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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline cascades---nuclear war

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

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T-No Courts

#### Courts cannot ‘expand’ antitrust law

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

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

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

#### Vote neg:

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

#### Ground—mechanism dodges DA links

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Torts CP

#### The United States federal government should prohibit conduct that falls under the Noerr-Pennington antitrust immunity as tortious interference.

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

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

Distinguish CP

#### The United States federal government should prohibit patent assertions by the private sector that lack any reasonable chance of success, restrict citizen petitions for drug approvals at the Food and Drug Administration, and should not substantially increase its prohibitions on anticompetitive lobbying by the private sector.

#### The CP solves advantage 1 by ending sham patent assertions and advantage 3 by restricting citizen petitions but doesn’t affect political activity

Daniel B. Rice 19, Associate at the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, and Jack Boeglin, Associate at Covington & Burling LLP, “Confining Cases To Their Facts”, Virginia Law Review, June 2019, 105 Va. L. Rev. 865, Lexis

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of "confining a case to its facts," courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, "correct" principle. 5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined. 6 Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

[\*868] How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction. 8 Confining eases off this brake by enabling certain reasonable expectations - those formed in reliance on the particular facts of the confined case - to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so - one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining, 9 even though confining eviscerates everything a case stands for except its precise result. 10 Similarly, although each federal [\*869] court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining. 11 By labeling these deviations from precedent "confining," in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court's prohibition on "prospective overruling" - i.e., continuing to treat a case as good law only with respect to conduct predating its overruling. 12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court's doctrinal course-corrections. 13 The Court's retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations. 14 But this is precisely what happens with confining. 15 This discrepancy - oddly - appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: "Supreme Court Overrules Smith v. Jones" or "Supreme Court Confines Smith v. Jones to Its Facts." Confining's relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A [\*870] confining judge can say "with a straight face, "I didn't vote to overrule it. I simply limited the earlier decision to its facts.'" 16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable - and strangely underexplored - threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public's ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority. 17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect - even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as "good law" in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself. 18

### 1NC

T-Per Se

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

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

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

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

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

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

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

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

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

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

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

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

## Lobbying ADV

### Lobbying---1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Why Africa Matters

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

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

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

The Challenges for U.S. Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Democracy makes disease control impossible

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

Introduction

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

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

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

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

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

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

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

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

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

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

## Innovation ADV

### Innovation---1NC

#### The courts just tightened the sham litigation standard.

Nisha Gera & David Shotlander 21, Associate at Haug Partners LLP, J.D. from the University of New Hampshire Franklin Pierce School of Law; Antitrust Partner at Haug Partners LLP, J.D. from the Antonin Scalia Law School at George Mason University, “The Sham Litigation Exception after AbbVie - Is the Subjective Element a Sham?”, JD Supra, 10-20-2021, accessed via Lexis

Aftermath: Under AbbVie, there is no requirement to prove subjective intent to restrain competition or bad faith separate from the filing of an objectively baseless Hatch-Waxman lawsuit. The sham litigation exception has always been extremely “narrow.” Precedent dictates that the subjective component of Noerr-Pennington immunity protects litigation that is not motivated by an improper purpose, even when the lawsuit is not “reasonably based.”37

The truncated analysis of the two prong test could be partly attributed to the fact that because petitioners invoked attorney-client privilege to shield communications involving their in-house counsel, there was “no direct evidence” of petitioners’ motives, which will almost always be the case. Thus the District Court focused on “circumstantial evidence” such as in-house counsel’s experience and awareness of the prosecution history of the patent etc. to find that any alternative explanation for filing the lawsuit could not possibly exist. Therefore, implicit in the Third Circuit’s ruling is the notion that if an antitrust defendant in a Hatch-Waxman litigation invokes privilege, circumstantial evidence inherent to the nature of the litigation itself might be sufficient to satisfy the second prong of the sham litigation analysis. Moreover, Third Circuit’s approach of finding subjective intent from a suit’s objective lack of merit through a “syllogism” rather than independently approaching the two prongs invariably shifts the burden of proof on the antitrust defendant to show that it subjectively expected the lawsuit to succeed.

If a brand company has a competitively neutral motivation for bringing a lawsuit (which does not relate to the merits of the lawsuit), that company may improve its antitrust position by documenting that motivation in non-privileged documents, but the nature of Hatch-Waxman litigation creates very little space to prove a pro-competitive motivation to bring a baseless lawsuit against an ANDA filer, and AbbVie reinforces that challenge by putting the burden on the brand.

Incentives to innovative still exist when the fate of humanity is on the line.

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

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

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

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

#### The patent system is resilient.

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

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

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

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

#### But not key to innovation.

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

The resilience of patent system data may have more to do with general macroeconomic trends than with changes in the patent system. Patenting may be related to broader trends in economic growth. Economic growth is driven by productivity, and productivity is frequently driven by innovation, so it may make sense that an increase in invention (and therefore an increase in patenting) leads to an increase in economic growth. 15 3 Others have suggested that patent-litigation metrics may be countercyclical: patent owners don't file lawsuits or seek licensing revenue when the size of the pie is growing, but when growth lags and they need additional sources of revenue. 154

Here too, however, the relationships are likely a lot more complex. Because it takes time between invention and patent filing, and years longer between filing and issuance, we would expect some lag in any effect. In any event, the relationship between patents, industry, and innovation is a complex one.155 The relationship between innovation and productivity may also be problematic. 156 So patenting may sometimes drive growth, but it may also interfere with it in some circumstances. 15 7 Further, there is some reason to think that companies are more likely to spend the money on patents when they are doing well, so there may be a causal relationship running in the other direction between growth and patenting.1 58 And a recent study suggests that patent litigation is neither entirely cyclical nor entirely countercyclical. 15 9

In any event, there doesn't seem to be any obvious unidirectional relationship between patenting and growth. Figure 14 shows the growth rate in patenting since 1960.160 Between 1960 and 1980, patenting was roughly flat. 16 1 Starting in the early 1980s, it began to rise at an annualized rate of about 4.4%. 162 By contrast, Figure 15 shows that inflation-adjusted GDP growth since 1960 runs at an annualized rate of 3.4%, at least until the 2007 recession, when it drops to 2.3% per year. 16 3 The increase in patenting doesn't seem to have any effect on economic growth. Nor does economic growth seem to explain the increase in patenting.

Perhaps patent trends are related to a more direct macroeconomic measure-Research and Development (R&D) spending. In reality, however, that doesn't seem to be entirely true either. R&D has been increasing since the 1950s, though with variations in the rate of increase. 166 The growth rate of R&D was highest in the late 1970s and early 1980s, when patents were weak and the number of patents was not growing dramatically, and in the late 1990s, when patents were strong and the number of patents was growing dramatically. 16 7 R&D expenditure leveled off in the early 1990s, when patents were getting stronger and the number of patents was growing, and again in the early 2000s, when patents were strong and the number of patents was growing.1 6 8 There seems to be a relationship between R&D expenditure and the economy-R&D expenditure leveled off during recessions "-but not a clear relationship to substantive patent law or even to patenting behavior.

To complicate the analysis, we might distinguish between public and private R&D spending, as Figure 16 does. (It's not clear we should; public R&D leads to patenting by universities.) 17 0 But doing that doesn't change the result. Inflation-adjusted-government-R&D spending has been roughly constant since the mid-1960s, so the variance is driven almost entirely by private-industry-R&D expenditures. 17 1

A second complication is that we might care about R&D spending net of other intrinsic economic growth. (It's not clear that we should; none of our patent measures were GDP adjusted.) Figure 17 shows national R&D expenditures as a percentage of GDP.1 73 This does seem to track our assessment of patent merits in part. R&D expenditure as a percentage of GDP declined in the 1970s, when patents were weak, and rose in the 1980s as patents got stronger.1 74 But the effect seems driven mostly by a decline in government, not private, expenditure.17 5 And private expenditure as a percentage of R&D continued to grow through the 2000s and into the 201 Os, even as the substantive strength of patent law ebbed and flowed. 176

A final complication is that R&D shouldn't translate immediately into patents. R&D expenditure may only generate inventions some years later, patent applications later still, and issued patents several years later after that. 78 So we might want to shift our curves to see if an investment now in R&D results in patents five or ten years later. Even doing so, however, doesn't seem to align R&D expenditure and the number of patents. On this theory we would have expected to see patent applications drop in the early 1980s, just when they begin to rise. And the flattening of patent grants in the 2000s doesn't seem to map to any lagged change in R&D expenditure.

Additional evidence that R&D expenditure is not a complete explanation for the resilience of the patent system comes from Colleen Chien, who finds that the number of patents per R&D dollar not only varies by industry but has changed substantially over time, dropping from one patent per $5 million in R&D expenditure in the IT industry to one patent per $1 million in R&D expenditure. 179 By contrast, pharmaceutical patents per R&D dollar fluctuate but end up much where they started three decades before. 10

Economic trends in general, and R&D expenditures in particular, certainly should affect the use of the patent system. And I'm sure they do to some extent. But they don't seem to explain the trends we see in patent applications or patent grants. Nor do they tell a clean story about the rise in patent litigation.' 82

US isn’t key to innovation---China, Korea, Japan, Europe all solve.

