goals often seek to limit the sharing and use of consumer data, for example, while the goals of increased competition may seek to expand such information sharing. See Douglas, supra, at 660-61, 668.

The Staff Report states that “[a] firm’s dominance can enable it to abuse consumers’ privacy without losing customers,” Staff Report at 52, but efforts to protect consumer privacy to the detriment of other companies have faced setbacks in court. In hiQ Labs v. LinkedIn, 938 F.3d 985 (9th Cir. 2019), LinkedIn sent hiQ a cease and desist letter to prevent hiQ from collecting and using data from “publicly available LinkedIn member profiles.” 938 F.3d at 989, 992. In response, hiQ sued LinkedIn alleging violations of California’s Unfair Competition Law. See Complaint, hiQ Labs v. LinkedIn, No. 3:17-cv-03301-EMC (N.D. Cal. June 7, 2017), ECF No. 1. Though LinkedIn’s stated intention was to protect its customer’s data, the court was not persuaded by this privacy justification and ordered a preliminary injunction to restore hiQ’s access. See hiQ, 938 F.3d at 994.

Regulators have also started using diminished privacy as an example of consumer harm in antitrust enforcement actions. For example, in United States v. Google, 1:20-cv-03010-APM (D.D.C. 2021), ECF No. 94, the DOJ alleges that the anticompetitive effects of Google’s purported monopolization of internet search and search advertising include reduction in quality of privacy and data protection. Privacy considerations are being used both to criticize and justify conduct in antitrust issues.

Conclusion

While we expect Bedoya to be more vocal on consumer protection issues, particularly facial recognition and artificial intelligence, he joins an FTC that has proven motivated to use the antitrust laws to crack down on big tech companies. If confirmed (as expected), Bedoya will join two Democratic appointed commissioners, Chair Khan and Commissioner Rebecca Kelly Slaughter, in pursuing an aggressive enforcement agenda from all corners of the agency. Chair Khan has been hard at work laying some of the groundwork, from agency structural reforms to the FTC’s recent commitment to approaching enforcement with the overlap between privacy and competition in mind. We can expect to see privacy considerations make their way into more antitrust enforcement actions and, though Bedoya has been relatively quiet on competition issues, his privacy-focused background could impact where the FTC ends up on some of these questions.

#### The plan derails confirmation

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

#### Border surveillance makes inevitable migration flows destablizing

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Companies that profit from selling surveillance technologies and border services to governments are actively lobbying countries to adopt more militaristic approaches to migration. In fact, the border and surveillance industry is now so profitable that it has become a key commodity for major investment companies such as the Vanguard Group, BlackRock, or Capital Research Management, who invest on behalf of pension funds, insurance companies, university endowments or individuals’ savings.

Over the past ten years, the global population of displaced people has grown substantially to at least 79.5 million people, according to the United Nations refugee agency, UNHCR. The agency estimates that since 2012, the number of refugees under its mandate has nearly doubled due to conflicts, including the war in Syria and the Rohingya crisis in Myanmar.

The number of forcibly displaced people is expected to continue to rise, as it is growing even faster than the global population rate, due to conflict, economic insecurity and climate impacts that are forcing people to leave their homes.

However, instead of developing strategies to protect refugees and migrants, several governments around the world have focused their energies on building up borders to keep them out.

A walled world

Over the last 50 years, 63 walls have been built along borders or on occupied territory across the world. Authorities in the United States, Australia and the European Union have increasingly externalised their border controls to foreign countries, stopping displaced people from even arriving on their soil.

They have also been patrolling borders in ways that lead to the unlawful imprisonment, deportation and inhuman treatment of refugees and migrants. And these walls are not only physical, they are also digital, with governments around the world increasingly relying on artificial intelligence and biometrics.

Although governments are responsible for implementing these policies, it is companies that are lobbying, financing and profiting from the growth of the border and surveillance industry.

Governments are outsourcing border management to household name companies such as Accenture, IBM and Boeing, that provide surveillance technologies and services. And a new report released on 9 April by the Transnational Institute (TNI), in collaboration with Stop Wapenhandel has identified that companies including Capital Research and Management (part of the Capital Group), BlackRock, Morgan Stanley and the Vanguard Group are financing this industry’s expansion.

The result: more severe human rights abuses of refugees and migrants, with less accountability for the actors involved in perpetuating this abuse. “People on the move are increasingly confronted with a border security infrastructure specifically hired to treat them as a threat, to keep them out,” explained Daria Davitti, assistant professor in law at Nottingham University. “The levels of violence and abuse are unprecedented and in many cases unchecked.”

“Military and security companies and their lobby organisations are very influential in shaping border and migration policies”

Rightwing politicians and companies—who have financial incentives to see the border and surveillance industry grow – have framed migration as a security threat in their statements and policy briefs.

“Migration has been portrayed, in the EU and more generally in the Global North, as a threat to ‘our’ economic prosperity, cultural identity and ‘values’,” said Davitti. “Defining migrants’ arrivals as a security threat requires security answers, which the border and surveillance industry is of course best placed to provide with services it offers.”

The framing of migration as a security problem has resulted in the dramatic growth of the border and surveillance industry over the last decade, fuelled by booming budgets for border and immigration control. In the United States alone, budgets for borders increased by more than 6,000% since 1980, according to TNI.

The EU has plans to spend about three times more on border security and control in its new seven-year budget than its previous one. And by 2025, the global border security market is predicted to grow by between 7.2% and 8.6%, reaching a total of $65-68 billion.

According to TNI’s report, the border and surveillance industry is expanding in five key sectors: border security (more equipment and technologies that surveil and patrol borders to deter people from crossing them); biometrics (new technologies for fingerprints, iris scans or social media tracking); advisory and audit services (that lobby governments to adopt harsher border policies); and migrant detention and deportation.

“Military and security companies and their lobby organisations are very influential in shaping border and migration policies,” said Mark Akkerman, lead author of TNI’s report. “Representatives of these industries present themselves as experts on these issues and are embraced as such by authorities.”

The path forward

Displaced people are suffering the consequences of the expanding border and surveillance industry, whether they are being monitored at the border by overhead drones or through social media. “The militarisation of borders has led to more violence against migrants and has pushed them to more dangerous migration routes,” said Akkerman. “There have also been many reports about human rights violations in migrant detention and during deportations.”

The lack of accessible information about these companies’ roles in the border and surveillance industry makes it harder to hold them accountable. “These contracts are often kept secret and governments resist sharing them,” said Antonella Napolitano, a policy officer at Privacy International. “It is a system that lacks oversight and ultimately, accountability.”

#### Extinction

Lucas Perry 21, Project Coordinator at the Future of Life Institute, BA from Boston College, and Dr. Michael Klare, Five College Professor of Peace & World Security Studies, “Michael Klare on the Pentagon’s view of Climate Change and the Risks of State Collapse”, Future of Life Institute, 7/30/2021, https://futureoflife.org/2021/07/30/michael-klare-on-the-pentagons-view-of-climate-change-and-the-risks-of-state-collapse/

The influx of migrants on America’s Southern border, many of these people today are coming from Central America and from an area that’s suffering from extreme drought and where crop failure has become widespread, and people can’t earn an income and they’re fleeing to the United States in desperation. Well, this is something the military has been studying and talking about for a long time as a consequence of climate change, as an example of the ways in which climate change is going to multiply schisms in society and threats of all kinds that ultimately will endanger the United States, but it’s going to fall on their shoulders to cope with and creating humanitarian disasters and migratory problems.

And as I say, this is not what they view as their primary responsibility. They want to prepare for high-tech warfare with China and Russia, and they see all of this as a tremendous distraction, which will undermine their ability to defend the United States against its primary adversaries. So, it’s multiplying the threats and dangers to the United States on multiple levels including, and we have to talk about this, threats to the homeland itself.

Lucas Perry: I think one thing you do really well in your book is you give a lot of examples of natural disasters that have occurred recently, which will only increase with the existence of climate change as well as areas which are already experiencing climate change, and you give lots of examples about how that increases stress in the region. Before we move on to those examples, I just want to more clearly lay out all the ways in which climate change just makes everything worse. So, there’s the sense in which it stresses everything that is already stressed. Everything basically becomes more difficult and challenging, and so you mentioned things like mass migration, the increase of disease and pandemics, the increase of terrorism in destabilized regions, states may begin to collapse. There is, again, this idea of threat multiplication, so everything that’s already bad gets worse.

Lucas Perry: There’s loss of food, water, and shelter instability. There’s an increase in natural disasters from more and more extreme weather. This all leads to more resource competition and also energy crises as rivers dry up and electric dams stop working and the energy grid gets taxed more and more due to the extreme weather. So, is there anything else that you’d like to add here in terms of the specific ways in which things get worse and worse from the factor of threat multiplication?

Michael Klare: Then, you start getting kind of specific about particular places that could be affected, and the Pentagon would say, well this is first going to happen in the most vulnerable societies, poor countries, Central America, North Africa, places like that where society is already divided, poor, and the capacity to cope with disaster is very low. So, climate change will come along and conditions will deteriorate, and the state is unable to cope and you have breakdown and you have these migrations, but they also worry that as time goes on and climate change intensifies, that a bigger and bigger or richer and richer and more important states will begin to disintegrate, and some of these states are very important to US security and some of them have nuclear weapons, and then you have really serious dangers. For example, they worry a great deal about Pakistan.

Pakistan is a nuclear armed country. It’s also deeply divided along ethnic and religious lines, and it has multiple vulnerabilities to climate change. It goes between extremes of water scarcity, which will increase as the Himalayan glaciers disappear, but also we know that monsoons are likely to become more erratic and more destructive with more flooding.

All of these pose great threats to the ability of Pakistan’s government and society to cope with all of its internal divisions, which are already severe to begin with, and what happens when Pakistan experiences a state collapse and nuclear weapons begin to disappear into the hands of the Taliban or to forces close to the Taliban, then you have a level of worry and concern much greater than anything we’ve been talking before, and this is something that the Pentagon has started to worry about and to develop contingency plans for. And, there are other examples of this level of potential threat arising from bigger and more powerful states disintegrating. Saudi Arabia is at risk, Nigeria is at risk, the Philippines, a major ally in the Pacific is at extreme risk from rising waters and extreme storms, and I can continue, but from a strategic point of view, this starts getting very worrisome for the Department of Defense.

Lucas Perry: Could you also paint a little bit of a picture of how climate change will exacerbate the conditions between Pakistan, India, and China, especially given that they’re all nuclear weapon states?

Michael Klare: Absolutely, and this all goes back to water and many of us view water scarcity as the greatest danger arising from climate change in many parts of the world. In the case of India, China, Pakistan, not to mention a whole host of other countries depend very heavily on rivers that originate in the Himalayan mountains and draw a fair percentage of their water from the melting of the Himalayan glaciers and these glaciers are disappearing at a very rapid rate and are expected to lose a very large percentage of their mass by the end of this century due to warming temperatures.

And, this means that these critical rivers that are shared by these countries, the Indus River shared by India and Pakistan, the Brahmaputra River shared by India and China, these rivers, which provide the water for irrigation for hundreds of millions of people if not billions of people, depend on these rivers, the Mekong is another. As the water supply begins to diminish, this is going to exacerbate border disputes. All of these countries, Indian and China, Indian and Pakistan have border and territorial disputes. They have very restive agricultural populations to start with, that water scarcity is going to be the tipping point that will produce massive local violence that will lead to conflict between these countries, all of them nuclear armed.

Lucas Perry: So, to paint a little bit more of a picture of these historical examples of states essentially failing to be able to respond to climate events and the kind of destructive force that was to society and to the status of humanitarian conditions and the increasing need for humanitarian operations, so can you describe what happened in Tacloban for example, as well as what is going on in the Nigerian region?

Michael Klare: So, Tacloban is a major city on the island of Leyte in the Philippines, and it was a direct hit. It suffered a direct hit from Typhoon Haiyan in 2013. This was the most powerful typhoon to make landfall up until that point, an extremely powerful storm that created millions of homeless in the Philippines. Many people perished, but Tacloban was at the forefront of this. A city of several hundred thousand, many poor people living in low lying areas at the forefront of the storm. The storm surge was 10 or 20 feet high. That just over overwhelmed these low lying shanty towns, flooded them. Thousands of people died right away. The entire infrastructure of the city collapsed was destroyed, hospitals, everything. Food ran out, water ran out, and there was an element of despair and chaos. The Philippine government proved incapable of doing anything.

And, President Obama ordered the US Pacific Command to provide emergency assistance, and it sent almost the entire US Pacific fleet to Tacloban to provide emergency assistance on the scale of a major war, aircraft carrier, dozens of warships, hundreds of planes, thousands of troops to provide emergency assistance. Now, it was a wonderful sign of US aid. There are a number of elements of this crisis that are worthy of mention. In addition to all of this, one was the fact that there was anti-government rioting because of the failure of the local authorities to provide assistance or to provide it only to wealthy people in the town, and this is so often a characteristic of these disasters that assistance is not provided equitably, and the same thing was seen with Hurricane Katrina in New Orleans and this then becomes a new source of conflict.

When a disaster occurs and you do not have equitable emergency response, and some people are denied help and others are provided assistance, you’re setting the stage for future conflicts and anti-government violence, which is what happened in Tacloban And the US military had to intercede to calm things down, and this is something that has altered US thinking about humanitarian assistance because now they understand that it’s not just going to be handing out food and water, it’s also going to mean playing the role of a local government and providing police assistance and mediating disputes and providing law and order, not just in foreign countries, but in the United States itself and this proved to be the case in Houston with Hurricane Harvey in 2017 and in Puerto Rico with Hurricane Maria when local authorities simply disappeared or broke down and the military had to step in and play the role of government, which comes back to what I’ve been saying all along. From the military’s point of view, this is not what they were trained to do.

This is not what they want to do, and they view this as a distraction from their primary military function. So, here’s the Pacific fleet engaging in this very complex emergency in the Philippines, and what if there were a crisis with China that were to break out? The whole force would have been immobilized at that time, and this is the kind of worry that they have that climate change is going to create these complex emergencies they call them, or complex disasters that are going to require not just a quick in and out kind of situation, but a permanent or semi-permanent involvement in a disaster area and to provide services for which the military is not adequately prepared, but they see that climate change increasingly will force them to play this kind of role and thereby distracting them from what they see as their more important mission.

Lucas Perry: Right, so there’s this sense of the military increasingly being deployed in areas to provide humanitarian assistance. It’s obvious why that would be important and needed domestically in the United States and its territories. Can you explain why the military is incentivized or interested in providing global humanitarian assistance?

Michael Klare: This has always been part of American foreign policy, American diplomacy, winning friends, winning over friends and allies. So, it’s partly to make the United States look good particularly when other countries are not capable of doing that. We’re the one country that has that kind of global naval capacity to go anywhere and do that sort of thing. So, it’s a little bit a matter of showing off our capacity, but it’s also in the case of the Philippines, the Philippines plays a strategic role in US planning for conflict in the Pacific.

It is seen as a valuable ally in any future conflict with China and therefore its stability matters to the United States and the cooperation of the Philippine government is considered important and access to bases in the Philippines, for example, is considered important to the US. So, the fact that key allies of the US in the Pacific, in the Middle East and Europe are at risk of collapsing due to climate change poses a threat to the whole strategic planning of the US, which is to fight wars over there, in the forward area of operations off the coast of China, or off of Russian territory. So, we are very reliant on the stability and the capacity of key allies in these areas. So, providing humanitarian assistance and disaster relief is a part of a larger strategy of reliance on key allies in strategic parts of the world.

Lucas Perry: Can you also explain the conditions in Nigeria and how climate change has exacerbated those conditions and how this fits into the Pentagon’s perspective and interest in the issue?

Michael Klare: So, Nigeria is another country that has strategic significance for the US, not perhaps on the same scale as say Pakistan or Japan, but still important. Nigeria is a leading oil producer, not as important as it once was perhaps, but nonetheless important, but Nigeria is also a key player in peacekeeping operations throughout Africa and because the US doesn’t want to play that role itself, it relies on Nigeria for peacekeeping troops in many parts of Africa. And, Nigeria occupies a key piece of territory in Central Africa, which is it’s surrounded by countries, which are much more fragile and are threatened by terrorist organizations. So, Nigeria’s stability is very important in this larger picture, and in fact Nigeria itself is at risk from terrorist movements, especially Boko Haram and splinter groups, which continue to wreak havoc in Northern Nigeria despite years of effort by the Nigerian government to crush Boko Haram, it’s still a powerful force.

And, partly this is due to climate change. The Boko Haram operates in areas around Lake Chad, which is now a small sliver of what it once was. It has greatly diminished in size because of global warming and water mismanagement. And so, the farmers and fisher folk whose livelihood depended on Lake Chad has all been decimated. Many of them have become impoverished. The Nigerian government has proved inept and incapable of providing for their needs, and many of these people have therefore fallen prey to the appeals of recruitment by Boko Haram, young men without jobs. So, climate change is facilitating, is fueling the persistence of groups like Boko Haram and other terrorist groups in Nigeria, but that’s only part of the picture. There’s also growing conflict between pastoralists, these are herders, cattle herders whose lands are being devastated by desertification.

In this Sahel region, the southern fringe of the Sahara is expanding with climate change and driving these pastoralists into areas occupied by… These are all Muslim, the pastoralists are primarily Muslims and they’re moving into lands occupied by Christians, mainly Christian farmers, and there’s been terrible violence in the past few years, many hundreds of thousands of people displaced. Again, inept Nigerian response, and so I could go on. There’s violence in the Nigeria Delta region, the Niger Delta area in the south and in the area, their breakaway provinces. So, Nigeria is at permanent risk of breaking apart, and the US provides a lot of military aid to Nigeria and provides training. So, the US is involved in this country and faces a possibility of greater disequilibrium and greater US involvement.

Lucas Perry: Right, so I think this does a really good job of painting the picture of this factor of threat multiplication from climate change. So, climate change makes getting food, water, and shelter more difficult. There’s more extreme weather, which makes those things more difficult, which increases instability, and for places that are already not that stable, they get a lot more unstable and then states begin to collapse and you get terrorism, and then you get mass migration, and then there’s more disease spreading, so you get conditions for increased pandemics. Whether it’s in Nigeria or Pakistan and India or the Philippines or the United States and China and Russia, everything just keeps getting worse and worse and more difficult and challenging with climate change. So, could you describe the ladder of escalation of climate change related issues for the military and how that fits into all this?

Michael Klare: Well, now this is an expression that I made up to try to put this in some kind of context, drawing on the ladder of escalation from the nuclear era when the military talked about the escalation conflict from a skirmish to a small war, to a big war, to the first use of nuclear weapons, to all out nuclear war. That was the ladder of escalation of the nuclear age, and what I see happening is something of a similar nature where at present we’re still dealing mainly with these threat multiplying conditions occurring in the smaller and weaker states of Africa, Chad, Niger, Sudan and the Central American countries, Nicaragua and El Salvador, where you see all of these conditions developing, but not posing a threat to the central core of the major powers, but as climate change advances, the military expects and US intelligence agencies expect, as I indicated, that larger, stronger, richer states will experience the same kinds of consequences and dangers and begin to experience this kind of state disintegration.

