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Pharma DA

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

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

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

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

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

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

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

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

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

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

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

Abstract

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

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

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

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

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

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

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

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

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

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

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

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

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

Biocrimes and Bioterrorism

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

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

Biological Warfare

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

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

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

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

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

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

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

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

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

Model 3: Naive Power Law Extrapolation

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

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

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

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

Why Uncertainty Is Not Cause for Reassurance

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

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

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Capitalism K

#### The investment in competition compels imposition of extractive economic relations which are unsustainable and culminate in existential collapse.

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After three decades of neoliberal economic policies, we are in the midst of a major global economic crisis, which has not yet reached its zenith. Disparities in wealth have increased and living standards of the lower strata of society in many countries have deteriorated, while unemployment, underemployment, and informal work are on the rise.4 The depletion of natural resources and environmental devastation is reaching new heights, indicating that the forms of production and consumption of the developed world are no longer tenable.5 Safeguarding unbridled competition is nonetheless seen as the apex of restoring economic growth and social welfare. Seemingly unconcerned with growing social protests against neoliberal capitalism, policy-makers, business people and academics alike continue to be enthralled by the false promises of “free market” policies and even suggest an intensified neoliberalization as the route to salvation. So far, the chosen course has proven to be a blind alley, aggravating the crisis only further. A new phase of capitalist expansion and economic growth within neoliberalism seems unlikely, and even if it were to take place, it would not tackle today's social and ecological problems successfully.6 Therefore, a transformation of the socio-economic system itself is required—a transformation that takes into account not only the organization of the economic realm but also its relationship with nature. The exaggerated faith in competitive markets as a panacea for economic slump and recession forms however an obstacle to such a transformation. Entangled in the “Third Way” rhetoric of the 1990s, the political center-left in both the US and Europe suffers from internal fragmentation and ideological insecurity and lacks a coherent vision of possible alternatives to the prevailing neoliberal trajectory. It suggests at best mere reformist strategies that aim at rescuing capitalism from its internal contradictions, such as the implementation of “better regulation” or a turn toward some form of post-Keynesianism. The center-left has moreover in large part accepted and internalized the neoliberal pro-competition stance (alongside many other features of neoliberal thinking). Preoccupied with how the respective economies can win (or survive in) the global competitiveness race, it is instead concerned with how the detrimental effects of competition can be cushioned. Likewise, only a few academics and intellectuals have analyzed the downsides of competition, let alone thought about viable alternatives for post-neoliberal societies.7

This article attempts to contribute to fill this void. As stated by Robert W. Cox, an integral part of critical scholarship is not only to explain and criticize structures in the existing social order, but also to formulate coherent visions of alternatives that transcend this order.8 To this end, the article offers first an explanatory critique of capitalist competition from the vantage point of historical materialism and argues that today's crisis is partly rooted in excessive competition, here referred to as ”over-competition.”9 This leads to an analysis of the current economic crisis in the second section, where it is argued that over-competition is one of the root causes of the crisis. The next two sections address alternative forms of organization of economic life and critically engage with anarchist values and principles, culminating in some general ideas for a post-neoliberal competition order. The last section before the conclusion reflects on how this alternative competition order could be achieved. To be sure, the ambition is not to outline a blueprint of a post-neoliberal competition order in rigid and minute detail but rather to sketch out its contours, as well as to discuss what it would take for it to emerge.

Cross-fertilizing historical materialist insights on competition with visions inspired by anarchist thought and praxis might not seem obvious at first glance—given the joint history of fierce antagonism between various strands of Marxism and anarchism.10 There is however also much common ground that deserves to be explored when thinking about alternatives that go beyond narrow-minded conceptions of what is acceptable and feasible. Thus, the purpose of this article is not to (re-)construct orthodox platitudes or to arrive at some sort of synthesis that reconciles what cannot be reconciled, but rather to explore the creative tensions that anarchist thought provides for critical social research and emancipatory practice. Both perspectives, broadly defined, are wholeheartedly anti-capitalist and dedicated to understanding social life and inducing social change. It will be argued that anarchism has much to offer, but by giving ontological primacy to local initiatives for building an alternative economic order, it also suffers from limitations. In particular, the problems created by the destructive competitive logics operating at systemic level require solutions that exceed the local level and that institutionalize higher-order nested governance structures.

Capitalist Competition—An Explanatory Critique

The vogue for competition is not new. Already Adam Smith has claimed that competition is “advantageous to the great body of the people.”11 It drives “every man [sic!] to endeavor to execute his work with a certain degree of exactness.”12 Consequently, “[i]n general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be the more so.”13 Neoclassical economists frequently compare competition to a Darwinist form of market justice in which the uncompetitive, weak, and inefficient perish and the successful and efficient win. Although the zero-sum nature of competition is generally accepted (not everyone who plays can win), competition tends to be confused with success only. In line with neoclassical economic models, it is widely assumed that competitive markets deliver an efficient and just allocation of scarce resources.14 This view ignores, however, that real-world competitive markets are also highly inefficient, for instance by producing so-called negative externalities on a massive scale and “underproducing” public goods.15 Competition and the freedom to compete are moreover frequently associated with broader notions of political freedom and individual self-determination.16 This view is however equally mistaken as competition essentially negates individual freedom. As Karl Marx noted in Grundrisse: “[i]t is not individuals that are set free by free competition; it is, rather, capital which is set free.”17 Competition, he argued, “is nothing more than the way in which many capitalists force the inherent determinants of capital upon one another and upon themselves.”18 In Marx's view, competition represents “the most complete subjugation of individuality under social conditions which assume the form of objective powers […].”19 Rather than being the Smithian invisible hand, competition is an uncompromising fist, which exerts coercive pressures on “every individual capitalist,” irrespective of his “good or ill will.”20 In addition, competition disintegrates more than it unites, which means that in a competitive setting cooperation and mutual aid—the antithesis to competition—are marginalized as organizing principles. Mutual aid refers to altruistic and solidary practices aimed at enhancing the welfare of economic entities without the aid provider directly benefiting from it, while cooperation refers to voluntary arrangements between economic entities that focus on joint projects and reaching common goals. Without doubt, “one certainly can act in a solidaristic and cooperative manner within a competitive market system, but to do so often means having to go against the grain and place oneself at a competitive disadvantage.”21

Historical materialism captures the ineluctable toll of capitalist competition, namely that it exacerbates the intrinsic social contradictions and class antagonisms in the process of capital accumulation. The consumption of labor power and natural resources is seen as the source of real added value that makes capital accumulation possible.22 In other words, capital can only grow through the creation of new surplus value and thereby the further exploitation of labor and nature. As individual capitalists cannot afford to lag behind the price and quality standards set by competitors, defeating contender capitalists becomes essential for the reproduction of capital. In the struggle for economic survival, this means that economic power ultimately gravitates to those capitalists who can keep down the price of labor and other factors of production. Marx noted that “[t]he battle of competition is fought by cheapening of commodities. The cheapness of commodities depends all other circumstances remaining the same, on the productivity of labour […].”23 Employees feel the direct repercussions of competition in the form of labor-saving technologies or increased pressures on productivity, unpaid overtime, and degradation of working conditions, (below) subsistence wages and redundancies. In the presence of what Marx termed the “industrial reserve army,” competition directly or indirectly creates a chronic insecurity about the preservation of employment, leaving many people in dire straits regarding their future careers and living standards. Thus, competition might indeed lower prices, but one should not forget that people need a job first before they can consume. The interests of the wealthy few and the working many in the surplus created in the production process are incompatible from the outset, and competition further exacerbates this antagonism.

The process of the competitive accumulation of capital is thus neither stable nor unproblematic, nor linear nor infinite but pervaded by a range of contradictions. Marx famously suggested that competition is essentially a self-undermining process, which “pushes things so far as to destroy its very self.”24 Ultimately, all capital would be “united in the hands of either a single capitalist or a single capitalist company,” effectively putting an end to competition (and capitalism).25 Clearly we have not reached this stage and doubts about whether we ever will are more than justified.26 Yet, the expansionist and deepening nature of the capital accumulation process conquering ever more dimensions of the non-capitalist realm cannot be disputed. Marx also saw correctly that in order to secure profits and economic survival, many capitalists seek to evade the vicissitudes of competition by seeking synergy effects through mergers and acquisitions.27 Capitalists can also choose to “cooperate” with their competitors by concluding cartels and other collusive arrangements. However, like economic concentration, collusive cooperation aims at raising profits through ever tighter agglomerations of corporate power, which does not solve the pernicious and highly unequal nature of the social relations of capitalist production.

Because of these and other contradictions, capitalist markets depend on various forms of extra-economic stabilization to ensure the continued accumulation of capital.28 State apparatuses provide various forms of regulatory arrangements in the management of such contradictions and rules on competition can be such a stabilizer.29 Competition rules generally seek to enable competition and thereby protect capitalism from the capitalists and, to some extent, the capitalists from each other. In the most abstract sense, such rules usually define the scope of state intervention, corporate freedom, as well as the possibilities for market entry and the level of economic concentration.30 Importantly, competition rules are never a functionalist response to overcoming what neoclassical economists term “market failures,” but result from political struggles among socio-economic groups with different and sometimes opposing ideas on how to organize the economic realm. Competition rules frequently draw on notions of equity and justice. Through law as a fictitious equalizer, corporations are standardized and made comparable; they are unitized into something they are not, namely equal players on a level playing field. Moreover, competition rules can never cure the inherent contradictions in the accumulation of capital but only offer a temporary stabilization. In fact, rules aimed at preserving fierce competition can even buttress such contradictions.

The frailty of capital accumulation becomes particularly apparent in the event of structural crises of over-accumulation, referring to moments when capital owners lack attractive possibilities for reinvesting past profits.31 If expected profits on investments are considered unsatisfactory, capitalists can decide either to hold on to their surplus capital or invest it in another part of the system. An investment slowdown can occur because of a profit squeeze resulting from rising real wages in times of low unemployment levels, strong labor unions, or previous over-investment that has led to overcapacity in a sector.32 Another reason for a profit squeeze can be excessive competition, here referred to as over-competition.33 Once competition reaches a point where capitalists can no longer exploit labor to undercut the prices of competitors (either through technological replacements or by keeping down wages), profits and profit expectations fall, resulting in diminishing levels of investments in real production capacities. Moreover, as fierce competition and its unforgiving logic to reduce prices negatively affect wages and employment, it can backlash in decreasing levels in the consumption of produced goods and services, and slow down investments further. This is even more pertinent in the case of vast waves of mergers and acquisitions, which generally go hand in hand with rationalization processes and the elimination of duplicate job functions. As Marx pointed out, “the competition among capitals” and “their indifference to and independence of one another,” drives the capital-labor relationship “beyond the right proportions.”34 Over-competition can also lead to what Harvey calls a “peculiar combination” of low profits and low wages.35 Surplus capital that is not invested in means of real production and in labor can seek refuge in mergers and acquisitions or speculation with financial assets. Bubble markets created by speculation may temporarily offer new outlets for absorbing liquid capital. In fact, there “are even phases in the life of modern nations when everybody is seized with a sort of craze for making profit without producing. This speculation craze which recurs periodically, lays bare the true character of competition […].”36 Financial transactions may temporarily be disassociated from the real economy and generate high yields by adding ephemeral value through the mere circulation of capital. However, speculative bubbles always burst once the “perpetual accumulation of capital and of wealth” and “the perpetual accumulation and expansion of debt” become too far out of sync.37 It follows that financial crises are deeply anchored in the real economy and intimately related to competition.

To recapitulate, a historical materialist perspective highlights the contradictory and crisis-prone nature of capitalist competition. The next section argues that over-competition is one of the root causes of the crisis of neoliberal capitalism that we are currently witnessing.

The Crisis of Neoliberal Capitalism and Over-Competition

Competition is crucial to the capitalist mode of production, and has been present during all stages in the evolution of the capitalist system. It should therefore not be conflated with a particular form of capitalism. This said, competition for profits has probably never been fiercer than in the era of neoliberalism, which gained growing prominence on a global scale in the 1980s alongside what is commonly called the Reagan Revolution in the United States (US), Thatcherism in the United Kingdom (UK), and the dictatorial regime of Pinochet in Chile. Neoliberalism is generally associated with deregulation, the rollback of welfare states, a monetarist focus on keeping inflation low, reduced taxes, fiscal austerity, wage repression, and processes of financialization. Although neoliberal policies have been imposed throughout the world, neoliberalism nowhere became manifest in a pure fashion. Variations in contestation by social groups, regulatory experimentation, and inherited institutional landscapes account for the differences in the neoliberal organization of markets and levels of regulation.38 Nonetheless, as a common denominator, neoliberal policies generally sustain the disembedding of capital from the great part of the web of social, political, and regulatory constraints and the separation of key market institutions from democratic processes.39 Legitimated by neoclassical economics, uncontained competition came to be advertised as the chief catalyzing force for the most efficient and most profitable allocation of the resources of the world.

Rules safeguarding free competition consequently became neoliberalism's juggernaut.40 The expected theoretical benefits of fierce competition and its regulation served to legitimize the opening of markets worldwide: to compete freely eventually requires unimpaired market access. Enforced by “politically independent” (neoliberal newspeak for “democratically unaccountable”) authorities at national and supranational level in the western world, competition rules had to ensure that corporate practices would not interfere with the alleged equilibrium tendencies of capitalist markets (which happen to exist only in the minds of neoclassical economists and their textbooks). Narrow definitions of price competition subsequently received primacy as a benchmark for assessing anticompetitive conduct, supported by sophisticated econometric modeling and complex micro-economic algorithms, leaving no room for social interest criteria or environmental considerations.41 Premised on the idea that economies of scale and scope would be achieved, through competition more efficient corporations would take business away from less efficient ones by decreasing their marginal production costs, which was believed to benefit consumers in the form of price reductions. The particular emphasis on economies of scale and scope implied that economic concentration was not seen as problematic. Neoliberal competition regulation in the western industrialized world hence facilitated a massive centralization and consolidation of corporate power through mergers and acquisitions in nearly every industry, as well as various forms of strategic alliances and joint ventures. Notably, the merger waves that rolled over the global economy in the 1990s and at the dawn of the new century set new records in terms of number and aggregated volume of the companies involved. Under neoliberal capitalism, the conditions once identified by Adam Smith no longer hold: rather than competition between locally based, small-scale, owner-managed enterprises, oligopolistic rivalry of giant transnational corporations constitutes the order of the day.42 Oligopolistic market structures do not however imply that there is no or little competition. Competition between gigantic transnational corporations can be ruthless, as can competition between larger and smaller companies. Indeed, those able to compete set the standards of competition for others: with comparatively easy access to credit and huge advertising budgets aimed at homogenizing consumer preferences across cultures, such corporations can thwart the existence of weaker competitors, including small-scale enterprises at local level.

Alongside the growth of perverse social inequalities, the competitive race to offset products and services to affluent consumers has increased over the past thirty years. In the contemporary context of transnationalized production and geographically segmented, racialized, and gendered labor markets, harsh competition has become an all-pervasive conditioning dynamic. The exhaustion of natural resources, sweeping pollution, and climate change have toughened competition further, and set in motion a vicious spiral causing irreparable damage to the environment worldwide.43 In other words, under the reign of neoliberalism, competition has become ever more tenacious, spanning the entire globe and demanding ever greater competitiveness from capital and labor alike.

#### The alternative is revolutionary optimism targeted at the working class---it overcomes biases towards growth to unleash class consciousness but requires abandoning competition to succeed.

Collin L. Chambers 21, Department of Geography at Syracuse University, “Historical materialism, social change, and the necessity of revolutionary optimism,” Human Geography, Vol. 14, No. 2, 2021, <https://doi.org/10.1177%2F1942778620977202>

The productive forces necessary for socialism exist in the US and throughout the global north. The conditions to eradicate poverty, homelessness, create non-ablest spaces, and so on exist. It just takes the political will to make this material reality free from its capitalist confines. For working-class activists living in the global north, this needs to be emphasized ad nauseum. As Marx says, the bourgeoisie create their own “gravediggers”: “the advance of industry … replaces the isolation of the workers…with their revolutionary combination, due to association (Marx, 1970: 930 FN). However, and most unfortunately, the simple centralization of workers in one place (like a city or a factory) does not automatically produce revolutionary consciousness amongst the workers themselves. Capitalism and all of its vulgarities still persist; something is blocking the transition. Many point to things such as ideology, bourgeois cultural hegemony, “false consciousness,” “desire,” and “mystification” as reasons for the nonexistence of a working-class revolution in the US. The argument goes: the reason feudalism could be transcended was because in feudalism the division between the time when serfs/peasants were working for their own subsistence and directly for the lords was clear as noonday. Feudal exploitation was achieved through “extra-economic” means as Wood (2017) says. In capitalism, “surplus labour and necessary labour are mingled together” (Marx, 1970: 346). “Mystification” is built into the wage-relation itself (see Burawoy, 2012). There is some deal of truth that workers in capitalism can fall for imperialist-capitalist ideology, but I argue that there are actual real material and structural reasons for the nonexistence of working-class revolutions in the US and global north more broadly

If one actually talks to working people, a lot of them know that things in their world are messed up and don’t necessarily buy into capitalist ideology. Though many do not have revolutionary consciousness yet, they are not simply tricked by imperialist-capitalist ideology. “The everyday” for US workers is in the workplace. Many work multiple jobs just to scrape by. Working people just want to come home from work and enjoy the little free time they have, or they are simply working so much that it is almost impossible to have revolutionary consciousness, or if they do they cannot act upon it because they are just trying to survive, and thus doubt better days are ahead. But, these conditions can be overcome.