#### Innovation is high.

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

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

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

#### No emerging tech impact

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

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

#### Asteroid or comet risks are vanishingly low

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 71

But what about *our* century? By analyzing the exact trajectories of the known asteroids, astronomers can determine whether there is any real chance that they will hit the Earth within the next hundred years. At the time of writing, 95 percent of asteroids bigger than one kilometer have been found and none have an appreciable chance of collision with the Earth. So almost all the remaining risk is from the 5 percent we haven’t yet tracked.15 We have even better news with asteroids greater than ten kilometers, as astronomers are almost certain that they have found them all, and that they pose no immediate danger.16 Taking this trajectory information into account, the probability of an Earth-impact in the next hundred years falls to about one in 120,000 for asteroids between one and ten kilometers, and about one in 150 million for those above ten kilometers.17

These probabilities are immensely reassuring. While there is still real risk, it has been studied in great detail and shown to be vanishingly low. It is a famous risk, but a small one. If humanity were to go extinct in the next century, it would almost certainly be from something other than an asteroid or comet impact.

#### Nuclear deflection fails

Andrew Masterson 19, Editor of Cosmos Magazine, Citing a Research Paper by El Mir, Funded by NASA to Scale Up Previous Asteroid Collision Models, 3/6/2019, “Think We Can Nuke Away An Incoming Asteroid? Think Again”, Cosmos Magazine, https://cosmosmagazine.com/space/think-we-can-nuke-away-an-incoming-asteroid-think-again

Asteroids are much harder to destroy than previously thought, new modelling shows.

The research, published in the journal Icarus, shows that an asteroid damaged in a collision – by another asteroid, for instance, or a nuclear missile fired at it in the blind hope that doing so will prevent it from smacking into the planet with catastrophic consequences – will substantially reconstruct itself because of the strong gravitational pull of its still-intact core.

The modelling, funded by NASA, substantially updates and contradicts earlier research that showed that a collision between a small asteroid and a large one would completely demolish the latter, the destruction facilitated by the rapid transit of cracks right through it.

The new study, conducted by Charles El Mir and KT Ramesh, of Johns Hopkins University, US, and Derek Richardson, of the University of Maryland, US, applies more fine-grain analysis and arrives at a distinctly different conclusion.

At issue, fundamentally, is the way rocks react to energetic impacts. This process is well understood at what can be called “laboratory scale”, wherein real-world and simulated experiments use rocks roughly the size of a human fist.

But asteroids of a magnitude big enough to worry NASA scientists – or tempt would-be space-miners – are considerably larger than that. They might, indeed, be roughly the size of Berlin.

Destroying rocks of that magnitude is not merely a matter of scaling up the explosive force to be deployed. At issue, El Mir and colleagues report, is the speed and strength at which cracks propagate.

Using an analytical protocol called the Tonge–Ramesh model, the researchers re-ran the data from the earlier research – which simulated an asteroid a kilometre in diameter striking another 25-kilometres wide at an impact velocity of five kilometres a second – and the news wasn’t good.

“Our findings, however, show that asteroids are stronger than we used to think and require more energy to be completely shattered.”

The modelling divided the impact into two phases. In the first, in the fractions of a second after the smaller bolide smacked into it, the larger one developed millions of cracks, which travelled through the rock and caused parts of the asteroid, the researchers say, to ripple like sand. An impact crater formed.

However, the force was not enough to completely destroy the target – in sharp contrast to earlier results that did not account for the behaviour of the cracks. Instead, its large, dense, damaged core remained.

The previous research had factored in a level of gravitational attraction between the asteroid fragments, and thus a degree of continued proximity between them, but had basically determined they would be to a degree separated from each other, and the debris thus reminiscent of a flying rubble pile.

The new research begs to differ. The large, still intact core is in itself a scarily big thing, and one that exerts enough gravitational force to bind many of the exploded fragments back to it.

#### Deflection causes fragmentation---that’s worse

Adam Abelkop 13, JD from the University of Iowa, Indiana Public Policy PhD Candidate, “The Policy Trajectory of United States Asteroid Deflection Planning,” Timely Interventions, 1.1, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.469.5261&rep=rep1&type=pdf

The second and deadlier issue with nuclear deflection is that it risks fragmenting the NEO without changing the fragments’ trajectory toward Earth. Dr. Ed Lu, president of the B612 Foundation suggests that this would “[turn] a speeding bullet into a shotgun blast” (Near Earth objects [NEOs]: Hearings before the Subcommittee on Science, Technology and Space of the Senate Commerce Committee, 2004). Many scientists believe that being hit by numerous smaller fragments would be worse than one large asteroid or comet, and new scientific evidence suggests that even if the NEO was turned into dust, the high concentration of particles could still impact Earth with significant force (Nemchinov, et al., 2008, p. 59). The NASA study downplayed this risk in part because it focused on large solid NEOs, despite the fact that the vast majority of NEOs are either comprised of porous rock or small rocks held together by weak gravitational pull (rubble piles). Rubble piles and porous NEOs face a much higher risk of fragmentation from a nuclear blast. Perhaps the most pernicious effect of fragmentation is that it renders non-nuclear means of deflection useless, as Chapman argues, “Once you disrupt a comet or asteroid into many different chunks, you've lost all ability to affect what happens next” (Chapman, 2003). Given the possibility that fragmentation could greatly diminish the success rate of other means of deflection, NASA’s choice of nuclear deflection as the first and only line of defense was short-sighted.

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

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

Nonetheless, we think the focus on patent trolls obscures a more complex set of challenges confronting the patent system. In this Article, we make three points about the problems commonly associated with trolls. First, patent trolls are not a unitary phenomenon. We see at least three different troll business models developing, and those models have different effects

[marked]

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

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

## Citizen Petitioning ADV

### Citizen Petitioning---1NC

#### Exceptions to Noerr solve.

Saami Zain 14, Assistant Attorney General in the Antitrust Bureau in the Office of the New York State Attorney General, LL.M. in Trade Regulation from the New York University School of Law, “Antitrust Liability for Maintaining Baseless Litigation,” Santa Clara Law Review, Vol. 54, No. 3, 08-21-2014, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2783&context=lawreview

Antitrust immunity granted by Noerr-Pennington is not without limits, however. Rather, antitrust attempts to deal with the tension caused by allowing bona fide litigation and yet still curbing abusing, anticompetitive lawsuits by denying any immunity to frivolous litigation. Accordingly, antitrust immunity is not granted to litigation that is a mere “sham,” i.e., “encompass[ing] situations in which [a] person use[s] the government process—as opposed to the outcome of that process—as an anticompetitive weapon.”35 Litigation that is both objectively baseless “in the sense that no reasonable litigant could realistically expect success on the merits,” and is subjectively improper, i.e., “conceals ‘an attempt to interfere directly with the business relationships of a competitor,’” is thus not afforded antitrust immunity.36 However, proving that litigation is a “sham” under NoerrPennington merely strips a litigant of antitrust immunity; it does not impose liability by itself.37 Rather, “even a plaintiff who defeats the defendant’s claim to Noerr immunity by demonstrating both the objective and subjective components of a sham must still prove a substantive antitrust violation.”38

#### Pharma mergers are accelerating innovation

Kinjel Shah 1-18, Quality Control Analyst at Zacks Research Pvt. Ltd, Chartered Accountant in Commerce from The Institute of Chartered Accountants of India, B.Com in Commerce from Bhavanipur College, “Zacks Industry Outlook Highlights: Roche, Pfizer, AbbVie and Merck”, 1/18/2022, Lexis

The drug and biotech sectors remained in the limelight in 2021. The pharma, biotech and medical devices companies played a vital role in 2021, by bringing the pandemic slightly under control through the development of vaccines, diagnostic tests and medicines/antibodies to treat COVID-19. The vaccines allowed global economies to recover to some extent.

Just when things looked somewhat under control, the highly contagious Omicron variant of the virus struck toward the end of 2021, throwing the world into disarray again. Infection rates are rising to record highs globally and Omicron is already doing economic damage.

However, Omicron is expected to pass quickly and growth is expected to rebound in the second quarter of the year. It looks like drug/biotech and medical device companies will continue to remain in the spotlight in 2022. Among the large drugmakers Roche, Pfizer, AbbVie and Merck are worth retaining in your portfolio. Industry Description The Zacks Large Cap Pharmaceuticals[6] industry comprises some of the largest global companies that develop multi-million dollar drugs for a broad range of therapeutic areas such as neuroscience, cardiovascular and metabolism, rare diseases, immunology, and oncology. Some of these companies also make vaccines, animal health, medical devices, and consumer-related healthcare products.

All these players invest millions of dollars into their product pipelines and line extensions of their already marketed drugs. Continuous innovation is a defining characteristic of pharma companies and these large drugmakers are constantly investing in drug development and the discovery of new medicines. Regular mergers and acquisitions and collaboration deals are another key feature of large drug companies. What's Shaping the Future of the Large-Cap Pharma Industry? Innovation and Pipeline Success: For big drugmakers, innovation in their pipeline is a competitive necessity and key to top-line growth. Pharma companies are constantly striving to ramp up innovation and spending a significantly high portion of their revenues on R&D. Successful innovation and product line extensions in important therapeutic areas and strong clinical study results may act as important catalysts for these stocks.

