# 1NC---Round 5---NDT

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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.

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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.

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Torts CP

#### The United States federal government should substantially increase its prohibitions on private business practices that create anticompetitive restrictions on federal electoral debates 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]

#### Expanding TI creates a feedback loop that spills over, ensuring a safe and effective Internet of Things

Dr. Rebecca Crootof 19, Assistant Professor of Law at the University of Richmond School of Law, Affiliated Fellow at the Information Society Project, JD from Yale Law School, PhD in Law from Yale University, “The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference”, Duke Law Journal, 69 Duke L.J. 583, December 2019, Lexis

This is but one of many examples of how internet-connected devices, collectively referred to as the "Internet of Things" ("IoT"), allow companies to engage in remote interference - the practice of employing an over-the-air update to remotely alter or deactivate a physical device. After identifying this contractually legitimized vector for harm and discussing why our current civil liability regime is ill-suited to regulate it, this Article proposes legal reforms to expand corporate liability and minimize foreseeable user injury. Enacting these suggestions will foster a powerful regulatory and social-norms feedback loop, shaping our future assumptions about IoT companies' obligations and consumer rights.

Thanks to recent technological advances, it is increasingly easy to add sensors and wireless capabilities into more and more items, allowing companies to transform innumerable once-"dumb" items into "smart" IoT devices. 4As this Article is concerned with the issue of consumer physical harm, it focuses on IoT devices intended for individual and household use. These include both relatively independent gadgets - like an implantable medical device, wearable step tracker, smart appliance, or vehicle - and integration systems - like a smart-home hub that networks lights, entertainment, and environmental controls. 5

The ongoing connection between these devices and IoT companies 6 allows for corporate remote interference, which can benefit both industry and individuals: over-the-air updates can address bugs, protect against discovered malware, correct cyber vulnerabilities, enable new capabilities, 7or even save lives. 8The ability to remotely alter IoT devices also reduces industry costs of complying with changing regulations, 9monitoring compliance with terms and conditions, and enforcing consequences for contractual breaches. 10Companies may pass these savings on to consumers in the form of cheaper products or a greater willingness to extend credit to riskier borrowers. 11For example, the ability to remotely boot a car reduces the need for physical repossessions, minimizing the potential for embarrassment, trespass, or breaches of the peace and the attendant physical risks to repossession agents, consumers, and bystanders. 12

The benefits of corporate remote interference are widely touted, but the drawbacks are less obvious. Some scholars and commentators are detailing how connected items create consumer-privacy issues and underappreciated economic harms, 13and others are discussing how IoT devices' malfunctions or weak cybersecurity create an increased risk of physical harm. 14These topics deserve attention - not least because standing rules and the economic-loss doctrine bar many suits that would otherwise result in liability for IoT companies - but the focus on privacy, cybersecurity, and criminal hacks has obscured the increased risk of physical harm from nonaccidental corporate acts.

This is the first law review article to discuss how the benefits of unconstrained corporate remote interference may come at the expense of consumers' physical safety. 15Because IoT devices interact with and affect our physical environment, corporate remote interference can foreseeably cause physical harm. Your oven turning on unexpectedly increases the risk of a house fire; 16your car turning off unexpectedly increases the risk that you will be stranded in a dangerous area. 17 You trust an IoT baby monitor, senior lifeline, home-security system, or fire alarm to notify you of a problem - but should a software update disable the alert system without warning, your reliance could lead to tragedy. 18Your garage or front door could be left open, inviting theft or assault, in retaliation for a bad review of a smart lock on Amazon. 19 And implantable IoT medical devices - like pacemakers and insulin pumps - make the physical risks of remote deactivation all the more visceral. 20

In short, this technology increases consumer risk without a corresponding increase in corporate liability. Given how IoT devices increasingly affect our environment and bodies, the potential magnitude and kinds of harm from corporate remote interference are significant; given that the digital nature of the IoT enables relatively costless and automated action, the potential scale of these harms is staggering. Meanwhile, IoT companies are creating, monitoring, and enforcing contractual-governance regimes with few legal incentives to ensure foreseeable harms are avoided. Finally, absent a better understanding of how IoT-enabled injuries operate and propagate, judges will likely apply products liability and negligence standards in ways that minimize corporate liability. Thus, the actual harm individual consumers experience is familiar - after all, repossessed cars have never been able to take children to emergency rooms, and malfunctioning alert systems or medical devices have long caused injuries. But our current civil liability system is ill-equipped to address this new vector for harm. To correct this imbalance, this Article proposes expanding liability for harms resulting from corporate remote interference.

Part I introduces IoT devices and discusses how these internet-connected objects foster a new ongoing and intimate relationship between IoT companies and users, characterized both by an increased power differential and an increased risk of harm. 21Companies can harness IoT devices' extensive surveillance capabilities 22to monitor consumer compliance with contractual terms - written by and for the company 23- and employ strategic remote interference to extort concessions and engage in self-help enforcement. 24Critically, and in contrast to prior forms of electronic self-help, corporate remote interference with IoT devices can cause property and bodily harm. If, as Ryan Calo has quipped, robots are "software that can touch you," 25IoT devices are contracts that can hurt you.

Part II discusses how contract and tort law work in tandem to shield companies from liability for the harms caused by their remote interference. 26Unsophisticated consumers agree to nonnegotiated terms of service, which notify them of the possibility of remote interference and purport to limit corporate liability for its consequences. 27Even if a court determines that a liability-limiting clause is invalid as unconscionable or contrary to public policy, IoT devices' bundled goods/services nature thwart breach of warranty claims, 28while the contractual notification precludes other common law tort suits. 29Meanwhile, none of the products liability standards map well onto these situations, and the duty analysis for a negligence claim is confused by tempting but misleading analogies. Further, for both products liability and negligence actions, the causal chain may appear tenuous. Not only can corporate remote interference facilitate accidental and criminal intervening sources of harm, it also shifts responsibility to those intervening sources. 30 This allows companies to evade the reputational costs that might otherwise attend dramatic injuries resulting from remote interference, limiting the market's ability to address this problem - indeed, if anything, it encourages a market for lemons. 31In short, remote interference has foreseeable, harmful consequences, but our current civil liability regime is unlikely to hold IoT companies sufficiently accountable.

But, as discussed in Part III, law can evolve. Civil liability standards regularly change in the wake of technological development, new sources of harm, and attendant shifts in power and social relations. 32The proliferation of IoT devices heralds another possible liability inflection point, 33 the outcome of which will determine our future basic assumptions about IoT companies' obligations and consumer rights. In one potential timeline, consumers will continue to bear the brunt of harms resulting from corporate remote interference, and consumer expectations regarding corporate duties - or lack thereof - will develop accordingly. In another, preferable future, liability will be allocated in a more balanced way, and consumers will reasonably expect companies to take steps to prevent foreseeable harms.

Part III concludes by outlining various routes toward expanding corporate liability for harms resulting from remote interference. In some situations, it may be sufficient to adopt more expansive understandings of existing tech-neutral doctrine; in others, it may be clarifying to articulate tech-specific rules. This Article discusses the relative benefits of strengthening the unconscionability and public policy doctrines to limit the reach of exculpatory clauses; recognizing broader relational duties, which might take the form of a new implied warranty, a new products liability claim, or a new informal fiduciary duty; and extending proximate cause standards. 34It closes with a discussion of how courts, legislatures, and agencies at both the state and federal levels can complement each other in implementing these recommendations.

Calibrated correctly, our civil liability regime can evolve to preserve the benefits of remote interference and ensure that IoT companies are incentivized to better protect consumers.

#### Unchecked IoT causes extinction---legal guardrails make it a positive force to solve multiple global threats

Jerry Bowles 19, Co-Founder of Social Media Today and Founder of Sequenza21, Writer at EarthWatch Magazine, MA in Journalism from West Virginia University, BA in Journalism from Marshall University, “Can AI + IoT Help Save the Planet?”, Medium, 5/26/2019, https://medium.datadriveninvestor.com/can-ai-iot-help-save-the-planet-af369053978b

Can AI + IoT Help Save the Planet?

Only if we use them wisely.

The United Nations’ recent report on biodiversity is sobering evidence that human economic development has created a crisis that threatens the extinction of over 1 million species of plants and animals on earth in the coming years.

Species loss — driven mainly by climate change, loss of habitat, overfishing, deforestation, pollution and other man-made activities — has accelerated at a rate that is tens to hundreds of times faster than in the past, the report said.

In a telephone interview, Osvald Bjelland, chairman of the Oslo-based business advisory firm, Xyntéo, which advises global leaders on high performance and sustainability issues, said:

This is not a crisis that is somewhere far off in the future. This is something that is happening right now. The UN report is clear: nature is in the worst shape it has been in history. If we don’t act immediately, we are in danger of losing forever vital parts of our living planet. And that threatens our own extinction.

We have the technology, capital and talent we need to create a more sustainable world; what we need is for business leaders, scientists, policymakers and ordinarytizens to come together to develop a growth model that works for mankind and for the planet.

How technology can help

The latest alarming warning from Mother Earth comes at a time when the high tech industry is in the midst of a paradigm shift that many analysts are calling the Fourth Industrial Revolution. Basically, the term applies to a convergence of emerging cognitive technologies — centered around artificial intelligence (AI) — that will reshape entire industries, accelerate and enhance human decision-making, and automate or replace much work now performed by people.

Artificial Intelligence (AI) and the systems it helps power, as the Internet of Things (IoT), machine learning, robotic processes automation, deep learning, and virtual assistants, will soon touch every facet of how people work and live and has the potential to radically transform their lives for the better. Or, without strong ethical and wise leadership and the proper safeguards, it could also make their lives worse.

The good news for environmentalists and global sustainability advocates is that these new technologies — especially AI and the IoT — profoundly enhance mankind’s ability to manage environmental factors like climate change, agriculture, biodiversity, water quality, natural disaster prediction and much more. As Microsoft President Brad Smith explained when the technology giant launched its ambitious “AI for earth” program:

There are few societal areas where AI can be more impactful than in helping address the urgent work needed to monitor, model and manage the earth’s natural systems. Data can help tell us about the health of our planet, including the conditions of our air, water, land and the well-being of our wildlife…AI can be trained to classify raw data from sensors on the ground, in the sky or in space into categories that both humans and computers understand. Fundamentally, AI can accelerate our ability to observe environmental systems and how they are changing at a global scale, convert the data into useful information and apply that information to take concrete steps to better manage our natural resources.

Here’s an example of AI + IoT in real life. Farmers and growers around the world are at the mercy of the one factor they can’t control — weather. The Yield, an agricultural technology company based in Australia, uses sensors, data and artificial intelligence (AI) to help farmers and growers make informed decisions related to weather, soil and plant conditions.

Sensors in the company’s end-to-end solution measure 12 factors including soil moisture, leaf wetness, light, wind and rain and uploads the data to the Microsoft Azure Cloud platform. Using Microsoft AI, The Yield applies advanced analytics and predictive modeling to create a 7-day weather forecast for a farmer’s specific microclimate. An intuitive mobile application helps farmers use the forecast to determine how, when and where best to plant, irrigate, protect, feed and harvest their crops. The result? Less spoilage and more food for the planet. The bonus is that the software learns from its mistakes and gets smarter the more it is used.

There are literally thousands of uses for AI technologies across old and new industries that address the environment and other quality of life issues. Cisco estimates that by 2030, 500 billion such devices and objects will be connected to the internet. The arrival of 5G will hasten this adoption.

This has enormous implications for both society and technology, ranging across the wide-range of IoT applications: smart agriculture, ocean monitoring, wildlife protection, water supply monitoring, optimized sensor-based air purifying systems, extreme weather monitoring and prediction, early natural disaster warning, smart energy data center management and thousands of other applications that are to come.

One positive indicator; the World Economic Forum conducted an analysis of more than 640 existing IoT deployments, in collaboration with IoT research firm IoT Analytics, and found that 84% of existing IoT deployments can address its Sustainable Development Goals (SDGs).

Artificial intelligence and the Internet of things have the potential to drive unprecedented growth that respects and protects the environment, reduces the expanding human footprint that threatens wildlife and natural habitats, and improve human and animal health through better air, water, and reliable food supply.

They also have the potential to make already deadly weapons even more deadly, enable total surveillance of individuals by authoritarian regimes in ways that are easier and more intrusive, and make autonomous decisions that do not reflect the best of human “values” or meet democratic standards of fairness and justice. They have the power to automate and make redundant many tasks now performed by humans which could be a disaster for humanity if not mitigated in ways that urgently require planning now.

Two of America’s most prestigious institutions — Stanford and MIT — have addressed those questions and others by launching major interdisciplinary programs committed to studying, guiding and developing AI technologies and applications that are ethical and remain “human-centered.”

What is needed most to guide the development of the most powerful technologies that mankind developed to date is leadership. We need leaders of government and industry who are wise, fair and committed to the fundamental values of human freedom, autonomy, and privacy.

My personal view is that the sustainability imperative does not apply just to the physical environment but also to issues like the world’s rising income inequality gap, the political drift toward authoritarianism, and the inevitable job losses that automation will engender.

If guided properly, AI could have a profound, positive impact on people’s lives: It can help mitigate the effects of climate change; detect and prevent disease through early detection; deliver quality medical care to more people; provide better access to clean water and healthy food; personalize education and job training and; lift millions of people out of poverty and help solve many other challenges we face.

### 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:

[Plank 1]

#### ---clarify and enforce pre-existing, objective standards with respect to debate-staging organizations, including requiring contemporaneous proof of such standards;

[Plank 2]

#### ---establish a federally hosted and regulated presidential debate that extends invitations to third parties;

#### ---financially induce the Commission on Presidential Debates to extend invitations to third party candidates.

#### FEC rulemaking incentivizes third-party candidate invitation---antitrust spurs extant litigation AND turns the case.

Margaret Thomas 15, JD, Georgetown University Law Center, "The Exclusion of Third-Party Candidates from Televised Debates: The Danger of Overstating and Overreacting to the Problem," Georgetown Journal of Law & Public Policy, Vol. 13, No. 1, pg. 222-223, 2015, HeinOnline. [italics in original]

Even in the unlikely case that a suit seeking judicially mandated inclusion were successful, a judicial remedy would likely be ill suited to the problem. Courts are simply not equipped to formulate broad policy, which is why they typically defer to agencies out of respect for the political branches and agency expertise under Chevron. Judge Roberts, who wrote the sympathetic opinion in Buchanan, summed it up perfectly: "Although it might be good public policy to allow more third-party candidates into the presidential debates, 'the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.'"1 41 A court decision requiring inclusion of a third-party candidate would likely be 'a simplistic, narrow, fact-specific determination that would not concern itself with the necessarily complex, fine-tuned political judgments that need to be made ... [and] would likely encourage a spate of lawsuits."1 4 2 An FEC regulation, on the other hand, would be able to address a broad range of factual situations. To sum up, it is very unlikely that third-party candidates could secure inclusion via litigation; such a remedy would be ill suited to address the problem long-term, and the costs of continued litigation efforts may outweigh the benefits. Such issues are better addressed elsewhere.

*C. The More Prudent Path*

First and foremost, in order to advocate a solution, it is important to be clear about what the real problems are with the status quo and what the goals of reform ought to be. Here, this Note diverges from many of the other commentators in the area. The primary problem with the status quo is that none of the players (the major candidates, third-party candidates, debate-staging organizations, broadcasters, or corporate donors) know what the rules are. This is due partly to the complexity and variety of the law that touches on the subject and the multiple agencies that arguably have authority in the area but also to the multitude of litigation in the area, much of which is entirely inconsistent. The lack of knowledge about what is allowed and what is not leads to seemingly endless expensive, time-consuming litigation that muddles doctrines like standing and mootness and still affords no real remedy to third-party candidates.

The primary goals for reform in this area should be to clarify what is required of the players involved and to put an end to this definitely futile and perhaps even damaging litigation. In order to do this, the FEC needs to more seriously enforce its existing regulations. It needs to insist upon truly *pre-existing, objective* standards and should consider doing a rulemaking to define more clearly what objective standards entail. Furthermore, the FEC needs to be more willing to police this area by requiring contemporaneous proof of such standards.143 \*\*\*FOOTNOTE BEGINS\*\*\* The FEC will likely do this now as a matter of practice because of *La Botz*. See La Botz v. FEC, 889 F. Supp. 2d 51, 62 (D.D.C. 2012) (discussing the problems with post-litigation affidavits and the risk of post hoc rationalizations). \*\*\*FOOTNOTE ENDS\*\*\* Requiring proof of contemporaneous evidence will not only incentivize debate-staging organizations to come up with such criteria but will also arm the FEC with more substantial evidence on judicial review.