Truly revolutionary working-class ideas do not arise spontaneously within the working class itself. Marxism has to be learned by the working masses, and it is indeed a science that working and oppressed people can learn; it just has to be introduced. It must be introduced by a revolutionary vanguard party composed of the most advanced and class-conscious working people. Vanguard parties provide the material and infrastructural foundation for working-class people to join the ranks of the revolutionaries (see Dean, 2016). Workers must be able to understand and explain the class character of all political phenomenon—Marxism provides this. In “What Is to Be Done?” Lenin says that a class-conscious worker cannot be left to work 11 hours a day in a factory if we want the worker to develop clear revolutionary class consciousness. Thus, as he says, the party must make the arrangements necessary to ensure that the worker can have more free time for organizing and developing revolutionary class consciousness. The vanguard party form makes joining the revolution truly accessible to the vast masses of people. To paraphrase Lenin (1987 [1929]), the working class left to organize themselves will fall into trade unionism, which is ingrained in bourgeois ideology and thus cannot transcend the capitalist mode of production. A Marxist (i.e. historical materialist) understanding of society can indeed be understood by the masses of people, which will in turn unleash the power of class consciousness itself as a real material power.

The way Marx explains how the capitalist mode of production develops through time empowers workers and provides revolutionary optimism/hope. As the productive forces develop, more and more proletarians are produced and less and less capitalists exist (due to competition and monopolization, etc.). Out of market competition, “[o]ne capitalist always strikes down many others” (Marx, 1970: 929). The means of labor are transformed into forms “that can only be used in common.” Thus, as the capitalist mode of production develops,

The monopoly of capital becomes a fetter upon the mode of production … The centralization of the means of production and the socialization of labour reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated. (Marx, 1970: 929)

The “immanent laws of capitalist production” itself leads to not only class struggle but also to communist revolution. The laws of competition within the capitalist mode of production have the tendency to constantly revolutionize/ develop the productive forces even in the era of monopoly capitalism. The developed productive forces that are created in capitalism create the foundations from which socialist society can arise (see Phillips and Rozworski, 2019).

In Capital, Marx says it will be easier to move beyond capitalism than it was to move beyond feudalism, for the simple fact that during the transition from feudalism to capitalism “it was a matter of the expropriation of the mass of the people by a few usurpers.” But in the case of transitioning out of capitalism, “we have the expropriation of a few usurpers by the mass of the people[!]” (Marx, 1970: 929–930). Thus, to end capitalist private ownership of the means of production, we only have to usurp a handful of capitalists, which numerically speaking should be easier to do than usurping millions of people as what occurred within the process of primitive accumulation that created the social conditions necessary for the capitalist mode of production.

The inert power working people have exists at all times (even in eras of global working-class defeat and retreat); workers can simply shut production by striking, occupying the workplace, and so on (see Allen and Mitchell, 2003; Glassman, 2003). A nice made-up scenario I like to give students is that no one would really notice if all the bosses/ CEOs did not show up to work for one day, but if all workers did not show up for one day, all of society would simply shut down and reach a standstill. Additionally, and most importantly, the proletariat can use its class power to overthrow and transcend the bourgeois order by seizing political power—that is, the state—and radically transform it to serve the class interests of the working class. This cannot be dismissed as utopian. It has been done in history and it will occur again. This revolutionary takeover allows for the working class to make “despotic inroads on the rights of [bourgeois] property, and on the conditions of bourgeois production” (Marx and Engels, 1978: 490; see also Lenin, 1987 [1932]: 336).

Conclusion

This essay was written with two broad goals in mind: first, to review and reaffirm the central tenants of historical materialism; second, to provide an optimistic and revolutionary outlook for the future using historical materialism. Workers across the capitalist world know that their lives are hard. We do not always need to point out all the evils that capitalism creates. What we need to do is to instill hope and emphasizing how capital provides the material foundations for socialism does just that. Marx “regards communism as something which develops out of capitalism. Instead of scholastically invented, ‘concocted’ definitions and fruitless disputes about words (what is socialism? What is communism?), Marx gives an analysis of what may be called stages in the economic ripeness of communism” (Lenin, 1987 [1932]: 346, emphasis in original). We can say to workers: the material conditions exist to end poverty, there are more empty houses than homeless people, the means exist to end societal degradation, it just takes the political will to do so. Emphasizing this political will is empowering; it says we have the power to change things. We need stop with the talk of how workers and oppressed peoples are chained and have no power. Rather, “[i]t is within the present that the future can emerge,” and we need to force the future upon us (Malott and Ford, 2015: 154).

### 1NC

Litigation DA

#### Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Overload from litigation trades-off with judicial exchanges

Matthew J. Wilson 13, Associate Dean of Academic Affairs and Professor of Law at the University of Wyoming College of Law, “Improving the Process: Transnational Litigation and The Application of Private Foreign Law in U.S. Courts”, International Law and Politics, Summer 2013, http://nyujilp.org/wp-content/uploads/2014/01/45.4-Wilson.pdf

In light of increasing global integration and various international outreach activities by the U.S. judiciary, the timing is right for expanding cross-border cooperation and interaction among judiciaries.98 Relationships have developed over the past several decades among judicial systems making information exchanges in civil cases possible on a level never seen before. Judges increasingly appreciate that they function within a common transnational system. Cooperative activities including international educational exchanges, “sister-court” relationships, judicial outreach activities, international judicial conferences, informal meetings, seminars, and similar opportunities for transnational judicial interaction have furthered cordial relationships. Interaction during cross-border criminal cases has done the same.

These activities have also laid a strong foundation for certification- like arrangements. The relationship between the court systems of New York and New South Wales, Australia (NSW) is a prime example. In 2010, the New York state judiciary entered into an informal certification procedure with the NSW courts in the form of a bilateral Memorandum of Understanding (MOU) that contemplates reciprocal cooperation and consultation between their respective judicial systems to enable the parties to obtain correct and authoritative applications of law.99 As the first agreement of its kind between a U.S. and foreign judicial system, this MOU was also designed to combat the high cost of legal experts and reduce the confusion caused by conflicting accounts of foreign law.100 In principle, with the litigants’ consent, the MOU allows both jurisdictions to exchange analysis about a contested dispositive legal issue.101

The path to a successful transnational certification system involves finding the time and resources to answer legal questions received from foreign courts. Court systems in the United States and other countries are often overburdened with their own civil caseloads. Adding another dimension of legal review to the mix could overwhelm some courts. However, courts might look to emeritus or retired judges for special assistance. They might also tap into other competent court officials. Many countries maintain a Central Authority that could provide accurate information regarding their domestic law. Alternatively, court systems could rely on current judges who are interested in international cooperation and who are willing to volunteer their time and expertise. By way of illustration, the New York State court system is relying upon volunteer judges to operate their informal certification system with New South Wales. New York has staffed its “certification” board with one volunteer judge from the New York Court of Appeals and one volunteer judge from each appellate division.102 With an eye towards enhancing accuracy and promoting comity, a panel of three judges functioning as referees will consider any certified questions about New York law submitted by NSW courts and provide a report prepared outside of work hours.103

#### Collapses i-law---extinction

Dr. Noah Feldman 8, Professor of Law at Harvard University School of Law, Director of the Julis-Rabinowitz Program on Jewish and Israeli Law, D.Phil. in Oriental Studies from Oxford University, A.B. Summa Cum Laude in Near Eastern Languages and Civilizations from Harvard University, J.D. from Yale Law School, “When Judges Make Foreign Policy”, New York Times, 9/28/2008, Lexis

Looking at today's problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now? Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own. On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn't the court defer to the decisions of the elected president and Congress? Aren't judgments about the direction of our country the exclusive preserve of the political branches? Indeed, the Supreme Court does need to be limited to its proper role. But when it comes to our engagement with the world, that role involves taking a stand, not stepping aside. The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved. Even choosing to defer to the other branches of government amounts to a substantive stand on the question. That said, when the court exercises its own independent political judgment, it still does so in a distinctively legal way. For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law -- which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. This, too, is an effective constraint on the way the court exercises its policy judgment. Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning. Why We Need More Law, More Than Ever So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. We need to build and rebuild alliances -- and law has historically been one of our best tools for doing so. In our present precarious situation, it would be a terrible mistake to abandon our historic position of leadership in the global spread of the rule of law. Our leadership matters for reasons both universal and national. Seen from the perspective of the world, the fragmentation of power after the cold war creates new dangers of disorder that need to be mitigated by the sense of regularity and predictability that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all. From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies are obligated to help us by virtue of legal commitments they have made. The Bush administration's lawyers often insisted that law was a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of ''lawfare'' as a threat to the United States is based on a misunderstanding of the very essence of how law operates. Law comes into being and is sustained not because the weak demand it but because it is a tool of the powerful -- as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker people or states by promising them rules and a fair hearing than by threatening them constantly with force. After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over.

### 1NC

T Core Antitrust

#### The ‘core’ antitrust laws are Sherman, Clayton, and FTC

Michael A. Rataj 21, PC, Law Degree from the Detroit College of Law, “Consequences for Breaking Antitrust Laws”, 5/12/2021, https://www.michaelrataj.com/blog/2021/05/consequences-for-breaking-antitrust-laws/

The core antitrust laws are…

The three core antitrust laws are the Sherman Act, the Federal Trade Commission Act and the Clayton Act. The Sherman Act primarily prohibits unreasonable restraint of trade and monopolization. Those who are in violation of the Sherman Act may face hefty fines, up to $100 million, and up to 10 years behind bars.

The FTC Act prohibits unfair practices or acts and unfair approaches to harming competition. Only the FTC can file cases under this act. The Clayton Act is a catch-all that covers every practice not covered by the Sherman and FTC Acts. Then consequences for violations of both of these acts are usually civil in nature.

#### Vote neg:

#### Limits---the Big 3 sets a manageable, predictable case list, without devolving into countless secondary laws. Those overstretch research, making in-depth preparation impossible.

#### Ground---it locks in DAs about the FTC and DOJ, plus core literature about the primary antitrust law.

### 1NC

Regulation CP

#### The United States federal government should:

#### ---regulate banking mergers that consider larger geographical markets, minimum efficient scale, and non-traditional competition;

#### ---financially induce banks to disengage from anticompetitive mergers;

#### ---enact fiscal responsibility reforms.

### 1NC

BBB DA

#### PC’s key to pass a revived BBB.

Andrew Duehren 1-21, Reporter for the Wall Street Journal, “Democrats Start to Sketch Out Revived Build Back Better Package,” Wall Street Journal, 01-21-2022, https://www.wsj.com/articles/democrats-start-to-sketch-out-revived-build-back-better-package-11642771824

Democrats began to revive their efforts to pass a major child-care, healthcare and climate package as lawmakers started to accept that they would have to further cater to Sen. Joe Manchin (D., W.Va.) in hopes of reaching a deal on a scaled-back plan.

After Mr. Manchin said last month that he was opposed to the party’s roughly $2 trillion plan, dooming its chances in the 50-50 Senate, the party largely pivoted away from the package for several weeks. Now, after the failure of a separate push on elections legislation, Democrats are again turning to the economic plan, which President Biden said on Wednesday the party may cut into separate pieces.

House Speaker Nancy Pelosi (D., Calif.) on Thursday said that Democrats wouldn’t seek to pass multiple pieces of legislation because of the procedural problems it could pose. But the party will likely have to further scale back its ambitions, she said.

“What the president calls ‘chunks’, I would hope would be a major bill going forward, it may be more limited, but it is still significant,” she said. She added that Democrats may have to change the name of the legislation, currently dubbed the Build Back Better Act.

Still, Democrats on Capitol Hill said Mr. Biden’s remarks more definitively showed that the White House would be willing to make major changes to the economic package in hopes of moving toward a deal. Mr. Biden, White House aides and Democrats on Capitol Hill have started to identify priorities for a revamped package: roughly $500 billion in incentives for reducing carbon emissions, which Mr. Manchin has said he supports, as well as measures aimed at lowering healthcare costs and expanded child care programs.

The healthcare provisions would likely include extending subsidies for insurance premiums and empowering the government to negotiate the price of some prescription drugs, according to lawmakers and aides. Democrats also see a universal prekindergarten program, along with subsidies for child-care costs, as part of a resurrected effort.

Such a package could leave out programs from the House-passed version of the plan, including funding for housing and expanding Medicare to cover hearing. Democrats have already abandoned a host of proposals, including creating a 12-week paid-leave program and offering free community college, as they tried to tailor the bill to centrist demands.

All of the early discussions among Democrats are premised on trying to win the support of Mr. Manchin, who on Thursday said the party would have to totally restart their monthslong effort on the bill.

“I’m hoping to talk to everybody and start with a clean sheet of paper,” Mr. Manchin said. “We’ll just be starting from scratch whenever we start.”

He also again raised concerns about inflation, which he has said could be exacerbated by a major spending package.

“The main thing we need to do is take care of the inflation, get your financial house in order, get a tax code that works, take care of the pharmaceuticals gouging people with high prices, we can fix that. We can do a lot of good things,” he said.

Democrats are using a process called reconciliation to pursue the package. Reconciliation allows lawmakers to approve tax-and-spending measures with a simple majority in the Senate and skirt the 60-vote threshold required of other bills. But the procedure also comes with a number of limitations, including on how often it can be used, which would largely preclude Democrats from trying to pass multiple bills through the process.

When he came out in opposition to the legislation in December, Mr. Manchin argued against Democrats’ plan to fund myriad programs for the short term in hopes of extending them later, saying that disguised the potential cost. Democrats are now working to choose a smaller core of initiatives to fund for the long term, while keeping the price tag in the range of $1.75 trillion. Mr. Manchin previously signaled he could support roughly that much spending.

“We need to get as much as we can across the finish line,” Sen. Elizabeth Warren (D., Mass.) said. “That’s hard because we have the skinniest possible majority and that means it takes every vote and so that means we have to do what it takes to get every vote.”

Democrats will face a particularly fraught choice on the expanded child tax credit, a central component of the House-passed plan and a subject of regular criticism by Mr. Manchin. The party had been hoping to continue offering a more generous child tax credit to a larger group of Americans in monthly cash installments.

That expansion expired at the end of 2021, and Democrats have started sketching out how they could revive a pared-back version that might draw Mr. Manchin’s support. In a blow to some Democrats on Capitol Hill, Mr. Biden said on Wednesday that Democrats may not be able to include any expansion of the child tax credit in the legislation.

Rep. Richard Neal (D., Mass.), the chairman of the Ways and Means Committee, said he would seek to alter the expansion in a way that was palatable to Mr. Manchin.

“I think that the child credit is very popular in the Democratic caucus,” he said. “We need to determine what Joe Manchin is in favor of.”

On the revenue side of the equation, Democrats expect their proposed tax increases to win the support of their caucus, though Mr. Manchin has expressed frustration that the party moved away from increases in the top rates for corporations and individual income. The party dropped those tax increases from the package to address the concerns of Sen. Kyrsten Sinema (D., Ariz.).

The party will also still have to grapple with demands to lift the $10,000 cap on the state and local tax deduction. Democrats from high-tax states like New York and New Jersey have made lifting the cap, which Republicans put into place in their 2017 tax law, a priority in the bill. Other Democrats have said lifting the cap primarily benefits high-income Americans.

A group of three House Democrats said again on Thursday that any deal would need to include measures addressing the state and local tax, known as SALT, deduction.

“We support the President’s agenda, and if there are any efforts that include a change in the tax code, then a SALT fix must be part of it. No SALT, no deal,” Reps. Tom Suozzi (D., N.Y.), Mikie Sherrill (D., N.J.) and Josh Gottheimer (D., N.J.) said.

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 21, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

### 1NC

Torts CP

#### The United States federal government should substantially increase its prohibitions on anticompetitive bank mergers as tortious interference, considering larger geographical markets, minimum efficient scale, and non-traditional competition in their assessment.