Aggressive M&A & Collaboration Activity: The sector is characterized by aggressive M&A activity. Given that it takes several years and millions of dollars to develop new therapeutics from scratch, large pharmaceutical companies sitting on huge piles of cash regularly buy innovative small/mid-cap biotech companies to build out their pipelines.

Also, the imperfect sales of mature drugs, dwindling in-house pipelines, government scrutiny of drug prices, and the emergence of big tech firms like Apple and Google in the healthcare industry whet the M&A appetite of large drugmakers. In 2021, M&A activity in pharma and biotech recovered after a dull 2020 when deal-making was hurt by pandemic-led disruption. Though deals were not as plentiful as 2018 and 2019 and there were no mega-mergers, most of the M&A deals of 2021 were valued at more than $1 billion.

It is expected that M&A activity will pick up significantly in 2022. The fast-growing and lucrative markets such as oncology and cell and gene therapy are likely to remain focus areas for M&A activities. Also, collaborations and partnerships with smaller companies are in full swing.

#### The plan 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?

#### The thesis of the advantage is wrong.

Scott Lassman 17. Partner with Goodwin LLP in Washington, D.C., 11/20/17. “Criticism Of FDA Citizen Petitions Is Often Misguided.” https://www.goodwinlaw.com/-/media/files/publications/law360-criticism-of-fda-citizen-petitions-is-often.pdf?la=en

First, and most significantly, the critics fail to acknowledge that, as a legal matter, the filing of a citizen petition cannot delay the approval of a competing product. The law was amended in 2007 to prohibit the FDA from delaying approval of a pending abbreviated new drug application (ANDA) or 505(b)(2) application during its review of a citizen petition (the law recently was amended to afford this same protection to biosimilar applications).[7] The only exception is if the FDA determines that a delay “is necessary to protect the public health.”[8] Accordingly, except in very limited circumstances, the FDA’s review of a citizen petition and its review of a generic drug application are required to be completely separate processes that proceed down separate tracks with distinct requirements and timelines.

Critics, however, either ignore or do not understand this critical aspect of the law. For example, some have argued that Congress should address alleged delays caused by petitions by creating a “parallel timing track for ANDA approval and citizen petition review.”[9] But the law already does this and has done so since 2007.

Second, critics overlook or ignore the FDA’s own data, which demonstrates that the 2007 changes to the law are working as intended and that the FDA almost never delays approval of an ANDA or 505(b)(2) application simply because of the filing of a citizen petition. According to the FDA’s latest annual report on drug-related citizen petitions, of the 537 ANDAs and 505(b)(2) applications approved in fiscal year 2015, less than 1 percent were delayed because of a citizen petition (2/537).[10] This is consistent with other fiscal years going back to fiscal year 2008 (10/4008). Moreover, for the eight years spanning fiscal years 2008 through 2015, only 9 of the 175 drug-related petitions — 5 percent — resulted in the delay of a generic drug approval.

Although delays are rare, they do occur. Such delays, however, typically are short and, as required by the law, are justified by public health concerns. Under the 2007 law, the FDA can delay the approval of an ANDA or 505(b)(2) application because of a petition only if it determines that a delay is “necessary to protect the public health.”[11] This exception recognizes that the FDA should not approve a competing drug if there are outstanding scientific or medical issues that implicate patient welfare and safety. Since fiscal year 2008, the FDA has delayed the approval of only 10 applications because of a petition, and in every instance, the agency determined that the delay was necessary to protect the public health. Accordingly, it appears that the system is working as intended and that the FDA is striking the proper balance between expediting approvals for competing drug products and protecting the public health.

Despite the above evidence, critics nevertheless contend that the petition process is subject to abuse because “FDA denies the requested action for approximately 80 percent of citizen petitions filed by competitors against drug companies.”[12] But these statistics are presented out of context. In fact, the success rate of petitions filed by pharmaceutical companies is well in line with — and by some measures significantly higher than — the success rate for petitions filed by other stakeholders. For example, according to one recent study, only 12.7 percent of petitions filed by individuals or nonmanufacturer organizations (e.g., nonprofits, state governments) between 2001 and 2013 resulted in a favorable outcome.[13] This is significantly lower than the 20 percent success rate for pharmaceutical company petitions filed during a similar time period (2001-2010) and generally in line with success rates from more recent years (8 percent). The fact is that administrative agency inertia is strong, and the FDA rarely reverses course based on a citizen petition — any citizen petition. The FDA, however, appears to grant petitions filed by pharmaceutical companies more often than petitions filed by other entities.

Moreover, there are good reasons to believe that academic researchers are reporting denial rates for pharmaceutical company petitions that are artificially inflated. First, the critics often count “non- substantive denials” as true denials. In recent years, the FDA has adopted a practice of issuing nonsubstantive denials in which the agency “denies” the petition without indicating whether or not it agrees with the substance of the petition.[14] The agency typically does this when it is not ready to make a decision on a pending ANDA or 505(b)(2) application but the 150-day deadline for answering the petition is about to expire. A nonsubstantive denial is thus a way for the FDA to meet its statutory deadline without actually making a substantive decision. In essence, the FDA just kicks the can down the road. In order to obtain a substantive decision, a company thus may need to resubmit its citizen petition, sometimes multiple times. By counting these nonsubstantive denials as true denials, however, the critics artificially inflate the rejection rate and artificially depress the success rate.

Critics also fail to recognize that the FDA is not always the last word on issues raised in citizen petitions. Citizen petitions serve the critical function of assuring the opportunity for meaningful judicial review of the FDA’s policies and decisions. Consequently, citizen petitions often are filed by pharmaceutical companies to exhaust administrative remedies and to define and create an administrative record for purposes of judicial review. In many cases, the FDA’s denial of a petition is reversed when reviewed by a federal court. For example, in 2016, a United States district court reversed the FDA’s decision that a combination drug product was not eligible for new chemical entity (NCE) exclusivity.[15] Critics of the citizen petition process, however, never look beyond the FDA’s decision to account for judicial reversal of the FDA decisions on petitions.

Finally, the various criticisms of the citizen petition process often overlook or downplay the importance of petitions to the drug approval process. Both branded and generic companies utilize citizen petitions to raise a wide variety of important medical, scientific and legal issues relating to the approval of new drug products through the NDA, ANDA and 505(b)(2) approval pathways. The issues raised in petitions by pharmaceutical companies often relate to significant public health and safety concerns, such as active ingredient sameness or bioequivalence requirements or application of the FDA’s combination drug rule.

#### Disease can’t cause extinction

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

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

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

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

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

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

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

[FOONOTE]

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

[END FOOTNOTE]

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

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

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

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

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

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

#### ABR wrong – drugs can evolve faster – new remedies prove

Beth Mole 17, Ars Technica’s health reporter. She’s interested in everything from biomedical research to infectious disease, health policy and law. And she loves all things microbial. Beth has a bachelor’s degree in biology and world music from the College of William and Mary and a Ph.D. in microbiology from the University of North Carolina at Chapel Hill, 5-31-2017, "Killer antibiotic now 25,000× more potent—and resistant to drug resistance," Ars Technica, https://arstechnica.com/science/2017/05/killer-antibiotic-now-25000x-more-potent-and-resistant-to-drug-resistance/