With these incentivizing forces at work, private actors should come up with the right result: inclusion of those third-party candidates who have significant support. Candidates like Ross Perot cannot be ignored, and it is for that reason that he was included in the 1992 debates.44 However, debate-staging organizations should not be required to open their doors to all candidates regardless of their legitimacy, voter support, or campaign organization. When such widespread inclusion was statutorily mandated in the form of the equal time provision of the Communications Act,14 5 the result was a sixteen-year drought of debates after the famous Kennedy-Nixon debates.1 4 6 Furthermore, it is important to note that many of the candidates seeking judicially mandated inclusion are candidates who would not have been included in the debates under any objective criteria. 147 Thus, perhaps when such candidates are excluded, there is not a market failure requiring government intervention; perhaps Ross Perot is the only real example of a third-party candidate with sufficient national backing in recent years, which is why he secured a place in the debates through the normal process of invitation and not by judicial mandate. Perot's experience presents a prime example of why market forces-with the correct incentivizing forces provided by a more actively engaged FEC-should be trusted to include *significant* third-party candidates.

## Market Politics ADV

### Market Politics---1NC

#### Democratic peace is statistically disproven---it’s conflict driving

Dr. Daina Chiba 21, Associate Professor of Political Science in the Department of Government and Public Administration at the University of Macau, Ph.D. in Political Science from Rice University, LL.M in Jurisprudence and International Relations from Hitotsubashi University, and Dr. Erik Gartzke, Professor of Political Science at the University of California, San Diego, PhD in Political Science from the University of Iowa, “Make Two Democracies and Call Me in the Morning: Endogenous Regime Type and the Democratic Peace”, 2/19/2021, https://dainachiba.github.io/research/make2dem/Make2Dem.pdf

The democratic peace—the observation that democracies are less likely to fight each other than are other pairings of states—is one of the most widely acknowledged empirical regularities in international relations. Prominent scholars have even characterized the relationship as an empirical law (Levy 1988; Gleditsch 1992). The discovery of a special peace in liberal dyads stimulated enormous scholarly debate and led to, or reinforced, a number of policy initiatives by various governments and international organizations. Although a broad consensus has emerged among researchers regarding the empirical correlation between joint democracy and peace, disagreement remains as to its logical foundations. Numerous theories have been proposed to account for how democracy produces peace, if only dyadically (e.g., Russett 1993; Rummel 1996; Doyle 1997; Schultz 2001).

At the same time, peace appears likely to foster or maintain democracy (Thompson 1996; James, Solberg, andWolfson 1999). A vast swath of research in political science and economics proposes explanations for the origins of liberal government involving variables such as economic development (Lipset 1959; Burkhart and Lewis-Beck 1994; Przeworski et al. 2000; Acemoglu and Robinson 2006; Epstein et al. 2006) and inequality (Boix 2003), political interests (Downs 1957; Bueno de Mesquita et al. 2003), power hierarchies (Moore 1966; Lake 2009), third party inducements (Pevehouse 2005) or impositions (Peceny 1995; Meernik 1996), geography (Gleditsch 2002b), and natural resource endowments (Ross 2001), to list just a few examples. Each of these putative causes of democracy is also associated with various explanations for international conflict. Indeed, some as yet poorly defined set of canonical factors may contribute both to democracy and to peace, making it look as if the two variables are directly related, even if possibly they are not.

We seek to contribute to this literature, not by proposing yet another theory to explain how democracy vanquishes war, but by estimating the causal effect of joint democracy on the probability of militarized disputes using a quasi-experimental research design. We begin by noting that some of the common causes of democracy and peace may be unobservable, generating an endogenous relationship between the two. Theories of democracy and explanations for peace are at a formative state; it is not possible to utilize detailed, validated and widely accepted models of each of these processes to assess their interaction. Indeed, to a remarkable degree democracy and peace each remain poorly understood and weakly accounted for empirically, despite their central roles in international politics. We address the risk of spurious correlation by applying an instrumental variables approach. Having taken into account possible endogeneity between democracy and peace, we find that joint democracy does not have an independent pacifying effect on interstate conflict. Instead, our findings show that democratic countries are more likely to attack other democracies than are non-democracies. Our results call into question the large body of theory that has been proposed to account for the apparent pacifism of democratic dyads.

#### Democracy causes Nigerian state collapse and civil war

Dr. Moses E. Ochonu 19, Cornelius Vanderbilt Chair in History and Professor of African History at Vanderbilt University, PhD and MA in African History from the University of Michigan, BA in History from Bayero University, Graduate Certificate in Conflict Management from Liscomb University, “Why Liberal Democracy is a Threat to Nigeria’s Stability”, Logos: A Journal of Modern Society & Culture, May 2019, http://logosjournal.com/2019/liberal-democracy-is-a-threat-to-nigerias-stability/

In 2015, Nigeria, a country of about 190 million, spent $625 million to conduct federal and local elections. By comparison, India, with a population of 1.2 billion, spent $600 million on its 2015 election, according to figures released by the Electoral Commission of India (ECI).[1]

In 2019, the election budget of Nigeria’s Independent Electoral Commission (INEC) rose to $670 million. This represents about 2.5 percent of Nigeria’s $28.8 billion budget for 2019, a portion of which is being financed through borrowing. To put the electoral spending in context, more than half of the country subsists on about a dollar a day, and the country recently acquired the dubious distinction of being named the poverty capital of the world, with more people living in extreme poverty there than in any other country.[2] Key infrastructures and services such as roads, railway, electricity, water supply, healthcare, and education are severely inadequate, requiring urgent investments and interventions.

Election-related expenditure is expected to rise in the near future as INEC implements a wider slate of digital technologies to combat manipulation and improve the integrity of the electoral process. For comparison, Nigeria typically devotes about 7 percent of its budget to education. And yet Nigeria continues to maintain a four-year election cycle, with smaller by-elections occurring in between. This electoral calendar guarantees that about $1 billion is spent on elections every four years. As the electoral price tag has grown, democratic dividends have plummeted.

Nigeria’s predicament is a microcosm of the phenomenon of rising financial costs of elections in Africa and diminishing returns on democracy. Across the continent, the cost of electoral democracy is increasing and threatens the delivery of social goods. As African countries battle myriad socioeconomic challenges, the question needs to posed: is it wise for these countries to continue to spend a large percentage of their revenue every four or five years on a political ritual with fewer and fewer positive socioeconomic consequences for their populations? Is this expensive, periodic democratic ritual called election worth its price?

It is not only the monetary cost of elections that now threatens to defeat their purpose and engender disillusionment and, along with disillusionment, the erosion of trust in the state and its ability to produce and distribute public goods. The social cost of periodic elections has been arguably greater, depleting, with each election cycle, the residual stability of the state and the credibility of its institutions.

Elections conducted in Nigeria since the return of civilian rule in 1999 have brought with them anxiety, tension, death, violence, and dangerous rhetoric that, taken together, have frayed the national political and social fabric. Elections have widened fissures and intensified preexisting primordial cleavages.

I can recall no electoral cycle since at least 2003 that was not been accompanied by fears of Nigeria’s disintegration or at the very least the acceleration of its demise. In 2007 and 2011, post-election violence claimed hundreds of lives in Northern Nigeria as supporters of then candidate Muhammadu Buhari rioted after his loss. In the 2019 presidential and national assembly elections, at least 46 people were reported to have died from election-related violence. In the state assembly and governorship elections two weeks later on March 9, 2019, another 10 people died across five states in what the Sunday Tribune newspaper described in its headline as “another bloody election.”[3]

Two riders below the same Sunday Tribune headline encapsulate the turbulent character of Nigerian elections. One was “Thugs, vote buyers, arsonists take over on election day”; the other was “Nigerians condemn militarization of elections in Rivers, Bayelsa, Kwara, Akwa Ibom, Benue,” a reference to the government’s deployment of soldiers and other military assets to opposition strongholds before and during the election. The involvement of soldiers and other military personnel in the election was a brazen violation of Nigeria’s Electoral Act, an action which many observers interpreted as the incumbent administration’s effort to use its might to manipulate the election in states held by the opposition.

Every election cycle in Nigeria sees massive, fear-induced demographic mobility as members of different ethnic groups and religions relocate to areas considered dominated by their kinsmen and co-religionists to await the conclusion of elections that often degenerate into communal clashes especially in the volatile north of the country.

Periodic national elections have thus worsened Nigeria’s notoriously frail union and caused apathy and discontent. The Nigerian people, the major stakeholders in Nigeria’s democracy, have grown weary of being periodically endangered and rendered pawns in an elaborate elite ritual with little or no consequence for their lives.

Electoral aftermaths have not improved economic conditions or strengthened the capacity of citizens to hold elected leaders accountable. Moreover, as I shall discuss shortly, the familiar abstract freedoms that democracy, lubricated by periodic elections, can confer on citizens who participate in such exercises, have eluded Nigerians.

The result has been noticeable apathy represented most poignantly by voter turnout, which declined from a peak of 69.1 percent in 2003 to 46.3 percent in 2015 and to about 35 percent in 2019. In the same 2019 election cycle, turnout declined to less than 20 percent in the governorship and state assembly elections, with many Nigerians on social media stating that they had lost faith in the electoral process and that the official results of the presidential elections two weeks earlier had shown that their votes would not count towards the declared outcome.

Voter apathy alone is not an indication of democratic disillusionment but it can portend or indicate something more devastating: diminishing trust in the state, its institutions, and its processes.

Such a trust deficit exists already and it predated the return of civilian rule in 1999 after about two decades of military dictatorship. However, by all theoretical formulations, such a cumulative loss of confidence in the transactional sociopolitical contract between the state and citizens should be corrected by the democratic ideals of voting, representation, and accountability. This has not happened in Nigeria. In fact, the opposite scenario is visible: a negative correlation between successive electoral cycles and citizens’ trust in the Nigerian state. Therein lay the paradoxical consequences of democratic practice in Nigeria.

If elections are increasingly burdensome as they have become in Nigeria, the corrective potential of democracy, broadly speaking, is lost. Citizens consequently lose faith in the state and resort to self-help, including criminal self-help. That is how states collapse. Nigeria is not far off this possibility.

In Nigeria, recent political realities reveal a blind spot of pro-democracy advocacy: without the modulating effect of decentralization, sustained economic growth, a growing, secure middle class, and a literate, hopeful poor, liberal democracy can do and has done more damage than good. Liberal democracy has ironically become both an incubator and protector of mediocrity, corruption, and bad governance. The overarching casualty has been Nigeria’s very stability.

#### Nigerian instability escalates to global great power war

Charles A. Ray 21, Member of the Board of Trustees and Chair of the Africa Program at the Foreign Policy Research Institute, Former U.S. Ambassador to the Kingdom of Cambodia and the Republic of Zimbabwe, “Does Africa Matter to the United States?”, Foreign Policy Research Institute, 1/11/2021, https://www.fpri.org/article/2021/01/does-africa-matter-to-the-united-states/

Africa matters in terms of size, population, and rate of population growth. It is the continent currently most affected by climate change but is also a continent that can have a devastating impact on climate change globally because of the importance of the Congo Basin rainforest, which is the second-largest absorber of heat after the Amazon rainforest. The destruction of this important ecosystem could further accelerate global warming. As residents of the region come into increasing contact with the animals of the rainforest, this region could be the origin of the world’s next viral pandemic. Violent extremism and terrorism are increasing in Africa, and while now mostly localized, the danger has the potential to spread beyond the continent. Crises—natural and man-made—cause massive relocations of populations, both on the continent and abroad, which can have negative economic, social, and political impacts.

Why Africa Matters

The African continent is the world’s second-largest, with the second-fastest growth rate after Asia. With 54 sovereign countries, four territories, and two de facto independent states with little international recognition, the continent has a current population of 1.3 billion. By 2050, the continent’s population is predicted to rise to 2.4 billion. By 2100, Nigeria, Africa’s most populous country, will have a population of one billion, and half the world’s population growth will be in Africa by then.

The population of African countries is also overwhelmingly young. Approximately 40% of Africans are under 15, and, in some countries, over 50% is under 25. By 2050, two of every five children born in the world will be in Africa, and the continent’s population is expected to triple. These developments have positive and negative potential impacts on the United States and the rest of the world. Young Africans have, for the most part, completely skipped the analog age and gone directly digital. Comfortable with technology, they form a huge potential consumer and labor market. If, on the other hand, the countries of Africa fail to develop economically and do not create gainful employment for this young population, then there is the risk that they will become a huge potential source of recruits to extremist and terrorist movements, which currently target disadvantaged and disenchanted youth.

Lack of economic opportunity, increased urbanization, and climate-fueled disasters will also contribute to movement of people seeking better lives, which will impact economies and security not only on the continent of Africa, but also the economic and security situations around the world. Nations, lacking adequate critical infrastructure, education, and job opportunities are ripe for internal unrest and radicalization. In particular, inadequate health delivery systems, when coupled with natural disasters, such as droughts or floods that limit food production, cause famine and mass movements of populations.

The Challenges for U.S. Policy

Prior to World War II, the U.S. policy towards Africa was not as active as it was toward Europe, Asia, or Latin America. During the Cold War, Africa policy was primarily viewed from a perspective of super-power competition. The end of the Cold War and the rise of international terrorism introduced this as a major component in U.S. Africa policy along with competition with a rising China and increased Chinese engagement in Africa.

Before his first official trip to Kenya, U.S. President Barack Obama said, “Africa had become an idea more than an actual place . . . with the benefit of distance, we engaged Africa in a selective embrace.” This is probably an apt description of U.S. policy towards African nations despite the bipartisan nature of that policy. The United States, with the many domestic and international issues it has to cope with, can ill afford to continue to ignore Africa. Going forward, U.S. policy must include a hard-headed look at where Africa fits in policy priorities.

The incoming Biden administration will face a number of important issues and challenges as it develops its Africa policy. The most pressing issues are the following:

Climate Change: Climate change is an existential problem that affects the entire globe, but Africa has probably suffered more from the effects of climate change than other continents—and the problem will only get worse with time. In an October 2020 article, World Meteorological Organization (WMO) Secretary-General Petteri Taalas said,

Climate change is having a growing impact on the African continent, hitting the most vulnerable hardest, and contributing to food insecurity, population displacement and stress on water resources. In recent months we have seen devastating floods, an invasion of desert locusts and now face the looming specter of drought because of a La Nina event. The human and economic toll has been aggravated by the COVID-19 pandemic.

Climate change impacts water quality and availability, and millions in Africa will likely face persistent increased water stress due to these impacts. A multi-year drought in parts of South Africa, for instance, threatened total water failure in several small towns and had livestock farmers facing financial ruin. Another pressing climate-change issue is the need for protection of the Congo Basin rainforest. This 178-million-hectare rainforest is the world’s second largest after the Amazon and is currently threatened by agricultural activities in Cameroon, Central African Republic, Democratic Republic of Congo, Republic of the Congo, Equatorial Guinea, and Gabon. Countries in the Congo Basin need to address the preservation issue, while also enabling sustainable agricultural activities to ensure food security for the region’s population. In addition to the impact on global climate caused by destruction of the rainforest, such destruction also brings human populations into closer contact with the region’s animals, creating the risk of future animal-to-human transmission of new and possibly more virulent viruses similar to COVID-19, which will have a global impact. In a January 2021 CNN report, Dr. Jean-Jacques Muyembe Tamfum, who as a researcher helped discover the Ebola virus in 1976, warned of possible new pathogens that could be as infectious as COVID-19 and as virulent as Ebola.

Rule of Law/Mitigation of Corruption: A key to African development, given the increasing urbanization, population increases, and youthfulness of the continent’s population, will be an increase in domestic and international investment to build the industries that can provide meaningful employment and improved standards of living. In order for this to be successful, African nations will need to address the issues of rule of law and corruption. Investors will not risk money if the business climate comes with a level of political risk that is too high. Government leaders throughout Africa need to establish legislation that provides an acceptable level of security for investments and take action to curb the endemic corruption that currently discourages investment. Corruption in Africa ranges from wholesale political corruption on the scale of General Sani Abachi’s looting of $3-5 billion of state money during his five years as Nigeria’s military ruler to the bribes paid by businessmen to police and customs officials. The “tradition” of having to pay bribes, or “sweeteners,” drives away domestic investment and scares away foreign investment, leaving many countries mired in poverty.

Violent Extremism and Terrorism: A number of African nations are currently plagued with rising extremist movements. While primarily a domestic issue, the mass movement of people fleeing violence and the disruption of economic activity have the potential to negatively impact the rest of the world. African nations need regional responses to curb extremist and terrorist organizations, many of which are supported by international terrorist organizations, such as ISIS and al Qaeda. In addition, the underlying conditions that helped to create these movements must be addressed. Terrorist groups in Africa range from relatively large and dangerous groups, such as Boko Haram, a group in Nigeria that has received support from al Qaeda and that aims to implement sharia law in the country; Al-Shabab, an al Qaeda affiliate aiming to overthrow the government in Somalia and to punish neighboring countries for their support of the Somali regime; and Uganda’s Lord’s Resistance Army, a fundamentalist Christian group. Terrorist groups in the fragile political climate of Libya also pose a threat to sub-Saharan Africa.