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

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

B. Historical Underpinnings: The Pick-Barth Doctrine

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

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

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

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

C. The Decline of Pick-Barth

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

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

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

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

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

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

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

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

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

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

D. Business Torts Under the Rule of Reason

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

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

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

E. The Role of Business Torts in Section 2 Claims

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

A leading antitrust treatise defines exclusionary conduct as acts that:

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

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

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

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

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

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

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

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

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

F. The Additional Requirement of "Antitrust Injury"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Dead or Dying Torts

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

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

A. The "Heartbalm" Torts

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

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

B. Support Actions by Wives of Alcoholics

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

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

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

C. Maintenance and Champerty

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

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

D. Bad Faith Denial of Contract

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

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

E. Mishandling of Dead Bodies

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

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

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

F. Loss of Services Actions

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

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

G. Insult

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

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

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

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

H. Nuisance

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

I. Telegram Suits

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

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

J. Unfair Trade and Labor Practices

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

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

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

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

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

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I Introduction

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

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

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

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

II Public Trust

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III Elements of Tortious Interference

A. Elements

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

(1) a protectable public trust interest; 60

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

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

B. Protectable Public Trust Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Unreasonable Interference

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Nexus

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

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

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

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

IV Common Law Is Always Evolving

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

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

V Suing to Enforce

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

VI Remedies

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

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

Conclusion

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

### 1NC

T-Scope Exemptions

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should substantially increase prohibitions on anticompetitive business practices by the private sector by establishing unified Banking Merger Guidelines that consider larger geographical markets, minimum efficient scale, and non-traditional competition and state that, if preempted, the states will withhold cooperation with federal initiatives.

## Investment ADV

### Investment ADV---1NC

#### Market forces drive consolidation which fosters competition but imposing constraints chills growth and investment

Will Gardner 21, Director, Center for Capital Market Competitiveness, “How Bank Mergers Promote Competition”, <https://www.uschamber.com/finance/how-bank-mergers-promote-competition>, November 16th, 2021

U.S. consumers looking for banking services have access to a wide variety of options from different institutions depending upon their needs. Today, banks of all sizes offer services that were incomprehensible just 20 years ago. From mobile banking, online check deposits, to contactless payments, banking is easier than ever. The widespread adoption of these innovations is the result of a competitive banking sector with a well-regulated mergers and acquisitions environment.

Through mergers, banks can build economies of scale, allowing them to focus on providing better products and services to customers. Mergers can also help banks provide these services to both rural and urban areas without fear that a merger will automatically lead to fewer branches or reduced access to services. Despite such robust competition, some policymakers in Washington, D.C. believe more industry oversight is needed when it comes to proposed mergers and acquisitions.

President Biden’s July 2021 executive order on competition encourages the Attorney General and bank regulators to adopt a plan for “the revitalization of merger oversight.” And, on the heels of this order, Sen. Elizabeth Warren (D-MA) and Rep. Jesús “Chuy” Garcia (D-IL) reintroduced the Bank Merger Review Modernization Act.

These proposals come at a time when the banking sector is already facing strict competition from new financial technologies and the increased digitization of the financial services industry. While the sheer number of banks has fallen, robust competition remains in the market driven by nearly 5,000 commercial banks and savings institutions and over 5,000 credit unions nationwide. Given this decline, regulators might also reflect on the unintended consequences brought by overregulation. For example, since the passage of Dodd-Frank, the number of full-service banks nationwide fell by 28.9 percent from 2010-2020.

The existing process for reviewing bank mergers is already rigorous. Once a merger application is submitted, regulators are required to follow all bank merger laws, weighing safety and soundness heavily, before any approval is granted.

The law makes it clear that bank regulators—as well as the Justice Department’s antitrust review—are obligated to block any merger application that poses a threat to competition. For the last two decades, regulators from administrations controlled by both major political parties have followed this rigorous process and have concluded that many mergers were good for our financial system.

In fact, the government has all the power it needs to stop mergers that are harmful to competition. Over the last 20 years, across all sectors of the economy, the government has won all but eleven of the approximately 780 mergers it has challenged. Such a track record demonstrates the existing legal framework for merger review is sound and the government is far from powerless to intervene when needed.

The federal government would do well to recognize that increased merger activity is driven overwhelmingly by market forces aimed at increasing competition and providing better services to consumers.

Excessive regulation and the compliance burden it has created has certainly played a role in bank consolidation. Regulations issued with the focus of consumer benefit in mind that limit unfair competition deserve support. Sadly, the regulations spurred on by Dodd-Frank are not part of the regulatory review process overseen by the Office of Information and Regulatory Affairs within the White House.

Placing more constraints on bank mergers will only serve to chill business activity that promotes growth, competition, and stability in our financial system.

#### China won’t overtake the US.

Eugene Gholz & Harvey M. Sapolsky 21, Associate Professor, Political Science, University of Notre Dame; Emeritus Professor, Public Policy & Organization, MIT. Former Director, MIT Security Studies Program, "The Defense Innovation Machine: Why the U.S. Will Remain on the Cutting Edge," Journal of Strategic Studies, pg. 2-17, 06/25/2021, T&F.

Here we examine these concerns that the American military advantage in the Post-Cold War era has dissipated in large part because the Defense Department lags behind in developing advanced technologies. Our judgment is that the American defense research and development system, as honed during the Cold War and expanded since, is fully capable of handling any military challenge. It is a gigantic technology-generating, innovation-producing, war-fighting machine. U.S. ‘hard’ innovation capabilities – ‘input and infrastructure factors’ like R&D facilities, human capital, access to foreign technology, and availability of funding – far outstrip those of its potential rivals, even though those factors are the ones often thought of as easier for catch-up countries to obtain.3 Despite warnings that the United States no longer spends enough on R&D and that Chinese R&D spending is surging, the reality is that the United States dramatically leads in military innovation investment. In functional terms, the United States dominates all other countries, including China, in ‘input factors,’ starting with resource allocations to defense research and development.

More important, we believe that the American defense technology system is pushed toward innovation by specific contextual factors, the ‘soft’ categories of attributes and capabilities, that cannot readily transfer to likely rivals.4 First, the political culture of the United States values technology strongly: technology is assumed to be the solution to most problems, including military ones. American culture also has a strong casualty aversion driven by an economy traditionally burdened by labor scarcity and by responsive political institutions that encourage the substitution of capital for labor to keep its own people out of harm’s way.5 The All-Volunteer Force reflects this by making military service voluntary and thus making military service expensive for government and service personnel lives ever-more-valuable and in need of husbanding.

Second, competition is deeply engrained in defense, as it is in most of American society, stimulating new ideas and providing a diversity of approaches to any problem, in case one technology trajectory does not work out as hoped. Competition extends among the various military services and agencies, which each seek to propose solutions to the nation’s strategic problems, and among firms with different design-team philosophies.

Third, the United States also welcomes foreign ideas much more readily than other countries, given U.S. openness to immigration, especially among the highly skilled and technically expert. Finally, a Cold-War organizational innovation in the United States created special public-private hybrid organizations, Federally-Funded Research and Development Centers (FFRDCs) that offer unbiased technical advice and a mechanism for the accumulation of knowledge – a unique social, relational system for institutional memory and systems integration capability that generally works very well. Other nations, with different divisions between the public and the private and dramatically different governance institutions, cannot easily copy these capabilities.

These soft innovation factors particularly emphasize American advantages in the functional category of institutional factors – norms of seeing technology as a solution, trying hard to minimise casualties, using innovation as a means of competition among organizations, and welcoming foreign ideas. The institutional factors draw from the particular American mix of organizations, notably independent military services with strong identities, competitive firms in the defense industry that readily form networks or teams of suppliers even as each maintains its own core competencies and technical habits, and FFRDCs that help keep systems integration efforts honest and less parochial and that help preserve knowledge of false-start technology trajectories and craft skills that enable high-tech systems to function well.6

Because of the robustness of America’s input factors and the difficulty of copying its unique institutional factors, we conclude that the American defense innovation system will remain at the cutting edge and will not be surpassed by a potential international rival. In the final section, we explain why American leaders are so nervous anyway.

Is the United States losing its military overmatch?

In the early 1990s, with the disintegration of the Soviet Union that marked the end of the Cold War and the rapid defeat of Iraq in the Gulf War, the United States had a dominating military edge against all comers in terms of the capabilities of both its nuclear and conventional forces. Many trace this edge to the so-called Reagan Build-up, which actually began in the last two years of the Carter Administration and then expanded under President Reagan. The buildup involved investments of hundreds of billions of dollars to modernize nearly all parts of the American military. The modernization of nuclear forces, for example, included the acquisition of Ohio-class ballistic missile submarines, the highly accurate Trident D-5 and MX Peacekeeper missiles, the B-1B and B-2 bombers, and the acceleration of work on strategic command-andcontrol, anti-submarine warfare, and anti-ballistic missile systems. Conventional forces improvements included fielding the Abrams tank, Bradley infantry fighting vehicle, Apache attack helicopter, and the Patriot missile system, constructing a nearly 600-ship Navy, and deploying the A-10, F-15, F-16, F/A-18, and JSTARS aircraft, along with important technical improvements in realistic training and investments in troop quality.

The Soviets were especially challenged by the conventional warfare improvements: the battlefield integration of sensors, communication systems, and precision weapons, which they labeled as a ‘Military-Technical Revolution’ or, in later American terms, a ‘Revolution in Military Affairs’ (RMA). The combination of new technologies seemingly rendered useless their ability to mass armored forces in a potential drive westward. As the Gulf War demonstrated to the entire world, numerical advantage in heavy metal on the battlefield had been transformed from the source of military power into an easily reduced target set for American forces.

Among the consequences of the Soviet Union’s collapse were a one-third reduction in the size of the United States’ standing forces and an increased use of the remaining forces in interventions across the globe. Freed from a possible clash with its nuclear-armed rival, the United States could involve itself in various civil wars and, after the 9/11 attacks on the United States homeland, interventions to counter terrorist groups and regimes that might support them. The wars in Afghanistan and Iraq produced persistent insurgencies, where the RMA systems had little relevance and thus no major success.

But it is not the limitations of precision weapons but rather their diffusion that worries many. Both Russia and China, through clever tactics and the fielding of accurate offensive and defensive systems, seem to be on the verge of being able to blunt the global reach of American power.7 Add in their acquisition of space and cyber weapons, and America’s once unquestioned military edge appears in jeopardy. These threats to the previously established American technological advantages seem to require a new round of American innovation.

Strong input factors: Defense R&D spending and the FFRDCs

It is not that the United States cannot lag behind in some fields of militarily relevant technology or be surprised on the battlefield. Technology advances on many fronts and is pioneered in many places. Technological investment by potential adversaries surely can raise the costs to the United States of blithely sticking to operational concepts that previously promised great effectiveness at low cost.8 However, the United States has been mobilized on such scale, for so long, with a special emphasis on applying its vast science and engineering resources to its defense, that it will not readily fall behind in weapons technology or quality.

The United States invests heavily in defense-related research and development (R&D) activities. Figure 1 shows the past 40 years of history of U.S. inputs to defense research and development. Currently the United States invests more than 75 billion USD each year in defense R&D plus billions more in Department of Energy R&D investment for nuclear weapons. That is about two-thirds of what all other countries in the world, American friend or foe, spend on defense R&D.9 China is the only great power that spends more on its entire defense effort than the United States spends on just defense R&D. Seventy-five billion dollars is more than Russia, the United Kingdom, France, Germany, or Japan spends on defense.10

Moreover, the United States has invested at very high levels for more than 70 years. The United States substantially ramped up its defense R&D investment in the 1950s to levels comparable to today’s spending. While it is true that in inflation-adjusted terms, defense R&D totals in the 1950s were lower than today’s, that is mainly because of the lower complexity of that era’s technological frontier, not because of some subsequent policy shift to greater emphasis on defense R&D investment.11 The continuing drive to push the military-technological frontier has kept R&D spending high all along, and the overall spending trend has increased in parallel with the increasing complexity rather than lagging behind. While R&D budget increases have not been constant, their cycle (including as shown in Figure 1) has crested and troughed at very high levels. Annual spending has not dropped below 55 billion USD (in 2018 dollars) since 1983, and in several years, it has been very close to 100 billion USD. That high level of spending, year-in and year-out, has a cumulative effect, because it builds a foundation of tacit knowledge, experience in integrating complex systems, and human capital that understands the specialized parameters of military systems, which often differ from those of even high-end civilian systems. For comparison, the much-hyped Chinese defense budget (not the Chinese defense R&D budget) did not exceed the level of U.S. defense R&D spending until the late-2000s. Cumulative Chinese defense R&D investment is surely quite modest in comparison to cumulative U.S. defense R&D investment.13

Chart

Description automatically generated

The intensity of U.S. interest in defense research began at the start of the Second World War, with scientists rather than the military. American scientists had been frustrated by the failure of the military to use them effectively in the First World War, when they were confined to military laboratories and subject to military discipline. Led by Vannevar Bush of MIT, they approached President Roosevelt and gained their own organization to manage wartime research, what was eventually called the Office of Scientific Research and Development (OSRD). That organization, not the military, directed the effort to develop the atomic bomb, radar, and many of the other significant technical advances of the war.14

In the postwar years scientists remained active in bomb research, though with less independence, in the newly created Atomic Energy Commission (later absorbed in the Department of Energy) and in the expansion of R&D efforts in the newly established Department of Defense (DOD), which sought in particular to exploit the advances in missile, jet propulsion, and submarine technologies of the war, including those made by the Germans. Although OSRD itself was disbanded, at least parts of its work continued in various universityand contractor-managed organizations and laboratories, the Federally Funded Research and Development Centers and University Affiliated Research Centers. Those organizations play a vital role in creating ‘soft’ innovation capabilities in the United States – preserving the institutional memory about past R&D efforts, cultivating multiple design-team philosophies that enable diverse approaches to technological challenges, and using their independence to prevent the capture of the U.S. R&D effort by rent-seeking activities of government customers and private-sector suppliers.15

For example, the Radiation Laboratory at MIT, which worked on radar in the Second World War, was renamed Lincoln Laboratory and continued under MIT management as an FFRDC doing classified work for the Air Force. The University of California manages the nuclear bomb-design laboratories, Los Alamos and Livermore, designated national laboratories for the Atomic Energy Commission. The Navy has its own set of university-managed laboratories, often called Applied Physics Laboratories, at Johns Hopkins University, the University of Hawaii, Pennsylvania State University, the University of Texas, and the University of Washington. The armed services also set up several policy-focused FFRDCs, the best known of which is the RAND Corporation. As new issues came up over the decades, new organizations were created such as the Software Engineering Institute at Carnegie Mellon University and the Institute for Soldier Nanotechnologies at MIT.

FFRDCs and related organizations do more than provide the American military with cutting edge research on important technical and policy problems. As non-profits dedicated only to serve government agencies, they are a source of valued, unbiased technical advice.16 In fact, some FFRDCs, specifically MITRE and the Aerospace Corporation but others as well, specialize in advancing systems design and integration skills to help the American military build its biggest systems.17

Until the Second World War, contractors hired to produce America’s weapons during wars returned to their commercial business at each war’s end, as military needs soon faded. But the end of the Second World War was quickly followed by the Cold War and the continuing demand for weapons. Many firms stayed in the weapons business, some focusing exclusively on defense while others formed specialized divisions to serve the military. This was especially true in the aviation industry, where firms like Lockheed, Northrop, Grumman, McDonnell, Douglas, and Boeing grew large developing and building the aircraft and missiles that were central to the Cold War arms competition.

The peak technologies in the arms race changed over time, but the U.S. organizations and level of investment maintained the U.S. lead. The 1950s added space: the shock of the launch of the Sputnik satellite spurred dramatic increases in American R&D investments and the commitment to reach the moon before the Soviet Union. The lead the United States already had in ballistic missiles became obvious in the 1960s, as it met milestone after milestone in the quest to deploy strategic nuclear forces and build satellites to support them, all the while fighting a war in Vietnam and reaching the moon. As the Soviet Union sought to catch up, the United States began the investment in sensors and precision weapons that eventually undermined Soviet power and self-confidence. The American emphasis on strategic defenses, sometimes more potential than real, nevertheless threatened to cancel the advantages the Soviets had worked hard to achieve in nuclear missile numbers and warhead size.18 The conventional warfare revolution took away the Red Army menace that had kept half of Europe in its grip and the other half in its fear for decades.19 The Soviets lost hope of winning battles that were never fought.

Little of this R&D structure went away at the end of the Cold War. The increase in defense R&D spending that marked the Reagan Build-up was a ratchet. Today, the United States spends more on defense research, in real terms, than it did at the height of the Cold War. Defense industry mergers and base closures reshuffled ownership of some military research facilities but did not shrink many of them. DOD employs nearly 100,000 people in 63 research laboratories and centers.20 The FFRDCs and similar organizations continued their work supporting the military. The end of the Cold War was a dip, not a cliff.