So, what we’re seeing in places like Chad and Niger, which involves this skirmishing between insurgents, terrorists, and other factions in which the US is playing a remote role, is playing the role, but it’s remote to situations where a Pakistan collapses, a Nigeria collapses, a Saudi Arabia collapses would require a much greater involvement by American forces on a much larger scale and that would be the next step up the ladder of escalation arising from climate change, and then you have the possibility, as I indicated, where nuclear armed states would engage in conflict, would be drawn into conflict because of climate related factors like the melting of the Himalayan glaciers and Indian and Pakistan going to war or Indian and China going to war, or we haven’t discussed this, but another consequence of climate change is the melting of the Arctic and this is leading to competition between the US and Russia in particular for control of that area.

So, you go from disintegration of small states to disintegration of medium-sized states, to conflict between nuclear armed states, and eventually to conceivable US involvement in climate related conflicts. That would be the ladder of escalation as I see it, and on top of that, you would have multiple disasters happening simultaneously in the United States of America, which would require a massive US military response. So, you can envision, and the military certainly worries about this, a time when US forces are fully immobilized and incapable of carrying out what they see as their primary defense tasks because they’re divided. Half their forces are engaging in disaster relief in the United States and another half are dealing with these multiple disasters in the rest of the world.

Lucas Perry: So, I have a few bullet points here that you could expand upon or correct about this ladder of escalation as you describe it. So at first, there’s the humanitarian interventions where the military is running around to solve particular humanitarian disasters like in Tacloban. Then, there’s limited military operations to support allies. There’s disruptions to supply chains and the increase of failed states. There’s the conflict over resources. There’s internal climate catastrophes and complex catastrophes, which you just mentioned, and then there’s what you call climate shock waves, and finally all hell breaking loose where you have multiple failed states, tons of mass migration, a situation in which no state no matter how powerful is able to handle.

Michael Klare: Climate shock wave would be a situation where you have multiple extreme disasters occurring simultaneously in different parts of the world leading to a breakdown in the supply chains that keep the world’s economy afloat and keep food and energy supplies flowing around the world, and this is certainly a very real possibility. Scientists speak of clusters of extreme events, and we’ve begun to see that. We saw that in 2017 when Hurricane Harvey was followed immediately by Hurricane Irma in Florida, and then Hurricane Maria in the Caribbean and Puerto Rico and the US military responded to each of those events, but had some difficulty moving emergency supplies first from Houston to Florida, then to Puerto Rico. At the same time, the west of the US was burning up. There were multiple forest fires out of control and the military was also supplying emergency assistance to California, Washington State, and Oregon.

That’s an example of clusters of extreme events. Now looking into the future, scientists are predicting that this could occur in several continents simultaneously. And as a result, food supply chains would break down, and many parts of the world rely on imported grain supplies, or other food stuffs and imported energy. And in a situation like this, you could imagine a climate shockwave in which trade just collapses and entire states suffer from a major catastrophe, food catastrophes leading to state collapse and all that we’ve been talking about.

### 1NC

Pharma PIC

#### The United States federal government should substantially increase prohibitions on patent thickets, except in the pharmaceutical sector.

### 1NC

T Per Se

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

#### Limits---many standards, requiring distinct answers, make the topic unmanageable.

#### Ground---fringe standards dodge links and allow bidirectional permissiveness.

## Disease ADV

### Disease ADV---1NC

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

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

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

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

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

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

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

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

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

#### Ideological judges will gut the plan

John Newman 19, Professor of Law at the University of Miami School of Law and Former Attorney with the U.S. Department of Justice Antitrust Division, JD from the University of Iowa College of Law, BA from the Iowa State University of Science & Technology, “What Democratic Contenders Are Missing in the Race to Revive Antitrust”, The Atlantic, 4/1/2019, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions.

But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well.

No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area.

Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades.

But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up.

Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it.

If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench.

Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power.

Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing.

And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017.

Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench.

Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system.

There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

#### Antitrust is developed by adjudication---that creates an unpredictable and unenforceable patchwork

Rohit Chopra 20, Commissioner of the Federal Trade Commission, and Lina M. Khan, Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission, “The Case for "Unfair Methods of Competition" Rulemaking”, University of Chicago Law Review, 87 U. Chi. L. Rev. 357, March 2020, Lexis

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8

#### Courts lack expertise to make correct decisions. That allows continued market distortion.

Dr. Herbert Hovenkamp 18, PhD in American Civilization from the University of Texas, JD from the University of Texas School of Law, BA from Calvin College, MA in American Literature from the University of Texas, James G. Dinan University Professor at Penn Law and Wharton School of Business at the University of Pennsylvania, Fellow of the American Academy of Arts and Sciences, “The Rule of Reason”, Florida Law Review, 70 Fla. L. Rev. 81, January 2018, Lexis

II. BURDENS OF PROOF, QUALITY OF EVIDENCE, AND THE "QUICK LOOK"

A. Cost Savings from the Per Se Rule?

Antitrust policy should strive to reduce the social costs of anticompetitive behavior, which has two distinct components. One is the net social costs of anticompetitive price increasing or output reducing conduct and the private measures taken to defend against it, offset by any economic benefits. Second are administrative costs, including error costs, of operating the enforcement system.

One must assume that a full-blown rule of reason inquiry is much costlier than analysis under the per se rule. Applying the rule of reason typically requires expert testimony identifying a relevant market or alternative mechanisms for estimating market power, as well as some evidence that purports to measure actual anticompetitive effects. 103 By contrast, the per se rule requires only proof that a particular type of conduct has occurred. Thus, the rule of reason is justifiable only to the extent that it provides superior outcomes.

Administrative costs include not only the costs of litigation, whether terminated by settlement, dispositive motion, or trial, including appeals, but also the cost of detecting violations, of determining whether to sue, as well as of antitrust compliance with whatever the rule happens to be. Error costs are particularly relevant to compliance costs. For example, an unduly harsh tying rule may influence firms to avoid socially beneficial tying. By contrast, an overly lenient predatory-pricing rule may yield excessive anticompetitive predation. 104

[\*99] Excessive complexity can increase error costs just as much as excessive simplicity. Antitrust cases in the United States are decided by generalist judges, many of whom lack economics training. Further, facts are often determined by juries, who frequently lack any relevant training whatsoever. In such cases increased complexity can produce poorer rather than better outcomes. 105 As a result, a per se rule that is easily administered but right only 80 percent of the time may actually be preferable to an open-ended rule of reason query with an arbitrary and indeterminate error rate.

#### No impact to patent trolls---the problem is structural.

Mark A. Lemley & A. Douglas Melamed 13, Director of the Program in Law, Science & Technology and William H. Neukom Professor of Law at Stanford Law School, J.D. from the University of California, Berkeley School of Law; Senior Vice President and General Counsel of Intel Corporation, J.D. from Harvard Law School, “Missing the Forest for the Trolls,” Columbia Law Review, Vol. 113, December 2013, accessed via Lexis

Nonetheless, we think the focus on patent trolls obscures a more complex set of challenges confronting the patent system. In this Article, we make three points about the problems commonly associated with trolls. First, patent trolls are not a unitary phenomenon. We see at least three different troll business models developing, and those models have different effects on the patent system. Second, patent assertions by practicing entities can create just as many problems as assertions by patent trolls. The nature of many industries obscures some of the costs of those assertions, but that does not mean they are cost-free. In addition, practicing entities are increasingly engaging in "patent privateering," in which product-producing companies take on many of the attributes of [\*2121] trolls. Put differently, while trolls exploit problems with the patent system, they are not the only ones that do so. Third, many of the problems associated with trolls are in fact problems that stem from the disaggregation of complementary patents (patents that cover technologies used together in the same products) into too many different hands. That in turn suggests that aggregators might be reducing, not worsening, these problems (though, as we will see, the overall effects are ambiguous) and that "patent privateers" that spin off patents in order for others to assert them might make things worse. For this reason, patent reformers and antitrust authorities should worry less about aggregation of patent rights and more about disaggregation of those rights, sometimes accomplished by spinning them out to others.

Understanding the economics of patent assertions by both trolls and practicing entities allows us to move beyond labels and the search for "bad actors" and to focus instead on aspects of the patent system itself that give rise to the problems and on specific, objectionable conduct in which both trolls and practicing entities sometimes engage. Patent trolls alone are not the problem; they are a symptom of larger problems with the patent system. Treating the symptom will not solve the problems. In a very real sense, critics have been missing the forest for the trolls. Exposing the larger problems allows us to contemplate changes in patent law that will actually tackle the underlying pathologies of the patent system and the abusive conduct they enable.

#### Litigation against patent trolls isn’t burdensome.

Jean Xiao 16, J.D. and Ph.D. candidate in Law and Economics from the Vanderbilt University Law School, Senior Articles Editor for the Vanderbilt Law Review, B.A. in Economics from Vanderbilt University, “In Defense of Patent Trolls: Patent Assertion Entities as Commercial Litigation Funders,” Chicago-Kent Journal of Intellectual Property, Vol. 16, 11-22-2016, accessed via Lexis

Second, critics gripe about the costs of troll lawsuits. 42 Bessen and Meurer (2014) estimated the sum of direct costs on defendants of nonpracticing entity (including troll) litigation to be approximately twenty-nine billion dollars. 43 Beyond direct lawsuit expenses, opponents argue that troll patent assertions also impose indirect costs, such as the disruption of business operations and loss of market share. 44 When examining the time period from January 2007 to October 2011, Bessen et al. (2011) found that defendants' total loss of wealth resulting from non-practicing entity litigation was eighty-three billion dollars per year. 45

[\*43] While patent cases financially burden defendants, they also necessitate large capital investments from plaintiffs including trolls--a point that critics have failed to recognize. 46 For a median-value patent lawsuit between one and twenty-five million dollars, a plaintiff pays about two million dollars in litigation costs. 47 Unless a troll believes that the expected value of the case exceeds the expenses, it will not initiate the legal action. 48 Further, there is no empirical evidence that suggests troll litigation imposes higher costs on defendants than that of practicing entities. In fact, patent assertions by practicing entities are likely more burdensome for defendants due to the discovery needed to investigate these entities' products or services. 49

#### Antitrust over patents fails.

Matthew G. Sipe 16, Law Clerk for Judge Kathleen M. O’Malley on the United States Court of Appeals for the Federal Circuit, J.D. from Yale Law School, “Patents v. Antitrust: Preempting Conflict,” American University Law Review, Vol. 66, December 2016, accessed via Lexis

Paradoxically, antitrust involvement in the patent sphere itself occasionally generates anticompetitive problems. A key example of this occurrence comes from the standard-setting context. As noted in Section III.A, SSOs are concerned with the potential for a patent owner to charge an exorbitant royalty rate after its technology has been incorporated into a standard and implementers are thereby effectively "locked-in." 316 As a result, before incorporating a known patented technology into a standard, SSOs will frequently require patent owners to agree in advance to license its technology on certain favorable terms. 317

However, SSOs are constrained in their ability to engage in such ex ante negotiations due to antitrust interference. An SSO requiring all standard-implicating patent owners to license at a given rate may be characterized as a price-fixing cartel--a serious Sherman Act violation. 318 As a result, SSOs use [\*471] "licensing obligations [that] are left intentionally vague to avert price-fixing liability." 319 Typically, these obligations take the form of nebulous "FRAND" terms: the patentee is asked to agree to license on "fair, reasonable, and non-discriminatory terms." 320

This intentional ambiguity unfortunately comes at the cost of enforceability: Despite the appeal of FRAND commitments, a

consistent, practical, and readily enforceable definition of FRAND has proven difficult to achieve. Virtually no [SSO] defines what this elusive phrase means, and many [SSOs] affirmatively disclaim any role in establishing, interpreting, or adjudicating the reasonableness of FRAND licensing terms. In fact, some [SSOs] go so far as to prohibit discussions of royalties and other licensing terms at [SSO] meetings, making the development of any consensus view unlikely. 321

As a result, there has been considerable litigation between patentees and SSOs over the meaning of their FRAND obligations--leaving courts to the thankless task of determining, for example, what a "reasonable" price for a given patent license is. 322 Scholars and policymakers have already proposed antitrust intervention as a solution to these attempts to "exploit the ambiguities" of FRAND commitments. 323 But these proposals consistently fail to observe the role that antitrust played in creating and perpetuating these ambiguities in the first place.

In other words, antitrust law has created an anticompetitive problem in the patent sphere, and the existence of that anticompetitive problem is now being used as a justification for greater antitrust intervention. In cases such as this, [\*472] preemption offers an out. Antitrust intervention, on the other hand, merely ensures its own necessity.

#### The patent system is resilient.

Mark A. Lemley 16, Director of the Program in Law, Science & Technology and William H. Neukom Professor of Law at Stanford Law School, J.D. from the University of California, Berkeley School of Law, “The Surprising Resilience of the Patent System,” Texas Law Review, Vol. 95, No. 1, November 2016, accessed via HeinOnline

1. Good: The Sky Isn't Falling.-First, the good news: we are unlikely to break the patent system, whether by passing patent reform legislation or by failing to pass it. Much of the academic and policy debate over patent law in the past twenty years has focused on the relative dangers of overprotection and underprotection. Both sides have worried that changes to the patent system will kill the goose that laid the golden egg, retarding, rather than promoting, innovation. Those who worry about overprotection fear that patent trolls will impose a tax on true innovators and that too many strong patent rights will make cumulative innovation and bringing products to market harder.23 8 Those who (more recently) worry about underprotection tout the U.S. patent system as the primary reason for our national lead in innovation, and fear that weakening that system will discourage invention and prevent good ideas from getting to market.239

The evidence, however, suggests that both of these concerns are overblown. Radical changes in both patent substance and procedure that strengthened the hand of patent owners during the 1980s and 1990s and brought us a deluge of patent trolls didn't break the patent system, worries about the patent crisis notwithstanding. Indeed, they didn't seem to have a significant causal effect on patent applications, patent grants, patent lawsuits, or patent judgments.

By the same token, the more recent reforms to the patent system weakening patent rights will also not break the patent system. Indeed, those reforms too don't seem to have much changed the ever-increasing number of patent applications, patent grants, or patent lawsuits. Nor have they reduced patentees' win rate in court or the damage awards they receive when they do win. We don't, of course, know whether the courts and Congress will continue to cut back on the power of patent owners. There is some reason to think the pendulum is slowing down.240 But previous changes to the substance of patent law haven't derailed the patent system. Indeed, they haven't even changed its momentum very much. The same is likely to be true for the foreseeable future. The good news, then, is that the sky isn't falling. We aren't about to destroy the patent system or halt innovation.

#### The risk of existential disease is .01%

Dr. Ilan Noy 22, Chair in the Economics of Disasters and Climate Change at the Victoria University of Wellington, PhD from the University of California, Santa Cruz, and Dr. Tomáš Uher, PhD, Professor at Masaryk University, “Four New Horsemen of an Apocalypse? Solar Flares, Super-volcanoes, Pandemics, and Artificial Intelligence”, Economics of Disasters and Climate Change, 1/15/2022, SpringerLink

High-Mortality Pandemics

A naturally occurring pandemic (i.e., not from an engineered pathogen) that would threaten human extinction is a very small probability event. However, historical accounts point to several instances where disease spread played an important role in causing very significant decline of specific populations. For example, the introduction of novel diseases to the Native American population during the European colonization of the Americas had deadly consequences. It is difficult to distinguish the effects of the diseases that came with the Europeans from the war and conflict they also brought with them. Nevertheless, during the first hundred years of the colonization period, the American population may have been reduced by as much as 90% (Ord 2020).

Moreover, two major pandemic events, the Justinian Plague in the sixth century and the Black Death in the fourteenth century appear to have been severe enough to cause a significant population decline of tens of percent in the populations they affected. Both events are believed to have been caused by plague, an infectious disease caused by the bacteria Yersinia Pestis (Christakos et al. 2005; Allen 1979). While there is a certain degree of uncertainty involved in studying these events’ societal impacts, historical accounts in combination with modern scientific methods provide us with some valuable insights into the effects they may have had on the societies of the time.

With respect to the possibility of a future catastrophic global pandemic, it appears that this risk is increasing significantly along with the advances in the field of synthetic biology and the rising possibility of an accidental or intentional release of an engineered pathogen. While some of the scientific efforts in the field of synthetic biology are directed towards increasing our understanding and our ability to prevent future catastrophic epidemic threats, the risk stemming from these activities is non-trivial, and may outweigh their benefits.

The Justinian Plague

The Justinian Plague severely affected the people of Europe and East Asia, though estimates of its overall mortality vary. Focusing exclusively on the first wave of the pandemic (AD 541–544), Muehlhauser (2017) suggests the pandemic was associated with a 20% mortality in the Byzantine empire. This estimate is based on the mortality rate estimated for the empire’s capital, Constantinople, by Stathakopoulos (2007) to produce a death toll of roughly 5.6 million. For a longer time span, AD 541 to 600, which included subsequent waves of the plague, scholars estimate a higher mortality rate of 33–50% (Allen 1979; Meier 2016).

The demographic changes associated with this high mortality led to a significant disruption of economic activity in the Byzantine empire (Gârdan 2020). A decline in the labour force caused a decline in agricultural production which led to food shortages and famine (Meier 2016). Trade also collapsed. Decreased tax revenues caused by the population decline initiated a major fiscal contraction and consequently a military crisis for the empire (Sarris 2002; Meier 2016). In the longer run, however, the massive reduction of the labour force appears to have had a positive economic effect for the surviving laborers, as the increased marginal value of labour caused a rise in real wages and per capita incomes. These beneficial effects for the survivors were also observed after the Black Death (Pamuk and Shatzmiller 2014; Findlay and Lundahl 2017).

The mortality and the disruption of activity the plague caused in the Byzantine empire also led to further direct and indirect cultural and religious consequences. Meier (2016) particularly highlights the plague’s indirect effect of an increase in liturgification (a process of religious permeation and internalization throughout society as defined by Meier 2020), the rise of the Marian cult, and the sacralization of the emperor.

The direct and indirect effects of the plague also appear to have had far-reaching and long-term political repercussions. The societal disruptions caused by the plague are believed to have significantly weakened the position of the Byzantine empire and arguably led to the decline of the Sasanian empire (Sabbatani et al. 2012). Interestingly, the pandemic indirectly favoured the nomadic Arab tribes who were less vulnerable to the contagion while traveling through desert and semi-desert environments during the initial expansion of Islam (Sabbatani et al. 2012).

Of note is the absence of a scientific consensus on the severity of the Justinian Plague’s impacts. For example, Mordechai and Eisenberg (2019) and Mordechai et al. (2019) argue against the maximalist interpretation of the historical evidence described above. They suggest that the estimated mortality rate of the plague is exaggerated, and that the pandemic was not a primary cause of the transformational demographic, political and economic changes in the Mediterranean region between the sixth and eighth century. Recently, White and Mordechai (2020) highlighted the high likelihood of the plague having different impacts in the urban areas of the Mediterranean outside of Constantinople.

The Black Death

The Black Death which ravaged Europe, North Africa, and parts of Asia in the middle of the fourteenth century is considered the deadliest pandemic in human history and potentially the most severe global catastrophe to have ever struck mankind. With respect to its mortality, Ord (2020) argues that the best estimate of its global mortality rate is 5–14% of the global population, largely based on Muehlhauser (2017).