Great Power Competition: As the world’s second-largest economy, and with its increasing participation in international activities, China will continue to be a factor in Africa for the foreseeable future. This, however, is more a problem for the nations of Africa than it is for the rest of the world. The West can compete best by outperforming China in areas of strength by providing those goods and services that are unquestionably superior, and let African governments decide how to deal with China and its often-predatory lending practices and the Chinese tendency to import Chinese workers for its projects and investments rather than hiring locals. At the same time, Russia, which did not completely turn away from Africa at the end of the Cold War as many in the West sometimes believe, must still be considered a significant factor on the African landscape. In an effort to compensate for Western sanctions and to counter U.S. and Western influence, Russia is once again increasing its presence on the continent. Russian mercenaries, in exchange for diamond mining rights, have trained military forces in the Central African Republic, raising concerns about human rights abuses. Of particular concern is the presence of the Wagner Group, a private military company associated with Yevgeny Progozhin, a Russian oligarch with close ties to Vladimir Putin, who was indicted in the United States for trying to disrupt the 2016 U.S. elections. To date, Russia has, in addition to seeking basing rights, signed military cooperation agreements with 28 African nations. Russian activity is a combination of military and commercial, with Progozhin at the center of both. From 2010 to 2018, Russia nearly tripled its trade with African countries. While the activities of both Russia and China in Africa are of concern, and should be closely monitored, neither is of critical importance to U.S. national security.

With climate change, disease outbreaks, famine, extremism, and inter-ethnic violence, Africa will still experience crises in the foreseeable future that will be beyond the capacity of most nations on the continent to deal with. Climate change is probably the greatest cause of humanitarian crises in Africa, but mainstream media outside the continent either fail to notice or under-report them. Some of the crises, like Ebola or the next viral infection, can impact the rest of the world. These crises will cause starvation, mass movement of people, and increase internal and regional instability. Africa matters to the United States and the rest of the world. Its impacts can be felt far beyond the continent’s borders, but if approached as a partner rather than as a patron—with a focus on assisting African nations to improve governance, build critical infrastructure, boost domestic economies, and provide essential services to all—then Africa can be a positive contributor on the global stage.

#### Democracy makes disease control impossible

Zhifa Zhou 21, Associate Professor at the Institute of African Studies at Zhejiang Normal University and Pan Qu, Postgraduate at the Institute of African Studies at Zhejiang Normal University, “The Root Cause of the Failure of American COVID-19 Governance Based on the Criticism of Liberal Democracy From Error-Tolerant Democracy”, Philosophy Study, Volume 11, Number 7, July 2021, https://www.davidpublisher.com/Public/uploads/Contribute/60ff9cfb4589c.pdf

Introduction

Whether liberal democracy contributed to the COVID-19 governance was a hot topic in 2020 (“Democracy and Rise of Authoritarianism in COVID-19 World”, 2020). At the end of January, 2020, when COVID-19 witnessed the lockdown of Wuhan City, the West generally agreed that China lacked freedom of speech and the inertia of a rigid bureaucratic structure, and the national censorship system kept the whistle blower Dr. Wenliang Li silent, which led to the disease out of control (Mérieau, 2020). Democracies’ confidence mainly came from Amartya Sen’s research on the famine. Sen (1999) has claimed that no substantial famine has ever occurred in any independent and democratic country with a relatively free press and there is no exception to this rule. Citizens in democracies can expect governments to be more candid, transparent, and responsible in dealing with all kinds of crises, which authoritarian countries usually cannot (Berengaut, 2020; Bollyky & Kickbusch, 2020). So Steve Bloomfield (2020) has regarded that if China had a free press and transparent government, the pandemic could be brought under control before the outbreak. In conclusion, freedom plus democracy equals the COVID-19 antidote according to Western standards, although Wilson and Wisongye have found that social media rumors can exploit the right to freedom of speech and erode people’s health benefits (New York Times, 2021; Bollyky & Kickbusch, 2020). However, since March, 2020, with Western democracies seriously affected by COVID-19, their superiority of the political system has begun to expose its untrue and fatal defects. Especially when Wuhan began to lift its blockade on April 8, 2020 (People.cn, 2020), scholars and journalists began to question whether democracies had the ability to deal with the crisis better than China (Mérieau, 2020). Liberal democracy in the United States has not proved that it is more conducive to the COVID-19 governance than authoritarianism since 2020. From a global perspective, not only do most democracies fail to contain the spread of COVID-19, but almost all of the 10 most affected countries are liberal democracies (Coronavirus Resource Center, 2021). Their policy responses have a poor effect in reducing the death toll in early stages of the crisis, as shown that democratic political institutions may be at a disadvantage in responding quickly to COVID-19 (Cepaluni, Dorsch, & Branyiczki, 2020). More surprising is that the COVID-19 pandemic is so serious in the United States, yet no government officials have been removed from office because of their inactivity in fighting against the corona-virus. People doubt whether American accountability mechanism is still working. However, two impeachments against President Trump indicate that it seems to function quite well (Valenta & Valenta, 2017; Herb, Raju, Fox, & Mattingly, 2021). The direct loss to the United States caused by Russiagate and incitement of insurrection is far less than the pain caused by the failure of the COVID-19 governance, but no any official in the United States is responsible for it. If it again faces infectious diseases similar to COVID-19, will it repeat this unprecedented tragedy? Can liberal democracy and the separation and balance of powers push American president to act more aggressively? Error-tolerantism explains that the fundamental reason for the failure of American COVID-19 governance is a serious misunderstanding of the concept of freedom (Zhou, 2018; 2019; Zhou, Tan, & Liu, 2020). Liberalism has witnessed a rare scene: In the context of COVID-19, the president, governors, magistrates, and the public (Emery, Schwebke, & Park, 2020; Sullum, 2020; Behrmann, 2020; Kenton, 2020; Strano, 2020) have severe misunderstanding of freedom that cost more than American 600,000 lives (Coronavirus Resource Center, 2021).

In response to the above phenomenon, error-tolerantism as the development of liberalism defines liberty from a new perspective and shows a stronger explanatory power than liberalism (Zhou et al., 2020). The right paradigm of error-tolerantism, the right to be wrong (right to trial and error) as an original right and mutual empowerment theory, instead of natural rights theory and social contract theory, divides liberty into the right to liberty in innovative fields, right to be wrong as an original right, and the right to be right in non-innovative fields as sub-rights. The lockdown of Wuhan means that Chinese government has excised the power to be wrong as an original power, but the West criticized it with the right to liberty at the level of sub-rights, which is the first error in understanding liberty during American COVID-19 governance; after Wuhan effectively controlled COVID-19, its governance has transformed from an innovative field to a non-innovative one. Then, liberties in non-innovative fields as the sub-rights level, such as wearing face masks, keeping social distancing, showing health codes, are formed definitely (Zhou et al., 2020). However, wearing masks has been regarded as a sign of political oppression rather than a simple hygienic measure by the United States (Kahanel, 2021). Since liberalism has a major misunderstanding of the concept of liberty, liberal democracy based on the philosophy of liberalism should be deeply reflected or even reconstructed, and it is very reasonable for error-tolerant democracy constructed based on error-tolerantism to explore the defects of liberal democracy in American COVID-19 governance. Therefore, we first review scholars’ relevant research on American democracy and the COVID-19 governance, and then based on the theory of error-tolerant democracy, discuss the defects of liberal democracy and American political system that are unable to cope with the crisis of the century.

#### Future pandemics are inevitable---extinction

Dr. Matt Boyd 21, Research Director at Adapt Research Ltd, PhD in Philosophy of Evolution & Cognition from the Victoria University of Wellington, BA from Massey University, and Nick Wilson, Research Professor in the Department of Public Health at the University of Otago, “Optimizing Island Refuges Against global Catastrophic and Existential Biological Threats: Priorities and Preparations”, Risk Analysis: An International Journal, Wiley Online Library

1 INTRODUCTION

Our world is vulnerable to global catastrophic risks (GCRs) or existential risks (Bostrom, 2019; Ord, 2020). GCRs are so disastrous because they affect one or more systems critical to humanity, and spread to affect the entire planet (Avin et al., 2018). Existential risks threaten to eliminate humanity or permanently curtail its potential (Ord, 2020). Some of these risks are natural, for example asteroid or comet impact, supervolcanic eruption, naturally occurring pandemic, or various cosmic events (Bostrom & Cirkovic, 2008; Ord, 2020). Many others are the result of human activities, for example nuclear war, anthropogenic climate change, nonaligned artificial intelligence, engineered biological threats, geoengineering, or inescapable totalitarianism (Bostrom & Cirkovic, 2008; Ord, 2020).

There are three phases to an existential catastrophe: origin, scale up, and reaching every last human (Cotton-Barratt, Daniel, & Sandberg, 2020). Following any near miss, there would be a period where recovery of humanity's long-term potential may or may not be realized (Baum et al., 2019). Failure to anticipate or mitigate these threats risks undesirable trajectories for human civilization (Baum et al., 2019).

In addition to the present generation's obvious self-interest in continuing to exist, the perspective of long-termism suggests that humanity ought to mitigate these risks due to the potential immense value of future human generations (Beckstead, 2013), a desire to see aspects of the human project continue across time and perhaps the universe (Bostrom, 2003; Scheffler, 2013), and the potential cosmic significance of preserving intelligent life on Earth (Ord, 2020). A number of philosophical defenses of long-termism have been published (Beckstead, 2013; Greaves & MacAskill, 2019). Importantly, these long-term outcomes are largely under human control because most of the risk is probably anthropogenic (Beard & Torres, 2020; Ord, 2020).

1.1 Mitigating Existential Threats

It is too simplistic to think of existential risks as mere causes that are followed by a sequence of effects. We should think of risks as the product of hazards, vulnerabilities, and exposures (Liu, Lauta, & Maas, 2018). Hazards are the precipitating cause of a catastrophe, vulnerabilities are the inability of critical systems to withstand hazards, and exposures are the features of human society that turn this system damage into harm to populations (Beard & Torres, 2020). Mitigation of existential threats involves preventing their emergence, responding if the threat spreads, and building resilience so the threat does not lead to the death of every last human or leave humanity with permanently curtailed prospects (Cotton-Barratt et al., 2020). After a threat has passed, there may also be a series of limiters that might prevent the reemergence of a flourishing humanity (Baum et al., 2019). One such limiting factor could be the loss of technological society and know-how.

In order to achieve immunity from existential threat, humanity will need a period where it preserves its potential and protects itself from risks (Ord, 2020). Various methods have been proposed to address vulnerabilities and hence shift the probability of existential risk. These suggestions include: improved international focus, governance, and cooperation such as through the United Nations (Boyd & Wilson, 2020), imitating existing frameworks such as the Sendai framework for disaster risk reduction (Avin et al., 2018), achieving the United Nations Sustainable Development Goals (Cernev & Fenner, 2020), or extreme surveillance for threats (Bostrom, 2019). Toby Ord lists 38 specific measures across eight existential threats, and an additional 12 avenues to explore that address risks in general terms (Ord, 2020).

1.2 Biological Threats

Pandemic viruses with high case fatality could potentially infect a majority of the population. Deliberate biological events (DBEs) have occurred before (Millet & Snyder-Beattie, 2017a), will likely occur again, and could pose a threat to humans as great as nuclear war (Kosal, 2020). New technologies such as artificial intelligence could amplify biothreats in a number of ways (O'Brien & Nelson, 2020). These risks are increased because the Biological Weapons Convention (BWC) has no verification system (Dando, 2016), and has been violated in the past (Gronvall, 2018). It would only take one unanticipated or accidental event for a bioweapon (or laboratory accident) to become a catastrophic threat. The U.S. National Academies of Sciences specifically warns against synthetic biology and xenobiology (Gomez-Tatay & Hernandez-Andreu, 2019) and it is argued that a state-sponsored bioweapon attack is the greatest current threat (Sandberg & Nelson, 2020). See the Supporting Information for further details on biological threats. Global preparedness through the One Health approach, global health security projects, and the need to integrate health and the GCR field (Millet & Snyder-Beattie, 2017b) are important. But as the COVID-19 pandemic has shown, there may be important overlooked aspects or misunderstood risks that could make any suite of general preparation inadequate. Therefore, last lines of defense may be required, such as refuges.

#### Existential warming is inevitable AND causes a collapse into extreme authoritarianism---only transitioning from democracy solves

Dr. Chien-Yi Lu 21, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 1-2

The fact that the scientific knowledge on the human contribution to climate change entered human society through the most advanced democratic societies should have been a cause for celebration. Given the congruence of climate mitigation and public interests, the problem of climate change should have been considered solved decades ago. Several decades of inaction later, however, arguments are proliferating that democracy is exactly the reason for inaction.

In The Collapse of Western Civilization, historians Naomi Oreskes and Erik Conway travel to the future to look back and offer a forensic analysis on the climate-induced Great Collapse of Western Civilization of 2074 (2014: 63). The future historians’ forensic report states that “[a]s the devastating effects of the Great Collapse began to appear, the nation-states with democratic governments… were at first unwilling and then unable” to deal with the crisis. These democratic governments realized that they had no “infrastructure and organizational ability to quarantine and relocate people” as “food shortages and disease outbreaks spread and sea level[s] rose.” In China, where there was centralized government, the crisis was handled much more adequately, leading to survival rates exceeding 80%, a development that “vindicated the necessity of centralized government” (2014: 51–2). The gist of The Collapse of Western Civilization is not about critiquing democracy per se but a warning against the stubborn inaction mandated by market fundamentalism that has hijacked Western democracies.1 In their previous book, Merchants of Doubt, Oreskes and Conway documented the way that climate deniers sowed the seeds of doubt about climate change and successfully staved off implementations of mitigation measures. For the authors, the anticommunist ideology that had kept actors vigilant about government encroachment in the marketplace occupied a central place in climate denial (2014: 69). Ironically, this sort of ideology-informed calculation meant that preventative action was blocked, increasing the risk that disruptive climate disasters would eventually necessitate the suspension of democracy and legitimating the sort of heavy-handed authoritarian interventions that the conservatives most abhorred (2014: 52; 69).

An appeal to suspend democracy for the sake of survival can be found in The Climate Change Challenge and the Failure of Democracy, where Shearman and Smith argue that liberal democracy is incompatible with the urgent necessity to prevent catastrophic climate change. The vested interests of politicians, corporations, and media lie in continuing with business as usual and in keeping the public ignorant. Instead of bottom-up reforms to improve democracy and bring about sensible climate policies, Shearman and Smith see a transformation into authoritarian regimes as the only responsible way forward when faced with the extreme ecological stress of climate change. They point out that, as Plato foresaw, those in power in a democracy are seldom able to resist the demands of the populace for long, but as a mass, the populace is seldom able to focus on complex problems and to perceive threats that lie over the horizon. Hence, those able to see further—scientists, experts, and the knowledgeable— should be entrusted with steering the course while there is still time to avoid disaster. It is only under a benign authoritarian rule of the knowledgeable that a saner, fairer, and more rational means of weighing social goods against evils can be introduced (Shearman and Smith, 2007).

#### The public is an idiocracy. ‘Pressure’ cannot be productive.

Dr. Stuart Parker 20, Philosopher and Former Teacher who Lectured on Philosophy and Education at London's Institute of Education, South Bank University, Author of Reflective Teaching in the Postmodern World, “The Problem With Democracy — It's You”, The Article, 10/5/2020, https://www.thearticle.com/the-problem-with-democracy-its-you

So why is our democracy so unfit for purpose? Why is it that we can elect leaders who are little more than self-serving schemers, whose contempt for the electorate renders them incapable of giving straight, honest answers to even the most straightforward, reasonable questions? It’s not as if any of these qualities have been smuggled in under our noses. They are paraded before our eyes every single day. Nobody voting for Johnson or Trump could ~~be blind to the fact~~ [ignore] that they are serial liars. And yet they voted all the same. Why?

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Mencken was on to something when suggesting that the leaders we get, the leaders we deserve, closely represent something dark in the inner soul of the people. There’s no easy way to put this — the problem with democracy is the voters. The voters simply aren’t good enough to support a healthy democracy. They’re not up to the job. Now I know some will think: a snowflake-remainer-lefty-loser will always blame the voters just as a bad workman always blames his tools. But these tools are shot.

Consider this: a poll in 2005 found that 21 per cent of Americans believe in witches and 9 per cent that spirits can take control of a person. In 1999, 18 per cent believed the sun revolves around the earth — so much for “the science” — and in 2000, 31 per cent believed in ghosts, and increase of 20 percentage points since 1978.

By 2019, the year before Trump’s re-election attempt, significant numbers believed in the illuminati, Big-foot and a flat earth. Ghost-belief had risen to 45 per cent, as had the belief in demons. Belief in vampires stood at a fangtastic 13 per cent.

Britain has nothing to be proud of. While 33 per cent of us believe in ghosts and 18 per cent in demonic possession, a whopping 52 per cent of us believe that you can magically make a false claim true simply by writing it on the side of a bus.

In elective dictatorships where small margins have huge consequences we’d better get used to the fact that (possibly small) groups with stupid ideas and a lack of relevant knowledge and skills can have a disproportionate effect on the lives of the rest of us.