Soft institutional factors: Incentives for innovation

What also didn’t go away with the end of the Cold War were the incentives that drive American military innovation – the institutional factors or ‘shared prescriptions guiding conduct [of] participants within the system’ that drive the American defense innovation system.21 There are at least three. One is a concern for avoiding casualties. A second is the rivalry that exists among the various components of the American defense establishment. And the third is the openness of American society to immigrants and their ideas.

The concern for avoiding casualties runs deep in American military operations and stems from both a persistent national labor shortage and the democratic nature of the American polity.22 There were never enough people to build the country, thus the constant importation of labor, free or not, to tend the fields or run the factories. The earliest defense forces were militias made up of all local men, but it was difficult to assemble significant troops for expeditions or to keep them deployed for long because of the need for their labor back home. Mobilization for wars relied heavily on state forces, which varied in quality and commitment. Later resort to conscription was contentious and often produced evasion and rioting. The United States resisted the maintenance of a large, professional military until the 1950s.23

Even when the United States succumbed because of the Cold War, it sought to limit the military’s growth through the intense application of technology. The World Wars drew the United States into the age of total war with huge armies, but the combat experience made the United States fully aware of the human costs inherent in modern industrialized warfare. The Army Air Corps became the champion of strategic bombing doctrine that called for fleets of bombers bypassing the carnage of the battlefield to destroy industries that were thought to be central to an opponent’s power.

Bombers themselves proved vulnerable in World War II, and when they failed to achieve the intended strategic effects, air power advocates repeatedly promised that with just a little more technological progress they would achieve the precision and invulnerability needed to make the operational concept work.24 The accuracy problem persisted through the Vietnam conflict, where the destruction of specific targets, usually bridges, often required risking the lives or capture of hundreds of pilots in multiple missions involving dozens upon dozens of aircraft each.25 Given the limited goals at stake in such conflicts, individual losses mattered much politically. Thus, the great and successful effort to improve the accuracy of conventional weapons and the speed and stealth of the platforms that carry them to the point where if a target can be identified and located, it can be destroyed with little or no risk to American personnel.26 The means depend upon the circumstance, often weather- or platform-determined, and include laser- and GPS-guided weapons. Now drones often take the place of manned aircraft.

The race to develop new weapons and doctrine is spurred on in the American system by inter-service competition.27 The United States military, unlike those of nearly all big nations, is not dominated by one armed service, the Royal Navy in the United Kingdom or the Red Army in the Soviet Union. The United States does not fear invasions across its borders by foreign armies, nor does it need a navy to link it to distant colonies. Instead, each of its armed services seeks special prominence among the others as being the answer to emerging dangers or the foreign policy desires of the president. There is overlap and duplication in their efforts – and the incentive to innovate.

It was this competition that gave the United States the lead in the race to develop ballistic missiles and satellites of all types.28 Civilian agencies, particularly the Central Intelligence Agency and the National Aeronautics and Space Administration, sometimes join in. The United States has several intelligence agencies, four air forces, three armies, and a navy or two, and each favors certain technologies and sees a particular threat best. They are rivals for attention, resources, and public acclaim.

The Goldwater-Nichols Act of 1986 and the intelligence reforms that followed the 9/11 terror attacks were intended to foster more cooperation and more central direction among the services and agencies. Certainly, the conflicts among the services are less visible, as all hail (in public) the virtues of Jointness. But it is a soft Jointness, more logrolling than subordination to a common doctrine or an agreed-upon set of priorities. The services still compete for attention and promote their vision of the threat that endangers the nation: witness the reactions of the Army and Marine Corps to the Navyand Air Force-conceived AirSea Battle doctrine.

The resistance to centralization is protected first and foremost by the military services’ strong cultures, with their proud traditions and their situations as ‘total organizations’ that control their members’ entire lives. Even the civilians who work for the services tend to have a relatively strong sense of their organization’s mission, compared to other government workers, because of the services’ relatively clear definitions of their critical tasks, although the services are also notably complex organizations, and in other circumstances such complexity tends to dilute organizational identity. But in addition to the organizations’ natural drive to nurture and protect their professional jurisdiction, Congress, which has often pushed for centralization and planning, also protects inter-service competition by separating out favored causes. At the same time that it passed Goldwater-Nichols, which emphasizes Jointness, Congress created the Special Operations Command, essentially a new service with its own global jurisdiction and budgetary independence. More recently, Congress has elevated cyberwarfare to a separate warfare command and laid the groundwork for the creation of a separate Marine Corps-like Space Corps from within the Air Force.29 One hand praises centralization and planning while the other advocates decentralization and competition, the stimulants of innovation.

The military power of the United States also benefits from immigration, which is a continuing source of new ideas and great energy. John Ericsson, the much-admired 19th Century American naval engineer who promoted steam propulsion and ironclads, was born in Sweden. John Holland, the pioneer of the modern submarine, was born in Ireland. Igor Sikorsky, the developer of the helicopter, was born in Russia, as was Alexander P. de Seversky, the great promoter of air power. America got to the atomic bomb first, thanks to Albert Einstein and other Jewish refugees from Nazi Germany. In aviation William Boeing was of German origin, the Lockheed brothers were of Scottish descent, and John Knudsen Northrop’s family was from Yorkshire. And Abraham Karem, the designer of the Predator drone, immigrated to the United States from Israel.30

Immigration may be under scrutiny in the United States these days, but illegal immigration is much more contentious than immigration itself. The United States still admits a million new permanent residents and naturalizes another three quarters of million people each year.31 Immigrants are part of every aspect of American life, but most particularly science and engineering and every field of technology development that is relevant for defense – computer science, aeronautical engineering, nanotechnology, robotics. Just look at American universities or a list of Silicon Valley technology startups.32 America’s main military rivals have no immigrants or asylum seekers. None except desperate North Koreans fleeing an even-more-oppressive regime.

The irrelevance of reform

But doesn’t the importance of private organizations (private firms and FFRDCs) for the development of military technology mean that the Department of Defense needs to take special care to connect to the most innovative parts of the United States like Silicon Valley, Cambridge, Massachusetts, and other centers of high technology? Relative labor scarcity and inter-service competition can help the military come up with ideas and wish lists for technology, but if the military intends to tap the technologies of the future, someone else is going to have to actually design and build the systems. Former Defense Secretary Ashton Carter set up initiatives like the DIUx (Defense Innovation Unit – experimental, now no longer experimental and known simply as DIU) during the Obama administration to make these connections, fueled by a concern that the military organizations’ style is a poor fit for the modern American culture of innovation.33 Will a new generation of research scientists relate well to defense’s mission of breaking things and accommodate at all to its requirement to apply reams of acquisition rules to its contracts and to take months for reviews in order to make any decisions? Can the private-sector world of stock options and public offerings be a part of the public world of government shutdowns, salary freezes, and debt-ceiling crises?34

Because the Defense Department relies heavily upon prime contractors such as Lockheed Martin and Northrop Grumman to design and build its most advanced weapon systems, the technology question really is: can the existing prime contractors effectively use advances in technology to build the best weapon systems? There is no indication that they cannot. With these primes, the United States still builds the best weapon systems. The primes already are the integrators of technologies produced by others, including the commercially oriented firms that DIU and the other new agencies are meant to reach.35 The primes’ job is to bring together a network of subcontractors with the appropriate technology and skills and manage them to an exacting schedule and within certain budget limits to build systems that can survive and dominate in the harshest environment of them all, a battlefield, usually after traversing another difficult environment like space or the ocean to get to the fight. The technologies are important, but it is weaponizing them by creating complex systems that can work when stressed that counts the most, and that is what Lockheed, Northrop, and the other primes do for the American military.

The Department of Defense taps into advanced technology by funding some basic research and lots of applied science and engineering at universities through its own research support agencies and its set of service-specific laboratories.36 For riskier efforts usually involving major prototyping or technology demonstrations, the military uses the Defense Advanced Research Projects Agency (DARPA).37 The FFRDCs, national laboratories, and dozens of defense-supported specialized institutes are linked in with all of this and have their own ties to academic research. It is this system that gave the United States the lead position in computers, created the internet, pioneered work in oceanography and ocean engineering, and pushed capabilities in remote sensing and satellite imaging.

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The Defense Innovation Unit initiative may help a little. So, too, may the Defense Department’s Strategic Capabilities Office, the Defense Innovation Board, and the CIA’s experimental venture capital unit In-Q-Tel.38 These initiatives reinforce and complement what defense agencies in the United States have been doing for decades. More important, creating these agencies is also politically smart, as it shows defense agencies dealing directly with what the American public perceives to be the very cutting edge of technology and innovation. Likely unnecessary, but no harm done.

No harm unless the Department of Defense gets so caught up in pursuing the new organizations that it somehow forgets that what it really buys is the expertise in designing and building complex systems specifically for military roles. Systems integration works in any field because the integrators understand their customers’ particularities and peculiarities. In defense, that means that the systems integrators that make complex weapons systems need to know a little bit about warfighting, the jargon that the military uses to talk about its unusual missions, and the political deal-making (organizational and electoral) that chooses which projects get funded and survive to eventual deployment with the operational military.39 The commercial technology companies are already in the mix of weapon systems’ supply chains, along with defense-unique suppliers; there is no real lack of technology access. And the commercial technology companies will never specialize in the defenseunique aspects of the weapons or be responsive enough to the military customers’ quirks to produce cutting-edge military systems or to keep the demanding military customers happy and to work gracefully with them in the complex political ballet of defense acquisition. DIU and the rest are just a veneer, a new part of that political dance.

Perhaps the perceived decline in American power that worries some is due to failures in the acquisition system, problems with its structure and the inflexibility of its regulations. The Congress obviously thinks so, as it often prescribes changes in both. For example, it recently required that the jurisdiction of the Undersecretary of Defense for Acquisition, Technology and Logistics be divided into separate undersecretaries for research and engineering and for acquisition and sustainment on the argument that technology and innovation needed their own high-level champion within the Defense Department. Of course, it was not too long ago that predecessor offices were combined because, as the argument went, technology development, weapon system acquisition, and the maintenance of complex equipment need to be thought of as one continuous activity and closely coordinated. It is striking that the recent reorganization takes the wiring diagram of the Department of Defense more or less back to what it was in the late-1950s.40

There is no more common project in defense than acquisition reform. There have literally been dozens of congressionally mandated and secretarially commanded studies of the weapons acquisition process over the years. Changes in bureaucratic structure and regulatory detail have been constant. Too often unacknowledged in all of this is the difficulty gaining agreement within the fragmented American political system on the value, schedule, and cost of particular weapons. The defense budget is cyclical, with periods of rapid growth and inevitable decline as war fears grow and decline. Advocates of particular systems push for quick commitments on the upside, increasing the likelihood of project cost growth and performance failures, while opponents seek delays, hoping to catch the budget downside, when new starts and regular progress are hard to make. Proponents are optimists, and rivals are pessimists. Disappointments beset all complex undertakings, weapon acquisitions included. There are no reform cures for most acquisition problems.41

Some believe the problem lies in the Congress itself, its lack of regular order, the reliance on continuing resolutions and the threat of shutdowns. All of this is said to harm defense, disrupting planning, slowing modernization, and hurting force readiness. There certainly have been important changes in Congress in recent years. The growth of party extremes, weakening greatly the opportunity for compromise, is one. Another is the elimination of earmarking, which was a way to gather votes in exchange for funding favorite projects in particular districts. And a third is the weakening of the power of committee chairmen, who used to rule with iron fists.

But the incoherence in Congress on defense matters likely reflects more the disagreement over the nature and saliency of the threats the United States faces than it does the general political cleavages in the society. The partisan divide on defense is in fact weaker than it has been in past.42 Gone also, though, is the imminent danger posed by the Soviet Union. Instead there is just a long list potential dangers – a resurgent Russia, a rising China, diffusing technologies, cyber hacking, terror threats, climate change – none galvanizing in the way the Soviet Union once was, all hidden off in some distant part of the globe, and many more potential than realized.43

The source of discontent

Why the insecurity, when the United States is a very secure country? Although American force structure was cut by about a third (from about 2.1 million to 1.4 million), little else in the security infrastructure created for the Cold War was downsized after the Soviet Union collapsed and the Warsaw Pact disbanded. Some Soviet experts left the field for new occupations, fleeing the unexpected wreckage that was suddenly their careers. But many other defense analysts did well by becoming ethnic-conflict experts or democracy-promotion specialists, the business of the day. Likely the threat assessment meetings were more relaxed sessions than in the past, and fewer serious military exercises were conducted, but nearly all of America’s Cold Warfocused think tanks, academic research institutes, and contract study groups stayed in place and began searching the globe for other security problems that could possibly replace the East/West one that had served so well as the source of their livelihoods for so long.

Business was good from the start because the American military did not go home, finding missions in Europe, Africa, and Asia trying to prevent ethnic slaughter or staving off famine and political chaos. The National Command Structure expanded rather contracted, adding four-star commands for North America and Africa to complete the globe-spanning regional listing and adding subordinate commands to the functional commands to raise the status of space or to give strategic warfare its due. As new developments occurred, accommodations were made for them: counter-terrorism operations and cyber defense joined the top tier along with nuclear proliferation.

The threat/policy opportunity radars have kept turning.44 There is reward for identifying new dangers. Terrorism, cyber, and climate change threats have an endless quality to them, ideal to justify continuing planning efforts and making new budget requests.45 The United States built up a large threat assessment apparatus to ask ‘what if’ questions for the Cold War. That apparatus, like the defense research and innovation establishment, was not disbanded at war’s end. It finds the threats for the others to solve.

The United States pays a lot to avoid being surprised. Part of that price pays for people and organizations that constantly call out dangers, potential gaps, or failures in its multiple layers of defenses. Analysts warn that America is not ready for biological warfare, that its cyber defenses are inadequate, and that it hasn’t been paying enough attention to space. Worse, they say, the Defense Department is too slow in fielding this system or that, there is too much red tape, and there is not enough initiative. They call for a defense budget big enough to build the 355-ship Navy, a new strategic bomber, and a new generation of modernized nuclear weapons. These continuing calls for defense investment, especially in new technologies, keep the U.S. defense R&D system on its toes, well supplied with inputs and opportunities to capitalize on the incentives to generate innovations.

#### No US-China war.

Charles C. Krulak & Alex Friedman 21, former President of Birmingham-Southern College, former Commandant of the US Marine Corps, M.S. from George Washington University; former Chief Financial Officer of the Bill & Melinda Gates Foundation, J.D. from Columbia University, “The US and China Are Not Destined for War,” Project Syndicate, 08-17-2021, https://www.project-syndicate.org/commentary/us-china-not-destined-for-war-by-charles-c-krulak-and-alex-friedman-1-2021-08

True, throughout history, when a rising power has challenged a ruling one, war has often been the result. But there are notable exceptions. A war between the US and China today is no more inevitable than was war between the rising US and the declining United Kingdom a century ago. And in today’s context, there are four compelling reasons to believe that war between the US and China can be avoided.

First and foremost, any military conflict between the two would quickly turn nuclear. The US thus finds itself in the same situation that it was in vis-à-vis the Soviet Union. Taiwan could easily become this century’s tripwire, just as the “Fulda Gap” in Germany was during the Cold War. But the same dynamic of “mutual assured destruction” that limited US-Soviet conflict applies to the US and China. And the international community would do everything in its power to ensure that a potential nuclear conflict did not materialize, given that the consequences would be fundamentally transnational and – unlike climate change – immediate.

A US-China conflict would almost certainly take the form of a proxy war, rather than a major-power confrontation. Each superpower might take a different side in a domestic conflict in a country such as Pakistan, Venezuela, Iran, or North Korea, and deploy some combination of economic, cyber, and diplomatic instruments. We have seen this type of conflict many times before: from Vietnam to Bosnia, the US faced surrogates rather than its principal foe.

Second, it is important to remember that, historically, China plays a long game. Although Chinese military power has grown dramatically, it still lags behind the US on almost every measure that matters. And while China is investing heavily in asymmetric equalizers (long-range anti-ship and hypersonic missiles, military applications of cyber, and more), it will not match the US in conventional means such as aircraft and large ships for decades, if ever.

A head-to-head conflict with the US would thus be too dangerous for China to countenance at its current stage of development. If such a conflict did occur, China would have few options but to let the nuclear genie out of the bottle. In thinking about baseline scenarios, therefore, we should give less weight to any scenario in which the Chinese consciously precipitate a military confrontation with America. The US military, however, tends to plan for worst-case scenarios and is currently focused on a potential direct conflict with China – a fixation with overtones of the US-Soviet dynamic.

This raises the risk of being blindsided by other threats. Time and again since the Korean War, asymmetric threats have proven the most problematic to national security. Building a force that can handle the worst-case scenario does not guarantee success across the spectrum of warfare.