The plague created a large demographic shock in the affected regions. It reduced the European population by approximately 30–50% during the 6 years of its initial outbreak (Ord 2020). It took approximately two centuries for the population levels to recover (Livi-Bacci 2017; Jedwab et al. 2019b). As the mortality rates appear to have been the highest among the working-age population, the effects on the labour force were acute (Pamuk 2007).

The plague's mortality, morbidity and the associated societal disruption led to a major decline in economic output both in Europe (Pamuk 2007) and the Middle East (Dols 2019). In Europe, however, this decline in economic output was smaller than the decline in population; output per capita began to increase within a few years of the initial outbreak (Pamuk 2007).

The large demographic shock caused by the plague led to a shift in the relative price of labour which, similarly to the Justinian Plague, had a positive impact on wages. With a reduced labour force, real wages and per capita incomes in many European countries increased and were sustained at higher levels for several centuries (Voigtländer and Voth 2013a; Jedwab et al. 2020; Pamuk and Shatzmiller 2014). Scott and Duncan (2001) point out that real wages approximately doubled in most countries of Europe in the century following the plague.

An additional insight into the long-run relationship between the Black Death’s mortality and per capita incomes in Europe is offered by Voigtländer and Voth (2013a). Using a Malthusian model, they suggest that over time, the rise in income caused by the plague’s mortality led to an increase in urbanization and trade. Furthermore, the increased tax burden (per capita), combined with the contemporary political climate, increased the frequency of wars. Consequently, higher urbanization and trade led to an increase in disease spread which along with a more frequent war occurrence caused a long-term increase in mortality and a further positive effect on per capita incomes. In this way, the Black Death appears to have created a long-lasting environment of high-mortality and high-income specifically in Western Europe, functioning as an important contributing factor to its economic growth in the next centuries (Alfani 2020). However, while in Western Europe incomes remained elevated over the next centuries, in Southern Europe they began to decline as the Southern European population started recovering after AD 1500 (Jedwab et al. 2020).

Apart from the positive effects on wages, the increased marginal value of labour combined with other factors had further economic and social implications. A decreased relative value of land and the lack of workforce to use it effectively caused land prices and land rents to decrease (Jedwab et al. 2020; Pamuk 2007). A decreased marginal value of capital assets in general led to a lapse in the enforcement of property rights (Haddock and Kiesling 2002). Interest rates and real rates of return on assets also decreased (Pamuk 2007; Jedwab et al. 2020; Pamuk and Shatzmiller 2014; Jordà et al. 2021; Clark 2016).

Higher wages in combination with a relative abundance of land increased people’s access to land/home ownership, likely reducing social inequality (Alfani 2020). On the other end of the income distribution, decreased incomes for landowners led to an overall decrease in income inequality (Jedwab et al. 2020; Alfani and Murphy 2017).

With respect to the effects on agriculture, the structure of agricultural output moved away from cereals to other crops following the plague. Furthermore, the workforce shortages and the incentives to increase the labour supply are believed to have caused a shift from male-labour intensive arable farming towards pastoral farming, consequently raising the demand for female labour (Voigtländer and Voth 2013b). However, while the Black Death appears to have caused certain structural agricultural changes, Clark (2016) finds no effect of the plague on agricultural productivity in the long run.

In terms of other social consequences, the evidence suggests that the plague's mortality reduced labour coercion, particularly throughout Western Europe (Jedwab et al. 2020; Haddock and Kiesling 2002; Gingerich and Vogler 2021). The increased bargaining power of labour caused by the plague’s demographic shock contributed to and accelerated the decline in serfdom and development of a free labour regime. Gingerich and Voler (2021) further argue that these effects may have had long-lasting political implications and that a decline of repressive labour practices (such as serfdom) permitted the development of more inclusive political institutions. They find that the regions with the highest mortality were more likely to develop participatory political institutions and more equitable land ownership systems. They find that centuries later, In Germany, the populations in these high-mortality regions were less likely to vote for Hitler’s National Socialist (Nazi) Party in the 1930 and 1932 elections in Germany.

However, the positive effects on the emergence of freer labour did not take place in Eastern Europe, where serfdom was sustained and even intensified. Robinson and Torvik (2011) attempt to explain this asymmetry arguing that these differential outcomes may have been caused by the varying power and quality of institutions. The authors suggest that opportunities generated by the increased bargaining power of labour, in an environment of weak institutions, were less likely to lead to a positive effect than in the case of regions with stronger institutions (with more robust rule-of-law or less corrupt or predatory practices).

Apart from causing a negative demographic shock to the affected populations, the Black Death appears to have caused further indirect demographic changes, particularly in Western Europe. The increased employment opportunities for females caused by worker shortages and a higher female labour demand led to a decline in fertility rates and an increased age of marriage (Voigtländer and Voth 2013b). This demographic transition to a population characterized by lower birth rates likely helped to preserve the high levels of per capita incomes and contributed to further economic development of certain parts of Europe, enabling it to escape the “Malthusian trap” in the following centuries (Pamuk 2007). Siuda and Sunde (2021) confirm the pandemic’s effect on the accelerated demographic transition empirically, as they find that greater pandemic mortality was associated with an earlier onset of the demographic transition across the various regions of Germany.

Unfortunately, the Black Death also led to an increase in the persecution of Jews (Finley and Koyama 2018; Jedwab et al. 2019a). Interestingly, Jedwab et al. (2019a) were able to estimate that in the case of regions with the highest mortality rates, the probability of persecution decreased if the Jewish minority was believed to benefit the local economy.

It is important to highlight that the long-term repercussions of the Black Death were highly asymmetrical. While in Western Europe the pandemic appears to have led to some long-term dynamic shifts associated with increased wages, decreased inequality and a decrease in labour coercion, this was not the case for other regions. A decrease in wages was observed for example in Spain (Alfani 2020) and Egypt. In Spain, the plague's demographic impact on an already scarce population caused a long-lasting negative disruption to the local trade-oriented economy. The workforce disruption in Egypt led to a collapse of the labour-intensive irrigation system for growing crops in the Nile valley, with consequent disastrous effects on the rural economy (Alfani 2020). Borsch (2005) argues that the economic decline in Egypt caused by the Black Death “put an end to the power in the heartland of the Arab world” (p. 114) and to the impressive scientific and technological developments that came out of this region.

A consensus for an explanation of the Black Death’s varied impacts across regions, and their determinants, does not appear to exist. However, several researchers attempt to provide partial insights. For example, Alfani (2020) considers the differential outcomes to be broadly dependent upon the initial conditions in each region. More specifically, both Robinson and Torvik (2011) and Pamuk (2007) propose that the asymmetry of impacts can largely be explained by the differences in the institutional environments of the affected societies.

It is argued that the Black Death defined the threshold between the medieval and the modern ages, similarly to the way the Justinian Plague did for antiquity and the Middle Ages (Horden 2021). Furthermore, the differential long-term outcomes of the Black Death likely provided a significant contribution to the so-called “Great Divergence” between Europe and the rest of the world and the “Little Divergence” between North-western and Southern and Eastern Europe (Jedwab et al. 2020; Pamuk 2007).

From this perspective, it would seem rational to conclude that apart from causing substantial and long-term demographic, economic, political, and cultural changes, both the Justinian Plague and the Black Death likely significantly altered the course of human history.

Considering the above, it is not unreasonable to expect that a pandemic of a similar magnitude to these past catastrophes would do the same in the present day. However, what societal impacts a pandemic of similar or higher mortality would inflict in the twenty-first century has not really been the subject of any study, as far as we were able to identify. A possibility exists, given the newly developed capacity of humanity to create new pathogens, that the outcomes of a future catastrophic pandemic will be even more adverse than those of the Justinian Plague and the Black Death.

Probability

In terms of the probability of naturally occurring pandemics, an informal survey of participants of the Global Catastrophic Risk Conference in Oxford in 2008 shows that the median estimate for a probability of a natural pandemic killing more than 1 billion people before the year 2100 was surveyed to be 5%, and the probability of such pandemic to cause human extinction was 0.05%. Ord (2020) uses a slightly broader definition of existential risk, which apart from human extinction also includes a permanent reduction of human potential. He estimates the probability of an existential risk stemming from a natural pandemic in the next 100 years to be 0.01%.

#### ABR won’t get close to extinction, intervening actors solve it, their internal link can’t

Ed Cara 17, Science Writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “The Attack Of The Superbugs,” http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here. Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives. For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty. Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess. “There has been a lot of work done the last couple of years, much of it spurned by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture. In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains. Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging. Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC. Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race. But barring the calvary showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability. The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

#### No bioterror impact---it assumes every warrant.

Glenn Cross 21, PhD, Former Deputy National Intelligence Officer, Weapons of Mass Destruction, "Biological Weapons in The ‘Shadow War’," War on the Rocks, 11/09/2021, https://warontherocks.com/2021/11/biological-weapons-in-the-shadow-war/.

The threat of terrorists using biological agents exists but is very limited. The fear of nonstate actors using biological agents rose with Aum Shinrikyo’s 1995 failed efforts to spread botulinum and anthrax in Japan. Fears of bioterror reached its most recent crescendo with the 2001 anthrax letter mailings, coming as they did within weeks after the 9/11 attacks. The threat of further bioterror attacks, however, never materialized.

Despite the fact that terrorist biological weapons attacks have not materialized since the Amerithrax scare, some continue to argue that the supposed ease and lower cost of biological weapons development, production, and use along with the societal disruption of COVID-19 has incentivized bad actors to adopt biological weapons. These concerns have been echoed by others who assume that misuse is inevitable and following the COVID-19 example will result in mass casualties and crippling political, societal, and economic repercussions.

However, the bioterror threat seems to have diminished — not grown — since the 2001 Amerithrax letter mailings. The core al-Qaeda biological weapons efforts were first envisioned in the late 1990s and began in earnest shortly afterward. Yet the U.S. invasion of Afghanistan and the fall of the Taliban in late 2001 effectively disrupted al-Qaeda’s biological weapons work which largely centered on anthrax. Left without a suitable safe haven, al-Qaeda was never able to reconstitute its biological weapons efforts. The Taliban’s return to power in Afghanistan, however, may result in a reemergence of al-Qaeda and its biological weapons ambitions. Time will tell whether the Taliban now will grant safe haven to al-Qaeda that could be used for biological weapons work. What is undoubted is that the Taliban and al-Qaeda have a shared history and have continued to work closely together. Without a presence in Afghanistan, U.S. intelligence will have a more difficult time detecting any resurgent al-Qaeda biological weapons efforts.

The threat of a biological weapons effort by the Islamic State in Iraq never materialized, although the group did manage to produce and use chemical weapons agents until that program was effectively disrupted. Other terrorist groups’ interest in biological weapons has been rudimentary with a focus predominately on toxins such as ricin and botulinum. U.S. domestic extremists, self-radicalized individuals, and lone actors also have gravitated toward ricin, but no known casualties have resulted from the decades-long interest in ricin.

Some analysts, however, argue that the life science revolution and global proliferation of related scientific and technical capabilities has opened a Pandora’s Box of biothreats. The argument goes that the rapid revolution in genetic engineering — including synthetic biology — the DIY bio movement, and the advent of technologies like CRISPR (acronym for “clustered regularly interspaced short palindromic repeats”) makes their misuse likely. However, as noted in the 2018 National Academies of Science report, Biodefense in the Age of Synthetic Biology, the large-scale production and delivery of biological weapons agents is inherently difficult, with biological weapons use favoring small-scale, highly targeted attacks.

#### Innovation is high.

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.

# 2NC

## Torts CP

### Perm: Do Both---2NC

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

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

E. Alternatives

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

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

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

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

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

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

### Perm: Do the CP---2NC

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

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

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

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

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

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

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

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

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

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

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

#### ‘Scope’ is their breadth

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

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

#### ‘Of’ means deriving from them

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

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

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

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

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

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

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

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

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

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

### Perm: Other Issues---2NC

#### The commercial setting of antitrust is necessary to broaden the tort

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

Introduction

Vertical restraint 1 cases once constituted an integral part of antitrust jurisprudence. They typically involved discount dealers 2 who alleged that a manufacturer had terminated their dealerships or supply arrangements pursuant to a price-related conspiracy between the manufacturer and other, full-priced, dealers. 3 In the past, these terminated dealers would likely have prevailed under section 1 of the Sherman Act 4 --or at least survived motions to dismiss or for summary judgment--so long as they could establish a causal connection between the other dealers' price complaints and the manufacturer's subsequent actions.

The influence of the Chicago School on antitrust analysis in the last two decades, however, has completely changed the legal landscape of vertical restraints. 5 The Chicago School's minimalist policy toward antitrust [\*36] enforcement in general is well-known. 6 On vertical issues, its approach is even more radical. 7 In fact, several prominent Chicago proponents advocate defacto legality for almost all vertical restraints, except those imposed by a monopolist or near-monopolist manufacturer. 8 Ultimately, the Chicago School's views proved persuasive to the Supreme Court. In two notable decisions rendered in the 1980s, Monsanto Co. v. Spray-Rite Service Corp. 9 and Business Electronics Corp. v. Sharp Electronics Corp., 10 the Court effectively dismantled the decades old law on vertical restraints. 11 While purporting to uphold the per se illegality rule against vertical price fixing, 12 the Court redefined the requirements for establishing such a case [\*37] so narrowly as to make it almost impossible to prove in the real world. 13

When a previously existing avenue for seeking justice is blocked, those who can no longer obtain redress inevitably turn to, or develop, a more accommodating body of law. It is no surprise, then, that the use of state business tort law, 14 particularly the claims known as "tortious interference," 15 has surged. 16 It is probably also no coincidence that an increasing number of federal and state laws have been passed in recent years to protect terminated dealers in a nonantitrust context. 17 In a sense, tortious interference and other related state remedies have stepped in to fill a vacuum created in antitrust law by a relentless adherence to economic efficiency. This move to state law has caused some critics to contend that tortious interference fundamentally conflicts with federal antitrust law when it condemns as "tortious" the very same conduct that antitrust law sees fit to permit for reasons of efficiency. 18 This Article disagrees with [\*38] this critique and with the basic assumptions on which it is founded.

Section I of this Article will briefly relate the ascendancy of the Chicago School. It will discuss how the Chicago approach to vertical restraints has rendered federal antitrust law virtually irrelevant in dealer termination cases, enhancing the allure of tortious interference as a supplemental or substitute claim. Section II will defend tortious interference against a few general critiques. It will begin by examining the features of tortious interference that account for the tort's adaptability for use in what were traditionally antitrust cases. It will then analyze objections to the tort's vagueness and to its indifference to the efficient breach theory of contract law. With respect to the vagueness criticism, this Article argues that indeterminacy, even in commercial settings, has its own value and actually furthers policies underlying tortious interference. With respect to the "efficient breach" critique, this Article contends that nothing precludes tortious interference from embracing societal values that are not reflected in the efficient breach theory of contract law. Thus, tortious interference cases are not "wrong" even if they transgress the efficient breach theory. Section III will discuss the reproach that the tort ignores efficiency principles underlying federal antitrust law. The Article posits that neither the Constitution nor public policy requires tortious interference to conform to federal antitrust policy. The tort exhibits none of the characteristics that warrant preemption under the Supremacy Clause or otherwise offend the "dormant" Commerce Clause. Furthermore, as a distinct body of law that serves different interests than federal antitrust law, the tort should not be bound by the same rules.

### Solvency---2NC

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

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

I. THE STANDING CLAIM

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

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

A. Interference

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

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

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

B. Exclusivity

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

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

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

C. Marketing

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

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

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

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

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

[\*2043] D. Other Misconduct

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

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

E. Competition Law as Private Law

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

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

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

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

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

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

II. Private antitrust enforcement

A. Subsidiary Contribution

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

### Solvency---Noerr---AT: Antitrust Key---2NC

#### 3. Determining that behavior is unlawful interference completely overturns Noerr and reverses First Amendment protections wholesale---the doctrine is independent of antitrust and applies equally to tort law

Thomas A. Waldman 92, JD from at UCLA Law School, “SLAPP Suits: Weaknesses in First Amendment Law and in The Courts' Responses to Frivolous Litigation”, UCLA Law Review, 39 UCLA L. Rev. 979, April 1992, Lexis

B. The Noerr-Pennington Doctrine: An Expansive View of the Right to Petition

The Noerr-Pennington doctrine is a product of antitrust law and, in sum, provides that petitioning the government to take anticompetitive action does not violate antitrust law. Some commentators have interpreted the doctrine to mean that petitioning is merely an exception to Congress's rules on antitrust. 94 If so, then courts have misapplied the Noerr-Pennington doctrine in non-antitrust cases. But the Supreme Court has implied that the doctrine is grounded in the First Amendment right to petition and not in a statutory interpretation of the antitrust laws. 95 [FOOTNOTE] 95 See *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (holding that the constitutional right to petition prevented Mississippi from holding the NAACP liable under an interference theory for boycotting Claiborne, Mississippi businesses to effect a change in segregationist government policies). [END FOOTNOTE] Lower courts have used the Noerr-Pennington doctrine in both antitrust and non-antitrust cases. The most vigorous application of the doctrine outside of antitrust has occurred in SLAPP suits, where the right to petition is raised as a defense to tort claims; some courts have read Noerr-Pennington as establishing an absolute, constitutional privilege against tort claims for bona fide petitioning activity.

#### 4. The CP reverses Noerr in patent law---applying tortious interference to patent assertions flips the doctrine

Paul R. Gugliuzza 15, Associate Professor at the Boston University School of Law, “Patent Trolls and Preemption”, Virginia Law Review, 101 Va. L. Rev. 1579, October 2015, Lexis

Nevertheless, lower courts have widely concluded that Noerr's First Amendment aspects require the doctrine to be applied to all types of civil claims seeking to impose liability for litigation conduct, not just to antitrust claims. 197 For example, courts have applied the doctrine to claims of tortious interference, abuse of process, defamation, intentional infliction of emotional distress, and even civil rights claims. 198 In addition, many lower courts have extended Noerr to immunize not only the act of pursuing litigation in court but also statements made in pre-litigation communications. 199 As discussed in more detail below, the Federal Circuit has embraced all of these expansions of Noerr immunity to broadly protect patent holders from any type of civil liability based on their enforcement conduct, whether or not that conduct relates to a pending lawsuit. 200

In a second line of cases involving the Petition Clause, however, the Supreme Court has provided some guidance about the scope of the right to petition when the antitrust laws are not involved, casting doubt on the lower courts' unflinching expansion of Noerr immunity to all types of [\*1613] civil claims. Most notable among those decisions is McDonald v. Smith. 201 In that case, the defendant wrote two letters to the President alleging that the plaintiff, who was being considered for a position as a U.S. Attorney, had engaged in blackmail, extortion, and civil rights violations. 202 The plaintiff did not get the position and sued the defendant for libel. 203 The Court rejected the defendant's argument that the Petition Clause granted him absolute immunity from the libel claim. 204 The Court noted that to accept that argument "would elevate the Petition Clause to special First Amendment status" when, in fact, it "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." 205 Accordingly, the Court reasoned, "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." 206 Because the relevant state law required the plaintiff to prove that the defendant acted with malice, which was consistent with the Court's precedent on the right to free speech, the Court held that the right to petition did not preclude the libel suit. 207

The Supreme Court's decision in McDonald casts doubt on the lower courts' grant of Noerr immunity to defendants faced with non-antitrust claims. Noerr, recall, was arguably based on an interpretation of the Sherman Act in light of the First Amendment right to petition. 208 If the Sherman Act is removed from the picture, the defendant's sole protection is the Petition Clause, and McDonald appears to be the more relevant case. 209 In McDonald, the Court suggested that the Petition Clause allows state tort law room to operate, so long as that state law does not [\*1614] condemn speech that is protected by the First Amendment. In many scenarios, the First Amendment does not protect speech that is intentionally false or deceptive, 210 such as outlandish claims for patent infringement damages intended to elicit nuisance-value settlements from small or unsophisticated businesses or organizations. The law can therefore condemn those statements without violating the patent holder's constitutional rights.