#### Antitrust is inherently volatile and nobody perceives changes as permanent.

Daniel M. Tracer 13, Attorney in the United States Department of Justice Antitrust Division, J.D. from the Benjamin N. Cardozo School of Law at Yeshiva University, “Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute,” DePaul Business & Commercial Law Journal, Vol. 12, Fall 2013, accessed via Lexis

In the wake of recent antitrust case law, 31 scholars now take for granted the fact that stare decisis plays a diminished role in the area of antitrust. 32 In particular, the Supreme Court has understood the Sherman Act to implement a common law approach whereby antitrust law can adapt and change course as needed. 33 Scholars thus assume that [\*10] stare decisis is simply not as big of an obstacle to change in the antitrust context as it is in other legal contexts. 34 For instance, it is understood that antitrust precedent may not survive as long and that antitrust legal tests may frequently change. 35 Indeed, because of the widespread belief that antitrust's legal doctrine can and will be overruled and repealed as appropriate, scholars frequently attempt to predict which formerly binding rules of law will be abandoned next and which, if any, have staying power. 36

To be sure, the diminished function of stare decisis in antitrust is a welcome development in the eyes of some. Those who subscribe to this understanding primarily highlight the flexibility that results from a weaker version stare decisis. 37 Accordingly, antitrust law is thought to [\*11] benefit from the Court's ability to more easily abandon precedent that no longer fits with contemporary economic views and the Court's ability to keep the antitrust laws up-to-date with economic thinking. In other words, this trend marks a triumph of economic reality over legalistic formality in the antitrust realm. Of course, one serious consequence of a weaker version of stare decisis is that the antitrust practitioner must also be an economist. 38 Thus stated, this view of stare decisis would hardly surprise students of the Chicago School and its understanding of antitrust law as nothing more than a branch of applied microeconomics. 39

In contrast, a somewhat more dominant view of stare decisis takes a negative attitude of such a state of affairs. As an initial matter, scholars have criticized the predominance of economic theory over traditional legal reasoning in antitrust law due to a concern that judges may lack the proper expertise to fully base their decision on economic analysis. This concern goes beyond a judge's possible lack of formal economic training, taking into account the institutional impediments of a court in deciding economic matters and the lack of consensus among economic scholars themselves on the costs and benefits of various business practices. 40 Moreover, to the extent that the Court's antitrust decisions are in tension with stare decisis, the Court's tendency to overrule antitrust precedent goes against the Court's function to interpret law rather than promulgate policy. 41 The consequences of [\*12] failing to abide by stare decisis, especially in economic matters, include the following: the inability of businesspeople to confidently transact under the assumption of settled law, 42 diminished public confidence in the Court, 43 and a lack of fairness or evenhandedness in the way justice is administered, which tends to undermine the concept of the rule of law. 44 In other words, many of the benefits associated with stare decisis may be lacking in antitrust law.

One final perspective that has gained traction in recent years is the notion that weaker stare decisis in the field of antitrust flows - or ought to flow - from the regulatory nature of the antitrust laws. 45 Under this view, it is assumed that regulatory agencies, as opposed to courts, tend to change the rules and doctrines they apply very quickly, often reflecting shifting policies and priorities of incoming executive administrations as well as the technical expertise of the agency involved. 46 Thus, if one assumes there is some carryover in the way that [\*13] courts and the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are involved in the interpretation and enforcement of the antitrust laws, it may be somewhat less surprising that stare decisis should play a less pronounced role. 47

In any event, for better or worse, stare decisis's diminished status in antitrust appears to be beyond real debate. While it is difficult to gather precise data on the relative frequency of cases being overruled by the Supreme Court, many well-known antitrust doctrines have been retired by the Court in the last five decades - at a time when the Court rarely hears more than one or two antitrust cases per term 48 - suggesting a unique willingness to override stare decisis in this area. Part II.C now turns to a sampling of cases that have overruled antitrust precedent and the justifications for these decisions.

#### Rule of law is doomed—too many ways for the AFF to solve.

Jon Robins 18, 1-31-2018, "'A crisis for human rights': new index reveals global fall in basic justice," Guardian, https://www.theguardian.com/inequality/2018/jan/31/human-rights-new-rule-of-law-index-reveals-global-fall-basic-justice

Fundamental human rights are reported to have diminished in almost two-thirds of the 113 countries surveyed for the 2018 Rule of Law Index, amid concerns over a worldwide surge in authoritarian nationalism and a retreat from international legal obligations. “All signs point to a crisis not just for human rights, but for the human rights movement,” said Professor Samuel Moyn of Yale University. “Within many nations, these fundamental rights are falling prey to the backlash against a globalising economy in which the rich are winning. But human rights movements have not historically set out to name or shame inequality.” The 2018 index, published by the World Justice Project (WJP), gathers data from more than 110,000 households and 3,000 experts to compare their experiences of legal systems worldwide, by calculating weighted scores across eight separate categories. While Venezuela retains its unwanted position at the bottom of the index – just behind Cambodia and Afghanistan – the Philippines is this year’s biggest faller, dropping 18 places to 88th in the table, on top of a slump of nine places in the 2016 survey. President Rodrigo Duterte’s administration has put a “palpable strain upon established countervailing institutions of society”, according to Jose Luis Martin Gascon, chairman of the Philippine Commission on Human Rights. He said there had been a “chilling effect” on the country’s opposition in the wake of attacks against personalities who have criticised Duterte’s policies. Non-discrimination, freedom of expression and religion, the right to privacy and workers’ rights were all taken into account in calculating observance of people’s fundamental rights across the world. Respondents’ belief in the protections afforded by such rights has dropped in 71 of the 113 countries surveyed for the latest index. “The WJP’s findings provide worrying confirmation that we live in very dangerous times for the rule of law and human rights,” said Murray Hunt, director of the Bingham Centre for the Rule of Law. “The worldwide resurgence of populism, authoritarian nationalism and the general retreat from international legal obligations are trends which, if not checked, pose an existential threat to the rule of law. Preventing violations of the rule of law and human rights is always better than curing them after the event,” Hunt said.

#### One case doesn’t change legitimacy.

Michael J. Nelson 21, Jeffrey L. Hyde and Sharon D. Hyde and Political Science Board of Visitors Early Career Professor in Political Science at Pennsylvania State University, Ph.D. in Political Science from Washington University in St. Louis, “Biden’s court commission is worried about Supreme Court ‘legitimacy.’ So what is ‘legitimacy,’ exactly?”, Washington Post, 10-22-2021, <https://www.washingtonpost.com/politics/2021/10/22/bidens-court-commission-is-worried-about-supreme-court-legitimacy-so-what-is-legitimacy-exactly>

The commission’s draft materials offered no single definition of legitimacy. At various points, the materials define legitimacy as “the general level of support that the Court has among the people of the United States,” “how the people regard the Court: whether they see it as a judicial or legal institution,” or “an evaluative judgment about the Court’s actions — whether it is making good or right decisions — rather than an assessment of the support the Court has among Americans generally.”

But social science defines legitimacy differently.

Political scientists often differentiate legitimacy, sometimes called “diffuse support,” from approval of the court’s decisions, also called “performance satisfaction” or “specific support.” According to political scientist David Easton, legitimacy is a “reservoir of favorable attitudes or good will that helps [citizens] to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants.” Whether Americans see institutions as legitimate grows from childhood socialization about politics and democratic values. When institutions are considered legitimate, citizens more easily accept decisions they dislike. That’s especially important for courts, which cannot enforce their own decisions.

Americans’ attitudes about an institution’s performance, on the other hand, are more closely tied to whether they like particular decisions the institution makes. A shift in people’s judgments of performance satisfaction doesn't necessarily measure anything about whether they still feel the institution is legitimate. For instance, when Gallup announced last month that approval of the Supreme Court had hit a new low, its poll measured performance satisfaction, not legitimacy.

Legitimacy is willingness to accept losing

Instead of conflating legitimacy and performance satisfaction, the commission should follow social science research and define legitimacy as citizens’ felt obligation to follow a court’s decision, not out of fear of reward or punishment but because they simply should obey the court. In this tradition, too, legitimacy and performance satisfaction are distinct.

This definitional issue could affect the commission’s conclusions. Citizens’ judgments of performance satisfaction are fleeting: Someone might be unhappy with what the court decided today but satisfied with the outcome of a case tomorrow. By contrast, attitudes about judicial legitimacy are much more stable over time. Moreover, performance satisfaction is grounded in partisanship; Democrats’ and Republicans’ judgments of the court’s performance often diverge widely. A person’s partisanship, on the other hand, generally doesn’t tell us much about whether they see an institution as legitimate.

By conflating legitimacy with performance satisfaction, the commission may favor reforms that will keep Americans happy in the short term rather than the sorts of reforms that may be needed to preserve the court’s institutional power and position in the U.S. constitutional system. If the commission isn’t careful, its decisions could rely on a metric grounded in the very partisanship from which they are trying to save the court.

Institutional legitimacy matters deeply for democratic institutions, and the commission is rightly paying close attention to whether any reforms would improve or reduce public support for the court. Happily, scholars have produced a rich body of research on judicial legitimacy in the United States and abroad. As it deliberates, the commission may wish to rely on that research and ensure that its concept of legitimacy goes deeper than mere public approval of particular decisions.

## Third Parties ADV

### Third Parties---1NC

#### Third-party candidates cannot succeed.

Sean Goff & Daniel J. Lee 19, PhD, Instructor, Political Science, UNLV; PhD, Assistant Professor, Political Science, UNLV, "Prospects for Third Party Electoral Success in a Polarized Era," American Politics Research, Vol. 47, No. 6, pg. 1324-1326, 2019, SAGE.

One of the most significant trends in American politics since the 1970s is the increase in major party polarization. Some observers have blamed excessive polarization as the source of significant problems in the contemporary American democracy—excessively polarized parties are unable to effectively legislate, more often ending in gridlock. As no surprise, an accompanying trend since the 1970s is a decrease in the favorability ratings of the major parties (data shown later). One potential consequence of such negative feelings toward the major parties is the emergence of a third party. Rosenstone, Behr, and Lazarus (1996) argue that voters are more likely to break from habit and vote for a third party candidate when they are especially disaffected by the major parties, that is, when there is “major party failure.” Indeed, Gallup polling shows that the percentage of survey respondents agreeing that a third party is needed has increased from 40% in 2003 to 57% in 2016.1 And some argue that polarization has indeed contributed to an increase in third party activity and success.2

Within this larger trend, in 2016 the two major parties nominated historically unfavorable candidates for the presidency.3 The scene, therefore, seemed ripe for a potential third party challenger. Early that summer, there seemed to be some indication that might be the case, as Gary Johnson was polling in the 7% to 9% range. On one hand, Johnson appeared to benefit from major party dissatisfaction, as he ultimately won 3.27% of the vote, which was better than any third party candidate since Perot in 1996.4 But on the other hand, why was that effect so modest? That is, why didn’t Johnson or some other third candidate do even better in 2016, given the long-term trends and the disliked major party nominees in 2016?

In many ways, the circumstances surrounding the 1992 and 2016 elections were similar. During both election years, more so than other years in over that span, there was much discussion of how voters have lost confidence in political institutions and the Washington establishment. In 1992, that discontent led to Perot’s successful third party candidacy, winning nearly 20% of the popular vote. Yet, a strong third party movement did not emerge in 2016, although the favorable conditions did contribute to the best showing for third party presidential candidates since 1996 in winning just over 5% of the vote.

We highlight two factors that contributed to the lack of third party success in 2016, especially in contrast to 1992. The first is part of a long-term trend, while the second is related to specific dynamics of the 2016 election. We argue that major party polarization depresses third party success, and this in part explains their lack of success in 2016. That is, the conditions that contribute to higher third party demand (excessive polarization) also decrease the incentives to vote for a third party. Whereas earlier work has focused on elite-level actions that contribute to that effect, our analysis focuses on the individuallevel dynamics. The risks (costs) for third party voting are higher during a polarized era. The second factor we consider is major party co-optation of potential third party support, which we argue was pertinent in 2016 with Trump’s nomination as the Republican candidate.

#### It makes polarization worse.

Sean Goff & Daniel J. Lee 19, PhD, Instructor, Political Science, UNLV; PhD, Assistant Professor, Political Science, UNLV, "Prospects for Third Party Electoral Success in a Polarized Era," American Politics Research, Vol. 47, No. 6, pg. 1339, 2019, SAGE.

Our review of the literature and our findings suggest a quirk in the life of third parties in America. Research has shown how third parties can induce major party divergence. Although we have not presented evidence that third parties have contributed to the increase in polarization since the 1970s, research supports the claim that they at least reinforce major party polarization. Thus, in a way, third parties contribute to (or at least reinforce) the problem that they are supposed to solve, which they cannot solve anyway because of the nature of the problem (i.e., voters’ hesitancy to vote for third parties in a polarized era).

Third parties are worse for polarization---they prevent true democracy by making elections determined by the plurality rather than the majority

More voices on the stage are independently more polarizing because it allows for primary-like shitshows

#### Diversionary war is nonsense.

Jack Shafer 1-27, Senior Media Writer for POLITICO, “Sorry, Right-wing Pundits, ‘Wag the Dog’ Is Just Nonsense.”, POLITICO, 01-27-2022, https://www.politico.com/news/magazine/2022/01/27/wag-the-dog-was-a-fine-film-but-its-a-terrible-meme-00002781

Join me in damning to hell Barry Levinson’s 1997 black comedy Wag the Dog, but not because it’s a bad movie. To the contrary, it’s inventive, entertaining and eminently rewatchable. It deserves our damnation because it’s addled our brains with the alluring “wag the dog” meme. In the movie, the president boosts his droopy approval ratings by, among other things, concocting a foreign conflict. Since the movie’s release, practically anytime a national leader needs to improve his ratings, critics are quick to accuse him of devising military action to divert the public’s attention from his problems. He’s said to be “wagging the dog,” that is, using the small part to move the big part.

Today, both Joe Biden and Vladimir Putin face charges of dog-wagging. Biden, whose approval ratings have cellared, is getting it from the hard right of the Federalist and Michael Savage. They fear he is scheming to rally the country around him by threatening Putin with military and diplomatic retaliation over Ukraine. Putin is using “wag-the-dog” politics in Ukraine, says New York Times columnist Thomas L. Friedman, to take his countrymen’s eyes off Russia’s economic stagnation.

That’s a kennel full of wagging! It’s also completely implausible that the two presidents have decided to square off over Ukraine to increase their popularity. World politics are too unpredictable and too dangerous for a leader to saber-rattle and wage war just to improve their approval ratings. Life is not the movies, even though it should be. Wag the Dog was a terrific film, but its explanatory power over geopolitics is close to zero. Recent presidents have gotten little in the way of a popularity kick from their foreign interventions, so please stop invoking it.

That’s not an absolute position. If Biden were, say, making noises about invading Grenada again or toppling Panama, it might make sense to say that he’s wagging the dog. But you don’t have to understand game theory on the level of a John von Neumann to appreciate the foolishness of Biden confronting Russia over Ukraine and maybe igniting World War III in the process, just to ascend a few rungs in the Gallup Poll. Likewise, Putin’s willingness to cause trouble to distract Russia is huge. But in the case of Ukraine, preparing for war as a publicity stunt makes no sense. A simpler explanation—trafficked by professional Russia watchers, that Putin’s Ukraine encroachment is about restoring the Russian empire—suffices. Who needs the dog?

Biden isn’t the only contemporary president to be reproached for allegedly wagging the dog. President Bill Clinton got the wag-the-dog scolding from several corners when he launched a missile strike (unsuccessful) on Osama bin Laden in August 1998, said by some to distract the public from his sex scandal. President Donald Trump got it from Senator Elizabeth Warren and others in January 2020 when he had Iranian Gen. Qassem Soleimani killed. But these theories don’t hold up. Clinton’s approval ratings were high to begin with in 1998, ranging from 59 percent approval to 73 percent, and the strike made no real ripple. Trump’s ratings were low at the time and though they inched up a few points after the strike, there was no lasting effect. Ronald Reagan got almost nothing for his Grenada intervention and George H.W. Bush, already riding high in the polls got only a temporary boost for his Panama adventurism. George W. Bush’s solid approval ratings of 55 percent soared after 9/11, but that definitionally didn’t qualify as wagging-the-dog.

Even if presidents could establish that wagging the dog made political sense in the short term, it’s not apparent that the practice makes sense in the long run. The public tires of war. It tired of Afghanistan, Iran, Vietnam and Korea, where military adventurism became a political liability. The only long-term war that enjoyed longitudinal support in the United States during the past century was World War II, and that was not an elective military operation. We were attacked. There are a thousand less-fraught schemes that Biden could attempt short of warring on Putin that would improve his Gallup Poll performance. Could Biden even muster national support for a war with Russia, given our wariness of foreign interventions after the Afghanistan and Iraq debacles? Is there anybody left alive in the country who despises Russia the way we did when it was our Cold War Enemy No. 1? The right wing alone, led by Tucker Carlson and Trump, has done plenty to rehabilitate Russia’s reputation, meaning a plurality of Americans probably wouldn’t respond well to a Biden-sponsored military gambit there.