The third reason to think that a Sino-American conflict can be avoided is that China is already chalking up victories in the global soft-power war. Notwithstanding accusations that COVID-19 escaped from a virology lab in Wuhan, China has emerged from the pandemic looking much better than the US. And with its Belt and Road Initiative to finance infrastructure development around the world, it has aggressively stepped into the void left by US retrenchment during Donald Trump’s four-year presidency. China’s leaders may very well look at the current status quo and conclude that they are on the right strategic path.

Finally, China and the US are deeply intertwined economically. Despite Trump’s trade war, Sino-American bilateral trade in 2020 was around $650 billion, and China was America’s largest trade partner. The two countries’ supply-chain linkages are vast, and China holds more than $1 trillion in US Treasuries, most of which it cannot easily unload, lest it reduce their value and incur massive losses.

To be sure, logic can be undermined by a single act and its unintended consequences. Something as simple as a miscommunication can escalate a proxy war into an interstate conflagration. And as the situations in Afghanistan and Iraq show, America’s track record in war-torn countries is not encouraging. China, meanwhile, has dramatically stepped up its foreign interventions. Between its expansionist mentality, its growing foreign-aid program, and rising nationalism at home, China could all too easily launch a foreign intervention that might threaten US interests.

Cyber mischief, in particular, could undercut conventional military command-and-control systems, forcing leaders into bad decisions if more traditional options are no longer on the table. And Sino-American economic ties may come to matter less than they used to, especially as China moves from an export-led growth model to one based on domestic consumption, and as two-way investment flows decline amid escalating bilateral tensions.

A “mistake” on the part of either country is always possible. That is why diplomacy is essential. Each country needs to determine its vital national interests vis-à-vis the other, and both need to consider the same question from the other’s perspective. For example, it may be hard to accept (and unpopular to say), but civil rights within China might not be a vital US national interest. By the same token, China should understand that the US does indeed have vital interests in Taiwan.

The US and China are destined to clash in many ways. But a direct, interstate war need not be one of them.

#### No food wars

Jonas Vestby 18, Doctoral Researcher at the Peace Research Institute Oslo, Ida Rudolfsen, doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO, and Halvard Buhaug, Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography, “Does hunger cause conflict?”, 5/18/18, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

## Localization ADV

### Localization ADV---1NC

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

Herbert Hovenkamp 18, James G. Dinan University Professor at Penn Law and Wharton School of Business at the University of Pennsylvania, “The Rule of Reason”, Florida Law Review, 70 Fla. L. Rev. 81, January 2018, Lexis

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

A. Cost Savings from the Per Se Rule?

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

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

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

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

#### No heg impact---Haass is a fool.

Dr. Christopher J. Fettweis 17, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. Haass, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 1990s, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global police~~man~~. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

## Rural Development ADV

### Rural Development ADV---1NC

#### Populism is dead.

Chloe Taylor 1-18, News Assistant, CNBC, “Populist Politics Lost Support Globally During the Pandemic, Research Finds,” CNBC, 01/17/2022, https://www.cnbc.com/2022/01/18/populist-politics-lost-support-during-the-pandemic-research-finds.html.

Populist parties and politicians lost support all over the world during the coronavirus pandemic, a survey of more than half a million people has found.

Published Tuesday by Cambridge University’s Bennett Institute for Public Policy, the study had more than half a million participants across 109 countries. The research team has been monitoring participants’ political attitudes since 2020.

According to the report, there are clear signs that the so-called “populist wave” — which saw radical and anti-establishment leaders, including former U.S. President Donald Trump, rise to power — could be diminishing.

The mishandling of the Covid-19 crisis by populist leaders, a desire for stability and a decline in polarizing attitudes were swaying public opinion away from populist sentiment, researchers said. Populist leaders were also considered to be less trustworthy as sources of Covid-related information than their centrist counterparts, the poll found.

The pandemic prompted a shift toward technocratic politics, the paper said, which bolstered trust in governments and experts such as scientists.

“The story of politics in recent years has been the emergence of anti-establishment politicians who thrive on the growing distrust of experts,” Roberto Foa, the report’s lead author, said in a press release Tuesday. “From [Turkey’s] Erdogan and [Brazil’s] Bolsonaro to the ‘strong men’ of Eastern Europe, the planet has experienced a wave of political populism. Covid-19 may have caused that wave to crest.”

Foa added that support for anti-establishment parties had collapsed worldwide in a way that wasn’t being seen for more “mainstream” politicians.

Co-author Xavier Romero-Vidal added that the pandemic had created “a sense of shared purpose that may have reduced the political polarization we’ve seen over the last decade.”

“This could help explain why populist leaders are struggling to mobilise support,” he said.

Between the spring of 2020 and the final quarter of 2021, populist leaders have seen an average approval rating decline of 10 percentage points, the study found. In Europe, the proportion of people intending to vote for a populist party fell by an average of 11 percentage points to 27% during the same period.

While European support for incumbent parties increased during early lockdowns, the continent’s governing populist parties — including Italy’s Five Star Movement and Hungary’s Fidesz — experienced the largest declines in support.

Opposition populist parties also lost support during the pandemic, while “mainstream” opposition parties gained supporters.

Approval of the way governments handled the Covid crisis also showed rising skepticism toward populist leaders’ competence. In June 2020, public approval of how countries with populist leaders had handled the pandemic was an average 11 percentage points lower than approval of countries with centrist governments. By the end of 2020, the gap had widened to 16 points.

Statements associated with populism, such as a dislike for “corrupt elites” and a desire for the “will of the people” to be obeyed, also saw a decline in support, the report found. The number of people saying they agreed with similar statements fell by around 10 percentage points in Italy, the U.K. and France between 2019 and 2021.

Meanwhile, researchers found that political “tribalism” — signaled by party supporters expressing a “strong dislike” of those who voted for opposing politicians — had declined in most countries. In the U.S., however, this so-called tribalism had not abated.

#### Inequality doesn’t cause populism

Brian Nolan 19, Professor of Social Policy and Director, Equity Employment and Growth Research Programme, University of Oxford, 8/13/2019, “Why We Can’t Just Blame Rising Inequality For The Growth Of Populism Around The World,” https://theconversation.com/why-we-cant-just-blame-rising-inequality-for-the-growth-of-populism-around-the-world-120951

The idea is now commonplace that income inequality is inexorably on the rise. The US experience in particular has become central to a new grand narrative prominent in public debate and taken to apply across rich countries: globalisation and technological change have polarised society into a small elite with highly paid, secure jobs on one side, and on the other side are growing numbers of people, including an increasingly “squeezed” middle class, in insecure, poorly-paid work.

This growing inequality is held responsible for a wide range of social and political ills. Not least the erosion of solidarity, social trust and faith in democratic institutions. And, politically, it caused the election of Donald Trump, the UK’s Brexit vote, and the broad rise of populism seen as threatening democracy.

This “grand narrative” undoubtedly captures important aspects of the US experience. But it does not represent the whole picture. And as far as other rich countries are concerned, examining the evidence highlights the diversity of their experiences over recent decades. As I’ve found in my research, this story is more often than not a poor fit for various countries around the world.

Different experiences

Household surveys show that income inequality has risen significantly since the 1980s in about two-thirds of the rich countries of the OECD – leaving one-third where it has not. The following graph shows what has happened to the Gini coefficient, the most commonly-used indicator of income inequality. Inequality did not rise everywhere and, where it did, the scale of that increase varied widely. Countries such as the UK and Sweden did see inequality go up as sharply as the US. But for others the increase was often much more modest and even decreased for some.

Inequality rose decade by decade in the US, but the UK’s increase was mostly concentrated in the Thatcher years of the 1980s, Sweden’s in the 1990s, and these contained “episodes”, rather than continuous rises, are also common elsewhere. Tax data show pre-tax income shares at the very top increasing in many countries, but again this varies widely across countries.

When it comes to ordinary living standards, middle class income growth has been even more varied. The next chart shows that middle incomes have stagnated in purchasing power terms since the early 1980s in Japan and Italy, as well as the US, and grown only modestly in Germany. But these are the poorest performers.

The UK, for example, saw substantial income growth around the middle from the late 1980s up to the mid-2000s, in sharp contrast to its lack of growth since then. Countries such as Australia, Belgium, Canada, Denmark, Finland and Sweden also saw periods of quite strong growth.

Crucially, across rich countries the relationship between inequality and middle income growth is weak – throwing into question the link that gets made between the so-called squeezed middle and populism. Middle incomes have generally lagged behind growth in GDP per head but again to widely varying extents, and rising income inequality is only one factor. Knowing what happened to inequality in a given country would have been of little help in predicting whether growth in middle incomes was strong or weak.

Not just the economy

The extent to which rising inequality and stagnating living standards over decades have driven the recent rise in populism across the rich countries is also open to question. Yes, the white working class population whose livelihoods have been hurt through decades of manufacturing decline provided the core constituency supporting Trump for president. But economic dysfunction combines with cultural and demographic factors in a way that makes them very hard to disentangle.

The fact that support for populist parties has risen in countries where inequality has been fairly stable over time (such as Austria and France), as well as ones where inequality has risen, and in countries where income growth has been quite robust (such as Poland), as well as ones where median incomes have stagnated (such as Hungary), illustrates the complexity of the factors at work.

#### Regional inequality is inevitable---people can’t afford to move post-plan.

Matthew Yglesias 17, Senior Correspondent and Co-Founder of Vox, “The real driver of regional inequality in America,” Vox, 08-18-2017, https://www.vox.com/policy-and-politics/2017/8/18/16162234/regional-inequality-cause

America in the Gilded Age was a starkly unequal place, not just in terms of inequality between people but inequality between regions. Long-settled, fast-industrializing states in the Northeast were far richer than those of the West or the South, which had many fewer factories, railroads, and other kinds of capital goods that allowed for productive work and high wages. But around 1880 that began to change, and for 100 years, income gaps between states slowly converged at a rate of about 1.8 percent per year.

But since 1980, that process has began to slow, and over the past decade it’s essentially stopped entirely. Today, Massachusetts’s GDP per capita is about double what you find in Mississippi — roughly equivalent to the gap between Switzerland and Slovakia — and it’s not getting any narrower.

Phillip Longman of New America’s Open Markets program has been arguing for some years now that Reagan-era shifts in the federal government’s attitude toward corporate concentration are to blame. This is one of several arguments that’s helped inspire Democrats to start calling for a rethink of federal antitrust policy. But new empirical research from Peter Ganong of the University of Chicago and Daniel Shoag of Harvard’s Kennedy School of Government suggests the issue is more complicated than that. After all, even as the richest cities have gotten richer on a per capita basis, their share of aggregate national output has stagnated because their populations are growing slowly.

Ganong and Shoag argue that the slowing population growth in rich cities and the slowing of regional income convergence are intimately linked trends.

Less skilled workers used to move to rich states to increase their wages. That lowered average income in the rich states while raising it in the poor ones, as people’s natural tendency to move toward economic opportunity helped drive nationwide convergence of wages and incomes. But in the contemporary United States, zoning restrictions that prevent adequate levels of house building mean that much of the higher incomes earned in rich states simply pass through in the form of higher housing costs.

For skilled workers, this trade-off is worth it, but for the working class, it generally isn’t. Consequently, working-class people have begun to move out of the rich states and toward the cheap ones — throwing the pattern of convergence into reverse.

Chart, diagram, scatter chart

Description automatically generated

Two big shifts in migration and economics

This set of four charts in Ganong and Shoag’s paper tells the fundamental story — in the old days, there was a strong tendency for poor states’ per capita incomes to grow faster than those of rich ones and an equally strong tendency for people to move away from poor states to go live in rich ones. But in recent years, the income convergence trend has slowed and the migration pattern has reversed.

People move, of course, for non-economic reasons. You can see clearly on these charts that the warm weather of Nevada and Arizona causes those states to punch above their weight in terms of migration in both eras. But the overall pattern is striking. Lots of people used to move to rich places like California, Maryland, and the tri-state area around New York City. These days, very few people move there, even though the typical resident of the South or Midwest could earn more by moving to a rich city.

The reason is that these states are also more expensive, and for working-class people the higher costs are no longer worth the higher wages.

<<MARKED>>

Chart, box and whisker chart

Description automatically generated

This chart shows that until 1990 or so, both skilled and unskilled workers could improve their standard of living, even considering housing costs, by moving to a high-income state. But the net gains for unskilled workers began to diminish sharply, and by 2010 a typical low-skill household was actually worse off in a high-income state due to the even higher housing costs.

Traditionally, in other words, both lawyers and janitors earned more in the New York City area than they did in the Deep South. Today, “lawyers continue to earn much more in the New York area in both nominal terms and net of housing costs, but janitors now earn less in the New York area after subtracting housing.”

The result is that less skilled workers now tend to eschew the highest-wage, highest-cost locations — creating a powerful counterpressure to other forces that would otherwise drive regional income convergence.

The paradox of regional inequality

This and other lines of recent research tend to indicate that the gains to increasing the housing supply (whether through zoning changes to allow more market-rate housing or through the direct construction of social housing) would produce large economic benefits. Regional inequality would be reduced, as the pattern of state-level income convergence restarted. Ganong and Shoag also believe that about 8 percent of the increase in individual-level inequality can be explained through this mechanism. Meanwhile, overall GDP would be about 9.5 percent higher, and the structural increase in the capital share of national income would be greatly reduced.

In short, with more elastic housing supply, the United States would be richer on average, and the gains would be disproportionately concentrated among poorer people and poorer states.

But there is a paradoxical aspect to this. The housing fix for regional inequality entails more rather than less concentration of economic activity in rich coastal metro areas. The mechanism is that with a greater supply of housing, the working-class share of the population of these metro areas would grow disproportionately — dragging per capita incomes down while pulling them up in poorer places. Sunbelt and Rust Belt cities would be richer but smaller, while coastal ones would be bigger.

This would leave almost everyone better off, but it’s not exactly the political solution to the problem of regional inequality that elected officials are looking for. To get that job done, politicians may need to look at more direct solutions like moving white-collar government work to cities that have suffered population decline or creating new universities in declining areas.

#### The US isn’t key to their impacts, AND challengers don’t want wholesale revision.

G. John **Ikenberry 18**. Albert G. Milbank Professor of Politics and International Affairs at Princeton University in the Department of Politics and the Woodrow Wilson School of Public and International Affairs, also a Global Eminence Scholar at Kyung Hee University in Seoul. 2018. “Why the Liberal World Order Will Survive.” Ethics & International Affairs, vol. 32, no. 01, pp. 17–29.