Although the Supreme Court has recently suggested that false statements are not categorically exempt from First Amendment protection, 211 the Court has reiterated that false statements may be condemned when they produce or are likely to produce "specific harm to identifiable victims," 212 such as those under the common law torts of fraud and defamation. The types of false statements commonly made during patent enforcement, such as misrepresentations about the strength of the patents or how many other businesses or organizations have already licensed the patents, can cause numerous tangible harms. An accused infringer, for instance, might be intimidated into purchasing an unnecessary license. Also, if the false statements are directed toward end users, the manufacturer of the relevant product might lose sales or suffer damage to its reputation. Although the First Amendment may impose some limits on the patent enforcement conduct that may be condemned, 213 requiring objective baselessness as a prerequisite to all claims, as the Federal Circuit [\*1615] does, seems to provide defendants with more protection than the Constitution actually mandates. 214

## Antitrust PIC

### AT: Anti-Vaxxers---2NC

#### CP solves backlash

Roland Pierik 16, Associate Professor of Legal Philosophy, University of Amsterdam, “Mandatory Vaccination: An Unqualified Defence,” Journal of Applied Philosophy, 5-18-2016, Wiley

Section 'A Defence of Mandatory Vaccination' presented a normative defence of mandatory vaccination against the measles, while Section 'A Legal Justification of Mandatory Vaccination' argued that unconditional mandatory vaccination laws fit within the legal framework of liberal democracies. Some, however, present a pragmatic counter-argument: unconditional mandatory laws will undermine herd immunity because it would create a public backlash against voluntary vaccination and will galvanise anti-vaccination groups. This section unpacks this claim by analysing the effect mandatory vaccination laws on three relevant categories of parents: those who wholeheartedly endorse vaccination, steadfast vaccine denialists, and indecisive parents. It is unlikely that voluntary vaccination would be affected by introducing mandatory laws. After all, why would those convinced by the beneficial effect of vaccination suddenly become civilly disobedient once refusers are also legally obligated to vaccinate – something they already consider prudent behaviour? Vaccine denialists, on the other hand, are already dead-set against vaccination and, as discussed in Section 'Vaccination Objectors and their Motivations', will neither be convinced by the consensus in the mainstream scientific community, nor be open to persuasion by the government. Thus, making vaccination mandatory might not affect the number of denialists; it will only strengthen their opposition. Governments seeking to protect robust herd immunity should primarily focus on the third category: hesitant parents, and separate these parents, who might still be open to persuasion, from the relatively small – albeit very vocal – group of vaccine denialists who will cling to their convictions, no matter what. Those on the fence are a heterogeneous group of parents who seek information about vaccine safety at the precarious moment when having to decide upon the inoculation of their first infant. If it were clear that a legal obligation would discourage them to vaccinate, this fact would provide a pragmatic argument against such a proposal – despite having argued in Section 'A Defence of Mandatory Vaccination' above that it is the most justified policy. Although one can never be sure in advance how citizens will react to a future policy change, empirical research in adjacent discussions suggests that mandatory laws will convince hesitant parents to vaccinate, rather then discouraging them to do so. The more vaccinations are presented as a given by the paediatrician, and the less as a choice, the more hesitant parents are inclined to vaccinate. The choice to vaccinate ‘is not only complicated by an overwhelming amount of information, it is also fraught with emotion. It is often easier in these situations to simply accept what is recommended, especially when that recommendation is made by someone as influential and trusted as their child's pediatrician or family practitioner.’37 By leaving vaccination within the domain of voluntary choice, the government communicates the message that parents have a lot of leeway in this issue. Parents might be less hesitant to vaccinate when the government communicates an explicit message that measles are dangerous for their child and a threat to public health. Horne et al. show that ‘rather than attempting to overcome vaccination myths by convincing parents of the safety of vaccines, provaccine messages might be more effective if they work to convince parents of the dangers of failing to vaccinate their children.’38 Government should communicate that refusing to vaccinate is unacceptable risky behaviour, on a par with not buckling up one's kid in its car seat. One effective way to communicate that message is by making vaccination a non-negotiable legal duty, outside of the ambit of parental freedom of religion and conscience. Finally, it turns out that opposition to vaccination is less immune to governmental policies than message of denialists would suggest. States in the US with stricter regulation and stricter enforcement of exemption laws have higher vaccination rates than states with less strict regulation.39 When vaccination becomes a legal obligation, steadfast denialists might stick to their opposition – and might even accept criminal prosecution. Hesitant parents, on the other hand, might either be convinced by the message that not vaccinating is too dangerous, or might not be willing to risk criminal prosecution and accept the option of vaccination reluctantly. Mandatory vaccination laws might strengthen the social norm that responsible parents vaccinate their children, and generate social pressure amongst parents in day care centres and schoolyards to confirm to this norm. It is very unlikely that it will lead to vaccination coverage of a 100%; but it will definitely increase vaccination rates, and contribute to a more robust herd immunity. In sum, there is no reason to assume that mandatory vaccination laws will dissuade hesitant parents to vaccinate; to the contrary, the arguments above suggest that they might even encourage them. This effect might be strengthened when mandatory laws are accompanied by encouraging policies, for example, by ensuring that parents are not hindered in their attempts get their children vaccinated. The government should offer the relevant vaccinations free of charge, and guarantee the availability of a sufficient supply of safe vaccines. Moreover, the government should set up an effective system of vaccination reminders, and should guarantee that immunisation services are staffed by well-trained health professionals who are able and willing to discuss the concerns and questions of parents. The legal obligation to vaccinate might drive a necessary wedge between vaccine denialists and hesitant parents. Anti-vaccination websites disperse the wildest speculations with anecdotal evidence as ‘alternative medical truths’, while medical specialists can only provide peer reviewed information and are handcuffed by professional standards in their attempts to counter this fear mongering. Denialists have the freedom of speech to disperse their views; but there is something unsettling about the fact that the freedom of speech allows their unscientific and ungrounded claims to have such weight in public debates, diluting the voice of evidence-based science.40 This makes that well-meaning hesitant parents systematically over-perceive the magnitude of the risks involved, causing them to doubt whether the benefits of vaccinations do outweigh their dangers.41 The unequivocal message of a legal obligation to vaccinate might make hesitant less susceptible to information from denialists – their message gets tainted since it incites parents to illegal behaviour. Ironically enough, it might require an actual first-hand experience with an epidemic outbreak to end societal complacency towards non-vaccination and for a political community to question the dominance of the ‘freedom of parental choice’ argument. Indeed, the Disney outbreak of January 2015 led to an outpour of public indignation over the irresponsible behaviour of non-vaccinating parents, and the risks they present to public health. A CNN/ORC poll in the wake of the Disney outbreak found that 78 per cent of respondents believed that vaccinations should be mandatory for healthy children.42 Moreover, in reaction to the Disney outbreak, the state of California discussed Senate Bill 277 to eliminate all nonmedical exemptions. The proposal led, predictably, to heated opposition by denialists but was in the end accepted by a significant margin in the State Legislature.43 An initiative to a referendum to overturn the bill fell (far) short of the number of signatures needed to put the issue on the ballot.44 In addition, legislators and public health professionals have been calling for similar reforms in nearly 30 other states.45 In sum: the pragmatic counterargument is less convincing than it might have looked at first sight. There is no reason to assume that mandatory vaccination laws undermine voluntary vaccination. They might indeed galvanise straightforward vaccine denialists, but they are immune to scientific consensus and persuasion by the government anyway. But, most importantly, there are good reasons to assume that mandatory vaccination laws encourage, rather than discourage hesitant parents to vaccinate their children and to contribute to robust herd immunity.

## Case

### Errors---Link---2NC

#### Errors are inevitable due to vagueness, technical complexity, and non-expert judges and juries

Alan Devlin 10, LLM from the University of Chicago, JSD from the University of Chicago, JD from Stanford University, BBL from the University College Dublin, Law Clerk to the Honorable Amy J. St. Eve, United States District Court for the Northern District of Illinois, and Michael Jacobs, Distinguished Research Professor of Law, DePaul University College of Law, JD from Yale Law School, BA from Dartmouth College, “Antitrust Error”, William & Mary Law Review, 52 Wm. & Mary L. Rev. 75, October 2010, Lexis

B. Antitrust's Unique Vulnerability to Error

More than any other area of civil law, antitrust is error-prone. Its primary statutes are confoundingly ambiguous. 33 Its basic analytical methodology is hopelessly imprecise. The economic terms at the heart of many of its important doctrinal questions-terms such as "cost," "market," "monopoly power," and "entry barrier"-are either vague, contestable, or both. In many cases, the answer to the question of interest-whether certain conduct is harmful to consumers-can depend upon first identifying and then comparing current or past harms and benefits with those likely, but not certain, to arise in the future. This comparison involves measuring the relative size of a known set of facts, on the one hand, and an uncertain but theoretically predictable future outcome, on the other. And finally, antitrust trials-famous, or notorious, for their complexity 34 -are often heard by lay juries unfamiliar with the relevant economics, save through conflicting and often equally [\*87] persuasive experts; 35 and those juries are empowered to award large judgments, which are then automatically trebled. 36

#### Generalist courts are non-experts without industry-specific knowledge

Dr. William Rogerson 20, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology, and Dr. Howard Shelanski, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

D. Generalists versus Industry Experts

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

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

### Disease D---2NC

#### Not happening bud

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

# 1NR

## Bedoya

### Impact---1NR

#### Africa, Asia, and the Middle East explode---extinction

Christopher McFadden 21, Masters Degree from Cardiff University, Qualified and Accredited Energy Consultant, Green Deal Assessor and Practitioner Member of IEMA, “What Could Cause World War 3?”, Interesting Engineering, 10/21/2021, https://interestingengineering.com/what-could-cause-world-war-3

6. Mass migration may spark the next world war too

Throughout most of human history, mass migration has been the result of, not the cause of conflict – the Hunnic invasions of the 5th-century being a prime example.

But some have warned that the kind of mass migration we have seen over the last decade or so could set the scene for conflict in the not too distant future. Some even believe we are only just entering an era called the "migration wars."

The reasons for these large-scale migrations vary from civil wars to environmental disasters or economic desperation. And these issues are likely only going to get worse as populations rise.

In recent times, the ongoing war in Syria has resulted in tens of millions of refugees seeking safety in neighboring countries and in the West. Often taking incredibly perilous journies over land and sea to do so. But, it's not just the West being affected.

Since 2017, around half a million Rohingya people have fled persecution in Myanmar to seek relative safety in neighboring states, notably Bangladesh, Thailand, Indonesia, and Malaysia. Mass migration is also becoming an issue for Western Africa.

The problem is also being accelerated by technology as access to information of the quality of life, or perceived quality of life, in other parts of the world, are now readily accessible.

Such large influxes of new people cause understandable trepidation and very real pressures on the infrastructure and economy of native populations. This can lead host nations to intervene overseas in an attempt to curb the flow of refugees. While this can be done peacefully, it is all too often violent.

Such interventions run the risk of sparking something much more serious. Not to mention making the problem worse.

We can never know if another world war is on the cards or not in the near future, but rest assured the world has gone through many trials and tribulations in the past. Only twice (arguably once with a two-decade ceasefire) has this led to an all-out war.

Some of the potential causes highlighted above can be resolved peacefully. After all, Einstein is credited as once poignantly saying "I do not know with what weapons World War III will be fought, but World War IV will be fought with sticks and stones."

Food for thought.

### AT: No Confirmation

#### Confirmation’s on track

Diane Bartz 3-30, MA from Georgetown University, Reporter at Thomson Reuters, “U.S. Senate Votes to Move Forward With Bedoya’s FTC Confirmation”, WHTC, 3/30/2022, https://whtc.com/2022/03/30/u-s-senate-votes-to-move-forward-with-bedoyas-ftc-confirmation/

The U.S. Senate on Wednesday voted to break a deadlock over the nomination of privacy expert Alvaro Bedoya to join the Federal Trade Commission, narrowly approving an effort to move forward with his confirmation.

By a vote of 51-50, with Vice President Kamala Harris breaking a 50-50 tie, Senate Majority Leader Chuck Schumer is now able to steer Bedoya’s nomination to an expected confirmation vote.

Bedoya, a Democrat, teaches at Georgetown Law School.

While the Senate usually votes twice on nominees, once to end debate and once to actually confirm the person, an additional vote was needed in Bedoya’s case because the U.S. Senate Commerce Committee tied 14-14 on whether to send his nomination to the Senate floor.

The committee similarly tied on Gigi Sohn, who was nominated to the Federal Communications Commission.

Since both the FCC and FTC are split between Republicans and Democrats, confirmation of Sohn and Bedoya would allow Democrats on the commissions to advance initiatives that Republicans do not support.

#### Bedoya will get through BUT it’s not guaranteed

Joseph Duball 3-25, Staff Contributor at the International Association of Privacy Professionals, Produces Content for the IAPP’s Daily Dashboard, European Dashboard Digest, Canada Dashboard Digest and Asia-Pacific Dashboard Digest, “Notes from the IAPP, March 25, 2022”, 3/25/2022, https://iapp.org/news/a/notes-from-the-iapp-march-25-2022/

Much of the relative status quo and silence we've witnessed to may have more to do with limitations than unwillingness to act. There's a lot working against the FTC, including limited resources and an ongoing commissioner vacancy that's creating a party-line stalemate on pending work that may require a majority vote. Both issues hampering Khan and the commission are at the mercy of U.S. Congress.

First, Congress failed to pass the Build Back Better Act. At one point that proposal would've given the FTC $1 billion in new funding for a privacy division before being trimmed to $500 million. Either figure could've been transformative, but lawmakers haven't indicated whether limited discussions to revive parts of the Build Back Better proposal would include the funding provision.

While the FTC can ultimately make do without additional funding, it can't be wholly effective without a full commissioner roster. Commissioner nominee Alvaro Bedoya is in the midst of a second tour through the Senate confirmation process after his initial nomination expired at the end of the 2021 calendar year. Recent reports suggest Bedoya's nomination could soon make it to a full Senate vote, but a return of prior political cards that have been played to hold up the process are always possible to return.

#### The Dems have the votes

Jimm Phillips 3-23, Associate Editor at Communications Daily, Former Reporter at Washington Post and the American Independent News Network, Graduated from American University, and Karl Herchenroeder, Associate Editor and Technology Policy Journalist at Communications Daily, BA in Journalism from the University of Maryland, “Senate Sohn, Bedoya Discharge Vote Timing in Doubt Amid Dem Attendance Issues”, Communications Daily, 3/23/2022, https://communicationsdaily.com/article/view?search\_id=535122&p=1&id=1200189&BC=bc\_623a668a13048

It remained unclear Tuesday afternoon if Senate leaders would move to hold initial votes later this week on Democratic FCC nominee Gigi Sohn and FTC nominee Alvaro Bedoya, amid uncertainties about whether all 50 Democratic caucus members will be available to appear on the floor. Senate Commerce Committee Chair Maria Cantwell, D-Wash., and Minority Whip John Thune, R-S.D., told us earlier in the day that chamber Democratic leaders were eyeing floor votes this week to discharge Bedoya and Sohn from the committee's jurisdiction (see 2203220034). Senate Commerce voted 14-14 earlier this month on Bedoya and Sohn, meaning the full chamber would need to vote to discharge both nominees before lawmakers could act on their confirmations (see 2203030070).

Senate aides and lobbyists told us Bedoya is the likeliest to get a discharge vote this week, but Sohn and Federal Reserve board nominee Lisa Cook were also in the mix. Senate Democratic leaders pressed to confirm both nominees "by April at the latest," said a telecom lobbyist who focuses on Hill Democrats. The Senate is scheduled to be in recess for the weeks of April 11 and 18.

Senate leaders have faced pressure to prioritize Bedoya because his vote is needed to break the FTC's 2-2 tie amid hopes a majority-Democratic commission will challenge Amazon's $8.5 billion purchase of MGM, lobbyists said. Amazon closed on the MGM buy last week (see 2203170007), but an FTC spokesperson noted the commission "may challenge a deal at any time if it determines that it violates the law." The office of Senate Majority Leader Chuck Schumer, D-N.Y., didn't comment.

There has "been some discussion about whether" Senate leaders will try to hold discharge votes on Bedoya, Cook and Sohn "later this week," said Thune, who's also Communications Subcommittee ranking member. Whether the Senate holds discharge votes on any of the trio this week is "going to be [the Democrats'] call" and will be "somewhat based on whether they have enough people here" from the Democratic caucus to get them through. Discharge votes on any of those nominees would likely end up in a "50-50" party-line tie with Vice President Kamala Harris casting the tiebreaker, Thune said.

"It's all about attendance" on the Democratic side of the aisle, Cantwell said. "If people are there" in enough numbers to ensure a tie, "they'll try to get it done." Cantwell is "not going to speculate" on whether all 50 Senate Democrats are now on board with Sohn and Bedoya, alluding to pushback she received after telling reporters last month that Commerce Democratic member Kyrsten Sinema of Arizona backed Sohn before the committee vote occurred.

Sen. Joe Manchin of West Virginia, seen as the most likely swing Democratic vote on Sohn, told reporters Tuesday her nomination "hasn't been given to me yet." Manchin's office didn't comment. Senate leaders are also eyeing whether Sen. Jeanne Shaheen, D-N.H., will be able to make it to floor votes later this week. She has been absent since testing positive March 13 for COVID-19, Senate aides and lobbyists said.

Shaheen's office didn't comment. She was the only Democrat not to cast a vote Monday on invoking cloture on the motion to proceed to the House-passed America Creating Opportunities for Manufacturing, Pre-Eminence in Technology and Economic Strength Act (HR-4521), seen as the first in potentially a weekslong series of procedural hurdles (see 2203210063) before moving to conference with the Senate-passed U.S. Innovation and Competition Act (S-1260). Three Democrats -- Manchin, Shaheen and Sen. Bob Casey of Pennsylvania -- missed a Tuesday vote on U.S. District Court nominee Ruth Bermudez Montenegro.

Senate Communications Chairman Ben Ray Lujan, D-N.M., who partially returned to the Senate earlier this month amid his recovery from a stroke, is now "fully back here in the Senate, and working fully and as normal," a spokesperson said.

"I know there's talk" of discharge votes on Bedoya and Sohn, but "I haven't heard anything definite," said Senate Commerce Committee ranking member Roger Wicker, R-Miss. "I hope" all 50 Senate Republicans uniformly oppose both nominees and "I'm trying to make sure senators understand the importance of these votes." Sen. Jerry Moran of Kansas said "I know of nothing that has changed that would cause my [Republican] colleagues or me to change" from opposing Bedoya and Sohn.