But what of Putin? In 2018, Washington Post reporter Adam Taylor reviewed the history of Putin’s popularity and political provocations to determine if he had succeeded in translating belligerence into higher ratings. Taylor found that Putin got a little bump in 2008 after invading Georgia but discounts it; Putin’s number was high before the invasion, and post-invasion his numbers fell hard. But in 2014, as Putin seized Crimea, he got a 20-percentage-point lift. But in the eight years since the Crimea annexation, Putin’s numbers have returned to their previous levels. It’s guesswork predicting how a Ukraine invasion might affect his numbers, especially if Ukraine resists. Will it be a replay of Georgia or Crimea?

Finally, if poll numbers inform Biden’s Ukraine strategy, he has recruited some very strange political partners in his Russia resistance. Senate Minority Leader Mitch McConnell has lined up on the president’s side, approving the administration’s plan to send Ukraine weapons and the deployment of NATO troops. “It appears to me that the administration is moving in the right direction,” McConnell said Tuesday.

If you believe that Biden is really wagging the dog in Ukraine, you will now have to also believe that he has transformed the obstructionist McConnell into his political lap dog. Fat chance of either.

No impact---no one watches, nor cares about Presidential debates in 2022, BUT soundbytes on Twitter after make polarization inevitable

#### Zero chance of a civil war

Dr. Anjali Dayal 1-18, Ph.D., Assistant Professor of International Politics in the Political Science Department at Fordham University, Dr. Alexandra Stark, Ph.D., Senior Researcher for New America’s Political Reform Program, Former Research Fellow at the Middle East Initiative of the Harvard Kennedy School’s Belfer Center for Science and International Affairs and Minerva/Jennings Randolph Peace Scholar at the United States Institute of Peace, and Dr. Megan A. Stewart, Ph.D., Assistant Professor at American University’s School of International Service, “Warnings of ‘Civil War’ Risk Harming Efforts Against Political Violence”, War on the Rocks, 1/18/2022, https://warontherocks.com/2022/01/warnings-of-civil-war-risk-harming-efforts-against-political-violence/

In the past, Americans have faced indiscriminate violence or terrorism against civilians (such as the Oklahoma City Bombing), electoral violence (the 1898 Wilmington Coup), the assassinations of civil rights workers, mob violence and riots (like the Tulsa Massacre), and interpersonal violence (including lynchings and hate crimes). Today, according to the Washington Post, “dozens of religious institutions — including mosques, synagogues and Black churches — as well as abortion clinics and government buildings, have been threatened, burned, bombed and hit with gunfire over the past six years.” CNN reports that, in 2020, hate crimes in the United States rose to the highest rates in 12 years, with Black and Asian persons the primary targets. According to research from the Center for Strategic and International Studies, “the number of domestic terrorist attacks and plots increased to its highest level since at least 1994” and “White supremacists, extremist militia members, and other violent far-right extremists were responsible for 66 percent of domestic terrorist attacks and plots in 2020.” Both researchers and U.S. government officials ​point to the rising threat of white supremacist, right-wing extremists, and militias as “the greatest domestic terrorism threats in 2021 and likely into 2022.” Together, these data suggest that political violence is creeping upward and also tell us who the most likely victims of future violence are likely to be.

These forms of violence could become even more pervasive and could stay that way for decades without ever rising to anything either scholars or lay people would call civil war. They are worth naming and attempting to address in their own right, not as waystations to an all-out conflagration — particularly because international relations research tells us that priming people to expect a civil war could actually increase political violence. Canonical models indicate that rhetoric overstating the threat of violence — such as fear-inducing claims about the onset of a new civil war or mass violence — can become a self-fulfilling prophecy. Recent work demonstrates that exaggerated misperceptions about rivals’ support for violence can make groups more likely to support violence — put another way, if you believe that your political rivals are actively seeking a civil war, you, too, may become more committed to violent strategies. But, if the political violence of today has echoes through American history, then so, too, do transitions out of crisis moments. Treating these forms of political violence as dynamic leaves open the possibility that the actions Americans take now could reverse the course on which the United States finds itself — especially because conflict research also shows us that even processes as extreme as genocide, ethnic cleansing, and lynching are never inevitable because they rest, ultimately, on the choices individuals make. When people choose differently, they can resist or interrupt violent processes. Choice by choice, a different, less violent politics can emerge.

A year ago, the United States lost the peaceful transfer of power — a core attribute of democracy itself. Democracy in the United States is at its most perilous moment in a hundred years, and analysts, journalists, and scholars should be clear-eyed about the forces that threaten the country. When they do so, however, they should avoid doing so by asking whether the United States is on the brink of a civil war and should instead ask who is in danger of what from whom. This might make for a poor tagline, but it is a more whole assessment of the threats the United States actually faces. The stakes are too high for Americans to be anything less than precise.

Simply adding a third side doesn’t make people less polarized, it just adds a third pole

#### Warming won’t be catastrophic

Dr. Benjamin Zycher 21, Senior Fellow at the American Enterprise Institute, Doctorate in Economics from UCLA, Master in Public Policy from the University of California, Berkeley, and Bachelor of Arts in Political Science from UCLA, Former Senior Economist at the RAND Corporation, Former Adjunct Professor of Economics at the University of California, Los Angeles (UCLA) and at the California State University Channel Islands, and Former Senior Economist at the Jet Propulsion Laboratory, California Institute of Technology, “The Case for Climate Change Realism”, 6/21/2021, https://www.aei.org/articles/the-case-for-climate-change-realism/

CLIMATE TRENDS

Beyond exhibiting extreme overconfidence in a cherry-picked analysis of climate-change causes, politicians and activists frequently ground their alarmism in frightening predictions about consequences that are likewise far from certain. This is not only true within the very new (and still quite unreliable) field of predictive climate science; it is true even in the context of ongoing climate phenomena. Indeed, politicians and journalists frequently characterize dramatic or unusual climate phenomena as the product of anthropogenic climate change, yet there is little evidence to support those claims.

For one thing, there is no observable upward trend in the number of “hot” days between 1895 and 2017; 11 of the 12 years with the highest number of such days occurred before 1960. Since 2005, NOAA has maintained the U.S. Climate Reference Network, comprising 114 meticulously maintained temperature stations spaced more or less uniformly across the lower 48 states, along with 21 stations in Alaska and two stations in Hawaii. They are placed to avoid heat-island effects and other such distortions as much as possible. The reported data show no increase in average temperatures over the available 2005-2020 period. In addition, a recent reconstruction of global temperatures over the past 1 million years — created using data from ice-sheet formations — shows that there is nothing unusual about the current warm period.

Rising sea levels are another frequently cited example of impending climate crisis. And yet sea levels have been rising since at least the mid-19th century. This rise is tied closely with the end of the Little Ice Age that occurred not long before, which led to a rise in global temperatures, some melting of sea ice, and a thermal expansion of sea water. There is some evidence showing an acceleration in sea-level rise beginning in the early 1990s: Satellite measurements of sea levels began in 1992 and show a sea-level rise of about 3.2 millimeters per year between 1993 and 2010. Before 1992, when sea levels were measured with tidal gauges, the data showed an increase of about 1.7 millimeters per year on average from 1901 to 1990.

But because the datasets are from two different sources — satellite measurements versus tidal gauges — they are not directly comparable, and therefore they cannot be interpreted as showing an acceleration in sea-level rises. Moreover, the period beginning in 1993 is short in terms of global climate phenomena. Since sea levels have risen at a constant rate, remained constant, or even fallen during similar relatively short periods, inferences drawn from them are problematic. It is of course possible there has been an acceleration in sea-level rise, but even still, it would not be clear whether such a development stemmed primarily from anthropogenic or natural causes; clearly, both processes are relevant.

A study of changes in Arctic and Antarctic sea ice yields very different inferences. Since 1979, Arctic sea ice has declined relative to the 30-year average (again, the degree to which this is the result of anthropogenic factors is not known). Meanwhile, Antarctic sea ice has been growing relative to the 30-year average, and the global sea-ice total has remained roughly constant since 1979.

Extreme weather occurrences are likewise used as evidence of an ongoing climate crisis, but again, a study of the available data undercuts that assessment. U.S. tornado activity shows either no increase or a downward trend since 1954. Data on tropical storms, hurricanes, and accumulated cyclone energy (a wind-speed index measuring the overall strength of a given hurricane season) reveal little change since satellite measurements of the phenomena began in the early 1970s. The number of wildfires in the United States shows no upward trend since 1985, and global acreage burned has declined over past decades. The Palmer Drought Severity Index shows no trend since 1895. And the IPCC’s Fifth Assessment Report, published in 2014, displays substantial divergence between its discussion of the historical evidence on droughts and the projections on future droughts yielded by its climate models. Simply put, the available data do not support the ubiquitous assertions about the causal link between greenhouse-gas accumulation, temperature change, and extreme weather events and conditions.

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases in greenhouse-gas concentrations. The IPCC’s 2014 Fifth Assessment Report, for example, uses four alternative “representative concentration pathways” to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC’s Special Report on Global Warming of 1.5°C and the U.S. government’s Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as “borderline impossible.”

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

#### 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

<<MARKED>>

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

# 2NC---Round 5---NDT

## 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.

#### Torts need a unique, independent moment to create a critical mass. Lucrative alternatives like antitrust’s tremble damages, prevent mainstreaming.

Kyle Graham 16, Assistant Professor at Santa Clara University School of Law, 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, “Strict Products Liability at 50: Four Histories”, Marquette Law Review, Volume 98, 98 Marq. L. Rev. 555, Revised 2/24/2016, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2385731

The discussion above provides a different way of understanding the switch to strict products liability. Academics conceived of products liability and defined its contours; judges adopted it. The prevailing narrative ends there. But the contributions of plaintiffs and their attorneys also must be acknowledged, since they provided the lifeblood for this transformation in the law. Without their cases, academics and judges would have little motivation to innovate, and no material with which to work. And while it is easy to assume that plaintiffs and their attorneys will rally around every liability-enhancing reform - an "if you build it, they will come" approach to doctrinal change - this is not in fact the case. Plaintiffs do not appreciate each and every cause of action that may arise, 293 and may abandon even well-recognized torts. 294 Likewise, attorneys may turn their backs on or decline to cultivate causes of action that do not appear to be especially lucrative. 295 In this respect, the proliferation of strict products liability may owe as much to its literal [\*600] value, from the perspective of attorneys, as to its expressive value, in the minds of judges.

At the same time, not all mid-century products lawsuits placed equal pressure on existing doctrine. Some types of cases made the argument for a strict-liability approach better than others did. The next section of this Article discusses another way to view the products-liability revolution, as a practical response to the challenges presented by particular case tropes that appeared often at mid-century, if not today.

IV. The Practical Narrative: "Bottle Cases" and their Discontents

In hindsight, it seems odd that courts adopted strict products liability as quickly as they did, given the relative rarity of these cases at the time of this transition. According to one study, between 1955 and 1970, products liability and malpractice cases, combined, amounted to only 1.6% of all cases heard by a surveyed subset of the nation's state supreme courts. 296 Products cases were not especially common at the trial-court level, either; one study of case outcomes in Los Angeles Superior Court in 1961 and 1962 identified only fifteen warranty cases among the 945 jury verdicts rendered in tort matters during that span. 297

That courts nevertheless rushed en masse toward strict liability to the consumer suggests that either they perceived products cases as more common than they actually were or that they regarded the issues presented by these cases as particularly troubling or significant. On the latter point, prevailing explanations of strict products liability's rise attribute judicial enthusiasm for this reform to a sense that it perfectly captured the intellectual and social zeitgeist. 298 Judges had to sign on, lest they were to appear behind the times. 299

Such sentiments probably did influence many judges. Yet there existed another, more practical reason for courts to adopt an unvarnished [\*601] exception to the prevailing negligence rule. While strict products liability, whether framed in tort or in warranty, had much to commend it from a broad policy perspective, it also had certain practical (if less revolutionary) advantages over a negligence regime, especially as applied to certain case types that appeared quite often before mid-century judges. Most notably, strict products liability averted the thorny problems that could arise with proving a particular defendant's fault when there existed multiple parties in the supply chain and a product that could have been compromised anywhere between the points of manufacture and sale.

This advantage represented an essential component of the reformist pitch for strict liability. Here, consider once again Prosser's discussion in his Assault upon the Citadel article of the specific problems associated with applying the negligence rule to products cases. 300 In relating his concerns, Prosser's usual talent for drumming up string citations to hammer home a point momentarily deserted him. Prosser cited only one case for the proposition that the product's manufacturer may be outside the jurisdiction, and just one other for the principle that the manufacturer may be unknown. 301 But when it came to the problem of proving negligence on the part of a particular defendant in the supply channel, Prosser had no trouble producing a hypothetical with a lengthy list of citations. 302 These cases all involved a single product: glass beverage bottles that had exploded, shattered, or chipped. 303

Prosser wisely relied upon breaking bottles to advance his argument for strict products liability, as Traynor had done sixteen years earlier in his Escola concurrence. 304 Bottle lawsuits neatly captured the intractable [\*602] problems with negligence doctrine as applied to certain products cases, and were common (and factually similar) enough to make these shortcomings apparent to a broad audience.

Though this fact may be difficult to appreciate today, as late as 1969 the humble glass beverage bottle was described by a National Commission on Product Safety official as being among the most dangerous of all household products. 305 And although Escola v. Coca Cola Bottling Company of Fresno 306 is the only widely remembered bottle case today, these matters once provided courts with a great deal of business. 307 Stacks of reported cases dealt with the aftermath of a bottle that had cracked or exploded. 308 In the fifteen years prior to 1963, the supreme courts of more than half of the states took up at least one of these matters. 309 Indeed, bottle cases may have been the most common [\*603] of all products-liability lawsuits during that era. 310 These cases were well [\*604] known among academics and practitioners, too. Numerous law review articles addressed exploding-bottle lawsuits and the problems they presented, 311 and NACCA seminars often included presentations on how to try these matters. 312

Bottle cases were common throughout the early to mid-1900s because of a robust claim consciousness of the sort discussed in the prior narrative. 313 Glass beverage bottles were ubiquitous from the early 1900s, when new technologies appeared that allowed for their mass manufacture, 314 through the 1970s, when they were overtaken first by aluminum cans equipped with the novel "pop-top" mechanism, 315 and later by plastic containers. 316 Throughout this span, when one of these bottles suddenly ruptured, it was easy for would-be plaintiffs to appreciate that they had suffered an injury attributable to an outside force rather than their own fault. 317 Enough bottles exploded, shattered, [\*605] or chipped to inflict a substantial number of cut fingers and gouged eyes, 318 but not so many that people appreciated these harms as the price paid for a "pause that refreshes." 319 Quite the contrary; these injuries seemed completely at odds with the pleasant messages conveyed by beverage companies' omnipresent advertising. 320 Finally, the popularity and notoriety of a related variety of lawsuit, the "mouse in a bottle" adulterated-beverage claim, may have conditioned prospective plaintiffs and their lawyers to regard bottlers as entities susceptible to suit in tort. 321

Given these circumstances, people seriously injured by glass bottles readily appreciated that they might have a claim and found lawyers to take their cases. 322 But regardless of whether a plaintiff sued the bottle's manufacturer, the bottler who filled it with a drink, the retailer who sold [\*606] the product, 323 or some combination of these defendants, she usually had a tough row to hoe in proving negligence. 324 Even assuming a jurisdiction had adopted the MacPherson doctrine, removing privity as an issue in most negligence cases, 325 the mere fact of a broken or exploding bottle did not necessarily spell negligence on the part of the manufacturer, bottler, or retailer, either individually or collectively. Each of these defendants could point a finger at the others (or at the plaintiff) as the culpable parties, and even a bottle that had been created, cleaned, filled, and inspected with care could break or explode for unknown reasons. 326

Many of these bursting-bottle plaintiffs, lacking a clear act of negligence to focus upon, sought to rely on res ipsa loquitur as a path toward recovery. 327 These litigants encountered several difficulties. The offending bottle typically had gone through the hands of several actors as part of the supply chain, and the plaintiff herself often had custody of the bottle for some time prior to its rupture. These facts meant a given [\*607] defendant lacked the "exclusive control" of the harm-causing instrumentality that courts traditionally demanded as a prerequisite for application of res ipsa loquitur. 328

Unsurprisingly, some judges tinkered with existing doctrine to provide a remedy, or at least a jury, to sympathetic plaintiffs. 329 Writing in 1960, Roscoe Pound identified seven different approaches courts had taken to the negligence issue in exploding bottle cases. 330 Several of these approaches liberalized res ipsa loquitur doctrine to allow plaintiffs an inference of negligence, at least against the bottler, notwithstanding the lack of exclusive control. 331 One case cluster allowed the plaintiff a res ipsa loquitur inference provided that she introduced some evidence that indicated the bottle had not been abused or mishandled after it left the defendant's hands. 332 Other courts allowed the plaintiff to invoke res ipsa loquitur if she showed that other bottles filled by the bottler had exploded around the time of the accident in question. 333 And still another approach allowed a plaintiff to rely upon res ipsa loquitur merely upon establishing that her bottle had exploded, "since reasonable men know that when bottles are properly manufactured and filled, they do not blow up." 334