In this essay I look at the evolving encounters between rising states and the post-war Western international order. My starting point is the classic “power transition” perspective. Power transition theories see a tight link between international order—its emergence, stability, and decline—and the rise and fall of great powers. It is a perspective that sees history as a sequence of cycles in which powerful or hegemonic states rise up and build order and dominate the global system until their power declines, leading to a new cycle of crisis and order building. In contrast, I offer a more evolutionary perspective, emphasizing the lineages and continuities in modern international order. More specifically, I argue that although America’s hegemonic position may be declining, the liberal international characteristics of order—openness, rules, multilateral cooperation—are deeply rooted and likely to persist. This is true even though the orientation and actions of the Trump administration have raised serious questions about the U.S. commitment to liberal internationalism. Just as importantly, rising states (led by China) are not engaged in a frontal attack on the American-led order. While struggles do exist over orientations, agendas, and leadership, the non-Western developing countries remain tied to the architecture and principles of a liberal-oriented global order. And even as China seeks in various ways to build rival regional institutions, there are stubborn limits on what it can do. Power Transitions and International Order There is wide agreement that the world is witnessing a long-term global power transition. Wealth and power is diffusing, spreading outward and away from Europe and the United States. The rapid growth that marked the non-Western rising states in the last decade may have ended, and even China’s rapid economic ascendency has slowed. But the overall pattern of change remains: the “rest” are gaining ground on the “West.” While there is wide agreement that the world is witnessing a global power transition, there is less agreement on the consequences of power shifts for international order. The classic view is advanced by realist scholars, such as E. H. Carr, Robert Gilpin, Paul Kennedy, and William Wohlforth, who make sweeping arguments about power and order. These hegemonic realists argue that international order is a by-product of the concentration of power. Order is created by a powerful state, and when that state declines and power diffuses, international order weakens or breaks apart. Out of these dynamic circumstances, a rising state emerges as the new dominant state, and it seeks to reorganize the international system to suit its own purposes. In this view, world politics from ancient times to the modern era can be seen as a series of repeated cycles of rise and decline. War, protectionism, depression, political upheaval—various sorts of crises and disruptions may push the cycle forward. This narrative of hegemonic rise and decline draws on the European and, more broadly, Western experience. Since the early modern era, Europe has been organized and reorganized by a succession of leading states and would-be hegemons: the Spanish Hapsburgs, France of Louis XIV and Napoleon, and post-Bismarck Germany. The logic of hegemonic order comes even more clearly into view with Pax Britannica, the nineteenth-century hegemonic order based on British naval and mercantile dominance. The decline of Britain was followed by decades of war and economic instability, which ended only with the rise of Pax Americana. For hegemonic realists, the debate today is about where the world is along this cyclical pathway of rise and decline. Has the United States finally lost the ability or willingness to underwrite and lead the post-war order? Are we in the midst of a hegemonic crisis and the breakdown of the old order? And are rising states, led by China, beginning to step forward in efforts to establish their own hegemonic dominance of their regions and the world? These are the lurking questions of the power transition perspective. But does this vision of power transition truly illuminate the struggles going on today over international order? Some might argue no—that the United States is still in a position, despite its travails, to provide hegemonic leadership. Here one would note that there is a durable infrastructure (or what Susan Strange has called “structural power”) that undergirds the existing American-led order. Far-flung security alliances, market relations, liberal democratic solidarity, deeply rooted geopolitical alignments—there are many possible sources of American hegemonic power that remain intact. But there may be even deeper sources of continuity in the existing system. This would be true if the existence of a liberal-oriented international order does not in fact require hegemonic domination. It might be that the power transition theory is wrong: the stability and persistence of the existing post-war international order does not depend on the concentration of American power. In fact, international order is not simply an artifact of concentrations of power. The rules and institutions that make up international order have a more complex and contingent relationship with the rise and fall of state power. This is true in two respects. First, international order itself is complex: multilayered, multifaceted, and not simply a political formation imposed by the leading state. International order is not “one thing” that states either join or resist. It is an aggregation of various sorts of ordering rules and institutions. There are the deep rules and norms of sovereignty. There are governing institutions, starting with the United Nations. There is a sprawling array of international institutions, regimes, treaties, agreements, protocols, and so forth. These governing arrangements cut across diverse realms, including security and arms control, the world economy, the environment and global commons, human rights, and political relations. Some of these domains of governance may have rules and institutions that narrowly reflect the interests of the hegemonic state, but most reflect negotiated outcomes based on a much broader set of interests. As rising states continue to rise, they do not simply confront an American-led order; they face a wider conglomeration of ordering rules, institutions, and arrangements; many of which they have long embraced. By separating “American hegemony” from “the existing international order,” we can see a more complex set of relationships. The United States does not embody the international order; it has a relationship with it, as do rising states. The United States embraces many of the core global rules and institutions, such as the United Nations, International Monetary Fund (IMF), World Bank, and World Trade Organization. But it also has resisted ratification of the Law of the Sea Convention and the Convention on the Rights of the Child (it being the only country not to have ratified the latter) as well as various arms control and disarmament agreements. China also embraces many of the same global rules and institutions, and resists ratification of others. Generally speaking, the more fundamental or core the norms and institutions are—beginning with the Westphalian norms of sovereignty and the United Nations system—the more agreement there is between the United States and China as well as other states. Disagreements are most salient where human rights and political principles are in play, such as in the Responsibility to Protect. Second, there is also diversity in what rising states “want” from the international order. The struggles over international order take many different forms. In some instances, what rising states want is more influence and control of territory and geopolitical space beyond their borders. One can see this in China’s efforts to expand its maritime and political influence in the South China Sea and other neighboring areas. This is an age-old type of struggle captured in realist accounts of security competition and geopolitical rivalry. Another type of struggle is over the norms and values that are enshrined in global governance rules and institutions. These may be about how open and rule-based the system should be. They may also be about the way human rights and political principles are defined and brought to bear in relations among states. Finally, the struggles over international order may be focused on the distribution of authority. That is, rising states may seek a greater role in the governance of existing institutions. This is a struggle over the position of states within the global political hierarchy: voting shares, leadership rights, and authority relations. These observations cut against the realist hegemonic perspective and cyclical theories of power transition. Rising states do not confront a single, coherent, hegemonic order. The international order offers a buffet of options and choices. They can embrace some rules and institutions and not others. Moreover, stepping back, the international orders that rising states have faced in different historical eras have not all been the same order. The British-led order that Germany faced at the turn of the twentieth century is different from the international order that China faces today. The contemporary international order is much more complex and wide-ranging than past orders. It has a much denser array of rules, institutions, and governance realms. There are also both regional and global domains of governance. This makes it hard to imagine an epic moment when the international order goes into crisis and rising states step forward—either China alone or rising states as a bloc—to reorganize and reshape its rules and institutions. Rather than a cyclical dynamic of rise and decline, change in the existing American-led order might best be captured by terms such as continuity, evolution, adaptation, and negotiation. The struggles over international order today are growing, but it is not a drama best told in terms of the rise and decline of American hegemony. Sources of Continuity in Liberal International Order If the liberal international order endures, it will be because it is based on more than American hegemonic order. To be sure, the United States did give shape to a distinctive post-war liberal hegemonic system, and many of its features— including the American-led alliance system and multilateral economic governance arrangements—are themselves quite durable. But the broader features of the modern international order are the result of centuries of struggle over its organizing principles and institutions. Rising states face an international order that is long in the making, one that presents these non-Western developing states with opportunities as well as constraints. The struggles over the existing international order will reshape the rules and institutions in the existing system in various ways. But rising states are not simply or primarily “revisionist” states seeking to overturn the order; rather, they are seeking greater access and authority over its operation. Indeed, the order creates as many safeguards and protections for rising states as it creates obstacles and constraints. For example, the World Trade Organization provides rules and mechanisms for rising states to dispute trade discrimination and protect access to markets. After all, more generally, it was this liberal-oriented international order—its openness and rules—that provided the conditions for China and other rising states to rise. Indeed, if the liberal international order survives, it will be in large part due to the fact that the constituencies for such an order that stretch across the Western and the non-Western worlds are larger than the constituencies that oppose it. We can look more closely at these sources of continuity and constituency.

# 2NC

## Torts CP

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

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

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

E. Alternatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### ‘Scope’ is their breadth

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

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

#### ‘Of’ means deriving from them

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction

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

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

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

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

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

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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

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

I. THE STANDING CLAIM

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

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

A. Interference

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

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

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

B. Exclusivity

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

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

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

C. Marketing

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

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

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

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

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

[\*2043] D. Other Misconduct

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

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

E. Competition Law as Private Law

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

II. Private antitrust enforcement

A. Subsidiary Contribution

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

#### Tort standards are clear and easily navigable by business---they mirror the UCC, the gold standard for commercial conduct

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

1. The Vagueness Critique

Detractors of the tort are critical about the lack of clear delineation between actionable and nonactionable conduct 124 and the malleability of [\*55] the notions of "privilege" and "justification." 125 Although there is some validity to these criticisms, indeterminacy is not unique to tortious interference. And, despite some drawbacks, indefinite rules have their own benefits and a place in the law, even in a case such as Machine Maintenance & Equipment Co. v. Cooper Industries, 126 cited by one commentator as epitomizing the indefiniteness of the tort. 127

Machine Maintenance involved a dealer's termination pursuant to a dealership agreement that gave the manufacturer the right to terminate the dealer without cause simply upon ninety days' notice. 128 The manufacturer, however, gave the dealer only thirty-four days' notice, allegedly to minimize its chances of securing another dealership from a competing manufacturer and thereby increasing the likelihood that the dealer's existing customers would transfer their business to the manufacturer's new dealer. 129 The terminated dealer sued the manufacturer alleging antitrust 130 and tortious interference violations, and won jury verdicts on both claims. 131

Although the court granted the defendant's motion for judgment notwithstanding the verdict on the antitrust claims, 132 it let stand a $ 1.8 million judgment for tortious interference, 133 despite the defendant's competition justification. 134 On the issue of privilege, the court stated that "competition that meets the standards for appropriate conduct" 135 would justify the interference, but conduct that violates "business ethics [\*56] and customs" 136 is considered "wrongful" and cannot be considered privileged. 137 Hence, a reasonable juror could find that the manufacturer's conduct in question "slipped over to the improper side of the 'wrongful means' line" 138 and was therefore unjustified. 139

What critics find unacceptable about this kind of case is the factsensitive nature of the liability question and the almost infinite adaptability of the rules. 140 They object that case-by-case inquiries without any definitive standards tend to send too many cases to the jury, which might chill aggressive, yet beneficial, business activities. 141 The crux of this critique is that the tort does not give business people the certainty they need to effectively plan their actions.

The use of generalized ethical standards in commercial settings is not unique to tortious interference. Even the Uniform Commercial Code, which consists primarily of very specific rules, includes a number of overarching, fairness-based provisions. Its requirements of good faith 142 and fair dealing, 143 the doctrine of unconscionability, 144 and standards based on commercial course of dealing and trade usage, 145 for example, set benchmarks that no more delineate the line between permissible and impermissible conduct than the liability standard of tortious interference. Fiduciary norms applicable in a number of commercial relationships, likewise, are little clearer than the impropriety standard of tortious interference. These norms are merely described as "stricter than the morals of the marketplace," 146 requiring the fiduciary to treat the beneficiary fairly regardless of the fiduciary's own self-interests. 147 Yet, courts in recent years have actually expanded the application of these "fuzzy" standards, once limited to special dependency relationships, 148 to some fairly conventional commercial cases. 149 Certainly, it can be no more [\*57] unpredictable for a defendant to have liability turn on the fairness of her dealings with another, as in tortious interference, than to have it turn on good faith or fair dealing under the Uniform Commercial Code. 150 Hence, the argument that tortious interference exposed the defendant in Machine Maintenance to unusually vague standards is overstated.

The call for bright line rules in the commercial arena is not new, of course. As early as the 1920s, for example, Roscoe Pound asserted that "rules or conceptions authoritatively prescribed in advance and mechanically applied" 151 were needed to preserve the security of economic transactions. 152 Today, critics continue to caution that imprecise fairness standards carry a risk of judicial error and, thus, of overdeterrence. 153 Decisionmaking, however, is never discretion-free or errorproof, even with the most distinct rules, and thus fears of the chilling effect of potential judicial mistakes are at least somewhat exaggerated.

Moreover, the critics' arguments fail to appreciate that indeterminacy has its own value. From an economic perspective, the expectation that one [\*58] will be treated fairly and/or according to reasonable commercial standards should encourage business dealings. Such expectations can also reduce transaction costs as parties no longer feel compelled to negotiate the minutiae of every contract. From a social perspective, the fact that fairness based standards have endured despite recurrent criticism suggests that they embody strong values that society respects and wishes to promote. In a balance of the business interest in predictability against the interest in preserving certain social values, there is no reason why the need for predictability should prevail in all contexts.

#### Antitrust is structurally unclear

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

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

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

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

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

### AT: No NB---2NC

#### Compound failures cause societal collapse AND nuclear war

Julian Cribb 21, Adjunct Professor at University of Technology, Sydney, Principal of Julian Cribb & Associates, Author, Journalist, Editor and Science Communicator, Surviving the 21st Century: Humanity’s Ten Great Challenges and How We Can Overcome Them, <https://issuu.com/jajadymu30303/docs/3319412698-surviving_the_21st_century_by__julian_c>

Eco-Collapse

The constellation of resource scarcities, extinction and decline in environmental services such as clean air, water, healthy landscapes etc, in the view of many scholars, carries with it potential for a collapse in modern civilisation, if not its actual extinction. This was the central thesis of Jared Diamond’s 2005 book Collapse: how societies choose to fail or survive (Diamond 2005 ) in which he identified eight factors in common between modern civilisation and failed civilisations of the past:

1. De-forestation and habitat destruction

2. Soil problems (erosion, salinization, and soil fertility losses)

3. Water management problems

4. Overhunting

5. Overfishing

6. Effects of introduced species on native species

7. Overpopulation

8. Increased per-capita impact of people.

However, Diamond warned, this situation is made worse in the modern context by man-made climate change, the build-up of man-made toxins in the environment, energy shortages and the increasing dominance of human use over the Earth’s photosynthetic capacity (i.e. our ill-conceived destruction of the world’s forests and grasslands).

Many people have difficulty grasping the idea that humans could so devastate our own environment as to render it unable to support us. One way to envisage this was proposed by John Schramski, a professor at the University of Georgia, whose team has studied the energy balance on Earth represented by its plant life. They concluded that if we continue to destroy plants and trees at present rates, it will imperil our own continued existence: “You can think of the Earth like a battery that has been charged very slowly over billions of years," Schramski says. “The sun’s energy is stored in plants and fossil fuels, but humans are draining that energy much faster than it can be replenished.” The researchers calculate that 2000 years ago the earth had about 1000 gigatonnes (billion tonnes) of energy stored in the form of plant carbon. Since then human activity has halved this colossal reserve. “If we don’t reverse this trend, we’ll eventually reach a point where the ‘biomass battery’ discharges to a level at which Earth can no longer sustain us,” he cautions (Schramski et al. 2015 ).

Writing in The Bulletin of The Atomic Scientists , ethicist Phil Torres argues that eco-collapse exists alongside nuclear weapons and global warming as a ‘clear and present danger’ to the human future. “The repercussions of biodiversity loss are potentially as severe as those anticipated from climate change, or even a nuclear conflict…. Biodiversity loss is a “threat multiplier” that, by pushing societies to the brink of collapse, will exacerbate existing conflicts and introduce entirely new struggles between state and non-state actors. Indeed, it could even fuel the rise of terrorism” (Torres 2016 ).

In their analysis of contemporary global trends population scholars Paul and Anne Ehrlich comment

… today, for the first time, humanity’s global civilization—the worldwide, increasingly interconnected, highly technological society in which we all are to one degree or another, embedded—is threatened with collapse by an array of environmental problems. Humankind finds itself engaged in what Prince Charles described as ‘an act of suicide on a grand scale’, facing what the UK’s Chief Scientifi c Advisor John Beddington called a ‘perfect storm’ of environmental problems (Ehrlich and Ehrlich 2013 ).

Th e Ehrlichs point out that a collapse would be unavoidable in the event of either a small nuclear war or major famines, but equally could come about through global toxification and the compound failure of key ecosystems on which we rely for survival. They note that scientists have repeatedly warned humanity about all these issues—and repeatedly been ignored. As a result, many governments are still asking questions like ‘how do we feed ten billion people?’ instead of ‘how do we reduce the size of the population to something the Earth can sustain?’

“Th ere is not much evidence of societies mobilizing and making sacrifices to meet gradually worsening conditions that threaten real disaster for future generations. Yet that is exactly the sort of mobilization that we believe is required to avoid a collapse,” the Ehrlichs conclude.

#### It says it stops water pollution AND ocean collapse---extinction from oxygen

Will Inglis 21, Humanities at McMaster University, Certificate in Geographic Information Science and Cartography from McMaster University, “From Ocean Pollution to a Modern-Day Solution”, McMaster University, 9/29/2021, https://storymaps.arcgis.com/stories/122c7c0434804bd4b0afd8ec0e503bbc

What is Water Pollution?

Water pollution occurs when objects and substances enter the water which disrupts aquatic habitats and is unsafe for human use. Harmful substances can enter through rivers, lakes, oceans or any other body of water.

When pollution reaches the water, it interferes with the natural functioning of ecosystems. Toxic chemicals that are dumped into these bodies of water negatively affect marine life.

As a global world, we need to quickly recognize these issues to preserve our oceans, aquatic life and ourselves.

Why does it happen?

Water is vulnerable to pollution because it is a universal solvent - water is able to dissolve more substances than any other liquid on earth. Given this unique quality, the major downside is that water can be easily polluted without proper care.

The major causes of water pollution are: industrial waste, sewage, agriculture, consumer pollution and global warming,

Where does all this pollution pile up?

There are 5 major garbage patches that result from more than six decades of waste dumping. Within that time, humans have managed to put 8.3 billion tonnes of polymer into these patches.

Ocean currents group up gigantic concentrations of garbage and traps them in immense whirlpools. There are two garbage patches in the Pacific, two in the Atlantic and one in the Indian Ocean.

Why is this important? Why should you care?

The earth has one big ocean with many features that contribute to how the earth operates. The ocean is connected to major lakes and waterways because everything drains into the ocean. The ocean is an important part of the water cycle - evaporation and precipitation processes.

The ocean has a major influence on the weather and climate. It moderates global weather and climate by absorbing most of the solar radiation reaching the Earth. Changes in the ocean's atmosphere can have dramatic physical, chemical, biological, economic, and social consequences.

The ocean has made the Earth a habitable place. Most of the oxygen in the atmosphere came from photosynthetic organisms in the ocean. The earliest evidence of life is found in the ocean. The ocean provides us with the essential things needed for life on earth.