With clever chemical tweaks, an old antibiotic can dole out any of three lethal blows to some of the deadliest bacteria—and give evolution one nasty concussion. The antibiotic, vancomycin, has always been a heavy hitter against odious germs; it uses one crafty maneuver that can take out even drug-resistant foes and is often used as a last resort. But, with three chemical modifications, reported this week in PNAS, the drug now has three distinct molecular moves to take out pathogens. The menacing modifications render vancomycin at least 25,000 times deadlier. And with that level of potency, dazed bacteria stumble at developing resistance when given the chance in lab experiments. And maybe that should be the real goal in the war against drug-resistant microbes, the authors of the new study—chemists at The Scripps Research Institute in La Jolla, California—argue. “As an alternative to championing the restricted use of antibiotics or conceding that bacteria will always outsmart us, can durable antibiotics be developed that are capable of continued or even more widespread use?” Perhaps, they write, we should be designing drugs that “overcome the forces of evolution and selection responsible for bacterial resistance, that are less prone or even impervious to resistance development, that avoid many of the common mechanisms of resistance, and that are more durable than ever before.” It’s not a new idea, but it’s certainly a very hard thing to accomplish. To take a serious swing at evolution, the team, led by chemical biologist Dale Boger, built upon years of detailed structural work on vancomycin. The drug has some useful characteristics for this feat, including that bacteria naturally have trouble resisting it. Vancomycin can kill bacteria with one of the two main types of cell wall structures—so called Gram-positive bacteria, such as Staph aureus. (Bacteria mainly fall into either Gram-positive or Gram-negative categories, which are based on the structures of the protective, rigid walls surrounding their cells. The structure can be figured out using Gram staining, named for bacteriologist Hans Christian Gram. An example of a Gram-negative bacteria is E. coli.) Knock-out drug Unlike other antibiotics, which often target important enzymes or cellular machinery, vancomycin kills Gram-positive bacteria by clamping onto, basically, a molecular brick in their cell wall—linked amino acids D-Alanine-D-Alanine. Vancomycin doesn’t do anything to the brick, it just gets in the way so the wall can’t cement together properly. As such, the wall crumbles apart, destabilizing the bacteria’s structure, leading to cell death. (Gram-negative bacteria use a different wall-building method, so they’re generally safe.) Time has shown that bacteria are bad at evolving resistance to the brick attack—there’s no simple genetic mutation to get around it. In nearly 60 years of clinical use, resistance to vancomycin has developed relatively slowly. And the resistance that has shown up is complicated and bulky: bacteria use a two-component signaling system that first senses if vancomycin is invading, then they trigger a late-stage switch in building materials, swapping D-Alanine-D-Alanine bricks for D-Alanine-D-Lactate in their walls. Facing this defense, vancomycin is a thousandfold less lethal to bacteria. Lucky for us, there is a simple trick to defeat this cumbersome resistance: a chemical tweak to the part of vancomycin’s structure that binds to the brick can make it just as likely to glom onto D-Ala-D-Lac as D-Ala-D-Ala. With that modification, Boger and his team could crush vancomycin resistance. But they weren’t done. They also figured out how to tweak two other areas of vancomycin’s structure. On the top of the molecule, they added (4-chlorobiphenyl)methyl or CBP, which can pummel an enzyme, called transglycosylase, involved in cell wall construction. Then, the chemists figured out that if they added a quaternary ammonium salt to the left side of the structure, this could punch holes in the cell’s membrane, the delicate barrier underneath the protective wall. Each of the three tweaks could kill bacteria on their own. But together, they make one killer antibiotic. In tests, the triple threat proved to be between 25,000 and 50,000 times deadlier to vancomycin-resistant bacteria than basic vancomycin. It also further slowed the bacteria’s ability to develop resistance.

# 2NC

## Distinguish CP

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

#### ‘Petitions’ are all written requests

Larry A. Jones 19 Sr., Judge on the Ohio Appeals Court, Eighth District, “State v. Hughes, 2019-Ohio-1000, P39-P40, 134 N.E.3d 710, 719, 2019 Ohio App. LEXIS 1034”, 3/21/2019, Lexis

Availability of This Court's Original Jurisdiction

[\*P40] The lead opinion holds that the instant matter should be dismissed because an alleged victim such as C.M. lacks standing to pursue an appeal because she is not a party to the criminal case. The lead opinion then alludes to the word "petition" in Article I, Section 10a(B) of the Ohio Constitution and suggests that she may assert her right by invoking this court's original jurisdiction. While the term "petition" is not defined within the constitutional amendment, it has generally been defined simply as "a formal written request presented to a court." See State v. Barr, 8th Dist. Cuyahoga No. 81904, 2003-Ohio-2652, ¶ 12; Black's Law Dictionary (10th Ed.2014). The lead opinion suggests that because the term "petition" is typically used in applications invoking this court's original jurisdiction, that [\*\*\*21] avenue is potentially available to a victim asserting her rights under Marsy's Law.

#### ‘Prohibitions’ cannot have exemptions

E. Norman Veasey 95, Chief Justice on the Delaware Supreme Court, “Snell v. Engineered Sys. & Designs”, Supreme Court of Delaware, 669 A.2d 13, 17-18, 1995 Del. LEXIS 338, 9/13/1995, Lexis

The interpretation of the statute is aided by the synopsis to a recent amendment to Section 2825. This synopsis states [\*\*12] that the amendment "clarifies the limitations on the public use of the word engineering by those not authorized to practice engineering for the general public." 68 Del. Laws, c. 24 (emphasis added). Had the General Assembly intended to ban all uses of the word "engineer" by those not certified, it would have been more logical for it to have used the word "prohibition" (or the equivalent) rather than the word "limitations" in the synopsis. Section 2825 must be analyzed, therefore, with the understanding that it bans only uses of the term "engineer" which would "lead to the [\*18] belief that such person is entitled to practice engineering"--i.e., a misleading use of any derivative of the word "engineer."

### Solvency---2NC

#### It’s definitely sufficient: they read 4 internal link cards, 3 of which are obviously all about patents. The only card that’s even slightly ambiguous is ‘Carson’, their card about ‘circuit splits’---but, that’s also in the context of patent law.

[blue]

**Carson and Russell 21.** Dylan Carson and Scott Russell. February 2021. Dylan Carson is a Partner at Faegre Drinker Biddle & Reath LLP. From 2015–2020, Mr. Carson served as Trial Attorney in the Media, Entertainment, and Communications Section of the Antitrust Division of the U.S. Department of Justice. Scott Russell is an antitrust attorney who has practiced in Washington, DC and California over the past 20 years. “Circuits Reinforce Split over When Noerr-Pennington Shields Serial Litigants” <https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2021/feb-2021/atsource-feb2021-carson.pdf>

Although the Supreme Court expressly carved out a sham exception to Noerr-Pennington immunity, lower courts disagree over the applicable standard when multiple lawsuits are challenged as sham petitioning. In 2020, two cases solidified a 5-2 circuit split on this issue, but no cert petition was filed in either case. The majority of circuits—the Second, Third, Fourth, Ninth, and Tenth—have held that a different analysis applies when the legality of a pattern of lawsuits or petitions is challenged than when just a single petition is at issue. When multiple lawsuits are implicated, these courts have held antitrust immunity may be lost under the sham exception if the series of petitions demonstrates a pattern of filings made solely to inflict harm through burdensome process, without consideration of the merits or interest in the requested relief. As a result, the majority of circuits have held that the overall pattern of filings can qualify as a sham––therefore subject to antitrust scrutiny and damages––even if a small percentage of the petitions were objectively reasonable or ultimately proved successful. In contrast, two circuits—the First and Seventh––have held that a separate standard for immunity does not apply when scrutinizing a pattern of sham petitioning. In those circuits, every petition is subject to the same two-step test: (1) whether it was objectively baseless (i.e., had no reasonable chance of success) and if so, (2) whether the subjective intent of the petitioning was to harm a rival. Under this standard, only objectively baseless petitions can give rise to potential antitrust liability, and Noerr-Pennington shields a pattern of petitions which had merit, were successful, or at least were objectively reasonable. **As a result**, **an antitrust defendant** **who succeeds in barring entry** of a competitor or raising its rival’s costs **through** a long series of **unsuccessful lawsuits** or administrative petitions **may be immunized** from liability so long as each unsuccessful petition had a reasonable chance of success (even if achieving that success was not the purpose of the petitioning). With the split now covering more than half of the federal circuits, the issue of when the NoerrPennington doctrine shields litigants who file a series of lawsuits or regulatory petitions is ripe for Supreme Court resolution. In 2018, the Supreme Court declined to grant certiorari to review the First Circuit’s decision on the issue, and in 2020, the unsuccessful plaintiff declined to appeal the Seventh Circuit’s decision on the issue. **Until Supreme Court review occurs**, **antitrust practitioners** tussling with potential sham litigation claims—which frequently arise in pharmaceuticals, health care, telecommunications, and other patent-intensive sectors—**lack the certainty** **needed to advise historically litigious clients** **of the antitrust risk associated with filing additional lawsuits against rivals**. From the perspective of antitrust practitioners (and their clients) with a vested interest in the predictability of outcomes, this is unfortunate since “federal [antitrust] law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.”7

#### This is how the Court normally operates---it always distinguishes on the facts and creates constructed rules because no two cases are identical

J.H. Gerards 5, Professor in the Section of Constitutional and Administrative Law Studies (UL) at the University of Leiden, Judicial Review in Equal Treatment Cases, p. 383-385

In interpreting the Constitution, the Supreme Court is bound by the doctrine of stare decisis, under which precedents have a status similar to that of positive law: this rule creates the obligation to follow the interpretation given in earlier decisions. To create a certain degree of flexibility and to make sure that the Court may set aside a precedent that is no longer considered right or desirable, the Supreme Court has two possibilities to break this rule. The most far-reaching and direct manner is “overruling” the earlier decision, which means that it is explicitly stated that a precedent should no longer be deemed valid. This, however, is a far-reaching and crude step, which is not preferred. A second, much subtler option for deviating from precedents is “distinguishing”. If it chooses to apply this method, the Supreme Court holds that the rule of law laid down in the precedent cannot be deemed applicable to the case at issue because the facts are different on relevant points. Since two cases are never completely identical, it is quite easy to use this method, which happens quite regularly in practice for this reason. This has resulted in the case law of the Supreme Court becoming very refined and rich in detail, which is why there are often different rules of law for only slightly different situations. This sophistication is also visible case law concerning the Equal Protection Clause: even though there is a clear general principle, a slightly different assessment method is used in a fairly large number of specific situations. This sometimes makes it hard to assess the importance of a specific series of decisions: a precedent may be interpreted and applied in a specific manner for years, after which a new decision states that the precedent relates only to a specific configuration of facts. As a result, the general principle is suddenly turned into an exception, but the reverse happens as well: a precedent considered to be an exception before may be turned into a general principle by means of distinguishing. Owing to the possibility of distinguishing, it is not always easy to find general lines in the Supreme Court’s case law. At the same time, however, the stare decisis rule and the possibilities of distinguishing may also facilitate the search and appreciation of the relevant case law: interesting conclusions about the significance and weight of certain doctrines, criteria and concepts may sometimes be drawn from the manner in which precedents are dealt with.