The increasingly aggressive application of res ipsa loquitur in bottle cases 335 meant that by mid-century, many observers understood that some [\*608] courts were applying negligence in name only in these matters, and justifying this sleight-of-hand on public-policy grounds. 336 One such commentator, summing up the state of the law in 1960, wrote that "it seems obvious from the talk of public policy which constantly recurs in opinions, that courts are designedly imposing strict liability as a means of ensuring that soft drink manufacturers take consummate protections." 337

But these reforms did not assist every plaintiff in a bottle case. Even under liberalized regimes, many plaintiffs could not show that the bottle in question had been handled reasonably carefully since it left the bottler's hands. 338 Most bottle cases therefore remained difficult to prove when grounded in negligence. 339 In these situations, the law of warranty provided the plaintiffs' only hope. 340 But many courts continued to insist [\*609] upon privity in bottle cases when a breach of warranty was alleged, a position that tightly circumscribed the universe of viable plaintiffs and plausible defendants. 341

The ongoing post-World War II trend toward lifting the privity requirement in warranty cases involving food thus presented an opportunity for plaintiffs in bottle cases, and a challenge for judges. Bottle cases stood at a crucial analogical pivot, halfway between food and all other consumer products. On the one hand, increasingly widespread rejection of a privity requirement in adulterated food cases begged the question of why defective food containers should be treated any differently. Why should the plaintiff's recovery depend upon whether a soda bottle chipped on the inside, depositing glass shards into a drink, or on the outside, sending the shards into the plaintiff's hand? 342 On the other hand, if courts accepted this analogy and lifted the privity requirement for food containers, too, such a holding contained no apparent limiting principle. If food containers, why not automobiles, space heaters, or any other consumer good? In the 1950s, a few courts leapt into the breach, rejecting a privity requirement for warranty claims in bottle cases. 343 It was around this time that proposals for strict products [\*610] liability in tort began to coalesce into a workable rule, through the Restatement (Second) of Torts § 402A. 344

Would some variation of § 402A have come about, even without bursting-bottle lawsuits? Almost certainly. Thought leaders like Prosser and Traynor had lobbied for a strict-liability approach to products problems, grounded in tort, for more than twenty years. 345 Bottle cases only typified, rather than exhausted, their concerns. 346 And yet these cases deserve more than the obscurity in which they have languished. Each time a bottle case appeared, from the 1940s through the 1960s, 347 it reminded even the most unimaginative judges of the nagging problems created by the prevailing rules. 348 The recurrence of these disputes, meanwhile, allowed courts to use them as an ongoing experiment with negligence doctrine, trying to blaze a path around the problems of proof associated with these cases (and other, similar case types as well). 349 In the end, these efforts gravitated toward a negligence approach in name that imposed strict liability in fact. 350 Judges who surveyed this record likely found that it justified their more straightforward embrace of strict liability, whether couched in warranty or in tort. 351

Meanwhile, even if bottle cases did not prompt § 402A, judging from Dean Prosser's pointed reference to bottle cases in his Assault upon the Citadel article, they likely informed the approach toward product defects that he promoted in the Restatement. 352 Much ink has been spilled over [\*611] Prosser's intentions in drafting § 402A. In particular, there exists an ongoing dispute over whether § 402A contemplated only what are today known as "manufacturing" defects (with other products claims being left to negligence law), or both these and other types of product-defect allegations, such as lawsuits premised on unsafe designs and inadequate warnings. 353 The bottle cases suggest that this argument may be orthogonal to the issue as Prosser perceived it, at least if one assumes his thinking was framed by the recurring case tropes of his era. A glass bottle could explode or shatter for any of several reasons. Among them, these bottles could be designed with glass too thin to withstand successive reuse; 354 a bottle could contain an inclusion or other irregularities that made it more prone to shatter; 355 or the bottler could abrade and thereby weaken the glass in cleaning prior to reuse, 356 over-carbonate the beverage inside, 357 or damage the bottle when affixing the bottle cap. 358 Alternatively, the glass could be damaged by careless handling by the distributor, retailer, plaintiff, or someone else, 359 or the glass simply might break for reasons unknown. 360 Today, some of these fact patterns would be classified as involving "manufacturing" defects, others as "design" defects, and still others as negligence. To Prosser, an essential point of strict liability was to make these distinctions essentially irrelevant to recovery. 361 Per the Restatement, the liability issue would instead simply hinge on whether the product had failed to satisfy the expectations of a reasonable consumer. 362 A soda bottle that inexplicably exploded in the [\*612] plaintiff's hands certainly qualified under this test, regardless of the source of the defect. 363

In the final analysis, perhaps the most intriguing aspect of the bottle cases is the fact that strict products liability, as extended to all products, was built atop a fairly limited universe of decided cases, 364 and the most numerous of these case types has virtually disappeared. 365 For several decades, bottle cases appeared in the background (and sometimes the forefront) of the debate over products liability. 366 Even if these cases were banal, their ubiquity and the substantial body of caselaw they produced made them an integral part of the legal culture. 367 Now they are mostly gone, and essentially forgotten. Meanwhile, strict products liability lives on. One might infer from this disconnect that the different lifespans of specific case types on the one hand, and doctrine on the other, can make it difficult to appreciate, in hindsight, the specific concerns that prompted judges of other eras to adopt a given doctrinal innovation. Where now-defunct cases contributed to a still-intact rule, modern observers may overestimate the importance of broad policy arguments in making the case for change, and underestimate the contributions made by particular problems associated with the most visible and common cases of an earlier era.

[\*613] Of course, judges vexed by bottle cases did not necessarily have to adopt a "pure" tort solution to the problems presented by these matters; the law of warranty, with some adjustments, might have done the trick just fine. The next section of this Article begins at this junction, and discusses why so many courts adopted an approach to products liability consciously grounded in tort law.

V. The Contingency Narrative: Tort vs. Warranty

A third and final story concerns how a "pure" tort theory eclipsed the rhetoric of warranty as the dominant method of framing a products-liability claim. As late as the 1950s, most of those who saw some form of strict products liability as inevitable assumed that this transition would occur within the prevailing warranty rubric. 368 Defying these expectations, an approach squarely grounded in tort law came to conquer the field of consumer protection, with warranty law now occupying a backup role.

In hindsight, it is easy to attribute this shift to certain perceived advantages of a "pure" tort approach, as embodied in Restatement (Second) of Torts § 402A, over a regime that would remold the law of warranty so as to give it the function, if not quite the precise form, of a tort remedy. Unlike warranty, a tort solution was not encumbered by notice and disclaimer rules associated with generic sales law. 369 The tort approach also did not suffer from decades of name-calling by Prosser, who described warranty as "a freak hybrid born of the illicit intercourse of tort and contract," among other choice epithets. 370 But none of these [\*614] problems was intractable - Henningsen refused to honor a seemingly airtight disclaimer of warranties, 371 and Greenman gainsaid a notice requirement in warranty suits before going on to recognize a tort remedy. 372 Meanwhile, warranty had its competitive advantages, too, the most important of which was inertia. 373 The fact that, even today, a handful of states still apply a modified warranty framework to products claims 374 suggests that the broad, swift adoption of the tort approach may have owed to fortuitous circumstances as much as any inherent superiority of a tort formulation. The text below spins out this possibility, suggesting that the preference for tort over warranty may owe partially to the fact that warranty was compromised as an alternative to tort at an especially crucial moment. By the time this damage had been repaired, § 402A already had gained a critical mass of adherents. 375

#### The perm lacks a discrete application---that guts general recognition of the tort

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2. Justiciability

A new cause of action must provide the court with discrete, concrete, and contained standards for application; otherwise, stealthing victims will be vulnerable to dismissal under 12(b)(6), the first line of defense for perpetrators. 57Courts will ask, where does the tort begin and where does the tort end? 58Litigants who fail to answer this question and leave questions for the determination of the court will be subject to dismissal, a death knell to victims of novel causes of action. 59

Advocates for stealthing victims will have difficulty articulating the standards of the proposed tort. 60Victims of stealthing have suffered violations of both their interest in bodily autonomy and freedom from misrepresentation, and balancing these two interests could lead to confusion in the courts. 61In presenting the cause of action, should the plaintiff focus on the physical violation or the deception? The former could lead courts to focus primarily on the physical harm instead of allowing room for the intangible harm that arises from the violation itself. However, if the focus is instead placed on the deception involved, it could be extended beyond the bounds of stealthing. 62For example, a court could extend liability for failing to reveal marital status, gender identity, race, or religion. 63The proper balance to strike is one that accounts for the intangible harm associated with the violation of the victim's consent, while also avoiding overregulation of sexual relationships. 64This may prove difficult to convey to a court [\*940] in a matter of first impression and leaving questions about what the tort encompasses may lead to extremely rigid standards that would limit its availability to future plaintiffs. 65

Outside of contextualization, there are also significant evidentiary hurdles associated with stealthing. 66Inherently, stealthing claims will almost always lack witnesses and outside of cases with physical harm (STD transmission or pregnancy), there may be no evidence at all, aside from the word of the victim and the defendant. 67A lack of evidence outside of testimony by the parties and difficulty defining the tort will not inspire the judiciary to override the separation of powers and rule on a matter without existing precedent. 68

3. "Critical Mass" Caseload

Tangential to the requirement that a new cause of action arise only out of a need and not out of a desire for social change, a new cause of action should present a legal issue likely to result in a large caseload. 69Through the common law system and the use of precedent in developing our legal rules, a significant case load is necessary to fully develop a tort and insure its consistent application. 70A judge is going to be unwilling to rule in favor of a novel cause of action that appears to be a one-off instance of conduct as opposed to yielding the necessary caseload to develop the tort. 71In order to provide a viable avenue for future victims, representation has to be not only possible, but also inexpensive. 72A plaintiff's attorney will likely take a stealthing case under a contingent-fee basis and concerns about the expense of litigating a novel claim could either prevent them from advocating for the victim entirely or charging a premium. 73

Contributing to confusion about what stealthing actually is and whether it constitutes a violation is the fact that there has not been [\*941] a single civil or criminal case brought in the United States addressing either question. 74However, reports and cases outside the United States and the conclusions of Brodsky's study suggest that the problem is pervasive enough to warrant a cause of action. 75As knowledge of stealthing and its implications expands, it is foreseeable that a significant number of claims could be brought in order to prompt judicial recognition and attorney representation. 76

4. Novelty

Despite attempts by female legislators to introduce legislation criminalizing stealthing, none have been successful. 77This lack of legislative recognition could encourage judicial action, but if the conduct at issue is already conceivably addressed by a pre-existing tort, courts may be unwilling to expand liability. 78The courts' primary function is to enforce the law, not to create it, and the judiciary sidesteps this by recognizing a new cause of action only when there is an obvious need. 79If conduct is already addressed through statutory means or through an existing cause of action, courts will not intervene. 80

Many forms of sexual misconduct are found in elements of other causes of action. 81Sexual harassment cases can make arguments under the existing framework of assault, sexual deception cases under fraud, and battered women's syndrome finds its place within a combination of existing torts. 82Stealthing, likewise, implicates [\*942] elements of intentional infliction of emotional distress, assault, fraud, and especially, battery. 83Courts may take a view that stealthing is merely a "gap-filler" tort, carving out liability for conduct not covered by the existing torts, and is thus unnecessary. 84This view has proven antagonistic to intentional infliction of emotional distress claims and as a result, application of the tort has been inconsistent and the burdens of proof are extremely difficult for plaintiffs to meet. 85Litigants who seek a new cause of action must meaningfully distinguish the conduct and harm associated with stealthing from other torts, or otherwise risk dismissal.

In assessing the above preconditions for general recognition of new causes of action in the context of stealthing - that is, normative weight, justiciability, adequate case load, and novelty - advocates for a new tort already face an uphill battle. 86While the time is certainly ripe for novel causes of action to address sexual misconduct, the hurdles of justiciability and novelty are significant. 87The conduct and interests encompassed by the act of stealthing are simultaneously unique, provoking difficulty in determining the conduct that falls within its category, and too similar to existing causes of action and the interests implicated under other torts. It seems unlikely a court will extend a hand to recognize a new cause of action willingly. 88

[FOOTNOTE] 87 Abraham & White, supra note 17, at 2143. In their discussion of potential new torts to address sexual misconduct, Abraham & White discuss the impact of the #MeToo movement and the current cultural momentum that could lead to the introduction of a new tort. Id. However, this may not be enough to overcome the evidentiary hurdles to achieve recognition of a new tort. [END FOOTNOTE]

### Solvency---2NC

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

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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.

#### 4. Tortious interference can be applied to political lobbying and reverses Noerr---it’s now totally delinked from antitrust

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Second, because the Noerr-Pennington doctrine is now commonly framed in First Amendment terms, its application has spread beyond antitrust claims--and in more than one dimension. 27 But the United States Supreme Court has not squarely held this to be the case, although, as we will see, it has inferentially done so, at least to the satisfaction of the lower courts. In BE & K Const. Co. v. N.L.R.B., the Court faced the by-then familiar "issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act." 28 Ultimately, the Court did not need to decide whether fully to [\*217] extend Noerr to a non-antitrust statute, but--as Justice Scalia stated in a concurring opinion--the majority opinion sufficiently cleared that road:

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with Justice BREYER that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process. 29

The underlying reasoning of the majority opinion was that--consistent with the general notion that the freedoms of speech and press entail that they must be given "breathing room"--it would be anathema to First Amendment values to declare unlawful an entire "class of reasonably based but unsuccessful lawsuits." 30

This expansive reading of Noerr is consistent with what many courts both before and after BE & K have held. As one Texas court put it, "The courts that have addressed whether the doctrine applies in cases other than those based on anti-trust violations recognized that while the doctrine originally arose in connection with anti-trust cases, it is fundamentally based on First Amendment principles . . . . Thus, the doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiff." 31 Not surprisingly, then, Noerr now applies to (1) non-antitrust federal statutory claims; 32 (2) state as well as federal claims; 33 (3) pre-litigation [\*218] activities; 34 (4) reports to law enforcement; 35 (5) some settlement agreements; 36 and (6) refusals to settle. 37

[FOOTNOTE] 31 RRR Farms, Ltd. v. Am. Horse Prot. Assoc., 957 S.W.2d 121, 129 (Tex. App. 1997) (holding that Noerr-Pennington immunity applies to a claim of tortious interference with prospective business advantage brought by breeders of Tennessee Walking Horses based on a horse association's lobbying and litigation designed to do away with certain procedures and devices used in the training and showing of Tennessee Walking Horses) [END FOOTNOTE]

As these cases show, Noerr casts a reasonably long shadow over litigation activities. But what if parties-particularly cross--border parties--elect arbitration instead of litigation as a method of dispute resolution? Should Noerr attach to the same extent--or even to some extent--to arbitration activities? To that subject we now turn.

### IoT---Impact---2NC

#### Without liability, it’ll enable autonomous and advanced weapons that threaten humanity AND 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.

# 1NR

## Biz Con DA

### Impact---2NC

#### It causes terrorism, civil wars, and diversion that go global---nothing checks

Dr. Qian Liu 18, PhD in Economics from Uppsala University, Former Visiting Researcher at the University of California, Berkeley, Managing Director for Greater China at The Economist Group, Guest Lecturer at New York University, Tsinghua University, the Chinese Academy of Social Sciences and Fudan University, “The Next Economic Crisis Could Cause A Global Conflict. Here's Why”, World Economic Forum, 11/13/2018, https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Turns every impact

Geoffrey Kemp 10, Director of Regional Strategic Programs at The Nixon Center, Served in the White House Under Ronald Reagan, Special Assistant to the President for National Security Affairs and Senior Director for Near East and South Asian Affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-234

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

### AT: Thumpers---T/L

#### Growth is stable, driven by business optimism

Dr. Daniel Bachman 3-17, Senior Manager with Deloitte Services LP, B.A. from Johns Hopkins and Ph.D. from Brown University, “United States Economic Forecast”, Deloitte, 3/17/2022, https://www2.deloitte.com/us/en/insights/economy/us-economic-forecast/united-states-outlook-analysis.html

The Russia-Ukraine war won’t derail the recovery

The US economy’s performance in the past few months has been better than most people expected—or even realized. While Omicron took infection rates to a new high, little trace appeared in economic data. Inflation and related problems, such as tangled supply chains, may continue to challenge business leaders and policymakers, but the US economy is performing well by most measures:

* The unemployment rate is already back to the full employment level.
* The labor force participation rate has started to pick up, as some of the folks who left the labor force are coming back to work.
* Corporate profits are more than satisfactory. Profits in Q3 2021 were 21% above the prepandemic level. That’s much better than many businesses had reason to expect when the pandemic first hit in March 2020.
* Strong profits have supported business investment. The pandemic shifted investment away from buildings and toward equipment and information products.1 But the willingness to invest suggests that businesses are surprisingly optimistic about the future.
* The pandemic drove the adoption of technology and—as a consequence—appears to have accelerated labor productivity growth. Previous Deloitte forecasts assumed trend productivity was less than 1%. But productivity growth has remained surprisingly strong during the recovery from the pandemic, about 2% over the four quarters to December 2021. If productivity growth remains high, many of the long-term issues facing the US economy—such as financing social security—will likely become considerably easier to solve.