The ocean supports a great diversity of life and ecosystems. Most of the major groups that exist on Earth are found exclusively in the ocean. The diversity of organisms are much greater in the ocean than on land.

The ocean and human are inextricably interconnected. The ocean provides food, medicines, mineral and energy resources. It provides jobs and a route for transportation for goods. It offers people immense amount of enjoyment, regardless if it is inspiration or recreation.

The ocean is largely unexplored. Less than 5% of it has been explored and with humans using more resources from the ocean, sustainability of the ocean is required for future generations.

#### And, fisheries---nuclear war

Dr. Julian Cribb 16, Adjunct Professor of Science Communication at the University of Technology Sydney and Fellow of the Australian Academy of Technological Sciences and Engineering (ATSE), Principal of Julian Cribb & Associates, “Surviving the 21st Century: Humanity's Ten Great Challenges and How We Can Overcome Them”, p. 74-75

In 1999 the Oslo Peace Research Institute issued a ground-breaking paper by Indra de Soysa and Nils Gleditsch which drew attention to the fact that, in the first decade of the post-Cold War era, most conflicts began with develop- ment failure and contests between the different players over those fundamen- tal resources for life: food, land and water. “The new internal wars, extremely bloody in terms of civilian casualties, reflect subsistence crises and are largely apolitical,” they said (De Soya and Gleditsch 1999). This represented a chal- lenge to the long-held academic view that scarcity is a product of war—rather than war a being product of scarcity. In fact, humans have always contested key resources vi et armis—and politics, religion, patriotism and ethnicity are just the way we tend to marshal ourselves into opposing groups around them. Peter Gleick’s work on water conflicts lends substance to the warnings of two UN chiefs, Boutros Boutros-Ghali and Ban Ki-Moon, of the increased danger of wars breaking out over this indispensable resource as scarcity takes hold. ‘Food wars’ (including so-called ‘fish wars’) have erupted on numerous occasions in Africa—where the Rwandan genocide and drawn-out bloody con- flicts in Darfur and the Horn of Africa are particular examples—but also in Central America and Asia (Messer et al. 1998). These fights are almost always over the fundamentals of human survival and tend to originate as civil conflicts, which then spiral out of control to embroil neighbour states and even the superpowers.

In the emerging era of resource instability, described in Chap. 3, the risk of war is liable to increase in proportion to the scarcity of essential resources, be they water, farm land, food itself, oil, gas or strategic minerals. The possibiity that some of these conflicts will involve the discharge of chemical, biological or nuclear weapons cannot be discounted. For example, in their Age of Consequences report, Kurt Campbell and colleagues at the US Center for Strategic and International Studies (CSIS) foreshadowed that with the famines and global disruption arising out of severe climate change (2.6 °C, in their sce- nario) “It is clear that even nuclear war cannot be excluded as a political consequence. Moreover, so-called “limited nuclear war” in any part of the world can escalate to a full-scale nuclear exchange among the big nuclear powers.” With catastrophic change of 5° or more, “The probability of conflict between two destabilized nuclear powers would seem high.” Furthermore “Armed conflict between nations over resources and even territory, such as the Nile and tributaries, is likely, and nuclear war is possible” (Campbell et al. 2007).

## Investment ADV

### Food D---2NC

#### The countries that matter will solve escalation with institutions.

Sarah **Cliffe 16**, Director of the Center on International Cooperation at New York University, 3/29/16, “Food Security, Nutrition, and Peace,” http://cic.nyu.edu/news\_commentary/food-security-nutrition-and-peace

However, current research does not yet indicate a clear link between climate change, food insecurity and conflict, except perhaps where rapidly deteriorating water availability cuts across existing tensions and weak institutions. But a series of interlinked problems – changing global patterns of consumption of energy and scarce resources, increasing demands for food imports (which draw on land, water, and energy inputs) can create pressure on fragile situations. Food security – and food prices – are a highly political issue, being a very immediate and visible source of popular welfare or popular uncertainty. But their link to conflict (and the wider links between climate change and conflict) is indirect rather than direct. What makes some countries more resilient than others? Many countries face food price or natural resource shocks without falling into conflict. Essentially, the two important factors in determining their resilience are: First, whether food insecurity is combined with other stresses – issues such as unemployment, but most fundamentally issues such as political exclusion or human rights abuses. We sometimes read nowadays that the 2006-2009 drought was a factor in the Syrian conflict, by driving rural-urban migration that caused societal stresses. It may of course have been one factor amongst many but it would be too simplistic to suggest that it was the primary driver of the Syrian conflict. Second, whether countries have strong enough institutions to fulfill a social compact with their citizens, providing help quickly to citizens affected by food insecurity, with or without international assistance. During the 2007-2008 food crisis, developing countries with low institutional strength experienced more food price protests than those with higher institutional strengths, and more than half these protests turned violent. This for example, is the difference in the events in Haiti versus those in Mexico or the Philippines where far greater institutional strength existed to deal with the food price shocks and protests did not spur deteriorating national security or widespread violence.

## Localization ADV

## Rural Development ADV

# 1NR

## T

### Overview---2NC

#### Federal courts have decided 4,278 rule of reason cases.

--WestLaw search for “adv: antitrust & (Rule +2 Reason)”

--this is the search used by Carrier 9 to capture all rule of reason cases, but without the date limiter because Carrier was updating an older article with post-1999 data

--FYI

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

I. METHODOLOGY

This survey is based on a Westlaw search of all federal cases decided between February 2, 1999, and May 5, 2009. I located the cases by searching broadly for all rule of reason cases: “DA(aft 2/2/1999) & antitrust & (Rule +2 Reason).”

Such a search is designed to pick up every instance in which a court applied rule of reason analysis. I assumed that any court conducting such analysis would at least mention the phrase “rule of reason.” This would appear to be a reasonable assumption given the importance of labels in antitrust. A court applying rule of reason analysis—as opposed to, say, per-se or quick-look analysis—should naturally refer to the concept. And I include “antitrust” as one of my search terms to restrict the universe of cases to antitrust cases, a helpful limitation given the prevalence of the phrase “rule of reason” in other settings such as environmental, patent, and criminal law.9

#### Defendants won 95% of those.

Sandeep Vaheesan 17, Regulations Counsel at the Consumer Financial Protections Bureau, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19, Iss. 3, pp 645-699

In adopting the rule of reason, the FTC practically guaranteed that it would be able to bring few, if any, Section 5 cases. The statistics demonstrate, in practice, that the rule of reason means that the plaintiff almost always loses. A leading study found that, between 2000 and 2009, defendants received a favorable court ruling in more than ninety-five percent of antitrust cases implicating the rule of reason.146

#### Nearly all of those are dismissed based on a substantive finding of ‘no anticompetitive effect’---reversing any one of those would be T! Insert this chart.

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

Table

Description automatically generated

#### Legally, the phrase ‘by at least expanding the scope’ must be given independent meaning---it cannot be renedered mere surplusage

Dr. Peter M. Tiersma 1, Professor of Law and Joseph Scott Fellow at Loyola Law School, Ph.D. from the University of California, San Diego and J.D. from the Boalt Hall School of Law, “A Message in a Bottle: Text, Autonomy, and Statutory Interpretation”, Tulane Law Review, 76 Tul. L. Rev. 431, December 2001, Lexis

A final example is the "surplusage" rule: that every word in a legal text is to be given effect and that nothing is to be considered surplusage. 113

[FOOTNOTE]

See 2A Norman J. Singer, Statutes and Statutory Construction 46.06, at 119-20 (5th rev. ed. 1992); see also Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963) ("[A] legislature is presumed to have no superfluous words."); W. Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 441 (Wash. Ct. App. 1980) ("Statutes are to be construed so as to give effect to every word.").

[END FOOTNOTE]

The fact of the matter is that a huge amount of ordinary language is needless verbiage, perhaps even verbal garbage, when it is closely examined. Many of the words we utter in everyday life are surplusage whose main purpose is to fill in awkward pauses in conversation, to recognize friends, engage in some sort of bonding, or simply to acknowledge the presence of someone else. This situation is different with autonomous texts, of course. Because words are chosen with care and almost always reviewed and edited once or twice, if not many more times, the surplusage rule makes sense - if at all - in autonomous texts.

### Violation---2NC

#### ‘Scope’ is whether antitrust law is available, not how it’s applied

Louis A. Bledsoe 19 III, Chief Business Judge on the North Carolina Business Court, “Rickenbaugh v. Power Home Solar, LLC”, North Carolina Superior Court, Mecklenburg County, 2019 NCBC LEXIS 109, 12/20/2019, Lexis

The question thus is whether the parties' agreement, through the incorporation of the AAA Construction Rules (and by that incorporation, the Supplementary Rules), that an arbitrator would decide the "scope" of the arbitration proceeding constitutes an agreement that the arbitrator would determine whether class arbitration is available in that proceeding. Giving the word "scope" its plain and ordinary meaning and considering it in the context [\*23] in which it is used in the AAA Rules, the Court concludes that it does. Other courts have agreed. See, e.g., JPay, 904 F.3d at 931 ("Formally, the question whether class arbitration is available will determine the scope of the arbitration proceedings."); Reed, 681 F.3d at 635-36 ("The parties' consent to the Supplementary Rules . . . constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration."); Burkett, 2014 U.S. Dist. LEXIS 148442, at \*22 (holding that a rule vesting an arbitrator with authority to decide the scope of his or her own jurisdiction includes "the issue of 'who decides' class arbitrability").

#### There’s a two-step process: first, ‘scope’, which determines whether claims can be heard, and second, the application of a particular legal standard once the question of scope has been decided. The plan only affects the latter.

Lise A. Barrera 96, J.D. from Wayne State University Law School, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Volume 42, Summer 1996, Lexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### The existence of current decisions on the merits is proof that the ‘scope’ of antitrust already exists---otherwise, they’d be dismissed for lack of jurisdiction

Michael J. Edney 1, J.D. Candidate at The University of Chicago, BA from the University of Notre Dame, “Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals after Ruhrgas”, University of Chicago Law Review, 68 U. Chi. L. Rev. 193, Winter 2001, Lexis

On the first reading, subject matter jurisdiction lacks dispositional priority over personal jurisdiction because both pertain to the power of the federal court to rule on the merits. 111 [FOOTNOTE] 111 See Ruhrgas, 526 US at 584 ("Personal jurisdiction, too, is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'"), quoting Employers Reinsurance Corp v Bryant, 299 US 374, 382 (1937). [END FOOTNOTE] In this sense, Ruhrgas is consistent with prior Court opinions requiring federal courts to decide questions of subject matter jurisdiction before proceeding to easier grounds on the merits which would also lead to dismissal. 112 [\*215]

This Comment's claim that subject matter jurisdiction is a necessary condition for federal court decisions to have an intersystem preclusive effect 113 is entirely consistent with this first "judicial power" rationale for Ruhrgas. A federal court has "jurisdiction to determine its own jurisdiction." 114 Here, a federal court involved in a Ruhrgas dismissal would have the jurisdiction to decide its own jurisdiction and nothing else, including the jurisdiction of a state court.

### Violation---1AC Cards

#### The plan merely clarifies the scope by determining that certain individual behaviors are not included within it---that’s not an expansion, which requires removing the exemption

Ethan P. Davis 19, Former Acting Assistant Attorney General, Partner at King & Spalding, Defendant’s Response to Plaintiff’s Motions for Judgment Upon the Agency Record, Trans Tex. Tire, LLC v. United States, United States International Trade Court, October 2019, LexisNexis

Zhejiang Jingu first argues that “Commerce’s reliance on the Petitions as the basis for ‘clarifying’ the scope with respect to chrome trailer wheels manufactured with the PVD process is not supported by substantial evidence because the Petitions unambiguously excluded trailer wheels if they were coated entirely with chrome without regard to manufacturing process.” Zhejiang Jingu Br. at 18-19. Contrary to Zhejiang Jingu’s claims, Commerce’s determination that PVD wheels were not included in the scope exclusion for chrome wheels constitutes a permissible clarification of the scope, rather than an expansion of the scope. See, e.g., Activated Carbon from China, 72 Fed. Reg. 9,508 (Dep’t of Commerce Mar. 2, 2007), and IDM at Cmt 1. Based on the totality of the record evidence, Commerce found that the petitioner’s “reference to ‘chrome’ in the scope exclusion language, initially proposed in the Petition, contemplated wheels coated by the process of chrome electroplating without consideration of the alternative PVD process.” Scope Memo at 10-11 (P.R. 602). Specifically, the information regarding chrome wheels in the Petition indicated that there are no United States producers of chrome wheels and that the manufacturing process differs as “{c}oating with chrome requires a different manufacturing process as {the} disc and rim need to be coated before being welded. This is due to the highly toxic nature of the chemicals and effects on the welds if applied after {the} disc and rim are welded together.” See Petition, Vol I – Narrative at I-13 (P.R. 47). Conversely, the information on the record demonstrates “that the PVD chrome coating process does not involve the same level of toxicity, and, as such, does not have such limitations, {because} it is applied in the United States (albeit not by wheel manufacturers) and PVD coatings are applied after assembly of the finished wheel over the weld.” Scope Memo at 11 (P.R. 602) (citing Clarification of Chrome Rebuttal at 3 (P.R. 534); Rebuttal to Dexstar Cmts – Part 1 at Exhibit 1 (P.R. 558)).

### AT: C/I---2NC

#### Our evidence is from the ABA Antitrust Section’s Committee on Exemptions and Immunities, which literally wrote an authoritative text called “Handbook on the Scope of Antitrust!” It’s the T evidence gold standard.

Layne E. Kruse 19, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

I. Current State of Exemptions and Immunities Committee

Even though we are a relatively small Committee, we address important policy issues that might not otherwise be addressed by the Antitrust Section. While we often work on issues alongside the Legislation Committee, our scope reaches judicial, as well as statutory exemptions. Our Committee is the one place within the Section that focuses on the concerns that may lead Congress or the courts to carve out certain conduct from traditional antitrust proscriptions.

In the 2017-2018 program year, we drafted and submitted four in-depth Section Comments at the request of the Council; produced six committee programs; published three newsletters; completed one ABA Handbook and are well underway on a second one; cosponsored two Spring Meeting Programs; co-sponsored one podcast; and participated in a Women in Leadership videoconference.

In the 2018-19 program year, we will chair an approved Spring Meeting Program; are cosponsoring a second approved Program; and we have been asked to revisit one of the Comments that we produced in the previous year. We are also working on committee programs, podcasts, and publications.

Perhaps most importantly, we are proud of our diversity achievements. In 2017-18, one of the E&I Co-Chairs was a woman for the first time, and our Young Lawyer Representative was LGBTQ for the first time. This year, we continue with a woman Co-Chair, a woman YLR, and we have added the first Vice Chair from the state of South Carolina on any Section Committee.

A. Scope of Charter: What is Role of Committee?

The Exemptions and Immunities Committee is chartered to address judicially created immunities from the antitrust laws, such as the Noerr-Pennington doctrine, state action, implied immunities, and filed rate doctrines, as well as statutory exemptions, including, among others, the McCarran-Ferguson and Capper-Volstead Acts. The Committee also addresses international issues, such as the Foreign Trade Antitrust Improvements Act (“FTAIA”), and other doctrines, such as antitrust preemption and primary jurisdiction, that affect the application and extent of the antitrust laws. The Committee strives to be the first and best resource for information on the fundamental question of defining the scope of the antitrust laws.

However, another key function of this Committee is an administrative role, rather than as a programming committee. This Committee serves as the de facto institutional memory before legislators and agencies for the Section's position on exemptions and immunities. The Section needs to have one place to look for what it has said in the past on exemption proposals, as well as commentary on DOJ or FTC attempts to narrow or expand exemptions. We believe this Committee has already served in that role and should serve in that role in the future. We want to improve on this function for the Section. We should have a Vice Chair designated as the point person to track prior comments and catalog the specific issues that have been raised. At the same time, we could develop a more standardized response. A related project would be a retrospective study of exemptions and their impact. We would join with International Task Force in its study of the impact of exemptions in other countries.

In short, the Committee should standardize the analysis of exemption proposals and reach out on the international front to catalog the differences in exemptions in different areas of the world.

B. Description of Reflective Evaluation of Membership Levels, Diversity, and Growth

The Committee currently has nearly 300 members, a 20% increase in membership in the last two years. Our members include government antitrust officials, private practitioners, corporate counsel and academics, and some practitioners based outside the United States. This variety of members ensures diverse views on the scope, applicability and appropriateness of antitrust exemptions and immunities.

Although other committees are larger, our Committee tends to include lawyers who specialize in specific antitrust issues. As most members of the Committee are members of other Section committees, the Committee may not be the primary committee that draws members into the Section. We believe that tracking the key issues surrounding the scope of the antitrust laws draws members of broader committees to also join E&I, and thus must continue to be a high priority for the Section.