#### It’s simple and effective---the Court can always cite factual differences for distinguished precedent

Larry Alexander 89, Professor of Law at the University of San Diego, Southern California Law Review, 63 S. Cal. L. Rev. 1, Lexis

It is easy to see that restricting a rule to the facts of the precedent case is inconsistent with constraint by precedent. No matter how broad the precedent rule and how brief the description of the facts in the precedent case, there will always be some factual distinctions between the precedent case and all other cases. At a minimum, the precedent case will almost always involve different parties. Even if the parties are identical, the time of the transaction will be different. Thus, if a constrained court could escape the constraint of a precedent rule by citing any factual distinctions between the precedent case and the constrained case -- whether or not those factual distinctions are relevant under the rule announced in the precedent case or are relevant under any plausible moral principle -- a precedent case and its rule could never constrain, and the distinction between distinguishing a case and overruling it would collapse.

### AT: Antidumping---2NC

#### The United States federal government should restrict petitions in antidumping procedures.

## Lobbying ADV

### Link---2NC

#### Chess guy disagrees with them misquoting themselves

---[UK in yellow]

Kasparov, Chairman of the Human Rights Foundation, 2/16/2017

Garry, “Democracy and Human Rights: The Case for U.S. Leadership” http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism–all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America being envied, imitated, and admired around the world. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

**Their uniqueness argument is global backsliding requiring US leadership.**

---[UK in yellow]

**Kendall-Taylor 16** - deputy national intelligence officer for Russia and Eurasia at the National Intelligence Council and a nonresident senior associate in the Human Rights Initiative at the Center for Strategic and International Studies in Washington, D.C..

Andrea, 7-15, How Democracy’s Decline Would Undermine the International Order, Center for Strategic & International Studies, https://www.csis.org/analysis/how-democracy%E2%80%99s-decline-would-undermine-international-order

It is rare that policymakers, analysts, and academics agree. But there is an emerging consensus in the world of foreign policy: threats to the stability of the current international order are rising. The norms, values, laws, and institutions that have undergirded the international system and governed relationships between nations are being gradually dismantled. The most discussed sources of this pressure are the ascent of China and other non-Western countries, Russia’s assertive foreign policy, and the diffusion of power from traditional nation-states to nonstate actors, such as nongovernmental organizations, multinational corporations, and technology-empowered individuals. Largely missing from these discussions, however, is the specter of widespread democratic decline. Rising challenges to democratic governance across the globe **are a major strain on the international system**, but they receive far less attention in discussions of the shifting world order. In the 70 years since the end of World War II, the United States has fostered a global order dominated by states that are liberal, capitalist, and democratic. The United States has promoted the spread of democracy to strengthen global norms and rules that constitute the foundation of our current international system. However, despite the steady rise of democracy since the end of the Cold War, over the last 10 years we have seen dramatic reversals in respect for democratic principles across the globe. A 2015 Freedom House report stated that the “acceptance of democracy as the world’s dominant form of government—and of an international system built on democratic ideals—is under greater threat than at any point in the last 25 years.” Although the number of democracies in the world is at an all-time high, there are a number of key trends that are working to undermine democracy. The rollback of democracy in a few influential states or even in a number of less consequential ones would almost certainly accelerate meaningful changes in today’s global order. Democratic decline would weaken U.S. partnerships and erode an important foundation for U.S. cooperation abroad. Research demonstrates that domestic politics are a key determinant of the international behavior of states. In particular, democracies are more likely to form alliances and cooperate more fully with other democracies than with autocracies. Similarly, authoritarian countries have established mechanisms for cooperation and sharing of “worst practices.” An increase in authoritarian countries, then, would provide a broader platform for coordination that could enable these countries to overcome their divergent histories, values, and interests—factors that are frequently cited as obstacles to the formation of a cohesive challenge to the U.S.-led international system. Recent examples support the empirical data. Democratic backsliding in Hungary and the hardening of Egypt’s autocracy under Abdel Fattah el-Sisi have led to enhanced relations between these countries and Russia. Likewise, democratic decline in Bangladesh has led Sheikh Hasina Wazed and her ruling Awami League to seek closer relations with China and Russia, in part to mitigate Western pressure and bolster the regime’s domestic standing. Although none of these burgeoning relationships has developed into a highly unified partnership, democratic backsliding in these countries has provided a basis for cooperation where it did not previously exist. And while the United States certainly finds common cause with authoritarian partners on specific issues, the depth and reliability of such cooperation is limited. Consequently, further **democratic decline could seriously compromise the United States’ ability to form the kinds of deep partnerships that will be required to confront today’s increasingly complex challenges**. Global issues such as **climate change**, migration, and **violent extremism** demand the coordination and cooperation that democratic backsliding would put in peril. Put simply, the United States is a less effective and influential actor if it loses its ability to rely on its partnerships with other democratic nations. A slide toward authoritarianism could also challenge the current global order by diluting U.S. influence in critical international institutions, including the United Nations , the World Bank, and the International Monetary Fund (IMF). Democratic decline would weaken Western efforts within these institutions to advance issues such as Internet freedom and the responsibility to protect. In the case of Internet governance, for example, Western democracies support an open, largely private, global Internet. Autocracies, in contrast, promote state control over the Internet, including laws and other mechanisms that facilitate their ability to censor and persecute dissidents. Already many autocracies, including Belarus, China, Iran, and Zimbabwe, have coalesced in the “Likeminded Group of Developing Countries” within the United Nations to advocate their interests. Within the IMF and World Bank, autocracies—along with other developing nations—seek to water down conditionality or the reforms that lenders require in exchange for financial support. If successful, diminished conditionality would enfeeble an important incentive for governance reforms. In a more extreme scenario, the rising influence of autocracies could enable these countries to bypass the IMF and World Bank all together. For example, the Chinese-created Asian Infrastructure and Investment Bank and the BRICS Bank—which includes Russia, China, and an increasingly authoritarian South Africa—provide countries with the potential to bypass existing global financial institutions when it suits their interests. Authoritarian-led alternatives pose the risk that global economic governance will become fragmented and less effective. **Violence and instability would also likely increase if more democracies give way to autocracy**. International relations literature tells us that democracies are less likely to fight wars against other democracies, suggesting that **interstate wars would rise as the number of democracies declines**. Moreover, within countries that are already autocratic, additional movement away from democracy, or an “authoritarian hardening,” would increase global instability. Highly repressive autocracies are the most likely to experience **state failure**, as was the case in the Central African Republic, Libya, Somalia, Syria, and Yemen. In this way, democratic decline would **significantly strain the international order** because **rising levels of instability** would exceed the West’s ability to respond to the tremendous costs of peacekeeping, humanitarian assistance, and refugee flows. Finally, widespread democratic decline would contribute to rising anti-U.S. sentiment that could fuel a global order that is increasingly antagonistic to the United States and its values. Most autocracies are highly suspicious of U.S. intentions and view the creation of an external enemy as an effective means for boosting their own public support. Russian president Vladimir Putin, Venezuelan president Nicolas Maduro, and Bolivian president Evo Morales regularly accuse the United States of fomenting instability and supporting regime change. This vilification of the United States is a convenient way of distracting their publics from regime shortcomings and fostering public support for strongman tactics.

### War---Offense---2NC

#### This is true in all scenarios, including against other democracies

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

We now turn to the results from the outcome stage, where militarized conflict initiation is regressed on democracy measures and other covariates. The univariate clog-log model 32 that ignores the endogeneity, shown in column (1) in Table 1, successfully replicates the standard, dyadic democratic peace finding that democracies are peaceful, though only toward other democracies. Note that, while individual democracy measures have either a positive or insignificant coefficient, joint democracy has a negative coefficient that overwhelms the positive coefficients of individual democracy measures in the univariate model. As a result, the univariate model produces a result that, while democracy may increase conflict against a non-democracy, it decreases conflict against a democracy.

To illustrate this, we calculate the average treatment effect of joint democracy for the challenger and for the target based on the univariate model. These effects are calculated by comparing the predicted probabilities of conflict initiation when changing the regime type of self (challenger or target) from non-democracy to democracy, holding constant the regime type of the other (target or challenger) as democracy. 33 Gray, hollow circles in Figure 4 show the treatment effects of challenger’s and target’s democracy. We can see that both effects are negative and statistically significant at the 95% confidence level.

Once we correct the endogeneity, however, the data no longer support such conclusions. In column (2) in Table 1, the negative coefficient for joint democracy no longer overwhelms the positive coefficient of challenger’s democracy. Challenger’s democracy now appears to increase conflict even against a democratic target. Red, solid circles in Figure 4 show the average treatment effects of challenger’s and target’s democracy, calculated from the trivariate model. The effect is positive and statistically significant for challenger’s democracy, although the effect is indistinguishable from zero for target’s democracy.