But just as Omicron’s potential to impact the economy waned, geopolitical tensions increased. The Russian invasion of Ukraine is not likely to derail the US recovery, but it will push up inflation in the short run.

The US economy is likely to feel the impact of a continuing Ukraine crisis through two main channels.

Most importantly, the price of oil is likely to remain higher than it would have otherwise—although how much higher is an open question. Russia produces about 12% of global crude oil supplies. Sanctions may remove some of this oil supply, as the United States (and possibly some European countries) reduce or end purchases of Russian oil.

However, oil is a global, fungible commodity and Russia can still sell oil to non-boycotting nations. That would release other oil for shipment to boycotting countries without affecting the global price of oil. Of course, payments may be more difficult, and Russia may need to sell its oil at a discount. But the size of the supply shock may be more limited than that 12% figure suggests.

Europe’s heavy dependence on Russian natural gas suggests that the EU’s economy will experience slower growth—or, in the extreme case, a recession. The EU is a major trading partner of the United States, accounting for more than 15% of US exports. On top of a direct decline in demand, dollar appreciation reflecting the relative safety of the United States will make US goods less competitive. Both would reduce the contribution of exports to US GDP growth.

The combined impact is not large enough to generate a recession in the United States. But growth could slow down. And inflation would pick up, at least in the short term. Our baseline forecast assumes a US$15 per barrel rise in the price of oil, which leads to an extra half a percentage point rise in the consumer price index (CPI) in 2022 (with most of the rise occurring in the second quarter). That’s not huge, but during a period when the Fed is struggling to control inflation, it presents policymakers with a big problem.

#### Momentum’s strong

David Lefkowitz 3-31, Equity Strategist at UBS Wealth Management, “Much Ado About Inversions”, UBS Editorial Team, 3/31/2022, https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1562284.html

Still, this is a signal that the business cycle is getting more mature and some riskier parts of the equity market may face incremental headwinds. This was part of our motivation to reduce US mid-caps from most preferred to neutral on 24 February. But the US economy currently has strong momentum and other indicators, such as banks' willingness to lend, remain supportive of economic growth. In short, we think it is too soon to adopt an outright defensive posture within portfolios.

#### Overall growth is accelerating---confidence in the domestic environment is offsets fears about other factors

Xavier Fontdegloria 3-24, Economy Reporter for Dow Jones Newswires and The Wall Street Journal, “U.S. Economic Activity Accelerated in March Despite Ukraine War -- S&P Global”, MarketWatch, 3/24/2022, https://www.marketwatch.com/story/u-s-economic-activity-accelerated-in-march-despite-ukraine-war-s-p-global-271648131005

U.S. economic growth gained momentum in March, in a sign that activity is holding up despite high inflation and uncertainty stemming from the war in Ukraine, according to data from a purchasing managers survey released Thursday.

The S&P Global Flash Composite Output Index rose to 58.5 in March from 55.9 in February, an eight-month high, signaling that the economy expanded at a robust pace.

The index gauges both the manufacturing and services sectors. A reading above 50.0 points to an increase in activity.

Activity in the U.S. private sector gained pace in March as Covid-19 containment measures were relaxed to the lowest since the pandemic began, offsetting a drag from growing concerns about the Ukraine war, said Chris Williamson, chief business economist at S&P Global.

Production for both the manufacturing and services sector accelerated, as well as inflows of new business due to strong demand, the report said. Firms also reported less severe supply-chain bottlenecks and stepped up job creation.

Services providers led the upturn in activity as the hospitality sector benefited from less pandemic-related restrictions.

The flash U.S. services PMI increased to 58.9 in March from 56.5 in February. Economists polled by The Wall Street Journal expected the indicator to be unchanged from the previous month.

The services sector saw a sharp increase in new business, while inflationary pressures remained substantial, S&P Global said.

Growth among goods producers also picked up pace, according to the survey. The U.S. manufacturing PMI rose to 58.5 in March from 57.3 the previous month, beating economists' estimates of 57.0.

Stronger expansions in output, new orders, employment and inventories supported activity, while vendor performance improved, the report said.

Business confidence fell to the lowest since last October, but remained encouragingly resilient, Mr. Williamson said. "Rising geopolitical concerns over Russia's invasion of Ukraine, higher living costs and Fed policy tightening were largely allayed by hopes of the economy gaining strength as the drag from the pandemic continues to recede," he said.

### AT: Ukraine Thumper

#### Ukraine’s a brink---growth’s still above average BUT fragile. A new shock risks recession.

Dr. Gus Faucher 3-21, PhD in Economics from the University of Pennsylvania, Senior Vice President and Chief Economist of The PNC Financial Services Group, “Economist's View: U.S. Economic Recovery Should Continue Despite Ukraine Invasion”, Pittsburgh Post-Gazette, 3/21/2022, https://www.post-gazette.com/business/money/2022/03/21/gus-faucher-pnc-us-economic-recovery-ukraine-invasion-economy-federal-reserve-inflation/stories/202203200045

The outlook for the U.S. economy is still good, with expansion expected to continue for the next couple of years and inflation expected to slow. A U.S. recession in the next couple of years is still unlikely, but the risk of one has increased with the invasion, with the most likely cause a Fed misstep.

Although rising prices are a big problem for many U.S. households, particularly those on fixed incomes, the U.S. economy is generally solid in early 2022. The economy added almost 7 million jobs in 2021, by far the best year on record. The unemployment rate, which hit almost 15% in April 2020 with the pandemic, is now down below 4% and almost back to its pre-pandemic level of 3.5%. Gross domestic product (GDP) adjusted for inflation, the best measure of overall economic activity, was up by almost 6% at the end of 2021 compared to a year earlier, with the economy more than 3% larger than it was before the pandemic.

More importantly, the economy was poised for solid growth in 2022, with continued improvement in the labor market. Even with high inflation households had, on average, a lot of money saved from 2020 and early 2021 thanks to aid from the federal government and limited opportunities to spend during the initial stages of the pandemic. Very strong job growth and rising wages were also positives for consumer spending. Supply-chain problems that weighed on the economy in 2021 were expected to fade this year.

But the situation is now more tenuous given the invasion of Ukraine.

The direct impact of U.S. sanctions on Russia will be minimal. Russia accounts for only about 2% of global GDP, and exports to Russia are little more than a rounding error in U.S. GDP.

But other effects are more worrisome. The Eurozone, which accounts for about 15% of global GDP, was already experiencing a weak recovery from the Viral Recession compared to the U.S. The currency union is now taking a big hit from reduced energy supplies from Russia and much higher energy prices, which will weigh on U.S. exports.

In addition, high energy prices will be a drag on consumers. In the Pittsburgh area, AAA reports the price of a gallon of gasoline has soared to $4.33, up from $3.60 a month and $3.07 a year ago. Although consumer savings are far above their pre-pandemic level, high energy prices are likely to cause consumers to economize in other areas. Lower stock prices in the wake of the invasion will be another drag on consumer spending, particularly for high-income households.

Manufacturing expertise in some areas may mean higher paying jobs stay in the Pittsburgh area in the future, even as overall manufacturing employment declines. In this Jluy 2021 photo, a TyBot ties rebar together on a test bridge on Friday, July 9, 2021, at Advanced Construction Robotics in Allison Park.

Economist's view: Modest uptick in Pittsburgh-area manufacturing employment won’t last

As a result, U.S. economic growth is now expected to be slightly below 3% over 2022, somewhat weaker compared to before the invasion. This is still a solid number, and well above the long-run average. But the risk of more significant slowing in the economy this year has increased.

### AT: Inflation Thumper

#### Inflation will subside and end in a soft landing

Paul Krugman 3-24, Won the 2008 Nobel Memorial Prize in Economic Sciences, Distinguished Professor at the City University of New York Graduate Center, Opinion Columnist at the New York Times, “How High Inflation Will Come Down”, The New York Times, 3/24/2022, https://www.nytimes.com/2022/03/24/opinion/inflation-united-states-economy.html

The Federal Reserve, however, believes that high inflation will be a temporary phenomenon. Furthermore, the Fed believes that it can bring inflation down relatively painlessly — that it can achieve a so-called soft landing.

But doesn’t this fly in the face of history? After all, the last time America had to bring high inflation under control, during the 1980s, the cost was immense. The unemployment rate soared to 10.8 percent and didn’t get back to 1979 levels until 1987. Are there good reasons to believe that this time is different?

Actually, there are. The landing probably won’t be as soft as the Fed envisions, but this time disinflation shouldn’t, or at least needn’t, be an extremely painful process.

To see why, we need to look at history more closely and appreciate the important differences between the last big inflation and our current situation.

Forty years ago, as many economists will tell you, inflation was “entrenched” in the economy. That is, businesses, workers and consumers were making decisions based on the belief that high inflation would continue for many years to come.

One way to see this entrenchment is to look at the wage contracts — typically for three years — that unions were negotiating with employers. Even then, most workers weren’t unionized, but these deals are a useful indicator of what was probably happening to wage- and price-setting more generally.

So what did those wage deals look like? In 1979, union settlements with large companies that didn’t include a cost-of-living adjustment specified an average wage increase of 10.2 percent in the first year and an annual average of 8.2 percent over the life of the contract. As late as 1981, the United Mine Workers negotiated a contract that would raise wages 11 percent annually over the next several years.

Why were workers demanding, and employers willing to grant, such big pay hikes? Because everyone expected high inflation to persist for a long time. In 1980 the Blue Chip survey of professional forecasters predicted 8 percent annual inflation over the next decade. Consumers surveyed by the University of Michigan expected prices to rise by about 9 percent annually over the next five to 10 years.

With everyone expecting inflation to continue, workers wanted raises that would keep up with rising prices, and employers were willing to grant those raises because they expected their competitors’ costs to be rising as fast as their own. What this did, in turn, was make inflation self-perpetuating: Everyone was raising prices in anticipation of everyone else raising prices.

Ending this cycle required a huge shock — an economy so depressed both that inflation fell and that workers were compelled to accept major concessions.

Things are very different now. Back then almost everyone expected persistent high inflation; now few people do. Bond markets expect inflation eventually to return to prepandemic levels. While consumers expect high inflation over the next year, their longer-term expectations remain “anchored” at fairly moderate levels. Professional forecasters expect inflation to moderate next year.

This means that we almost surely aren’t experiencing the kind of self-perpetuating inflation that was so hard to end in the 1980s. A lot of recent inflation will subside when oil and food prices stop rising, when the prices of used cars, which rose 41 percent (!) over the past year during the shortage of new cars, come down, and so on. The big surge in rents also appears to be largely behind us, although the slowdown won’t show up in official numbers for a while. So it probably won’t be necessary to put the economy through an ’80s-style wringer to get inflation down.

That said, the Fed is probably too optimistic in believing that we can get inflation under control without any rise in unemployment. Statistical measures like the unprecedented number of unfilled job openings, anecdotal evidence of labor shortages and, yes, wage increases suggest that the job market is running unsustainably hot. Cooling that market off will probably require accepting an uptick in the unemployment rate, although not a full-on recession.

And for what it’s worth, the Fed’s plan for gradual rate hikes, which has already led to a major rise in mortgage rates, is likely to cause that unfortunately necessary cooling-off, especially combined with the fact that fiscal policy has turned contractionary as the big spending of early 2021 recedes in the rearview mirror.

So my message for those intoning dire warnings about the return of ’70s-type stagflation — which some of them have been itching to do for years — is that they should look at their history more carefully. The inflation of 2021-22 looks very different, and much easier to solve, from the inflation of 1979-80.

### AT: EU Thumper

#### 3. Logic---it can only affect operations in the EU, NOT the US. Anything else is blatant protectionism!

[Kentucky in blue].

2AC Sullivan 3-25-2022 (Laurie Sullivan is a writer and editor for MediaPost "Amazon, Apple, Google, Meta Face New EU Regs: Could Alter Business Models," <https://www.mediapost.com/publications/article/372410/amazon-apple-google-meta-face-new-eu-regs-coul.html)sw>

The European Union passed landmark antitrust regulations late Thursday. The regulations, expected to come into force as early as October, could change the business models of large U.S. technology companies such as Amazon, Apple, Google, and Meta. The Digital Markets Act (DMA) rules will apply to “gatekeepers” -- technology companies with a market capitalization of at least $83 billion or annual revenues within the European Union of at least 7.5 billion euros in the past three years. They must also have at least 45 million monthly users or 10,000 business users in the EU. The regulations state that the platform must control one or more core platform services in at least three member EU countries. These core platform services include marketplaces and app stores, search engines, social networking, cloud services, advertising services, voice assistants and web browsers. “The gatekeepers will now have to comply with a well-defined set of obligations and prohibitions,” Margrethe Vestager, the EU’s competition chief, said in a statement. “This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU.” To adhere to the regulations, companies will need to ensure that users can unsubscribe from core platform services under similar conditions to subscription, give sellers access to their marketing or advertising performance data on the platform, allow app developers fair access to the supplementary functionalities of smartphones, inform the European Commission of their acquisitions and mergers, and more.

### AT: 9th Circuit Thumper

#### The SRP ruling is irrelevant.

Michael Wara 17, Associate Professor & Faculty Scholar, Law, Stanford University, "Competition At The Grid Edge: Innovation And Antitrust Law In The Electricity Sector," New York University Environmental Law Journal, Vol. 25, 2017, pg. 208.

This case will not resolve the interplay between antitrust law and state regulation of energy utilities. Because Salt River Project is a special district rather than an investor-owned utility, it is not subject to the Arizona Corporation Commission’s jurisdiction over its ratemaking.105 As a result, the case is unlikely to reveal how courts may view the application of antitrust laws to regulated utility rate changes approved by public utility commissions that harm DER providers. Nevertheless, it is an early signal of the potential for utilities to ask for monopoly-protective rate changes that are approved by their public utility commissions. Utilities, whether publicly owned, as is Salt River Project, or privately owned, as is the case in most of the United States, are responding to the competitive threat posed by rooftop solar in a fashion that calls into question the scope and depth of their monopoly.

#### It's too particular to spillover.

William Driscoll 2-2, Reporter, PV Magazine, "Appeals Court Ruling Could Bring Phoenix Solar Market Back to Life," PV Magazine, 02/02/2022, https://pv-magazine-usa.com/2022/02/02/appeals-court-ruling-on-anti-solar-rates-in-arizona-could-bring-phoenix-solar-market-back-to-life/.

The appeals court’s antitrust ruling hinges on two factors specific to SRP and Arizona. First, SRP does not file its rates with a regulatory agency for approval, so the “filed rate doctrine” that “prohibits individuals from asserting civil antitrust challenges to an entity’s agency-approved rates,” did not apply, the court said.

Second, Arizona law promotes competition in the retail electricity market, the appeals court found. If Arizona law instead aimed to displace such competition, the court said that SRP, as a political subdivision of the State of Arizona, could be entitled to “state-action immunity.”

### AT: Antitrust Thumper

#### No significant antitrust AND the market agrees!

Hirsh Chitkara 3-2, Reporter at Protocol Focused on the Intersection of Politics, Technology and Society, 3/2/2022, “The Antitrust Window is Shrinking as DC Turns to Ukraine,” <https://www.protocol.com/newsletters/policy/ukraine-russia-antitrust?rebelltitem=1#rebelltitem1>

The question I want to explore today is whether the moment has also passed for Big Tech antitrust: Is there enough wind in those sails to get anything done by midterms?

For a while, antitrust enforcement sat at the top of every D.C. agenda. Sen. Amy Klobuchar spearheaded two significant, bipartisan antitrust bills. And Lina Khan landed at the FTC ready to fend off critics and launch one of its most consequential antitrust campaigns in decades.

Antitrust no longer occupies that top slot. The war in Ukraine has instead become everyone’s highest priority, for obvious reasons. D.C. has a lot to figure out in the coming days, from the ramifications of further sanctions to the diplomatic fallout in Europe.

There’s also Biden’s Supreme Court nominee, Judge Ketanji Brown Jackson. Republicans may very well attempt to block her confirmation, and that would mean further political deadlock. It would also become another wedge splitting support for Klobuchar’s bills, which already held a tenuous bipartisan balance.

The war in Ukraine has changed political calculus surrounding antitrust. Big Tech and its lobbyists have pressured Republicans to steer clear of antitrust on the grounds that the U.S. needs big, powerful tech companies to uphold national security. That angle of attack may gain more traction as the U.S. faces off against Russia.