#### They’re premier in the field

Jonathan B. Baker 19, Research Professor of Law at the American University Washington College of Law, “Market Power in an Era of Antitrust,” The Antitrust Paradigm: Restoring a Competitive Economy, 2019, pp. 11–31

Antitrust norms, especially the objection to collusive conduct, are consistently endorsed and upheld by enforcers and courts, regardless of political affiliation.12 These norms have spread throughout the world, particularly since the 1990s, with the aid of a growing global antitrust community. Annual attendance at the spring meeting of the American Bar Association’s Section of Antitrust Law—the premier gathering in the field—now exceeds 3,000, a threefold increase over the low ebb in the late 1980s. Several new academic journals dedicated to antitrust law, economics, and policy were launched in the last decade.

#### It must be a change in kind, not merely magnitude

Jeffrey S. Ross 18, Judge on the California Superior Court, San Francisco County, “People v. Lawson,” 2018 Cal. App. Unpub. LEXIS 8132, Lexis

To prove the aggravated kidnapping allegation, there must be nonconsensual movement of the victim that is not merely incidental to the commission of the underlying crime, and the movement must substantially increase the risk of harm over and above that necessarily present in the underlying crime itself. (Martinez, supra, 20 Cal.4th at pp. 232-233.) The requirements of substantial movement and substantial increase in risk are separate, but interrelated, and are determined by consideration of the totality of the circumstances in a qualitative rather than quantitative evaluation. (People v. Dominguez (2006) 39 Cal.4th 1141, 1152, 47 Cal. Rptr. 3d 575, 140 P.3d 866 (Dominguez).)

### AT: Predictability---AT: Not Exclusive

#### It’s purposefully designed to be a comprehensive and complete list of all limits on the scope of antitrust

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, Handbook on the Scope of Antitrust, ePub

PREFACE

Throughout its life, federal antitrust law has been subject to literally dozens of limitations. Specific statutory exemptions have existed since 1914 and currently about 30 of them remain in force. Antitrust is likewise limited by several distinct, voluminous bodies of caselaw that set out judicially created exemptions, to shield politics, labor, and a broad range of industries subject to other regulation. Several of these doctrines have become complex and uncertain. The scope of antitrust, in other words, now comprises a substantial body of law in its own right. This new Handbook on the Scope of Antitrust offers a first-of-its-kind, user-friendly solution in the form of a one-stop, black-letter-focused book of practical guidance on *all* exemptions and immunities issues, treating them in an integrated fashion as components of one body of law.

As far as we are aware, no such book has ever existed. As for the statutory exemptions, no single book has ever covered them all. Even the Antitrust Section’s major Monograph on the topic1 is not well suited to most practitioners’ needs, and was not so intended. It covers only a sample of the exemptions that exist—while it mentions them all, it gives comprehensive treatment to only nine now in force—and its purpose was to assess empirical and theoretical evidence concerning their effects, not to aid practitioners. As to the caselaw doctrines, several books exist, some are practitioner-focused, and a few are recent (notably the Section’s Noerr Handbook and State Action Practice Manual). But none of them is comprehensive or integrated in any way, and there appear to be no recent practitioner works on important topics like implied repeal, the other regulated industries doctrines, or the labor exemption.

### AT: Topic Coherence

#### Here’s a comprehensive list---we’re inserting it.

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

Chapter II

The Domestic Scope of Antitrust, Unadulterated ........................ 13

A. The Scope of Federal Antitrust Unadulterated: The “Commerce” Requirement, the Meaning of “Persons,” and the Complicated Reach of the Clayton and FTC Acts ......................................................... 13

1. “Trade or Commerce” in General, Its Exclusion of Charity and Gratuity, and the Baseball Exemption ...................................................... 13

2. “Persons” ....................................................................... 17

3. The Reach of Clayton Act Section 7: Limitation on “Persons” Who Acquire “Assets” ............................ 21

4. The Jurisdiction of the Federal Trade Commission ................................................................... 23

5. Clayton Act Sections 3 and 8, and the RobinsonPatman Act .................................................................... 25

Chapter III

The International Scope of U.S. Antitrust ................................... 27

A. Political Compromises Underlying the International Scope of Antitrust ................................................................ 27

B. The Extraterritorial Reach of U.S. Antitrust Law, in General ............................................................................. 30

1. The Traditional “Effects Test” ...................................... 30

2. Codification of Extraterritorial Scope in FTAIA .......... 32

a. In General ............................................................... 32

b. Import Trade or Commerce .................................... 34

c. Foreign, Non-Import Commerce with “Direct, Substantial, and Reasonably Foreseeable” Domestic Effects ............................... 36

d. Plaintiff’s Claim Must Arise from a Domestic U.S. Harm ............................................... 38

C. Limitations Respecting Foreign Sovereignty and Foreign Relations Policy ...................................................... 40

1. Comity ........................................................................... 40

2. Sovereign Immunity ...................................................... 42

3. Act of State .................................................................... 43

4. Foreign Sovereign Compulsion ..................................... 46

D. Statutory Protection for U.S. Exports .................................. 47

1. Webb-Pomerene Act ..................................................... 47

2. The Export Trading Company Act of 1982 ................... 49

3. FTAIA’s Export Protection ........................................... 51

E. Exon-Florio: National Security Review of Certain International Acquisitions ....................................... 51

PART TWO

ANTITRUST AND THE CONSTITUTION

Chapter IV

Antitrust and the Constitution ....................................................... 57

A. Antitrust, Expression, and Free Association ........................ 58

1. Private Speech as a Component of Anticompetitive Conduct ............................................... 59

2. Political Activity and Public Speech .............................. 60

3. Association ..................................................................... 70

B. Antitrust and the Press .......................................................... 71

C. Antitrust and Religion ........................................................... 73

PART THREE

ANTITRUST AND POLITICS

Chapter V

The Noerr-Pennington Doctrine or “Petitioning” Immunity ..... 77

A. The Key Cases ..................................................................... 77

B. The Basis of the Noerr-Pennington Doctrine: Statutory Construction Versus the First Amendment ......................................................................... 80

C. What Is Petitioning? ............................................................ 84

1. In General ..................................................................... 84

2. Antitrust Violations Themselves Are Not “Petitioning” .................................................... 87

3. The “Sham” Exception ................................................. 88

4. The “Misrepresentation” or Corruption Exception ...................................................................... 91

5. The “Commercial” Exception ...................................... 94

6. Ministerial Government Acts ....................................... 94

D. Who May Be Petitioned ...................................................... 96

1. Quasi-Governmental Entities ....................................... 96

2. Petitioning of Foreign Governments ............................ 98

3. Foreign Parties Petitioning the U.S. Government .................................................................. 99

Chapter VI

The State Action Doctrine and Litigation Against State and Local Governments ........................................................................ 101

A. The State Action Doctrine ................................................... 101

1. Origins and Development ............................................. 103

2. Persons and Entities Entitled to Immunity ................... 106

a. The “Ipso Facto” Immunity of the State Qua State ............................................ 106

b. Cities, Counties, and Municipalities ....................... 107

c. Executive Departments, Agencies, and Special Authorities ........................................... 107

3. Issues in the Midcal Elements ....................................... 110

a. The Clear Articulation Requirement ....................... 110

b. The Active Supervision Requirement ..................... 114

4. Exceptions to State Action Immunity ............................ 117

a. Exceptions That Have Been Rejected: Conspiracy, Malicious Motives, and Corruption ................................................................ 117

b. The Uncertain Viability of the Market Participant Exception ............................................... 119

B. The Local Government Antitrust Act ................................... 120

1. In General ....................................................................... 121

2. Entities and Persons Entitled to Protection ..................... 122

C. Constitutional Aspects of Antitrust Litigation Against State and Local Government ................................... 125

1. Sovereign Immunity Issues: The Eleventh Amendment and the Rule of Ex Parte Young .............................................................................. 126

2. Antitrust and the Immunity for Public Officials .......................................................................... 129

3. Facial Challenge to Anticompetitive State Laws: Sherman Act “Preemption” and the “Hybrid Restraints” Concept .......................................... 132

PART FOUR

DOCTRINES OF IMPLICIT REPEAL

Chapter VII

The Doctrine of Implied Repeal and the Federal Instrumentality Rule ................................................................................................... 137

A. Implied Repeal and the Evolution of the Traditional Standard: Repeals by Implication Were Disfavored ............. 138

B. Credit Suisse .......................................................................... 144

C. Lower Court Developments Since Credit Suisse .................. 146

1. The “Generality” Gloss of Short Sale ............................. 146

2. Other Lower Court Developments .................................. 147

D. The Federal Instrumentality Rule .......................................... 150

Chapter VIII

The Keogh or “Filed-Rate” Doctrine .............................................. 153

A. The Filed-Rate Doctrine in General....................................... 154

B. Doctrinal Details .................................................................... 158

1. Scope of the Doctrine ...................................................... 158

2. The Filed-Rate Doctrine and Deregulation ..................... 164

3. Exceptions ....................................................................... 166

C. Future Prospects .................................................................... 170

Chapter IX

The Doctrine Of Primary Jurisdiction ........................................... 173

A. Origin and Contours of Primary Jurisdiction Doctrine ................................................................................. 174

B. Primary Jurisdiction in the Antitrust Context ........................ 178

C. Determining Whether Primary Jurisdiction Doctrine Applies .................................................................... 181

1. Identifying Appropriate Issues for Reference to Agency ........................................................................ 181

2. Determining Whether Agency Has Jurisdiction ...................................................................... 183

3. Determining Whether Referral Is Warranted ........................................................................ 184

D. Procedures Applicable to Primary Jurisdiction Referral .................................................................................. 187

E. Review of Decision to Invoke Primary Jurisdiction ............................................................................. 189

PART FIVE

ISSUES OF SECTOR-WIDE APPLICABILITY

Chapter X

Antitrust and Organized Labor ...................................................... 193

A. Historical Background ........................................................... 194

B. Current Law ........................................................................... 196

1. The “Statutory” Exemption ............................................. 196

2. The “Nonstatutory” Exemption ....................................... 200

Chapter XI

Antitrust and Agriculture ................................................................ 207

A. The Policy Problem and Evolution of the Statutory Framework ............................................................. 208

B. The Cooperatives Exemption: Antitrust Issues under Capper-Volstead and the Fishermen’s Collective Marketing Act ...................................................... 214

1. Applicability ................................................................... 214

2. Exempt and Non-Exempt Conduct ................................. 219

3. The Regulatory Roles of the Secretaries of Agriculture and Commerce ........................................ 222

C. The Agricultural Marketing Agreement Act ......................... 224

1. Orders and Antitrust Liability ......................................... 227

a. Filed Rates ................................................................ 228

b. Conduct Issues Associated with Orders ................... 228

2. The Hog-Cholera Serum Exemption ............................... 229

Chapter XII

Innovation and Entrepreneurship .................................................. 231

A. The National Cooperative Research and Production Act and the Standards Development Organization Advancement Act ............................................ 232

1. Applicability ................................................................... 235

2. Liability Standard, Awards of Costs and Fees, and Limited Damages ..................................................... 237

B. The Small Business Joint Venture Exemption ...................... 238

Chapter XIII

Antitrust and the Media .................................................................. 241

A. Newspaper Production Joint Ventures .................................. 243

1. Special Economic Problems in the Newspaper Industry ........................................................ 244

2. The Law of the NPA ....................................................... 246

a. Failing Newspaper Test ............................................ 247

b. “Effectuate the Policy and Purpose” of the Act ................................................................... 250

c. Challenges to Completed JOAs or Conduct by JOA Members ........................................ 250

3. Reform Efforts ................................................................. 251

B. FCC Merger Review and Broadcast Ownership Rules ...................................................................................... 252

1. Telecommunications Mergers ........................................ 252

2. Broadcast Ownership Rules ............................................ 254

C. Television Programming Collaboration ................................. 256

Chapter XIV

Antitrust and Sports ......................................................................... 259

A. Antitrust and Sports in General .............................................. 259

B. The Baseball Exemption and the Curt Flood Act .......................................................................................... 264

1. Historical Development of the Baseball Exemption ........................................................................ 264

2. The Curt Flood Act .......................................................... 265

3. The Scope of the Modern Baseball Exemption ........................................................................ 266

C. Statutory Exemptions for Sports ............................................ 267

1. The Sports Broadcasting Act of 1961 .............................. 268

2. The NFL-AFL Merger ..................................................... 270

3. The Olympic and Amateur Sports Act ............................ 271

D. The Labor Exemption In Sports ............................................. 272

PART SIX

REGULATED INDUSTRIES AND TARGETED EXEMPTIONS

Chapter XV

Statutory Exemptions for Regulated Industries ........................... 275

A. Insurance and the McCarran-Ferguson Act .......................... 276

1. Elements of the Exemption ............................................ 277

a. The Business of Insurance ....................................... 277

(1) Rate Setting ....................................................... 278

(2) Policy Standardization ...................................... 279

(3) Joint Underwriting Arrangements .................... 279

(4) Products Without Insurance Risk ...................... 280

(5) Non-Indemnity Health Insurance ...................... 281

(6) Relationships Between Insurers and Third-Party Vendors ......................................... 282

(7) Mergers & Acquisitions .................................... 283

(8) Marketing, Distribution, & Claims ................... 284

b. Regulated by State Law .......................................... 285

c. Boycott, Coercion, or Intimidation ......................... 288

2. Reforming the McCarran-Ferguson Exemption ...................................................................... 290

B. Banking and the Financial Sector ......................................... 291

1. Banking Law as a Competition Policy ........................... 292

2. The Current Applicability of Antitrust to Banking .......................................................................... 295

a. In General ................................................................ 295

b. The Robinson-Patman, Clayton, and FTC Acts .......................................................... 297

3. Bank Merger Review ..................................................... 298

a. In General ................................................................ 298

b. Resolution of Failing, Systemically Significant Firms ..................................................... 303

4. Alternative, Bank-Specific Competition Rules ............................................................................... 304

a. Objective Size and Concentration Limits ....................................................................... 305

b. Bank-Specific Conduct Rules .................................. 305

c. Affirmative Deconcentration: BHCA Divestiture Orders and the Kanjorski Amendment ............................................................ 306

5. Credit Unions ................................................................ 307

C. Air Transport Exemptions ................................................... 308

1. Regulation, Deregulation, and the Current Scope of Antitrust in General .......................... 308

2. The Exemptions That Remain ...................................... 310

a. Cooperative Agreements for International Markets ............................................. 311

(1) Alliance Agreements ....................................... 312

(2) Immunity for International Tariff Conferences ........................................... 314

3. Competition Regulation by the Department of Transportation ........................................................... 315

a. Unfair Competition ................................................. 316

b. Review of Joint Ventures ........................................ 317

D. Ocean Shipping .................................................................... 317

1. Legal Background ......................................................... 321

2. Antitrust Immunity ........................................................ 324

3. Ongoing Deregulatory Efforts ....................................... 326

E. Railroad Exemptions ............................................................ 328

1. Historical Background ................................................... 328

2. The Authority of the STB and the Applicability of Antitrust Laws in General ........................................................................... 330

3. Applicability of Antitrust Laws to Specific Practices ........................................................... 332

a. Rate-Related Antitrust Exemptions ......................... 332

b. Transactional Antitrust Exemptions ........................ 335

(1) Mergers & Acquisitions .................................... 335

(2) Pooling Agreements .......................................... 339

(3) Interlocking Directorates ................................... 339

(4) Rail Reorganization Meetings ........................... 339

(5) Other STB Powers with Competitive Consequences: Competitive Access, Market Entry, and Market Exit ................................................ 340

4. The Future of Railroad Antitrust Exemptions ............... 341

F. Collective Agreements among Motor Carriers ................... 342

1. Price Fixing .................................................................... 343

2. Interstate Bus Mergers ................................................... 344

Chapter XVI

Targeted Statutory Exemptions And Reversals Of Disfavored Judicial Decisions ............................................................................. 347

A. The Natural Gas Policy Act .................................................. 348

B. Soft Drink Interbrand Competition Act ................................ 349

C. Health Care Quality Improvement Act ................................. 353

D. Need-Based Educational Aid Act ......................................... 355

E. Charitable Gift Annuity Antitrust Relief Act ....................... 356

F. Graduate Medical Matching Program Exception .............................................................................. 358

PART SEVEN PROCEDURAL ISSUES

Chapter XVII

Certain Procedural Issues Common to Scope Matters ............... 363

A. Statutory Scope Limitations Are Presumed Not to Be Jurisdictional ......................................................... 363

1. The Significance of the Distinction ............................... 363

2. The Presumption Against Jurisdictional Limits ............................................................................. 364

B. Rulings on Exemptions, Immunities, and Other Scope Issues Are Ordinarily Not Subject to Interlocutory Review ............................................................ 365