Whether we correct for endogeneity thus makes a significant difference in our estimates of the effect of joint democracy on conflict. The key to understanding why these changes occur lies in the estimated correlations between the error terms for different equations. The estimated error correlation between equations for conflict and challenger’s democracy, 12, is negative and statistically significant. This suggests that unobservable or unmeasured determinants of a country’s democracy make it less likely for that country to attack another country. A failure to control for such factors would generate a negative omitted variable bias, making it look as if challenger’s democracy has a pacifying effect on conflict behavior. On the other hand, the estimated error correlation between conflict and target’s democracy equations, 13, is indistinguishable from zero, suggesting that the endogeneity problem does not seem to operate for target’s regime type.

#### It's an empirical question, answered by statistical methods---failing to code based on exogenous variables corrupts their evidence

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

Before we review our approach in detail, it may be useful to explain why this type of analysis has not been pursued successfully in the past and what makes our effort different from other, broadly related projects. We are not the first to apply an IV framework (more specifically) or multi-equation models (more broadly) to the democratic peace. However, previous attempts suffer from two major problems. First, previous studies have typically used a dyad (country pair) as the unit of observation in analyzing conflict, which requires some summary measure(s) of democracy for a pair of countries rather than the state-level (monadic) democracy measure. 6 Use of a dyadic aggregate to represent regime type creates a discrepancy between the first stage regression (predicting democracy at the country level) and the outcome stage regression (predicting conflict at the dyad level). 7 We avoid this problem by using the directed dyad as the unit of observation in predicting conflict, distinguishing between the potential challenger and target in a dispute. This allows us to connect the first stage equations (predicting the challenger’s and target’s regime types) and the outcome stage equation seamlessly. Doing so has several benefits: the outcome stage model could directly include country-level covariates (such as challenger’s and target’s democracy) without having to convert them to a dyadic summary. This also allows us to estimate the system of equations jointly rather than relying on the “forbidden regression.” 8

Second, a more daunting challenge in applying an IV approach to democratic peace research is the difficulty of finding a plausible instrument for regime type — a variable that is strongly correlated with regime type but is unrelated to war. This is the challenge that has plagued empirical researchers in many fields. For example, a recent study of the effect of regime type on economic growth uses a diffusion-based measure of democracy (i.e., average value of democracies in a given region) as an instrument for democracy (Acemoglu et al. 2019). However, diffusion-based instruments such as this are unlikely to be a valid instrument, due to spatial spill-over, interdependence, and, most importantly, simultaneity (Betz, Cook, and Hollenbach 2018). Recognizing problems with spatial instruments, McDonald (2015) seeks to exploit the very discrepancy between country-level and dyad-level designs as the source of identification. His discussion, however, lacks a clear explanation as to why some determinants of regime type do not influence conflict. 9

We turn to a demographic variable — average female fertility rate in a given country — as a source of variation in regime type that is exogenous to international conflict. As we will argue below, a lower fertility rate is a strong driver of democratization. We will also present theoretical arguments and a series of falsification tests that support the claim that average national fertility rate does not directly influence international conflict.

### War---Offense---Transitions---2NC

#### The move to democracy doubles the risk of quick conflict AND goes nuclear

Dr. Edward Mansfield 22, Hum Rosen Professor of Political Science and Director of the Christopher H. Browne Center for International Politics at the University of Pennsylvania, B.A., M.A., and Ph.D. from the University of Pennsylvania, and Dr. Jack Snyder, Robert and Renee Belfer Professor of International Relations in the Political Science Department and the Saltzman Institute of War and Peace Studies at Columbia University, Ph.D. in Political Science from Columbia University, BA in Government from Harvard University, Conflict After the Cold War: Arguments on Causes of War and Peace, Sixth Edition, Ed. Betts, p. 331-332

DANGERS OF TRANSITION

The idea that democracies never fight wars against each other has become an axiom for many scholars. It is, as one scholar puts it, “as close as anything we have to an empirical law in international relations.” This “law” is invoked by American statesmen to justify a foreign policy that encourages democratization abroad. In his 1994 State of the Union address, President Clinton asserted that no two democracies had ever gone to war with each other, thus explaining why promoting democracy abroad was a pillar of his foreign policy.

It is probably true that a world in which more countries were mature, stable democracies would be safer and preferable for the United States. But countries do not become mature democracies overnight. They usually go through a rocky transition, where mass politics mixes with authoritarian elite politics in a volatile way. Statistical evidence covering the past two centuries shows that in this transitional phase of democratization, countries become more aggressive and war-prone, not less, and they do fight wars with democratic states. In fact, formerly authoritarian states where democratic participation is on the rise are more likely to fight wars than are stable democracies or autocracies. States that make the biggest leap, from total autocracy to extensive mass democracy—like contemporary Russia—are about twice as likely to fight wars in the decade after democratization as are states that remain autocracies.

This historical pattern of democratization, belligerent nationalism, and war is already emerging in some of today’s new or partial democracies, especially some formerly communist states. Two pairs of states—Serbia and Croatia, and Armenia and Azerbaijan—have found themselves at war while experimenting with varying degrees of electoral democracy. The electorate of Russia’s partial democracy cast nearly a quarter of its votes for the party of radical nationalist Vladimir Zhirinovsky. Even mainstream Russian politicians have adopted an imperial tone in their dealings with neighboring former Soviet republics, and military force has been used ruthlessly in Chechnya.

The following evidence should raise questions about the Clinton administration’s policy of promoting peace by promoting democratization. The expectation that the spread of democracy will probably contribute to peace in the long run, once new democracies mature, provides little comfort to those who might face a heightened risk of war in the short run. Pushing nuclear-armed great powers like Russia or China toward democratization is like spinning a roulette wheel: many of the outcomes are undesirable. Of course, in most cases the initial steps on the road to democratization will not be produced by any conscious policy of the United States. The roulette wheel is already spinning for Russia and perhaps will be soon for China. Washington and the international community need to think not so much about encouraging or discouraging democratization as about helping to smooth the transition in ways that minimize its risks.

### Nigeria---Link---2NC

#### Spending on elections diverts from public services and locks in wealth inequality

Dr. Aloysius-Michaels Okolie 21, Professor in the Department of Political Science at the University of Nigeria, PhD in Political Science and MSc from the University of Nigeria, et al., “Does Liberal Democracy Promote Economic Development? Interrogating Electoral Cost and Development Trade-Off in Nigeria’s Fourth Republic”, Cogent Social Sciences, Volume 7, Issue 1, 4/28/2021, Taylor & Francis Online

PUBLIC INTEREST STATEMENT

The debate on the suitability of liberal democracy in supporting economic development in post-colonial African states has unabatedly continued to remain at the centre of current intellectual discourses and conversations. Although scholars seem to be focused on the endogenous constraints to the capacity of liberal democracy in generating the expected development outcome, specific attention is yet to be paid on how exorbitant spending on elections undermines human development in Nigeria. This study therefore argues that the electoral timetable of a 4-year tenure system renewable only once, which sustains exorbitant public expenditure on elections is antithetical to the human development drive of the Nigerian state. It diverts public spending, incapacitates the state from addressing the economic priority needs of the people, and deepens the gap between the rich and poor. Redesigning and retuning the content of liberal democracy in line with the demands, peculiarities and realities of the Nigerian state are highly recommended in the study.

#### That creates a time bomb that’ll inevitably implode stability---abandoning democracy’s key

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

The Real Cost of Democracy

Aside from the aforementioned financial cost of elections and patronage, other expenditures bring the recurring cost of the Nigeria’s 20-year democratic project into tens of billions of dollars, an expense that will sooner or later ~~cripple~~ [ruin] the country financially. Let me expatiate. A recent report confirmed what many Nigerians have long suspected about the remunerations of their elected executive and legislative leaders: Nigerian elected public office holders at all levels of government are the highest paid in the world.[5] Together with their string of assistants and advisors (who sometimes have their own paid advisors), Nigeria’s public officers gobble up at least half of the nation’s revenue and budgetary appropriations in legitimate rewards.

This prohibitive democratic overhead has left the country with a smaller pool of funds than ever to invest in the things that matter to Nigerians: roads, healthcare, schools, water, electricity, and food production. This odd reality of low returns on democratic investment is unsustainable. Something has to give.

What is being eroded is the very stability of the state, along with any trust that citizens still have in it. This is a proverbial ticking time bomb that will implode or explode if the trend continues, if this democracy endures. Twenty years since the return of civilian rule, it is not an exaggeration to say that not only has democracy not paid off for Nigeria but that it is now a threat to its stability and survival. This is a radical shift that has occurred stealthily and has thus been missed by the Western governmental and non-governmental actors that encouraged and funded democratic advocacy in the 1990s.