"As soon as we have 50 Democrats present, we can move forward" on Bedoya and Sohn, said Sen. Brian Schatz, D-Hawaii. It's "our charge" to ensure all 50 Democrats vote for the two nominees, said Sen. Ed Markey, D-Mass. "If there's unified Republican opposition, there will be no other option." Sen. Jon Tester, D-Mont., said he thinks Democrats have the support they need, but "I have no reason to know whether we do or don't truthfully."

#### They’ll will push through Bedoya BUT it hinges on the FTC’s agenda

John D. McKinnon 3-28, Staff Reporter Covering Tax Policy and Related Fiscal Issues for The Wall Street Journal, “Democrats Seek to Break Stalemate on Biden Nominees for FTC and FCC”, Wall Street Journal, 3/28/2022, https://www.wsj.com/articles/democrats-seek-to-break-stalemate-on-biden-nominees-for-ftc-and-fcc-11648459981?mod=hp\_lead\_pos3

Under pressure from progressive activists, Democrats are planning to employ a rarely used parliamentary maneuver to push through President Biden’s nominees for the Federal Trade Commission and Federal Communications Commission, according to people familiar with the matter.

Republicans on the Senate Commerce Committee have so far blocked the nominations of Georgetown University law professor Alvaro Bedoya to the FTC and consumer advocateGigi Sohn to the FCC, largely on grounds that they are too partisan.

That left both commissions deadlocked with a 2-2 split between Democrats and Republicans, denying agency leaders the majorities they needed to advance the Biden administration’s priorities.

In response, Senate Democratic leaders are preparing to use a parliamentary maneuver known as a discharge petition to allow a floor vote on both nominees, the people familiar said.

The vote for Mr. Bedoya could happen as early as this week, the people familiar said. But the maneuver could be difficult to pull off and could take weeks to accomplish.

A majority vote of the Senate is required to advance the discharge petition and bypass a committee vote. Without Republican support—and so far at the committee level there has been none—that means all 50 Democratic-voting members along with Vice President Kamala Harris must be present to support the petition.

Covid-19 exposures and infections have complicated the Democrats’ effort. In the latest holdup, Sen. Bob Casey (D., Pa.), said March 22 that he had tested positive and would be isolated for five days.

But if Senate Democrats stay healthy this week, the discharge petition could be successfully deployed for Mr. Bedoya, the people familiar with the matter said.

The FTC is considered the higher-stakes vote by both parties. Under Biden-appointed chair Lina Khan, the FTC is expected to advance comprehensive consumer-privacy protections as well as detailed standards for judging whether industry competition is fair. FTC actions also could include new antitrust lawsuits challenging big companies’ dominance.

Many of the actions likely would target the tech industry, which Ms. Khan has criticized for years.

Mr. Bedoya’s work has focused on problems around facial recognition software and other technology that can disadvantage minorities. He declined to comment.

The U.S. Chamber of Commerce—which receives backing from major tech companies—has been so concerned that it publicly declared “war” on the FTC and Ms. Khan’s agenda late last year.

“It feels to the business community that the FTC has gone to war against us, and we have to go to war back,” Suzanne Clark, the chamber’s president and chief executive, said at the time.

Republicans also have chafed over the way Ms. Khan was appointed. Mr. Biden named her FTC chairwoman only after her Senate confirmation as a commissioner. Typically an agency chair is designated as such at the time of nomination, leading some conservatives to label the move a bait-and-switch.

Allies say opposition to Mr. Bedoya has little to do with his qualifications and instead is aimed at derailing the FTC’s regulatory agenda.

#### Lujan will return and vote to advance AND there’s no GOP boycott

David Dayen 2-22, Executive Editor at the American Prospect, Work has Appeared in The Intercept, The New Republic, HuffPost, The Washington Post, the Los Angeles Times, and More, “The Wilson Phillips Blockade and Republican Obstruction”, American Prospect, 2/22/2022, https://prospect.org/politics/wilson-phillips-blockade-and-republican-obstruction/

In recent weeks, it’s become even more bottled up. Sen. Ben Ray Luján (D-NM) suffered a stroke in late January and has been in a treatment center in New Mexico ever since. Luján released a video last week saying that he would make a full recovery and be back in the Senate in “a few weeks.”

Until that time, however, he cannot fulfill his duties, which includes service on the Senate Commerce Committee. Because of the 50-50 Senate, there are an even number of Democrats and Republicans on all committees. Lujan’s absence gives Republicans a functioning majority on the Commerce Committee, and if they don’t want to advance Bedoya, it’s in their hands.

Like the FTC, the Federal Communications Commission is also deadlocked at 2-2 and unable to move forward on Democratic priorities like restoring net neutrality protections. Gigi Sohn, the public-interest advocate and Democratic nominee to fill the vacant slot, is also stuck in the Commerce Committee. Earlier this month, Republicans compelled Sohn to stand for a second confirmation hearing to address what she called “unrelenting, unfair and outright false criticism” about her views.

There was talk of also having a second hearing for Bedoya after Republicans raised concerns about his social media posts, but Commerce Committee chair Maria Cantwell (D-WA) shot that down.

But even after Luján returns, Republicans still have an option to block Bedoya and Sohn from advancing out of committee and to the Senate floor. They could boycott the committee hearing, denying Democrats a quorum to move a nomination forward. Because of the standing rules of the Senate, there must be a majority of a committee “physically present” to vote on pending nominations in order for them to get a vote on the floor. The even division of Senate committees makes that impossible without one Republican present.

Republicans on the Senate Banking Committee successfully used this maneuver last week to block five Federal Reserve Board of Governors nominees from getting a committee vote, in a bid to stop Sarah Bloom Raskin from becoming the Fed’s vice chair for financial supervision.

Sen. Roger Wicker (R-MS), the ranking member of the Commerce Committee, has downplayed the prospect that committee Republicans would boycott an FCC or FTC vote. But Wicker’s staff threatened that in advance of the initially scheduled markup for Sohn’s nomination, which led to her second confirmation hearing. “You have to have a quorum to get a vote,” Wicker told reporters last week.

### AT: Recess Solves

#### That’d require changing Senate rules---the GOP would block that

David Dayen 2-22, Executive Editor at the American Prospect, Work has Appeared in The Intercept, The New Republic, HuffPost, The Washington Post, the Los Angeles Times, and More, “The Wilson Phillips Blockade and Republican Obstruction”, American Prospect, 2/22/2022, https://prospect.org/politics/wilson-phillips-blockade-and-republican-obstruction/

But while a handful of Republicans support the study, it was the two Republican commissioners, Wilson Phillips, who blocked it. And it’s Republican senators who are holding Bedoya’s nomination hostage to prevent a majority that would likely favor an investigation into PBMs. Republican obstruction, in fact, could prevent any Biden nominees from taking their seats in the indefinite term, disrupting Lina Khan’s efforts to reinvigorate the FTC, along with hobbling agencies across the government.

Senate Democrats could do something about that last bit by changing the Senate rules, or enabling President Biden to recess-appoint Bedoya and others. Until or unless that happens, Republicans will likely continue down this path to grind down government and protect their favored corporations from scrutiny and the public’s need for a fairer economy.

#### They can block a recess.

Andrew Prokop 14, "Supreme Court Unanimously Rules Obama’s Recess Appointments Unconstitutional," Vox, 06/26/2014, https://www.vox.com/2014/6/26/5843366/recess-appointments-supreme-court.

Overall, the president's recess power remains mostly intact — but it's less important than ever. With the recent filibuster rules change, Obama can get more of his nominees through the chamber without Republican support. Historically, the recess appointment power has been important during periods of divided government. But the GOP is still requiring pro forma sessions to block official recesses (unless the president promises not to appoint any nominees). So while recess appointments may still be possible, they're looking increasingly like a thing of the past.

### AT: Plan Causes Confirmation

#### They view the plan as overreach

Mary Ashley Salvino 21, Senior Legal Specialist at Bloomberg Law, JD from the City University of New York Law School, BA in Political Science from Duke University, “Analysis: How Will the FTC Get Its Privacy Mojo Back in 2022?”, Bloomberg Law, 11/1/2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-will-the-ftc-get-its-privacy-mojo-back-in-2022

Leveraging Democratic Political Capital

The odds are likely that the FTC will seek to optimize and strengthen its authority via its new left-leaning leadership. Lawyers should keep an eye on how the FTC leverages and aligns political capital in a way that maximizes innovation and cooperation with Democrats in Congress. Be ready for a robust rulemaking effort by the FTC, accompanied by a strong push for uniform privacy legislation.

The confirmation of Alvaro Bedoya as an FTC commissioner will likely give the FTC new leadership and momentum to focus on alternative rulemaking in consumer privacy protection. Additionally, Lina Khan, the new FTC chairwoman, has expressed interest in forging new antitrust rules, which could extend to creating additional privacy rulemaking.

In terms of political calculus, a strengthened regulator faces the same bipartisan gridlock characterized by a divided Congress. Yet legal practitioners should be aware of a growing momentum on both sides of the aisle, seeking more stringent regulations on unbridled Big Tech firms, as well as emerging nonpartisan sentiments toward seeking protection for children online.

Exploring Unprecedented Funding Initiatives

On Sept. 14, the House Committee on Energy and Commerce voted to appropriate an unprecedented $1 billion over 10 years to the FTC to establish and operate a new privacy bureau. Such an infusion, if passed by Congress, would instantly transform the FTC’s ability to effectively regulate unfair or deceptive acts or practices relating to privacy, data security, and data abuses. To put this infusion into perspective, it is critical to compare to FTC’s privacy budget for 2021 ($13 million) to its overall budget of $351 million.

Looking forward to 2022, it is likely that continued political alignment will be necessary to reinforce (and perhaps even expand) the FTC’s data privacy enforcement power. However, proponents of the FTC funding boost will need to reckon with rigorous bipartisan scrutiny in the Senate, as well as fierce opposition skepticism by Republicans and centrist Democrats alike. At the very least, proposals will face serious funding trimming, and even full-throated opposition, by legislators concerned about agency overreach.

#### 3. Congress backlashes, even when FTC does what they want!

Alison Jones 20, Professor of Law at King's College London and Solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, Global Competition Professor of Law and Policy, George Washington University Law School and Non-executive Director, United Kingdom Competition and Markets Authority, JD from Columbia University Law School, BA from Princeton University, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy”, The Antitrust Bulletin, Volume 65, Issue 2

Second, what risks does the project pose? How will a project failure – such as a litigation defeat – affect the market and the agency? Will the agency be able to sustain political support for its projects, or will the targets of intervention mobilize a political coalition to constrain the agency by, for example, curbing its authority or budget? To succeed, agencies must be mindful of the shifting sands in politics and be prepared with countermeasures to deal with situations where relevant politicians’ interests change and become more sympathetic to commercial interests. Important issues therefore will be whether current political supporters of reform have the staying power to back agencies for the five to ten years it might take to carry out cases successfully, what steps agencies can take to ensure sustained political support and to deal with swings in the political environment, and whether financial support from the affected firms may be used to sway, or can be prevented from swaying, the political process and buckle political resolve.

We raise this issue because, in a painful number of instances, Congress has given unreliable policy guidance to the federal enforcement agencies. Bold cases that endanger economic power often lead adversely affected firms to expend large sums, through lobbying and campaign contributions, to induce legislators to restrain the antitrust agencies. In particular, there is an unvirtuous cycle in the United States through which Congress has demanded bold action from the FTC and then punished the agency, or threatened to reduce its budget or powers, when the Commission followed its guidance. The Commission has grim memories of episodes – for example, in the late 1940s and early 1950s and in the late 1970s and early 1980s –in which Congress berated the FTC for bringing the types of cases that powerful legislators or committees at an earlier time had urged the agency to pursue.82 No well-informed leader in the U.S. agencies is unaware of this unfortunate history.

#### 4. Opposition will evaporate the plan’s thin support

Alison Jones 20, Professor of Law at King's College London and Solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, Global Competition Professor of Law and Policy, George Washington University Law School and Non-executive Director, United Kingdom Competition and Markets Authority, JD from Columbia University Law School, BA from Princeton University, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy”, The Antitrust Bulletin, Volume 65, Issue 2

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

E. Opposition to Legislative Reform

Although statutory reform might at first sight appear to be a direct, effective solution to some of the impediments (such as entrenched judicial resistance to intervention), there are good reasons to expect that powerful business interests will also stoutly oppose any proposals for legislation to expand the reach of the antitrust laws or to create a new digital regulator.128 One can envisage the formidable financial and political resources of the affected firms will amass to stymie far-reaching legislative reforms. Legislative steps that threaten the structure, operations, and profitability of the Tech Giants and other leading firms are fraught with political risk. These risks are surmountable, but only by means of a clever strategy that anticipates and blunts political pressure. One element of such a strategy is to mobilize countervailing support from consumer and business interests to sustain an enabling political environment to enact ambitious new laws.

#### The plan sparks fights that spill into the nomination

Cat Zakrzewski 21, Technology Policy Reporter, Tracking Washington's Efforts to Regulate Silicon Valley Companies at The Washington Post, “Will Lina Khan Bring A Reckoning To Silicon Valley? She’ll Face Major Challenges”, The Washington Post, 6/17/2021, https://www.washingtonpost.com/technology/2021/06/17/lina-khan-ftc-actions/

Amid this backdrop, Khan is likely to face immediate, intense pressure from anti-monopoly groups that have been calling for greater antitrust enforcement. Their expectations are incredibly high.

“The constituency that wanted her appointment to take place has expectations that are not merely stratospheric, they are out of this world,” Kovacic said. “She hasn’t even stepped foot in her office yet, and they are speaking as if she’s traveled to Mars.”

Breaking up major tech companies or bringing about other big changes to those companies’ operations may hinge on Congress overhauling competition laws. A bipartisan group of lawmakers last week introduced a series of bills that would outlaw many of the allegedly anticompetitive tactics that tech companies used to solidify their dominance. But it’s unclear whether they’ll all pass a bitterly divided Congress, as some Republicans raise concerns about them.

It seems likely the agency will see its funding grow under Khan, especially after the Senate passed legislation that would overhaul merger filing fees to provide more financing to antitrust enforcers. House lawmakers have introduced a similar proposal, which is less controversial than some of the other tech competition bills.

There remain many uncertainties about Khan’s tenure: She is coming into the FTC with a 3-2 Democratic majority, but it’s unclear how long that will last. Rohit Chopra (D) is awaiting his confirmation to the Consumer Financial Protection Bureau. When he leaves, it could be difficult for President Biden to build the bipartisan support needed to install another commissioner.

#### The vote’s not about Bedoya---it’s a referendum on Congress’ broader opinion about the FTC

Kathleen Murphy 21, Senior Reporter at FTC Watch, Former Section Research Manager, Specialist at Congressional Research Service, Former Managing Editor at CQ Roll Call and Bill Analysis Editor at Congressional Quarterly, “Bedoya’s Confirmation Hearing Draws Closer”, FTC Watch, Issue 1016, 11/1/2021, <https://www.mlexwatch.com/articles/13940/print?section=ftcwatch>

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

### AT: Antitrust Now

#### 3. Every prior action has been by consensus with no shift in underlying law because they’re waiting on Bedoya

D. Bruce Hoffman 22, Partner at Cleary Gottlieb, Practice Focuses on Antitrust Enforcement, Former Director of FTC’s Bureau of Competition, JD University of Florida Levin College of Law, and Henry Mostyn, Partner at Cleary Gottlieb, Practice Focuses on EU and UK Competition Law, BPP Law School – London; “U.S. & EU Antitrust: Developments and Outlook in 2022”, 1/11/2022, https://www.clearygottlieb.com//news-and-insights/publication-listing/us-eu-antitrust-developments-and-outlook-in-2022

The FTC in 2021 was characterized by staff and leadership turmoil, controversy and at least the appearance of a significant shift in agency priorities and practices. Initially, under Acting Chair Slaughter, the FTC largely continued its longstanding consensus-driven approach to antitrust, albeit with some aggressive statements on various issues from the Acting Chair and fellow Democratic Commissioner Rohit Chopra. That approach changed substantially with Lina Khan’s ascension to the position of FTC Chair.

Khan, a headliner antitrust progressive most famous for her criticism of Amazon and of the view that antitrust should focus on protecting consumers from higher prices or reduced output, was originally nominated by the President to be a Commissioner; no mention was made of her being Chair. Yet, to the surprise of observers and (as we understand it) much of the Senate, immediately after she was confirmed as a Commissioner the President designated her as Chair – an important distinction, because the FTC Chair controls the day-to-day administration of the FTC. Khan, with a three-Commissioner majority, moved swiftly to alter FTC practices in several areas:

Streamlining the process of adopting trade regulation rules and initiating discussion of several possible rules, notably including unprecedented rules on competition (such as on exclusive contracts, discounts and other widespread contractual practices)

Streamlining procedures for issuing compulsory process and eliminating the normal requirement of Commission votes for process in a wide range of cases

Rescinding longstanding bipartisan FTC guidance on antitrust enforcement to reflect a more regulatory, aggressive philosophy

Withdrawing from the recently adopted Vertical Merger Guidelines, leaving the FTC differently situated from the DOJ and with no clear guidance on vertical mergers.

Interestingly, though, these and other aggressive steps were not accompanied by an uptick in case filings (either initially under Acting Chair Slaughter or subsequently under Chair Khan); in fact, FTC case filings declined from the levels set under the Trump administration.

In any event, following this initial spate of activity, the progressive agenda has been slowed by the departure of Commissioner Chopra to serve as Director of the Consumer Financial Protection Bureau. While Commissioner Chopra cast a number of so-called “zombie votes” enabling the Commission to move forward on a limited number of issues after his departure, the Commission now has only four Commissioners, and so any controversial steps will have to wait until another Democratic Commissioner is confirmed, since the two Republicans can block new Commission actions they don’t support.

As a result, Commission action in the near future will either involve consensus – such as the study of supply-chain disruptions launched in December 2021, or the recently-filed challenge to the merger of NVIDIA and Arm – or areas in which the Chair and Bureau Directors can act without a vote, such as in issuing Second Requests triggering in-depth reviews of mergers (but actual challenges to mergers or consent decrees will require Commission votes, and thus at least some Republican support).

The President has nominated Alvaro Bedoya, a Georgetown law professor and privacy expert, to the Commission; however, his nomination (though supported by all four current FTC commissioners) drew significant opposition in the Senate and failed to advance in 2021. The President has just renominated Bedoya, re-starting the confirmation process. While we think it is still more likely than not that he will be confirmed, it may take several months for the process to play out.

So what will we see from the FTC in 2022? Initially, enforcement action in the form of consent decrees and litigated cases will likely be limited to consensus cases, given the 2-2 Commission split. Chair Khan has used the tools at her disposal to delay the review of some mergers, to launch full Second Request investigations of mergers that on their face don’t appear to raise competition issues and to issue threatening-sounding though legally insubstantial letters to merging firms reminding them that HSR clearance doesn’t mean that the merged firm is immune from antitrust scrutiny. We expect those trends to continue, even if they don’t result in enforcement action in the near term. While FTC staff has been subjected to a gag order and barred from public speaking since Chair Khan’s arrival, limiting insight into the FTC’s position and practices, we expect the limited public statements from the FTC to continue pushing for a progressive agenda. This will likely include criticizing large firms, touting the virtues of deconcentrating markets and expressing a general skepticism of mergers.