And timing is everything. We’re only eight months away from the midterms. Conventional D.C. wisdom (the irony of that phrase isn’t lost on me) says that nothing gets done during the eight weeks leading up to an election. Once you add the Labor Day recess into the mix, Congress realistically has until August to get antitrust measures passed. The lobbying arm opposing antitrust knows this, and it also knows midterms will likely swing Congress to the right. The odds are in tech’s favor, and the markets seem to agree — not that they ever took the threat all that seriously.

#### 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.

#### Courts will block it---businesses are watching for a breakthrough that signals a sea change in law

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

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

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

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

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

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

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

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

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

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

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

Warning Letters After the Close of HSR Waiting Periods

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

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

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

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

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

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

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

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

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

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

More Intensive Merger Investigations

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

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

Modifications to second requests will be more limited.

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

Additional information will be required with respect to privilege claims.

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

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

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

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

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

More Onerous Consent Decree Provisions

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

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

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

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

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

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

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

Withdrawal of the Vertical Merger Guidelines

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

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

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

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

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

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

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

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

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

Rescinding the Consumer Welfare Standard

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

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

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

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

Labor Market Scrutiny

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

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

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

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

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

Khan echoed the sentiment, saying:

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

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

Looking Ahead to the Year to Come

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

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

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

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

### AT: No I/L + Link

#### Even targeted antitrust sends a broad signal of aggressive overregulation

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

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

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

#### Legally, antitrust is economy-wide, so there’s no way to limit the plan’s scope AND risk-averse firms and lawyers think it’ll be applied, chilling investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets. n53 Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

### AT: Biz Con Not Key

#### Studies prove biz con’s key AND depends on perceptions of political stability

Gabriel Caldas Montes 21, PhD Candidate in the Department of Economics at Fluminense Federal University and Fabiana da Silva Dr. Leite Nogueira, PhD in Economics from Universidade Federal Fluminense, Professor of Economics at the Universidade de Vassouras, “Effects of Economic Policy Uncertainty and Political Uncertainty on Business Confidence and Investment”, Journal of Economic Studies, April 2021, Emerald Insights

1. Introduction

The literature on business confidence is vast. If on the one hand some studies indicate that business confidence acts as a leading indicator of macroeconomic activity and influences the economic environment, on the other hand, some studies investigate the determinants of business confidence (Khan and Upadhayaya, 2020).

Although many advances have been made, the literature on the determinants of business confidence continues to evolve. Some studies analyze not only the effects of macroeconomic variables, but also the effects of other variables able to create (or reduce) uncertainties, such as corruption (Montes and Almeida, 2017) and monetary policy credibility (Montes, 2013; de Mendonça and Almeida, 2019). These studies reveal that low credibility and high levels of corruption reduce confidence due to the uncertainties that emerge.

Uncertain economic scenarios created by economic policy uncertainty undermine confidence, and affect the decision making of entrepreneurs, who, for example, postpone investment and employment decisions in order to gain more information (Bloom et al., 2018). Regarding the definition of economic policy uncertainty, Al-Thaqeb and Algharabali (2019) points out that “*Policy uncertainty is the economic risk associated with undefined future government policies and regulatory frameworks*” (Al-Thaqeb and Algharabali, 2019, p. 2). Baker et al. (2016) and Al-Thaqeb and Algharabali (2019) suggest that economic policy uncertainty delay economic recoveries during periods of recession as businesses and households postpone their decisions about investment and consumption expenditures due to market uncertainty. Nevertheless, regarding the effects of economic policy uncertainty on research and development (R&D) expenditures and innovation outputs, Tajaddini and Gholipour (2020) find positive relationships for a set of 19 developed and developing countries, thus, contradicting those that claim a negative association between economic policy uncertainty and R&D expenditure.

Since the work of Bloom (2009), and due to existing controversies in the literature, studies investigate the effects of uncertainty shocks on different economic variables (e.g., Baker et al., 2016; Bachmann et al., 2013; Colombo, 2013; Nodari, 2014; Donadelli, 2015; Gulen and Ion, 2015; Moore, 2017; Istiak and Serletis, 2018; Bahmani-Oskooee and Nayeri, 2018; Bahmani- Oskooee et al., 2018; Mumtaz and Surico, 2018; Gholipour, 2019; Greenland et al., 2019; Istiak and Alam, 2019, 2020; Tajaddini and Gholipour, 2020). In general, the findings suggest that macroeconomic variables such as GDP, investment and employment are adversely affected by increased economic policy uncertainty.

The political environment is also a source of uncertainty that affects the economy. Studies provide evidence that the instability of the political environment has negative effects on the economic environment (e.g., Barro, 1991; Alesina and Perotti, 1996; Svensson, 1998; Carmignani, 2003; Aisen and Veiga, 2006, 2013; Durnev, 2010; Zouhaier and Kefi, 2012; Julio and Yook, 2012; Uddin et al., 2017; Azzimonti, 2018; Jens, 2017). These studies show that political instability has negative effects on inflation, GDP and unemployment.

Political uncertainty reflects instabilities on the political scene (i.e., involving politicians). The instabilities arising from the political scenario are associated to uncertainties regarding possible changes in the “rules of the game” and in the functioning of institutions. Hence, the uncertainty related to the political system is a key feature affecting the business environment, which entrepreneurs must consider when deciding, for instance, to start or expand their businesses. The effects of political uncertainty are stronger when firms and politicians have close connections and political favors might be at play.

One can suggest economic policy uncertainty reduces entrepreneurs’ optimism about the future of the economy and their business. Similarly, an uncertain political environment can deteriorate business confidence, producing negative effects on the economic environment. Hence, some important questions arise. Does political uncertainty affect business confidence? Is business confidence affected by economic policy uncertainty? Are political uncertainty and economic policy uncertainty transmitted to investment decisions through business confidence? These questions are particularly important for developing countries since these countries often present higher levels of political uncertainty and economic policy uncertainty.

#### Failure causes bankruptcies and unemployment---it’s unique: confidence is slowly recovering with stable support

Dr. Laurence Boone 20, PhD in Economics from London Business School, OECD Chief Economist, Master Degree in Econometrics from the University of Reading, MAS in Modelization and Quantitative Analysis from Paris X-Nanterre University, “Building Confidence Crucial Amid An Uncertain Economic Recovery”, OECD Interim Economic Report, 9/16/2020, https://www.oecd.org/newsroom/building-confidence-crucial-amid-an-uncertain-economic-recovery.htm

With the COVID-19 pandemic continuing to threaten jobs, businesses and the health and well-being of millions amid exceptional uncertainty, building confidence will be crucial to ensure that economies recover and adapt, says the OECD’s Interim Economic Outlook.

After an unprecedented collapse in the first half of the year, economic output recovered swiftly following the easing of containment measures and the initial re-opening of businesses, but the pace of recovery has lost some momentum more recently. New restrictions being imposed in some countries to tackle the resurgence of the virus are likely to have slowed growth, the report says.

Uncertainty remains high and the strength of the recovery varies markedly between countries and between business sectors. Prospects for an inclusive, resilient and sustainable economic growth will depend on a range of factors including the likelihood of new outbreaks of the virus, how well individuals observe health measures and restrictions, consumer and business confidence, and the extent to which government support to maintain jobs and help businesses succeeds in boosting demand.

The Interim Economic Outlook projects global GDP to fall by 4½ per cent this year, before growing by 5% in 2021. The forecasts are less negative than those in OECD’s June Economic Outlook, due primarily to better than expected outcomes for China and the United States in the first half of this year and a response by governments on a massive scale. However, output in many countries at the end of 2021 will still be below the levels at the end of 2019, and well below what was projected prior to the pandemic.

If the threat from COVID-19 fades more quickly than expected, improved business and consumer confidence could boost global activity sharply in 2021. But a stronger resurgence of the virus, or more stringent lockdowns could cut 2-3 percentage points from global growth in 2021, with even higher unemployment and a prolonged period of weak investment.

Presenting the Interim Economic Outlook, covering G20 economies, OECD Chief Economist Laurence Boone said: “The world is facing an acute health crisis and the most dramatic economic slowdown since the Second World War. The end is not yet in sight but there is still much policymakers can do to help build confidence.”

She added: “It is important that governments avoid the mistake of tightening fiscal policy too quickly, as happened after the last financial crisis. Without continued government support, bankruptcies and unemployment could rise faster than warranted and take a toll on people’s livelihoods for years to come. Policymakers have the opportunity of a lifetime to implement truly sustainable recovery plans that reboot the economy and generate investment in the digital upgrades much needed by small and medium-sized companies, as well as in green infrastructure, transport and housing to build back a better and greener economy.”

### AT: Defense

#### Defense doesn’t assume the post-COVID landscape---the globe’s a tinderbox, primed for conflict

Elise Labott 21, Adjunct Professor at American University’s School of International Service, Columnist at Foreign Policy, MA in Media Studies, New School for Social Research, BA in International Relations from the University of Wisconsin-Madison, “Get Ready for a Spike in Global Unrest”, Foreign Policy, 7/22/2021, https://foreignpolicy.com/2021/07/22/covid-global-unrest-political-upheaval/

To call 2021 the summer of discontent would be a severe understatement. From Cuba to South Africa to Colombia to Haiti, often violent protests are sweeping every corner of the globe as angry citizens are taking to the streets.

Each country has different histories and realities on the ground, particularly in Haiti, where years of violence and government corruption culminated two weeks ago in the assassination of President Jovenel Moïse. But they all faced a perfect storm of preexisting social, economic, and political hardships, which fallout from the COVID-19 pandemic only inflamed further. And they are merely a foreshadowing of the post-coronavirus global tinderbox that’s looming as existing tensions in countries across the world morph into broader civil unrest and uprisings against economic hardships and inequality deepened by the pandemic.

The coronavirus pandemic was a once-in-a-century crisis that not only shocked countries’ existing health systems but also demanded a response that impacted—and was itself shaped by—economic, political, and security considerations. The efforts to contain it may have curbed fatalities in the short term but have inadvertently deepened vulnerabilities that laid the groundwork for longer-term violence, conflict, and political upheaval and should serve as a danger sign to world leaders as countries reopen—including in the United States.

History is full of examples of pandemics being incubators of social unrest, from the Black Death to the Spanish flu to the great cholera outbreak in Paris, immortalized in Victor Hugo’s Les Miserables. Underlying it all this time around is a pervasive inequality. COVID-19 has ripped open economic divides and made life harder for already vulnerable groups, including women and girls and minority communities.

It has also exposed weaknesses in food security and dramatically increased the number of people affected by chronic hunger. The United Nations estimates around one-tenth of the global population—between 720 million people and 811 million—were undernourished last year. The impacts of climate change and environmental degradation have only compounded the despair.

Take the Sahel, where, due to a toxic cocktail of conflict, COVID-19 lockdowns, and climate change, the scale and severity of food insecurity continues to rise. Countries such as Ethiopia and Sudan are among the world’s worst humanitarian crises, with catastrophic levels of hunger. Droughts and locusts are coming at a critical time for farmers ready to plant crops and are stopping herders in their tracks from driving their livestock to greener pastures.

The global vaccine shortage is fueling the instability. A majority of Africa is lagging far behind the world in vaccinations, meaning COVID-19 will continue to constrain national economies and, in turn, become a source of potential political instability. The same is true for much of Latin America and Asia, where countries don’t have enough vaccines to protect their populations and simmering sources of protest—such as rising living costs and deepening inequalities—are more likely to boil over.

The global risk firm Verisk Maplecroft has warned that as many as 37 countries could face large protest movements for up to three years. A new study by Mercy Corps examining the intersection of COVID-19 and conflict found concerning trends that warn of potential for new conflict, deepening existing conflict, and worsening insecurity and instability shaped by the pandemic response.

The group found a collapse of public confidence in governments and institutions was a key driver of instability. People in fragile states, already suffering from diminished trust in their government, have felt further abandoned as they face disruptions in public services, rising food prices, and massive economic hardships, such as unemployment and reduced wages. Supply chains disrupted during the pandemic have seen food prices skyrocket, while in the global recession humanitarian aid budgets are being slashed, bringing many countries to the brink of famine. For the first time in 22 years, extreme poverty—people living on less than $1.90 a day—was on the rise last year. Oxfam International estimates that “it could take more than a decade for the world’s poorest to recover from the economic impacts of the pandemic.”

The shocks caused by the pandemic have also eroded social cohesion, further fraying relations between communities and deepening polarization. That is especially true in the United States, where social and political pressures both deepened the health crisis and were themselves worsened by it. All of this should serve as a clarion call to countries that they can’t prepare for, or respond to, future health crises in a vacuum—but must anticipate an economic, political, and social crisis. This is true for any severe shock, which brings the potential for a breakdown in public order.

#### Decline causes civil wars---those draw-in major powers and cause World War III

David Kampf 20, Senior PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University, BA in Political Science from Bates College, “How COVID-19 Could Increase the Risk of War”, World Politics Review, 6/16/2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended.

If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling.

Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing.

The Pessimists Strike Back

More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.”

Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before.

In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.”

But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will.

And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars.

The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle.

A Yugoslav Federal Army tank.

Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders.

Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control.

As Risks Increase, Deterrents Decline

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To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts.

Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely.

Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

### AT: No Spillover

#### Antitrust law applies across all sectors---there’s no exemption unless explicitly expressed

Dr. Niamh Dunne 14, Fellow in Law at Fitzwilliam College, Cambridge, and Affiliated Lecturer at the University of Cambridge, PhD from the University of Cambridge, LLM from the NYU School of Law, MA from King’s College London, “Between Competition Law and Regulation: Hybridized Approaches to Market Control”, Journal of Antitrust Enforcement, Volume 2, Issue 2, 10/1/2014, Lexis

In order to understand how hybridized instruments of this nature can be constructed, it is necessary, first, to consider briefly the conventional understanding of the interaction between competition law and regulation. At a general level, competition law refers to those legal rules intended to protect the process of competition in order to maximize consumer welfare. 8 More specifically, most competition systems encompass three sets of provisions: prohibitions on anticompetitive agreements or concerted practices between two or more firms, most typically cartels; prohibitions on anticompetitive unilateral behaviour by single firms that hold a dominant or monopoly market position; and rules controlling, and potentially prohibiting, mergers that may have anticompetitive market effects. Identifying a single exhaustive definition of regulation is more complex; 9 numerous formulations have been advanced, suggesting a looser, and potentially a much broader concept that typically includes both social and economic controls. 10 For the purposes of this article, regulation should be understood, more narrowly, as economic supervision of market power, 11 the standard example of which is utility regulation. Both competition law and regulation address forms of market failure, 12 yet utilize different means, and often to divergent ends. The archetypal explanation of the relationship between these legal mechanisms is therefore characterized by a series of dichotomies that contrast the objectives and modes of operation, and possible outcomes achieved, of both instruments. These can be summarized briefly as follows.

First, it is assumed that competition law is generally applicable across all markets, unless a sector is expressly or impliedly exempted, whereas regulation is enacted on a sector-by-sector basis, to address (typically) identified and discrete failures within particular markets. 13 As a corollary of this generalized-versus-specialized divergence, competition authorities have specialist expertise in antitrust law and economics, whereas regulators tend to have greater technical market expertise and institutional resources relating to the sectors under their control. 14 Secondly, regulation is viewed as a prospective phenomenon, imposed ex ante to create a structural framework intended to prevent market failures from occurring, whereas (with the exception of merger control) competition law is retrospective in application, utilized ex post once competition problems arise or anti-competitive behaviour is identified. 15 Accordingly, competition law intervention tends to be piecemeal, whereas regulation provides a systemic solution. 16 Thirdly, regulation can pursue a broad range of social objectives, including express redistributive goals. In contrast, it is generally denied that competition law incorporates redistributive aims: instead, the primary objective is the pursuit of consumer welfare, which is cast in increasingly economic, efficiency-focused terms. Fourthly, competition law and regulation are viewed as imposing qualitatively and quantitatively different obligations. 17 Competition law typically proscribes certain broad categories of conduct involving the anticompetitive exercise of market power, but otherwise defers to the market mechanism to solve market failures. In contrast, regulation usually prescribes the desired outcome for the market, and, to that extent, oversteps the market mechanism entirely. 18

#### AGENCY APPLICATION---they’re procedural opportunists who’ll exploit that plan as a green-light for cross-industry enforcement---antitrust is unique and distinct from targeted regulation because of its plenary status over all commercial actors

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

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

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

In contrast to regulatory jurisdiction, however, antitrust jurisdiction is not tethered to categorical classifications but, when triggered, is plenary over all private commercial actors. 32

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The jurisdictional question for antitrust authorities is not in what legacy-based category Internet access properly exists, but whether an Internet access provider, in a properly defined market, is acting or is likely to act counter to competitive norms. Antitrust jurisdiction is largely conduct-based and not limited [\*1636] to technical distinctions between industries 33 but, rather, assessed against anticompetitive conduct within relevant markets.