#### The two-party system creates polarization, social violence, and instability

Dr. Aloysius-Michaels Okolie 21, Professor in the Department of Political Science at the University of Nigeria, PhD in Political Science and MSc from the University of Nigeria, et al., “Does Liberal Democracy Promote Economic Development? Interrogating Electoral Cost and Development Trade-Off in Nigeria’s Fourth Republic”, Cogent Social Sciences, Volume 7, Issue 1, 4/28/2021, Taylor & Francis Online

The hitches and abnormalities characterising Nigeria’s electoral democracy are, no doubt, intrinsically linked to the institutionalised two-tenure renewable system. This tenure system was externally supported by the purveyors of liberal democracy and domesticated by the local accomplices solely for self-interest. In Nigeria, the winner-takes-all mentality as well as the high stakes usually associated with political offices heightens electoral contestations among the competing, polarised and distrusted ethnic nationalities who perceive political power as a means of advancing their peculiar economic interests. The struggle is usually intensified when it is obvious that access to state power guarantees an unfettered gateway to huge petro-dollar revenue. Indeed, the incumbent’s penchant for re-election often reinforces the tendency for divisiveness, violence, rancour and instability. For instance, the re-election bid of the then President Goodluck Jonathan in 2015 accounted for the deaths of 106 people while the election-related conflict in 2011 led to the deaths of 800 people and the displacement of 65,000 (Birch & Muchlinski, 2018; Harwood, 2019). The two-tenure system affects governance and policy responses since incumbent officials seeking re-election often devote a substantial part of their time and energy in politicking and grandstanding for a favourable outcome. This manifested in the 2015 and 2019 re-elections of Goodluck Jonathan and Muhammadu Buhari, respectively, in Nigeria when both leaders abandoned their jobs for campaigns. Also, given the monetised and winner-takes-all approach of Nigerian politics, incumbent candidates ruthlessly divert public funds for re-election campaigns. It drains the national treasury and redirects public expenditure to campaign funding rather than to human and capital development. A classic example is the ongoing investigation into the Office of the National Security Adviser which, at the interim, has revealed that the sum of 2.1 USD billion appropriated for procurement of military equipments was diverted and used to prosecute the 2015 general elections for the Peoples Democratic Party.

#### That implodes the country---autocracy solves

Dr. Moses E. Ochonu 20, Cornelius Vanderbilt Chair in History and Professor of African History at Vanderbilt University, PhD and MA in African History from the University of Michigan, BA in History from Bayero University, Graduate Certificate in Conflict Management from Liscomb University, “Liberal Democracy Has Failed in Nigeria”, Africa Is a Country, 2/7/2020, <https://africasacountry.com/2020/02/liberal-democracy-has-failed-in-nigeria> [language modified]

Liberal democracy’s capstone ritual, zero-sum elections, endow winners with all the rewards of victory—millions of dollars in licit and illicit earnings, local and international political visibility, and power. The loser, conversely, gets nothing. The result is a high-stakes version of what is called FOMO, or the fear of missing out, in American popular lingo. This fear of political exclusion in turn catalyzes desperation, which consistently and predictably produces messy, violent, and compromised elections.

In addition, since its return to civilian rule in 1999, liberal democracy has been an unacceptably costly enterprise for Nigeria. In 2019, the country spent about $670 million on a general election widely condemned as a sham. With budget financing increasingly steeped in external and internal debt, and given the fungibility of state funds, there is a depressing possibility that Nigeria is borrowing to fund elections and to finance its fledgling democratic institutions and processes. It’s a hefty price tag in a country where most people subsist on less than $2 a day. When this financial outlay is added to Nigeria’s notoriety for having some of the highest paid legislators in the world and for spending the national fortune to maintain a large army of elected and appointed civilian officials, the unsustainability of this “democratic” trajectory emerges in full relief.

It is not just the fiscal cost of elections and civilian administration that threatens to ~~cripple~~ [destroy] Nigeria. The social cost of this “democratic” adventure poses the most potent threat to the country. Plural, adversarial, and zero-sum elections have frayed the social fabric and undermined the cohesion of a notoriously fragile country. As mentioned previously, elections have been marked—and marred—by killings, displacement, scorched earth violence, and malicious manipulations. Electoral contests are little more than political warfare between factions of Nigeria’s political elite for access to the country’s resources.

The result of this charade has been a steady trend of voter apathy, represented by declining voter turnout, which stood at 35 percent in 2019. Nigerians are communicating their disillusionment with this iteration of democracy. Without urgent, profound reforms, the current path may destroy the country. It is no longer enough to argue that the current challenges are mere setbacks on the path to democratic maturity, or that escalating “democratic” tyranny is an aberration.

### Nigeria---Impact---2NC

#### It spills into the Middle East and South Asia---nuclear war

Walter Mead 13, James Clarke Chace Professor of Foreign Affairs and Humanities at Bard College, “Peace in The Congo? Why the World Should Care”, The American Interest, 12/15/2013, <https://www.the-american-interest.com/2013/12/15/peace-in-the-congo-why-the-world-should-care/>

The problem is that these wars spread. They may start in places that we don’t care much about (most Americans didn’t give a rat’s patootie about whether Germany controlled the Sudetenland in 1938 or Danzig in 1939) but they tend to spread to places that we do care very much about. This can be because a revisionist great power like Germany in 1938-39 needs to overturn the balance of power in Europe to achieve its goals, or it can be because instability in a very remote place triggers problems in places that we care about very much. Out of Afghanistan in 2001 came both 9/11 and the waves of insurgency and instability that threaten to rip nuclear-armed Pakistan apart or with trigger wider conflict India. Out of the mess in Syria a witches’ brew of terrorism and religious conflict looks set to complicate the security of our allies in Europe and the Middle East and even the security of the oil supply on which the world economy so profoundly depends.

Africa, and the potential for upheaval there, is of more importance to American security than many people may understand. The line between Africa and the Middle East is a soft one. The weak states that straddle the southern approaches of the Sahara are ideal petri dishes for Al Qaeda type groups to form and attract local support. There are networks of funding and religious contact that give groups in these countries potential access to funds, fighters, training and weapons from the Middle East. A war in the eastern Congo might not directly trigger these other conflicts, but it helps to create the swirling underworld of arms trading, money transfers, illegal commerce and the rise of a generation of young men who become experienced fighters—and know no other way to make a living. It destabilizes the environment for neighboring states (like Uganda and Kenya) that play much more direct role in potential crises of greater concern to us.

#### Boko Haram will get CBRNs---extinction

Dr. Bernard B. Fyanka 20, Ph.D. in History and Strategic Studies from the University of Lagos, Akoka Lagos Nigeria, "Chemical, Biological, Radiological and Nuclear (CBRN) Terrorism: Rethinking Nigeria’s Counterterrorism Strategy", African Security Review, Volume 28, Issue 3-4, 2/17/2020, Taylor & Francis Online

The end of the Cold War might have represented the end of mutually assured destruction (MAD), but it did not necessarily dispel the dangers of the nuclear age – in fact, to some extent the globalised proliferation of non-conventional weapons has instead escalated the possibilities for a nuclear attack being carried out. During the Cold War, the belligerents of any nuclear conflict would have been easily identifiable; however, in the post-Cold-War era, non-state actors and terrorist groups like Boko Haram have emerged as potential players in a new variety of nuclear conflicts that would entirely be based on terrorist models. The ominous possibilities for this new kind of warfare are indeed terrifying, and the rise in terrorist attacks around the globe enhances the likelihood of such an occurrence. Since 9/11, the body of academic literature on the threat posed by terrorists regarding weapons of mass destruction (WMDs) and chemical, biological, radiological and nuclear (CBRN) devices has increased. In Gary Ackerman and Jeremy Tamsett’s edited volume, Jihadists and Weapons of Mass Destruction, there is disagreement as to whether this threat is overestimated or underestimated.1 In recent times, however, ample ideological incentive for the use of CBRN devices has been provided by the likes of Abu Mus‘ab al-Suri – author of the ‘Global Islamic Resistance Call’ – who has stated that ‘[t]he aim of carrying out resistance missions and individual jihad terrorism “jihad al-irhabi al-fardi” is to inflict the largest human and material casualties possible on American interests and its allied countries’.2 This echoes the previous call of Grand Ayatollah Ahmad Husayni al-Baghdadi, who maintained:

If the objective and subjective conditions materialize, and there are soldiers, weapons, and money – even if this means using biological, chemical, and bacterial weapons – we will conquer the world, so that ‘There is no God but Allah, and Muhammad is His Prophet’ will be triumphant over the domes of Moscow, Washington, and Paris.3

For Boko Haram and other groups, there definitely exists a strong motivation for the use of WMDs, and the global reach of this thinking is not in doubt:

The globalization of the jihadist struggle has also led to an increased emphasis on Islamic identity. In combination with the ideological theme of revenge, the global struggle for Islamic identity has the potential to create a new jihadist cultic worldview in which its endorsers seek out WMDs because they represent the only means to significantly transform reality.4

Contextual scenarios in Nigeria strongly suggest that Boko Haram is one such group which has embraced the jihadist world view that endorses the use of WMDs. In this regard, the strengthened affiliation of Boko Haram’s splinter group – the Islamic State West Africa Province (ISWAP) – with the Islamic State of Iraq and Syria (ISIS) confirms their ideological persuasions. The motivation for Boko Haram to use such weapons is thus grounded in the recent use of chemical weapons by ISIS in both Iraq and Syria against both military and civilian targets.5 If ISIS is claiming ownership of a faction of Boko Haram as its West African province, it is likely to extend its tactics to its African allies.