#### 4. He'll be confirmed because the FTC’s avoiding controversial antitrust

Jessica Rich 3-16, Of Counsel at Kelley Drye, Former Director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection, JD from New York University School of Law, AB from Harvard University, “Lina Khan’s Privacy Priorities – Time for a Recap”, Kelley Drye Ad Law Access, 3/16/2022, https://www.adlawaccess.com/2022/03/articles/lina-khans-privacy-priorities-time-for-a-recap/

Rumors suggest that Senator Schumer is maneuvering to confirm Alvaro Bedoya as FTC Commissioner sooner rather than later, which would give FTC Chair Khan the majority she needs to move forward on multiple fronts. One of those fronts is consumer privacy, for which Khan has announced ambitious plans (discussed here and here) that have stalled for lack of Commissioner votes. With Bedoya potentially on deck, now seems like a good time to recap those plans, as they might provide clues about what’s in the pipeline awaiting Bedoya’s vote. We focus here on three priorities Khan has emphasized in statements and interviews since becoming Chair.

Privacy Rulemakings

At the top of the list are privacy rulemakings, which could create baseline standards for the entire marketplace and enable the FTC to obtain monetary relief in its cases. (Recall that the FTC has limited authority to obtain money in its cases, especially post AMG, but that it can seek penalties or redress when it’s enforcing a rule.) Last December, Khan issued a Statement of Regulatory Priorities detailing the privacy rulemakings she wants to initiate or complete, including:

* New rules to halt “abuses stemming from surveillance-based business models,” which could curb “lax security practices” and “intrusive surveillance,” “ensur[e] that algorithmic decision-making does not result in unlawful discrimination,” and potentially limit the use of “dark patterns” to manipulate consumers. (Yes, this is an ambitious one.)
* Possible amendments to existing privacy rules – including the Children’s Online Privacy Protection Act (COPPA), the Health Breach Notification Rule, the Safeguards Rule (breach notification requirements), and the FACTA Identity Theft Rules (including the Red Flags Rule).
* Possibly other new rules to “define with specificity unfair or deceptive acts or practices.”

Of note, absent Congressional legislation, any new privacy rules would need to follow the arduous process detailed in Section 18 of the FTC Act (referred to as “Mag-Moss” rulemaking). With Bedoya on board, the FTC can start these rulemakings, but they could still take years to complete, as we discuss here.

By contrast, the FTC can amend its existing privacy rules under the more manageable Administrative Procedures Act. Further, it’s already in the midst of rule reviews for all of the rules listed above (including COPPA’s, which started back in 2019). As a result, the FTC could act on these rules relatively quickly once Bedoya is on board.

Focus on Platforms

Khan has also made clear that she intends to focus on the tech platforms – which she has described as “gatekeepers” that use their critical market position to “dictate terms,” “protect and extend their market power,” and “degrade privacy without ramifications.” In a statement and accompanying staff report last September, Khan stated that such efforts would include:

* Additional compliance reviews of the platforms currently subject to privacy orders (Facebook, Google, Microsoft, Twitter and Uber), followed by order modifications and/or enforcement as necessary.
* As resources permit, examining the privacy implications of mergers, as well as potential COPPA violations by platforms and other online services – COPPA being of special importance as children have increasingly relied on online services during the pandemic. (Relatedly, report language accompanying the omnibus budget just signed into law directs the FTC to prioritize COPPA enforcement.)
* Completion of the pending Section 6(b) study of the data practices of the social media companies and video streaming services, which was initiated in December 2020.

So far, we’ve seen limited action from the FTC on platforms (at least on the consumer protection side). Last October, the FTC issued a 6(b) report on the privacy practices of ISPs, but largely concluded that the topic should be addressed by the FCC. Then, in December, the FTC announced a settlement with online ad platform OpenX for COPPA violations. Given Khan’s bold plans in this area, it seems likely that there are matters in the pipeline awaiting Bedoya’s vote.

Stronger Remedies

The third major area that Khan has highlighted is obtaining stronger remedies in privacy cases – that is, considering “substantive limits”, not just procedural protections that “sidestep[] more fundamental questions about whether certain types of data collection and processing should be permitted in the first place.” By this, Khan is referring to deletion of data and algorithms, bans on conduct, notices to consumers, stricter consent requirements, individual liability, and monetary remedies based on a range of theories post AMG.

As to this priority, the FTC has moved ahead where it can (even prior to Khan’s tenure), often using strategies that have been able to garner unanimous votes. For example, its settlements with photo app Everalbum (for alleged deception) and WW International (for alleged COPPA violations) required deletion of consumer data and algorithms alleged to have been obtained illegally. Its settlement with fertility app Flo Health (for alleged deception about data sharing) required the company to notify affected consumers and instruct third parties that received their data to destroy it. The FTC also has alleged rule violations where possible, and partnered with other agencies to shore up its ability to obtain monetary relief.

But we’ve also seen signs of a more combative approach that could increase when Khan has the votes to push it forward. Of note, last September, the FTC issued an aggressive interpretation of the Health Breach Notification Rule, purporting to extend the rule’s reach (and thus its penalties) to virtually all health apps, even though a rule review was already underway. Further, FTC staff are making strong, often unprecedented demands for penalties, bans, and individual liability in consent negotiations. It’s even possible, based on an article written by former Commissioner Chopra and now-BCP Director Sam Levine, that the agency could attempt to use penalty offense notice letters (explained here) to lay the groundwork for penalties in privacy cases under Section 5(m)(1)(B). However, given the paucity of administratively litigated privacy cases (a key requirement under 5(m)(1)(B)), this would be very aggressive indeed.

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For more on Khan’s privacy plans, you can read our earlier blogposts (here and here), as well as the various FTC statements and reports cited in this post. Or, if you like surprises, you can simply wait for Bedoya to be confirmed and see what happens. Needless to say, things should speed up at the FTC when he arrives.

#### 5. Antitrust action is stalled---it’s just talk

Scott Bicheno 3-18, Editorial Director of Telecoms.com, BSc in Microbiology from the University of Bristol, “So Much for the FTC’s Trustbusting Agenda”, Telecoms, 3/18/2022, https://telecoms.com/514263/so-much-for-the-ftcs-trustbusting-agenda/

US trade regulator, the FTC, has allowed Amazon’s acquisition of MGM to proceed without so much as a whimper of dissent.

This is not the kind thing we were led to expect when the slayer of monopolies Lina Khan was appointed Federal Trade Commission boss a year ago. In fact, she arrived with the reputation of feeling especially antagonistic towards Amazon, having previously written at length about how something needs to be done to curb the company’s power.

So when Amazon announced its intention to buy movie studio MGM, despite already being a video content producer via its Prime Video division, the scene was set for Khan to put her money where her mouth is. And yet, just a couple of days after the EU somehow determined the acquisition presented no competition concerns, Amazon declared the deal done.

What happened Lina? Surely this was a perfect opportunity for you to put a trustbusting stake in the ground and show these cocky tech giants who they’re dealing with. A report by Politico pins the blame of the absurdly politicised US system of regulatory agencies, in which commissioners always seem to be overtly partisan.

Usually this doesn’t matter because the party in power gets to pick the majority of commissioners, who simply overrule the Pavlovian opposition of the others. For a time after Khan’s appointment by President Biden there were indeed three Democrat-affiliated commissioners to two Republican ones. But then Biden moved Rohit Chopra to the Consumer Financial Protection Bureau and, due to the partisan nature of the approval process, has struggled to confirm Alvaro Bedoya as his replacement.

Lacking the customary majority among the FTC Commissioners, it seems Khan figured there was no point in even trying to move against the MGM acquisition because the vote would be deadlocked. What a tangled web we weave. You’d think she might have given it a go, just to say she did, or at least make a big show of her personal objections to the move, but Khan seems to have been surprisingly muted on the matter.

The US state has been signalling its eagerness to take on Big Tech for ages. Prior to this matter it wasted everyone’s time by moaning about some Facebook acquisitions, having previously approved them, and then failed in its bid to go after Qualcomm’s licensing practices. If, as we suspect, the underlying motive for this crusade is to give the government leverage to bend big tech to its agenda, we can only conclude it has largely failed in that aim so far.

### AT: Plan = Courts

#### Court action links more! The only way they’d rule is if there’s an initial novel theory brought by the FTC---that itself is an unpopular overreach AND getting the courts to abide only makes the political reaction worse.

Alison Jones 20, Professor of Law at King's College London and Solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, Global Competition Professor of Law and Policy, George Washington University Law School and Non-executive Director, United Kingdom Competition and Markets Authority, JD from Columbia University Law School, BA from Princeton University, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy”, The Antitrust Bulletin, Volume 65, Issue 2

In the end, FTC’s efforts to improve capability proved insufficient to support the expanded enforcement agenda, partly because the Commission failed to formulate an adequate plan to overcome the full range of implementation obstacles. The FTC seriously overreached because it did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and trade regulation rules, the ferocious opposition that big cases with huge remedial stakes would provoke from large defendants seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and the resources required to deliver good results. The Commission lacked the capacity to run novel shared monopoly cases that sought the break-up of the country’s eight leading petroleum refiners and four leading breakfast cereal manufacturers79 and simultaneously pursue an abundance of other high stake, difficult matters involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigorous lobbying of Congress, that its aggressive litigation program provoked.80

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are likely to be fiercely contested through the legislative process and so will take time, and be difficult, to enact. Further, even if armed with a more powerful mandate, the DOJ and the FTC will still have to bring what are likely to be challenging cases applying the new laws (see Section F). The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies is therefore unlikely to happen very quickly and is, consequently, unlikely to meet the demands of those seeking urgent and immediate action now.

These difficulties suggest that for the near future, at least, the agencies will have to achieve successful extensions of policy mainly through launching themselves into a number of lengthy, complex investigations and litigation based on the current regime. This means establishing violations under existing judicial interpretations of the antitrust laws and making a convincing case for the imposition of effective remedies, including structural relief.

The discussion in this section identifies likely impediments to the implementation of ambitious reforms, either through litigation (under the present-day regime) or legislation. These include judicial resistance to broader applications of the Sherman, Clayton, and FTC Acts, the complexities of designing effective remedies, the uncertainty of long-term political support for ambitious reforms and the possibilities for political backlash once agencies begin prosecuting major new cases, and the complications, and resistance, that confronts any effort in the United States to make legislative change.

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

As noted in Section II.A, judicial decisions since the mid-1970s have reshaped antitrust law; created more permissive substantive standards governing dominant firm conduct, mergers, and vertical restraints; and raised the bar to antitrust claims in a number of ways. This remolding has been facilitated by the Court’s conclusion that the Sherman Act constitutes “a special kind of common law offense,”81 so that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”82 This has allowed the statutory commands to be interpreted flexibly and the law to evolve with new circumstances and new wisdom;83 for example, where there is widespread agreement that the previous position is inappropriate or where the theoretical underpinnings of those decisions have been called into question.84

The proposed solutions will depend, in the short term at least, on the ability of enforcement agencies to navigate the described jurisprudence to find an antitrust infringement and, in some instances, a further rethinking, refinement, and/or development of doctrine, through softening, modification, or even a reversal of current case law. Although such an evolution could, in theory, result, as it did over the last forty years, from a steady stream of antitrust cases, judicial appointments since 2017 have arguably made such a change in direction unlikely. Rather, it seems more probable that successful prosecution of major antitrust, and especially Section 2 Sherman Act monopolization cases, will remain challenging and may even become more difficult. Cases will be litigated before judges who are ordinarily predisposed to accept the current framework, either by personal preference or by a felt compulsion to abide by forty years of jurisprudence that tells them to do so.85 A new president could gradually change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation.86 The reorientation of the courts through judicial appointments is, however, likely to take a long time.87

Until then, trial judges and the Court of Appeals will be compelled to abide by the existing jurisprudence and will only be at liberty to develop a more flexible approach in the “gaps” or spaces left by Supreme Court opinions—for example, in relation to mergers and rebates—and through creative interpretations of the law. Such cases are, however, likely to be hard fought. Indeed, Judge Lucy Koh’s finding in Federal Trade Commission v. Qualcomm, Inc. 88 that Qualcomm’s licensing practices constituted unlawful monopolization of the market for certain telecommunications chips has provoked hostile attacks, not only from practitioners and academics but also from the DOJ, the U.S. Departments of Defense and Energy, and even one of the FTC’s own members. In a scathing op-ed in the Wall Street Journal,89 Commissioner Christine Wilson attacked Judge Koh’s “startling new creation” of legal obligations that may trigger a new wave of enforcement actions and undermine intellectual property rights. Commissioner Wilson condemned the judge’s “judicial innovations,” and “alchemy,” through reviving and expanding the Supreme Court’s 1985 opinion in Aspen Skiing Co v. Aspen Highlands Skiing Corp 90 (which she stresses was described by the Supreme Court in Trinko 91 as “at or near the outer boundary” of U.S. antitrust law), turning contractual obligations into antitrust claims, and for departing from current federal agency practice, by imposing remedies requiring Qualcomm to negotiate or renegotiate contracts with customers and competitors worldwide. She has thus urged the Ninth Circuit (on appeal), and if necessary the Supreme Court, to assess the wisdom of these sweeping changes and to stay the ruling.92

It seems likely therefore that, at the same time as bringing cases seeking to develop procedural, evidential, and substantive antitrust standards under the existing regime, additional antidotes to the stringencies of existing jurisprudence will be required, including more extensive, and expansive, use of Section 5 FTC Act to plug the gaps created by the narrowing of the scope of Section 2 Sherman Act; and/or the adoption of legislation that directs courts to apply a wider goals framework.

B. Infirmities of Section 5 of the Federal Trade Commission Act

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

C. Designing Effective Remedies

Important issues arising for the new enforcement strategy proposed will be what remedies should be sought; how can an order, or decree, be fashioned to ensure that the violation is terminated, that competition on the market is restored, the opportunity for competition is re-established, and that future violations are not committed and deterred; and will a court be likely to impose any such remedy.102

The Sherman Act treats infringements of its key commands as crimes attracting severe sanctions, including fines (corporate and individual) and imprisonment. Although since 1980, the DOJ has used criminal prosecutions only to challenge hard-core horizontal cartels,103 some antitrust reform proponents are calling for the introduction of fines to sanction illegal monopolization, and some commentators have proposed that the DOJ reconsider its policy of not seeking criminal penalties beyond the Section 1 conspiracy context.104 For the time being, however, it would appear that existing civil sanctions will remain the tool of choice for DOJ in dealing with antitrust infringements and will be the only set of remedies available to the FTC, which has no mandate to bring criminal cases.

The civil remedial options, which can broadly be grouped into three categories, for the federal agencies, are nonetheless powerful in principle. The first and, perhaps, the most common form of remedy consists of controls on conduct. Conduct-related relief ordinarily takes the form of cease and desist orders that forbid certain behavior or, in a smaller number of cases, compel firms to engage in affirmative acts, such as providing a competitor access to an asset needed to compete.

The second major form of remedy is structural relief in the form of divestitures or the compulsory licensing of intellectual property that enables a firm to enter a previously monopolized market. The boundary between purely conduct-based and structural remedies is not always clear. A compulsory licensing decree has strong structural features (it directly facilitates new entry) and conduct elements (it may require the owner of the patent to provide the licensee know-how and updates of the patented technology).

The third remedy consists of civil monetary relief in the form of disgorgement of ill-gotten gains or the restitution of monopoly overcharges to victims. A number of Supreme Court decisions in monopolization cases in the late 1940s and early 1950s appeared to hold that these forms of recovery are encompassed in the mandate of courts to order equitable remedies to cure antitrust violations. The federal agencies have not used this power expansively, though it would appear to be available to recoup overcharges in Section 2 or other cases.105

The cures envisaged by many of the advocates of change call for the bold application of the full portfolio of civil remedies, including unwinding past mergers, divestment of assets, restructuring concentrated markets, limiting or reversing vertical integration or through the imposition of licensing obligations. Such advocates thus wish the DOJ and FTC to use the antitrust laws as an effective and simple mechanism for deconcentrating both monopolistic and oligopolistic markets, rapidly introducing new competition into a market; and reversing what they consider to be severe structural problems that have been allowed to develop on the market.106

Structural remedies, in particular, have always been a real and important part of the antitrust remedial arsenal,107 not only in merger cases where a violation of the antitrust rules may consist of an unlawful acquisition of shares or stock108 but also in Sherman Act cases.109 In the 1960s the FTC also sought, using its powers under Section 5 FTC Act to deconcentrate the petrol and breakfast cereal markets110 and in 1969 the Neal Report,111 commissioned by President Lyndon Johnson, proposed the adoption of laws which would allow oligopolistic industries to be deconcentrated and the condemnation of mergers on markets that were already concentrated.112

Modern antitrust has, however, had less appetite for the use of antitrust to break up companies. Although the District Court in United States v Microsoft Corp 113 ordered, at the request of the DOJ, that Microsoft be broken into two parts, the Court of Appeals, despite affirming the violation of section 2, reversed and remanded the finding that Microsoft should be split into two. Setting out a high bar for structural relief, the Court stressed that the lower court had not (1) held a remedies-specific hearing114 or (2) provided adequate reasons for the decreed remedies.115

A number of factors seem responsible for the trend away from structural remedies. First, the change in antitrust thinking that has evolved since the early 1970s, from a belief that antitrust intervention and structural remedies can improve performance116 to the current more laissez-faire one.117 Second, concerns about the effectiveness of previous attempts to deconcentrate industries,118 especially given the length of time that antitrust proceedings take.119 Third, the difficulty involved in constructing and overseeing a structural remedy effectively. Although in cases involving a merger or acquisition it may be relatively easy to structure such a remedy through disentangling assets that were once owned separately,120 outside of this situation, the question of how and what to divest might be much more speculative, seem much more risky and may in fact be complex and difficult to administer (involving significant restructuring, separation of physical facilities, and allocation of staff from integrated teams).121 These types of concern make it a challenge to persuade a court that a structural remedy is warranted and will be successful in achieving its objective.122

In the discussion above, we have been addressing the types of remedies that are imposed at the conclusion of a lawsuit. A problem in highly dynamic markets, however, is that the lag between the initiation of a case and a final order on relief may be so great that market circumstances have changed dramatically or the victim of allegedly improper exclusion may have left the market or otherwise lost its opportunity to expand and contest the position of the incumbent dominant firm. In this context, the antitrust cure arrives far too late to protect competition. The relatively slow pace of antitrust investigations and litigation (with appeals that follow an initial decision) has led some observers to doubt the efficacy of antitrust cases as effective policy-making tools in dynamic commercial sectors.

There are at least five possible responses to concerns about the speed of antitrust litigation, particularly matters involving dominant firms. First, agencies could experiment with ways to accelerate investigations, and courts could adopt innovative techniques to shorten the length of trials. In the United States, we perceive that greater integration of effort among the public agencies would permit the more rapid completion of investigations (e.g., by pooling knowledge and focusing more resources on the collection and evaluation of evidence). Courts could use methods tested with success in the DOJ prosecution of Microsoft in the late 1990s to truncate the presentation of evidence. These types of measures have some promise to bring matters to a close more quickly.

Second, the initiation of a lawsuit could be recognized as being, in some important ways, its own remedy; the prosecution of a case by itself causes the firm to change its behavior in ways that give rivals more breathing room to grow. Moreover, the visible presence of the enforcement authority, manifest by its investigations and lawsuits, causes other firms to reconsider tactics that arguably violate the law. Seen in this light, the entry of a final order that specifies remedies may not be necessary for all instances to have the desired chastening effect.

A third response is to experiment more broadly with interim relief that seeks to suspend certain types of exclusionary conduct pending the completion of the full trial.123 Effective interim measures would require the enforcement agency to develop a base of knowledge about the sector that enables it to accurately identify the practices to be enjoined on an interim basis and to give judges a confident basis for intervening in this manner.

A fourth approach would be that the remedies achieved in protracted antitrust litigation may not be so imperfect or untimely as they might appear to be. There have been a number of instances in which the remedy achieved in a monopolization case was rebuked as desperately insufficient when ordered but turned out to have positive competitive consequences.124 This is a humbling and difficult aspect of policy making. It may not be easy for an agency to persuade its political overseers—or other external audiences—that the chief benefits of its intervention will emerge in, say, two or three decades. Yet the positive results may take a long time to become apparent.

A fifth technique would be to rely more heavily on ex-ante regulation in the form of trade regulation rules that forbid certain practices. A competition authority—most likely the FTC—would use its rulemaking powers to proscribe specific types of conduct (e.g., self-preferencing by dominant information services platforms).

In this article, we do not purport to solve the problems of the remedial design set out above. There is, however, a fairly clear conclusion about how enforcement agencies should go about thinking of remedies. As we note below, there is considerable room for public agencies to design remedies more effectively by systematically examining past experience and collaborating with external researchers to identify superior techniques. In this regard, the FTC’s collection of policy tools would appear to make it the ideal focal point for the development of more effective approaches to remedial design.

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

### Turns Case

#### The link alone turns case---a 2-2 deadlock destroys the plan’s enforcement

FTC Watch 21 – “Chopra Confirmed to CFPB,” https://www.mlexwatch.com/articles/13707/chopra-confirmed-to-cfpb

Federal Trade Commission member Rohit Chopra will become director of the Consumer Financial Protection Bureau after President Joe Biden signs his commission.

The Senate confirmed Chopra’s nomination Sept. 30 in a 50-48 party-line vote to serve a five-year term leading the consumer watchdog agency. Biden named Alvaro Bedoya, a Georgetown University Law School professor, on Sept. 13 to succeed Chopra as an FTC commissioner.

If Biden gives Chopra the signed commission bearing the Great Seal of the United States, Chopra will be sworn into office and leave the FTC with a 2-2 partisan split. The president may sign the commission at any time after confirmation, making the appointment official.

Chopra, appointed in 2018, is serving in the FTC’s third Democratic spot alongside Commissioner Rebecca Kelly Slaughter and Chair Lina Khan. A series of 3-2 party-line votes at the agency since Khan took office in June indicate a deadlocked commission could prevent bold action on antitrust enforcement.

Chopra was the CFPB’s student-loan ombudsman under President Barack Obama. Kathy Kraninger, a Trump-appointed official, ran the CFPB from 2018 until earlier this year.

#### War rolls back antitrust reform AND enforcement

Dr. Bruce A. Khula 3, Juris Doctor Candidate at Notre Dame Law School, Ph.D. and MA from The Ohio State University, Associate General Counsel at Progressive Insurance, “Antitrust at the Water's Edge: National Security and Antitrust Enforcement”, Notre Dame Law Review, Volume 78, Issue 2, 78 Notre Dame L. Rev. 629, January 2003, Lexis

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work. [\*632] Besides, other scholars have already written quite excellent ones. Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful - indeed, in a great many cases, inexorable - influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture. The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law - and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

[\*633]

I. Antitrust Law: History and Development

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it is the history of words. And such a history - even an amateurish history, like that which follows - may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people call a thing can provide insight into the nature of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the Oxford English Dictionary (OED) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival." The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office … entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them." Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth." The OED affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust." Because of its descriptive nature, Bryce's passage is worth quoting in full:

Those anomalous giants called Trusts - groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.

[\*634] Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice. The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and The Federalist to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades. Facilitated by the advent and spread of the telegraph and railroad, big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations. Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic order." [\*635] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors." The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization, encouraged mass immigration from Southern and Eastern Europe, established new classes of industrial laborers and middle-class managers, and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption. Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century - namely, the labor movement, agrarian Populism, and Progressivism - all originated in the dislocations brought by the rise of big business. By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans not blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by [\*636] watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law. In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence." As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process. This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states. As Hans Thorelli notes, neither in England nor the [\*637] United States did common law competition policy accomplish very much. Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably. The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade. These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable. Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'" Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note. It suffices to note that deeply felt public sentiment - drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal - animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly [\*638] political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation - ostensibly the "antitrust movement" of which Hofstadter writes - dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues. Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act). In essence, literalists wanted the jurisprudence of United States v. Trans-Missouri Freight Ass'n to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in United States v. Addyston Pipe & Steel Co. This debate, it must be emphasized, was by no means strictly - or even principally - judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers. The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in Standard Oil Co. v. United States and the contemporaneous case, United States v. American Tobacco Co.

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War, and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed. Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large. Hooverian politics and "cooperative competition" managed to survive the early dark days [\*639] of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).

In the years after the U.S. Supreme Court scuttled NIRA, however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action. Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action." As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail. But this born-again antitrust zeal would not survive the coming of yet another global war.

### Impacts

#### Border programs are a testing ground for broader surveillance expansion

Caroline Haskins 21, Senior Reporter at Business Insider, Former Reporter at BuzzFeed News, “Here Are The 14 Most Important Pieces of Surveillance Technology That Make Up The US 'Digital Border Wall,' According to Immigrant-Rights Groups”, Business Insider, 11/1/2021, https://www.businessinsider.com/top-surveillance-technology-that-makes-up-us-digital-border-wall-2021-10

US Customs and Border Protection and Immigration and Customs Enforcement use phone hacking, license-plate scanning, iris recognition, and a host of other surveillance technology to monitor the US border, according to a report released on Thursday by immigrant-rights groups.

"The Deadly Digital Border Wall," compiled by Mijente, Just Futures Law, and the No Border Wall Coalition, doesn't identify every piece of software and hardware the agencies use. One example is Raven, short for Repository for Analytics in a Virtualized Environment, a data-mining and analytics tool ICE is developing. But it does provide an overview of some of the key technologies that ICE and CBP rely on.

Cinthya Rodriguez, a Mijente organizer, said the US border was a "testing ground" for more widespread expansions of government surveillance.

#### Extinction

Julian Cribb 19. Principal of Julian Cribb & Associates, Founding Editor of ScienceAlert, Author, Journalist, Editor and Science Communicator. 10/03/2019. “6 - Food as an Existential Risk.” Food or War, 1st ed., Cambridge University Press. DOI.org (Crossref), doi:10.1017/9781108690126.

– The advent of quantum computers and blockchain herald an age in which it will be possible to spy on every person on the planet for the whole of their lives, by mining the data that already exists in their bank accounts, mobile phones and computers, medical records, CCTV, employment history, etc. In the wrong hands, this could be used to influence or compel people to vote for dictators. In terms of human survival, it could be used to enforce beliefs – like climate denial – which threaten the very existence of humanity.

– Deliberate misuse and/or accidental disasters created by biotechnology and nanotechnology, such as the manufacture of uncontrollable new lifeforms which prove dangerous, or genetically altered humans.

The essential point is that there is no public or ethical oversight of these ultra-powerful technologies, which are open to exploitation by anyone with the resources and who can afford the expertise.

They are emerging and evolving far faster than legislators or regulators can keep up. Without strong public oversight, they can very easily be used to enslave humanity, silence dissidents or to control or destroy by various means those whom their overseers want controlled or destroyed.

The connection between these supertechnologies and twentyfirst-century warfare is evident. Most are being developed as military technologies, not only by democracies where there is little or no public scrutiny, but also by dictatorships and corporations where there is no public oversight at all. Links with food include the deployment of artificial intelligence for managing corporate super-farms (which may or may not be sustainable), the use of robot swarms and cyber warfare to attack the food systems of potential enemies, and the use of universal surveillance to silence or deter people who wish to produce food sustainably and who find themselves opposed to the dominance of oil and coal companies, agribusiness corporates, their puppet governments and other wielders of power.

The over-arching issue is that use of universal spying systems to subordinate and censor the whole society could very easily silence the warning voices who presently speak out about risks to our future. Such a development would increase the likelihood of human extinction.

#### FTC privacy actions regulate brain-machine interfaces

Walter G. Johnson 20, RegNet, Australian National University; Arizona State University (ASU), Sandra Day O'Connor College of Law, Students, “Catching Up with Convergence: Strategies for Bringing Together the Fragmented Regulatory Governance of Brain-Machine Interfaces in the U.S.,” SSRN Scholarly Paper, ID 3661850, Social Science Research Network, 07/27/2020, papers.ssrn.com, doi:10.2139/ssrn.3661850

B. FTC Adjudication

The Federal Trade Commission Act grants the FTC authority to oversee consumer protection issues in the United States. 100 In comparison to the FDA, the FTC adopts a regulatory strategy primarily defined by adjudication rather than rulemaking.101 The FTC wields the broad standard of “unfair or deceptive acts or practices,”102 which it applies to actions by industry in a case-by-case basis through adjudication. This flexibility in enforcement provides the FTC with notable discretion and, along with a handful of new statutory authorities, has allowed it to expand its jurisdiction to include data privacy. 103 However, the agency has limited resources to use in pursuing consumer protection violations, restricting the practical scope of its oversight.104 Over time, the FTC, through its adjudication and settlement activities, has incorporated data privacy and security within the scope of consumer protection issues that it regulates, and has built a healthy log of adjudicative “precedents” to draw from in addressing data protection violations.105 Notably, the FTC has begun more recent efforts in enforcing companies’ commitments to voluntary selfregulation in the area of data protection, expanding the agency’s reach into privacy and consumer protection.106 As such, the FTC’s previously existing authorizations grant it the ability to adjudicate claims made by BMI developers, evaluating industry claims for “unfair or deceptive acts or practices.” 107

The FTC can review claims which may be false, incomplete, or misleading, including claims about the degree and type of data privacy and cybersecurity protections offered by a product or service.108 This authority enables the FTC to go further than the FDA by allowing it to review nonmedical claims made by neurotechnological products, including DTC products.109 Even if such claims are related to general “wellness,” rather than making express health claims subject to FDA purview, they could still fall under the FTC’s wide scope of authority.110

C. Federal Court Deference

The federal courts play a significant role in the regulatory environment through their judicial review of administrative agency actions. In this context, judicial review includes determining whether an administrative agency acted beyond its statutory authority or complied with substantive and procedural requirements for taking regulatory action. 111 Beyond reviewing new rules, courts can also review agency efforts to extend the scope of their existing jurisdiction to new areas.112 This can involve both reviewing new rules for products which the agency already regulates, or reviewing standards for new products that agencies have not regulated in the past. For example, in 2000 the Supreme Court reviewed and denied the FDA’s moves to regulate tobacco under its authority to oversee drugs or devices. 113 The courts therefore could add to the regulatory environment for BMIs by placing an additional check on agency rulemaking authority.114

Over decades, the Supreme Court has established a robust doctrinal method of interpreting agency rules and conduct.115 The Chevron and Auer doctrines generally direct federal courts to uphold agency rules or an agency’s interpretation of its rules, respectively, when such rules are based on a reasonable interpretation of the underlying, but ambiguous, legal authority.116 Judicial deference enables agencies such as the FDA to create new rules for novel and emerging issues or products without needing to receive additional delegations from Congress to handle them.117 In the case of neurotechnological products, the FDA must interpret its existing medical device authority to justify oversight of both hardware and software, including cybersecurity issues.118 The agency has already issued repeated guidance on software,119 based on their medical device rules, yet these standards have not undergone rigorous judicial review and could be subject to Auer scrutiny in the future.120 The FTC relies primarily on adjudication, which remains susceptible to judicial review.121 However, empirical studies have shown that adjudications fare better in Chevron suits than notice and comment rulemaking,122 suggesting that the FTC’s regulatory decisions on neurotechnological products will be less contestable.

Given that the integrity of some of the FDA’s standards on BMI products may rely on federal courts applying some form of Auer deference, as those standards have largely been issued as guidance rather than through classic rulemaking, the fate of the Auer doctrine becomes critical.123 Both Auer and Chevron have faced increasing criticism from scholars and decisionmakers in the past decade, which has placed their durability on uncertain ground. 124 In Kisor v. Wilke, the Supreme Court recently left the Auer doctrine intact by a slim 5-4 majority, though qualified existing guardrails on the doctrine and affirmed that agencies should consider whether and how much stakeholders have relied on a particular interpretation of a rule.125 Four justices would have formally overruled Auer, even though the Court unanimously supported the outcome in this particular case, because of the perceived bias in favor of regulatory agencies that the doctrine creates. 126 Chief Justice Roberts was the swing vote in upholding the Auer doctrine, though he emphasized the doctrine’s limitations, suggesting an openness to upend Auer in the future.127

Efforts by the FDA to extend its medical device authority to BMIs with new rules and guidance will be reviewable by courts, but whether courts become involved will ultimately depend on whether litigants such as industry members challenge these efforts. Politically, the FDA enjoys relatively stable public support, though its reputation still fluctuates across constituencies and time.128 Recently, however, the agency has come under fire for both overburdensome and lax responses to diagnostic testing and therapeutics during the COVID-19 pandemic.129 Should public support for the FDA collapse, neurotechnology developers could become more prone to litigate FDA efforts to increase regulation of their industry. Unfavorable judicial review of the agency’s decisions to increase regulatory scrutiny on emerging BMIs could then become more likely and lead to further destabilization of the regulatory environment for these innovative products.130 Should courts limit the FDA’s oversight of BMIs, the FTC could only fill in a small fraction of the gap left regarding medical devices, given the broad differences in the scope of the two agencies’ respective authorities.131 Instead, absent further legislation, this situation could see some safety and effectiveness regulation consigned to market forces and voluntary obligations, potentially jeopardizing the effectiveness of oversight.132

D. Fragmented Regulatory Governance for BMIs

The presence of multiple administrative agencies and types of substantive regulation for BMIs creates the risk of fragmented and duplicative regulation, if not properly coordinated.133 Not only are administrative agencies such as the FDA and FTC involved, but also state and federal courts and lawmakers. 134 Other public entities, including the U.S. Patent and Trademark Office (“USPTO”) or Consumer Products Safety Commission (“CPSC”), could contribute to this fragmentation in the future as well, although USPTO oversight may be less direct and CPSC regulation appears unlikely to trigger. 135 Fragmentation results from the involvement of multiple decisionmakers with each having only partial authority, expertise, and information to address a regulatory problem, rather than one centralized decisionmaker with a comprehensive mandate and high capacity. 136

The resulting fragmentation from these gaps could create three types of problems in the regulatory governance of neurotechnologies like BMIs. First, overlap between agencies reviewing the same products could create additional costs on industry actors from inconsistent or duplicative norms, increasing both the financial costs and amount of time required for private actors to pass regulatory approval and remain on the market.137 The FDA and FTC both have authority over health- and safety-related claims of BMIs and will both have capacity to review the cybersecurity protections, creating potentially costly regulatory overlap.138 Second, and similarly, bifurcated jurisdiction could lead to different and inconsistent regulatory standards applied to the same problem.139 The FDA wields a standard of “safety and effectiveness” for medical device performance while the FTC applies an “unfair or deceptive acts or practices” standard to business activities such as communication and marketing,140 which could create two different sets of regulatory norms that must be met. Not only can this place costs on industry,141 but federal agencies may waste resources by developing similar expertise independent from each other, rather than by collaboratively sharing experiences. Third, the partial authority of each regulator in the neurotechnological landscape will likely result in governance gaps, as some risks and problems may fall outside of each entity’s perceived or actual scope of authority.142 In particular, using BMIs to enhance cognitive or physical performance presents novel regulatory challenges which neither the FDA nor the FTC have meaningfully addressed in the past and may lack authority over entirely.143

Significant fragmentation risks raising the costs of regulation for public and private actors, lowering the effectiveness of oversight, and losing public legitimacy by presenting duplicative requirements and slowing access to potentially valuable innovation.144 Resolving or mitigating fragmentation of oversight for BMIs will require strategies to bring regulators together, potentially alongside private and civil society actors, to ensure that regulation can achieve its goals to protect the public without imposing unacceptable costs.

III. STRATEGIES FOR MANAGING FRAGMENTATION FROM CONVERGENCE

The fragmented regulatory governance scheme for BMIs in the United States could result in both inhibiting innovation or market access for these promising new products and overlooking critical risks, while using scarce regulatory resources inefficiently. Alleviating these oversight issues will require thoughtfully engaging legal and political tools to stimulate and coordinate activity by the FDA, FTC, and other public bodies without rendering judicial resolution necessary. Successful coordination will be critical to generating robust, responsive, and efficient regulation for this site of technological convergence. Part III will proceed by considering tools and institutions that can be leveraged to promote greater regulatory effectiveness and efficiency through early action and collaboration.

A. Interagency Coordination: Tools and Institutions

Multiple federal agencies can hold regulatory authority which overlaps, creating potential inefficiencies and gaps in the governance of a shared regulatory space.145 Consolidating different agencies or subagencies into a larger department or other administrative unit provides one way to address fragmentation issues. 146 Perhaps the most notable recent example is the Bush Administration crafting the Department of Homeland Security in 2002 by fusing multiple agencies that were previously housed in other departments.147 However, legal and social scholars have illustrated how consolidation cannot guarantee that fragmentation will not continue within the new agency, undermining the rationale for consolidation. 148 Instead, recent literature suggests that coordinating various federal agencies with similar jurisdiction offers the most effective solution to fragmentation.149

Coordinating agencies requires understanding the “toolbox” of available coordination solutions and which particular institutions can most effectively wield those tools.150 These tools can involve (1) interagency consultation, whether voluntarily initiated by agencies or externally required, (2) memoranda of understanding (“MOU”) or other agreements between agencies on how to manage a shared space, and (3) joint policymaking, such as co-creating and issuing rules.151 For BMIs, each of these tools could provide value in coordinating the FDA and FTC in their endeavors. First, interagency consultation should provide opportunities for regulators at each agency to communicate with each other about their priorities, data collected, and lessons learned to form a more robust and coordinated agenda.152 Simply by consulting each other, the FDA and FTC could share experiences and technical expertise in regulating BMIs, especially on the most complex issues arising from technological convergence. By discussing successes and failures in handling BMIs, the two agencies could collaboratively develop regulatory capacity for BMIs rather than each independently spending their own resources, and taxpayer dollars, to develop similar expertise.

Second, interagency agreements such as MOUs can bring agencies together to negotiate the scope of each of their authorities and activities in a shared regulatory space, which can reduce overlapping activity and administrative costs.153 Agreements between the FDA and FTC on how to collectively regulate BMIs could provide significant clarity and predictability, both to regulators and to private industry, leading to a more stable environment for innovation and well-balanced oversight.154 Such MOUs would not be unprecedented.155 The FDA’s subunit for drugs and the FTC have an existing MOU on prescription drug labeling oversight,156 so creating another specialized agreement between the FDA’s medical device authority and the FTC has clear precedent. The existing, working MOU between the agencies could lower transaction costs in establishing a new one,157 as some of the same staff may be involved in establishing a new MOU over BMIs, particularly on the FTC side.

Third, joint policymaking sees agencies come together to collectively issue rules or guidance to assist regulated entities with compliance in a complex area.158 Agencies may organically decide to make policy together or Congress may require this through legislation.159 However, joint rulemaking may prove less effective in the particular case of regulating BMIs, because the FDA generally favors rulemaking while the FTC generally prefers adjudication in policymaking. 160 Yet, providing predictable and effective BMI regulation could still involve the FDA closely consulting with the FTC before issuing rules or guidance and the FTC closely consulting the FDA during or prior to adjudication.

To be sure, interagency coordination and collaboration efforts can pose normative and statutory overreach issues when these activities empower agencies beyond what Congress may have intended when delegating power to individual agencies. 161 However, adopting a functionalist point of view, agencies “pooling powers” may be effective and normatively desirable for responding to emerging technologies, such as BMIs, when Congress fails to appropriately direct regulatory policy.162 This strategy can even include agencies transferring their authority to adjudicate certain subject matters between each other.163 Technological convergence will spark issues that no one agency can oversee with their current jurisdiction and expertise, such as cognitive enhancement or sensitive neuroprivacy matters.164 Accordingly, the FDA and FTC working to expand their collective regulatory power may be desirable in both resolving fragmented governance for BMIs and working to close governance gaps to protect the public health and wellbeing.165

#### Extinction

Megan Demko 20, Arizona State University; Katina Michael, School for the Future of Innovation in Society, Arizona State University; Kennedy Wagner, School of Life Sciences, Arizona State University; Terri Bookman, Arizona State University, “When Brain Computer Interfaces Pose an Existential Risk,” 2020 IEEE International Symposium on Technology and Society (ISTAS), 11/2020, pp. 112–114

This paper explores the prospect of brain implants as related to human activity and functioning. The researchers present information compiled through popular data collection using specific keywords related to brain implantation. The study calls into question and discusses the harm that could result if a negligent populace receives brain implants to “merge” with artificial intelligence through brain computer interfaces. Its intent is to raise awareness of the risks that brain implantation imposes on an individual’s health, wellbeing and livelihood.

Keywords— brain implant, health, livelihood, artificial intelligence, brain computer interfaces, BCI

I. Introduction

Brain computer interfaces are included in a category of Artificial Intelligence (AI) and are controversial due to their purpose to interact with the user’s brain as a digital tool. The researchers find this new technology to be alarming, due to its ability to be invasive. This brings about the purpose of the researchers’ investigation which is to question this new technology that is heralded as imminent into society.

The populace, as to date, has become increasingly reliant to technology, and while this has provided several benefits to individuals, there should be boundaries on how much the populace should bind themselves to Artificial Intelligence. While robots, machines, and phones can be useful tools, individuals can maintain their own personal liberties and have their own autonomy. Technology has the ability to crash and carries the risk of hacking which are not currently issues that individuals’ brains possess. The researchers investigate these questions to bring awareness to the shortcomings of brain implantation and how it can negatively impact the populace.

September 2020 introduced Elon Musk’s Neuralink demonstrations on pigs to the world, to further encourage the public to merge itself with Artificial Intelligence. The researchers find this to be troubling since the advancement of brain computer interfaces and the populace’s current relationship with technology could create a catastrophic disaster to envelop if users do not heed warning or educate themselves on the risks that they welcome by allowing Artificial Intelligence to become too invasive in their lives.

Aside from the invasiveness executed by computer brain interfaces, the risks the populace faces from inserting a foreign apparatus into their brains can result in experiencing breaches in privacy and security and the possibility of interfering with thought cognitivity. This is not necessarily alluding to the ‘reading’ of thoughts, but rather the disruption of natural brain signals firing between neurons.

The current advancement associated with the narrative of “Artificial Intelligence in the brain” has migrated its concern from prosthesis to now direct itself toward human enhancement. Brain computer interfaces are becoming more familiar and desirable by the populace for the purpose of convenience and novelty rather than as a useful tool for people who might require them for basic functionality.

II. Methodology

To explore the questions the researchers had concerning Artificial Intelligence and brain computer interfaces, they performed data collection to find credited sources based on the keywords mentioned in abstracts until December 2018. The researchers then compiled quotations from the data collection and analyzed these concepts to address the following dangers associated with brain computer interfaces identified as the four dominant themes of concern:

1. Damage Infliction

2. Privacy Threats

3. Loss of Personal Autonomy

4. Memory Manipulation.

III. Damage Infliction

Brain implants will be applied via invasive means, since they require being physically inserted into brain tissue, which can cause potential risks of brain damage. Notably, brain implants will function “through tiny electrical signals... that allows one to ‘feel’ what the device’s input is” [1]. This creates motor function connections forged between the brain and movement, allowing thoughts to develop and command the body to function. Some of these “devices are vulnerable to security breaches that could be used to inflict pain and even alter behavior... this ability to control the brain remotely creates a ‘backdoor’ entry for hackers where patients could be forced to carry out impulsive acts or induce excruciating pain by malicious brain stimulation” [2, p. 3]. Human choice and free will could be threatened with brain implants. So much is unknown, but scenarios can easily be envisioned where hackers could gain control over the operation of a brain implant, and cause actions, behaviors, or experiences that are not under the sole control of the patient.

Patients have a variety of side effects and altercations they can experience as a result of receiving brain computer interfaces. Other examples of possible effects include that brain implants can alter people’s recognition and association with location and where they are. Hackers could create “possible attacks [that] include altering stimulation settings so that patients with chronic pain are caused to be in even greater pain. A sophisticated hacker could potentially even induce behavioral changes such as hypersexuality or pathological gambling” [1].

Brain implants have the ability to correlate with dopamine levels, influencing people to crave the “feel good” vibes more than they should, making them vulnerable and susceptible to addiction, potentially putting themselves at risk. For patients suffering severely, “brain implants could prevent [them] from ‘speaking or moving, cause irreversible damage to their brain, or even worse, be life-threatening’” [3].

Therefore, the physical health of potential brain implant recipients is pertinent. With the associated health and physical dangers, the populace should be cautious with their monetary consumption in relation to brain computer interfaces. Negligence could result in the inability to reverse the changes they have initiated upon themselves.

IV. Privacy Threats

Personal thoughts could be threatened or even cease to exist as a result of brain computer interfaces being hacked. Basic freedoms would be at risk. Related to brain implants, researchers “identify four new rights that may become of great relevance in the coming decades: the right to cognitive liberty, the right to mental privacy, the right to mental integrity, and the right to psychological continuity” [4, p. 5]. The populaces’ livelihood would be more concerned about protecting their personal thoughts. Before brain computer interfaces were brought into questioning, “the ultimate realm of privacy has been our unspoken thoughts” [5].

Individuals may require caution that results in paranoia. Restrictions on speech could be applied to more specific extremes such as thought processes of individuals which would threaten mental health. Privacy of individual ideas and thoughts has been a central value that has consistently been maintained throughout history. It would be necessary to consider individuals’ rights to privacy when considering the danger that brain implants might impose on society.

V. Loss of Personal Autonomy

With brain computer interfaces, the relationship between doctors, manufacturers, and consumers of advanced technology will change. Doctors and manufacturers could collect more data and information about consumers’ thoughts and feelings. Trusting manufacturers and doctors could risk the populace’s personal freedoms, leaving them defenseless, exposed, and susceptible to harm. If individuals receive brain computer interfaces, they would be volunteering intellectual and emotional information in their brains to be suspect to potential data collection.

T. Prescott comments on the loss of freedom due to brain implants, that “brain-computer interfaces would create new tools for government surveillance and control, and new kinds of crime such as ‘mind-jacking’- the remote control of another’s thoughts and actions” [6]. The government would have the ability to interfere closely with personal autonomy so the populace would behave in their interest.

In the military, “spies might well also try to eavesdrop on such a soldier’s brain, and hackers might want to hijack it. Security will be paramount, encryption de riguer” [7]. National Security could also be threatened by brain computer interfaces, since the populace’s secrets would cease the security they currently hold. The populace would have a higher chance of mental oppression and could lose their sense of self as a result.

VI. Memory Manipulation

As brain implants are currently conceived, it is easy to see how hackers, delving into people’s intellects, could manipulate a victim’s memory, causing them to remember or forget various ideas or events. D. Galov notes that in 2050, the populace would be “vulnerable to exploitation and cyber-abuse. New threats that have appeared in the last decade include the mass manipulation of groups through implanted or erased memories of political events or conflicts, and even the creation of “human botnets” [8]. The populace could have an increase or decrease in their own memories, thus causing them to believe fallacies and lies. Memories would lose their value across the populace’s standards.

Brain implants could provide online criminals with the ability “to exploit memory implants to steal, spy on, alter, or control human memories” [8]. Memories would be susceptible to the dictation of hackers. Some researchers fear that “neurostimulators may lead to dystopian scenarios whereby hackers create false memories and implant them in people’s brains” [9]. Loss of memory is loss of self.

A person’s fundamental being relies on memory to conceive time and reality. By taking away this sense of self, corporations manufacturing brain computer interfaces are delving into new, uncharted territory without a proper sense of caution. If a hacker intervenes with memory systems of an individual, they have destroyed the person’s psyche. The populace should be cautious with such implant technologies, especially any that could interfere with a recipient’s memory system.

VII. Results and Discussion

It is pertinent to consider one’s safety before receiving a brain computer implantation. Donovan [10], reporting on another Kaspersky report [11], warns the populace that, “Neurostimulators have cybersecurity vulnerabilities that could be exploited by hackers to get access to the devices, manipulate them, and steal data transmitted by them.” The purchase of brain computer interfaces could result in the populace being manipulated by an array of hackers, including governments.

In society, it is evident that the populace will begin to “see four main threats: the loss of individual privacy, identity and autonomy, and the potential for social inequalities to widen, as corporations, governments, and hackers gain added power to exploit and manipulate people.” [12], [13]. If the populace’s most intimate thoughts are monitored, their individuality could become collectivity while being naive to the malicious activity in their brain.

The populace should assess brain computer interfaces with skepticism, and initiate efforts to protect personal intellect. Brain implants should not be surgically affixed to people’s bodies until the integrity of the product and its encryption is ensured indefinitely.

# 2NR

## Bedoya DA

### AT: Antitrust Now

#### It concedes the effect relies on courts!

[Kentucky in green].

1AR Arends et al., Partner at Husch Blackwell, 2-23-2022

(Wendy, and Mark B. Tobey, Senior Counsel, and Julia A. Banegas, all for Husch Blackwell, “Biden Antitrust Enforcers Take Aim at Mergers and Acquisitions”, <https://www.huschblackwell.com/newsandinsights/biden-antitrust-enforcers-take-aim-at-mergers-and-acquisitions>) AJW

President Biden’s top antitrust cops, Jonathan Kanter at the U.S. Department of Justice Antitrust Division (DOJ) and Lina Khan at the Federal Trade Commission (FTC), are putting more arrows in their quiver to take aim at perceived consolidation in a variety of industries. Their changes to long-standing tenets of U.S. merger review policy fall in line with the Biden Administration’s whole-of-government approach to ferreting out concentration in a wide variety of industries. The FTC also cited a significant increase in mergers in the last year and over the past decade as the impetus for some of these reforms. While more change is expected, the recent pronouncements by the FTC and DOJ are likely to lead to increased scrutiny of reportable transactions under the Hart-Scott-Rodino Act (HSR), more uncertainty about the process, and a broader view of whether a transaction harms competition. Increased scrutiny of transactions HSR changes. Among the FTC’s announcements are changes to the HSR Act premerger notification process. The FTC indefinitely suspended early terminations of the 30-day HSR waiting period. Previously, the agency would grant early terminations upon request and the deal could be reviewed before the 30 days had run, allowing the parties to close prior to the expiration of the waiting period. Since the start of the Biden Administration, the FTC is no longer granting early terminations—for the time being, all deals will have to wait at least the full 30 days after filing the HSR notification before the parties can close. In addition, the FTC also reversed course on well-established guidance regarding retirement of debt in connection with acquisitions—parties can no longer subtract the amount paid to retire debt when calculating the HSR size of transaction value. This will likely increase the number of HSR reportable transactions. Prior approval policy is reinstated. The FTC voted to change its Prior Notice policy and turned back the clock to again require prior approval in settlement agreements. This means if the parties settle a merger investigation with the FTC, the FTC will require a consent decree provision requiring that the parties receive prior FTC approval of future acquisitions for the term of the decree. This will likely result in more acquisitions being subject to FTC scrutiny. Whether DOJ adopts this stance remains to be seen. Second requests—broader in scope and duration. Additionally, the FTC has announced other changes to merger review that will lead to increased scrutiny. In particular, the FTC changed its procedures for Second Requests. A Second Request may be issued if the FTC or DOJ continue to investigate a transaction beyond the 30-day HSR waiting period, and it generally consists of a very lengthy request for documents and information. The FTC announced that the Second Request process will be more demanding by heightening the requirements to request a modification to limit the scope of a Second Request, the effect of which may be to give the FTC more time and leverage to challenge a deal. The FTC also noted that a Second Request “may factor in additional facets of market competition that may be impacted,” including labor markets, cross-market effects and market incentives following investment firm involvement. More unpredictable merger review process FTC warning letters. In addition to the increased scrutiny outlined above, the FTC has also introduced reforms that will increase the uncertainty of the process. For instance, for deals in which the HSR waiting period has expired but the FTC has not completed its review, the FTC may decide to send warning letters advising the parties that the investigation remains open and that they will close the transaction at their own risk. Some practitioners report that the FTC is reaching out prior to the parties’ receipt of a warning letter, although this does not seem to be occurring in every instance. FTC informal opinions. The FTC announced that it is reviewing its informal opinions of HSR rules. Many HSR attorneys utilize these informal opinions to confirm the FTC’s view as to the applicability of the HSR rules to various situations. The FTC cites concerns that some parties may be misguided in their reliance on prior opinions that are not applicable (or are misconstrued) with respect to their specific transaction. Overhaul of merger guidelines. The FTC and DOJ have also requested comments on merger enforcement to determine whether and how to overhaul the agencies’ Horizontal and Vertical Merger Guidelines (Guidelines). The Guidelines (which have been updated over the years) provide practitioners and parties with an analytical framework within which to determine whether a transaction complies with antitrust law. The agencies are seeking input to help “modernize antitrust enforcement laws” relating to the following topics: the scope of review, anticompetitive presumptions, market definition, threats to potential and nascent competition, impacts of monopsony (buyer) power, and unique qualities of digital markets. The practical effect of these revisions is expected to increase the number of transactions that are found to be illegal by the agencies, although it remains to be seen whether courts take the same approach. DOJ’s preference is to litigate, not settle. DOJ’s Kanter recently stated that merger review settlements should be “the exception, not the rule,” because divestitures and other remedies are not sufficient to protect consumers. That said, DOJ will need to choose its litigation battles wisely given resource constraints and the current state of the law. A broader view of harm to competition DOJ and FTC have signaled they are open to a variety of theories regarding a transaction’s harm to competition and are not tied to the consumer welfare standard established over decades of economic analysis and judicial precedent. Chair Khan declared that the FTC will investigate a transaction’s potential effects on employees and small business, not just consumers. DOJ’s Kanter questioned the necessity of defining the market in a given case, and both agencies have signaled ramped-up enforcement of transactions in banking and finance, food and agriculture, healthcare, technology, and transportation, among other industries. The agencies are also taking a closer look at transactions that may not present traditional horizontal overlap issues, but instead raise vertical concerns, such as the denial of access to a key supplier or purchaser or harm to a rival. Examples of current transactions that were or are being investigated for vertical issues include: Microsoft/Activision. It is reported that the FTC is investigating Microsoft’s proposed $69 billion acquisition of Activision (creator of Call of Duty and Candy Crush) and is likely to scrutinize how the acquisition could harm rivals by limiting their access to content, among other issues. NVIDIA/Arm. In December 2021, the FTC filed suit to block U.S. semiconductor chip supplier Nvidia Corp.’s $40 billion acquisition of UK-based semiconductor design firm Arm Ltd. The FTC alleged that the transaction would harm competition in markets for computer chips used in datacenters and in automotive advanced driver assistance systems. Arm is a critical technology supplier to most of NVIDIA's competitors. It is reported that the parties are abandoning the transaction. Lockheed Martin/Aerojet. The FTC is suing to block Lockheed Martin’s $4.4 billion acquisition of Aerojet Rocketdyne. Aerojet supplies critical components for the missiles made by Lockheed and other defense prime contractors. The FTC’s complaint alleges that if the deal is allowed to proceed, Lockheed will use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense. Amazon/MGM. It is reported that the FTC continues to investigate Amazon’s proposed $8.45 billion acquisition of MGM. Penguin Random House/Simon & Schuster. DOJ filed a complaint in November 2021 to block the proposed acquisition by Penguin Random House of Simon & Schuster, two of the “Big Five” U.S. publishers. The complaint alleges not only elimination of head-to-head competition between the two, but also potential harm to best-selling authors by lessening incentives to give competitive pre-publication advances.

#### AND courts won’t do it.

Stephen Calkins 21, Professor of Law at the Wayne State University Law School, former Director of the Mergers Division in the Competition and Consumer Protection Commission of Ireland, former General Counsel for the Federal Trade Commission, J.D. from Harvard Law School, “The Future of Antitrust,” Antitrust Magazine, 12-17-2021, https://www.americanbar.org/groups/antitrust\_law/publications/antitrust\_magazine/2021/fall-2021/the-future-of-antitrust

But unless there are major legislative changes—an important caveat in this strange time when Democrats and Republicans are both down on Big Tech—it would be a mistake to look for wholesale change.

We have a conservative judiciary and a Supreme Court that is both reliably conservative and deeply imbued with antitrust as we have known it. Only last June Justice Gorsuch wrote, for a unanimous Court, that “antitrust courts must give wide berth to business judgments before finding liability. . . . Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare.” Government and private plaintiffs alike find it difficult to win antitrust cases. Indeed, as I write this both Facebook and Apple have recently won antitrust victories.

The conservative judiciary is not just poised to resist FTC activism but is threatening the very existence of the agency as we know it. The FTC has suffered major procedural setbacks; courts show less and less deference to agencies; and litigants now regularly assert that the FTC’s structure is unconstitutional. When the new progressive leadership overreaches—as it almost inevitably will—the consequences may not be pretty.

Also ready to resist wholesale change is the immensely talented defense bar and the consulting economists who work with it. The revolving door that has long been a reality for American antitrust enforcement also tends to restrain. The Biden administration took a different path when it appointed FTC Chair Khan, but its AAG nominee Jonathan Kanter, although famous for being a critic of Big Tech, spent more than 20 years in corporate law firms as a protégé of Reagan AAG Charles “Rick” Rule. The U.S. pattern of near-constant change of leadership—very unlike other countries (although this may be starting to change)—naturally tends toward a revolving door because so many talented antitrust experts work for or want to work for major law firms.

For wholesale change, then, my view is that it will come from Congress or not at all. The Biden FTC will try rulemaking, and although that can’t be completely dismissed it will not be easy to accomplish. But even if there will not be wholesale change the cracks in the foundation of modern antitrust are important. If that old confidence that everything will work out for the best is gone—as I think it is—then enforcers will act differently, academics will write differently, and, eventually, courts will rule differently.