In the light of the above, the use of WMDs by terrorists cannot be explained within the framework of orthodox terrorism theories. With this in mind, what Russell Worth Parker refers to as the ‘Islamic just war theory’ suitably anchors a discourse on terrorism and advanced weapons of war.6 Most theorists do not support a subjective theory of ‘just war’, but rather the traditional version that relies on Western ideas of morality and proportionality, as well as on motives for waging war.7 On the other hand, jihadist traditions reinterpret just war’s key tenet of proportionality to suit Islamists’ conflict rationale. According to the Western form of just war theory, wherein discrimination proves strategically impossible, any response should be proportionate to the action that compels it – hence, proportionality dictates that a military operation should not cause greater harm than the act that it was designed to counter or prevent.8 This proportionality argument is exemplified in the use of nuclear weapons in the Second World War; since casualty estimates for an invasion of Japan exceeded one million Allied lives, with similar estimates for Japanese military and civilians, a nuclear attack was preferable. Eventually, the actual casualties suffered from the bombing of Hiroshima and Nagasaki reached 200,000, which represents 10% of the casualties that would likely have been incurred if Japan had been invaded (see https://avalon.law.yale.edu/). In the light of this argument, justification for the use of WMDs by terrorist groups would rest on their interpretation of the extent of the damage caused by the military aggression and long-term imperialism of Western powers.

Fighting faceless enemies in a CBRN conflict, whether in West Africa or the Middle East, is hard to imagine. Enemies who can easily blend into the crowd and take on the face of ordinary civilians represent a nightmare scenario for security strategists all around the world. The risk of WMDs falling into the hands of terrorist groups is largely dependent on their ability to obtain weapons-grade nuclear material like uranium and plutonium, combined with gaining the capability to build and deploy weapons which make use of them. The global proliferation of nuclear material has made this possible today.

Global proliferation of fissile material

The collapse of the Soviet military-industrial complex ushered in a period of uncertainty regarding the security of nuclear material. Consequently, the risk of fissile material falling into the hands of terrorist groups – or into the hands of states that sympathise with or harbour such groups – increased considerably. Lax security at former Soviet nuclear facilities was widespread, making the theft of nuclear material possible. In the chaos that followed the Soviet collapse in the early 1990s, radioactive material was frequently stolen from poorly guarded reactors and nuclear facilities in Russia and its former satellite states. Police operations have intercepted shipments of Soviet nuclear material in cities as far away as Munich and Prague, and experts believe that large batches are still unaccounted for and most likely accessible to well-connected traders on the black market.9

Over 1800 metric tons of nuclear material is still stored in facilities belonging to more than 25 countries all around the world.10 Not all of this material is located in military stockpiles – in fact, most countries maintain civil stockpiles of plutonium for use in nuclear power reactors. The civil stockpiles in the United Kingdom (UK), India, Belgium, France, Germany, Japan and Russia add up to over 230 metric tons of plutonium. In spite of these enormous quantities, the UK, India, France, Japan and Russia have not yet reduced the reprocessing of plutonium for civil use. Although civil plutonium is not weapons-grade, it remains viable as a raw material that can be transformed through an enrichment process for use in a bomb. The United States (US) on the other hand has a comparatively small amount of civil plutonium because of its 1970 policy to suspend the separation of plutonium from spent nuclear fuel.11

About 25 kg of highly enriched uranium (HEU) is required to build a bomb – an insignificant amount in comparison to the global stockpile, which is in excess of 1.6 million kg. On the other hand, about 8 kg of plutonium is needed to build a bomb – a tiny fraction of the 500,000 kg global stockpile.12 Nuclear facilities that are relics of the Cold War era, especially those located in Eastern Europe, represent a high security risk. More than 130 nuclear reactors powered by HEU are operational in over 40 countries – the fallout of an early Cold-War-era programme in which the US and the Soviet Union helped their allies to obtain nuclear technology. Several other reactors have been shut down but may still contain nuclear fuel on site. In total, the world’s research reactors contain 22 tons of HEU – enough to build hundreds of nuclear bombs. The problem is that research reactor fuel tends to be stored under notoriously light security, making it a very vulnerable target for terrorists.13

In 2004, the US Government Accountability Office (GAO) published a report that details security lapses at civilian nuclear installations, citing a case in which the fences surrounding an unnamed foreign research reactor were in very poor condition and there were no guards securing the reactor building itself. In this report, Harvard expert Matthew Bunn explains that unlike the bulky and extremely radioactive fuel rods used in commercial nuclear power plants, research reactor fuel consists of small pellets that weigh only a few pounds each and moreover are easier to handle –a simple backpack can conceal several pellets.14 Naturally, civilian stockpiles are at greater risk of theft than those held in military installations. Consequently, the possibilities of such dangerous material falling into the hands of terrorists groups have become increasingly plausible.

Regarding military stockpiles, Russia and the US possess the largest amounts of weapons-grade plutonium – 100 and 150 metric tons, respectively. Diplomatic attempts aimed at reducing these stockpiles have resulted in an agreement for the two countries to dispose of 34 metric tons each via the method of turning the weapons-grade plutonium into fuel for nuclear power reactors. Although this agreement has not been effected yet, it is obvious given the above that the process may expose the material to greater risk of theft rather than securing it.15 On the other hand, in 2005 the US Congress eliminated the long-standing restrictions that were placed on the exporting of HEU to other countries for the purpose of manufacturing medical isotopes, which has also created new avenues for the proliferation of nuclear material through civilian use.16

Although the civilian use of nuclear material has increased the risk of its proliferation, the military facilities currently holding nuclear material around the world – especially in Russia – are also not well secured. Thousands of Cold-War-era tactical weapons are stored at very poorly guarded military installations, and most of these weapons are small and do not have electronic locks that prevent unauthorised usage.17 Since the collapse of the Soviet Union there has been no viable security strategy for securing the nuclear material contained in many of the former empire’s cities. During the Cold War era, the citizens of these cities had access to these facilities – and they still do, a problem further compounded by the fact that a strict inventory of the nuclear material contained in these facilities is not maintained.18

The likes of infamous arms dealer Leonid Minin (who was found guilty in a court of law for supplying weapons to non-state actors in African conflicts) are all too willing to do business with terrorists.19, 20 Arms dealers and smugglers all over the world are always seeking lucrative opportunities, and it is almost certain that some nuclear material has already been acquired by dangerous fanatics.

Several incidents in recent decades give every reason to believe that this is the case. In 1993, Kazakhstani authorities discovered HEU capable of arming 20 bombs in a building that was poorly secured.21 In 2006, Russian citizen Oleg Khinsagov was arrested in Georgia for carrying 100 g of HEU and attempting to find a buyer for what he claimed was many additional kilograms.22 In 2011, six men with 4 g of uranium were arrested by security forces in Moldova. Upon questioning, they claimed that the 4 g represented a sample of the product they were ready to market. They claimed to possess an additional 9kg, which represents one third of the quantity needed to create a nuclear weapon. The leader of this group and the North African buyer escaped.23 Four years before this incident, gunmen raided a facility in Pelindaba, South Africa; the details of the event are still shrouded in mystery.24

Efforts by terrorist organisations to purchase and use nuclear weapons continue unabated. The most high profile of these known efforts is that of Osama bin Laden, who in 2001 attempted to purchase a canister of uranium in Sudan for US$1.5 million. Intelligence reports claim that he also met with two Pakistani nuclear scientists, and sketches of nuclear weapons were found at an al-Qaeda training camp.25

From the foregoing, it is clear that there exists a robust and thriving black market in fissile material that seems to be tailor-made for use by terrorists groups. The International Atomic Energy Agency (IAEA) as at December 2015 had recorded in its trafficking database a total of 2889 incidents involving losses, thefts and/or attempts to traffic fissile material across international borders.26 This is an incredibly high rate of security lapses considering the security priority that nuclear facilities are supposed to possess. More pressing is the fact that the agency does not inspect every nuclear facility globally, and as such is not in a position to comprehensively enforce strict security and safety regulations. As a consequence of this, fissile material often goes missing and subsequently appears on the black market without being reported to the agency. Furthermore, several nations which maintain nuclear facilities do not possess the requisite resources to subject employees to the kind of extensive background checks that can ensure their trustworthiness for working at such high-security sites. In the absence of this screening, the likelihood of people with terrorist ties applying for jobs at nuclear facilities for the purpose of obtaining nuclear material is very high.

There is mounting evidence worldwide that increasing amounts of fissile material are being stolen and traded. Although the Russian government refuses to admit that it has lost any nuclear weapons, at least four Russian nuclear submarines have sunk, and it is believed that the warheads on board are yet to be recovered. The US on the other hand has admitted to losing a staggering 11 nuclear weapons.27

How can Boko Haram obtain nuclear material?

Boko Haram is one of the deadliest terrorist groups in the world. Since 2009, it has engaged with the Nigerian state in a lethal terrorism campaign aimed at toppling the secular structure and replacing it with an Islamist state. By May 2014 over 12,000 Nigerians had been killed in the insurgency,28 while one in five persons from Borno, Yobe and Adamawa states had been internally displaced. According to the 2017 Global Terrorism Index, Boko Haram ranks as the second deadliest terrorist group in the world, with an all-time high death toll of over 6000 in 2014 alone.29

With known ties to al-Qaeda, Boko Haram has an estimated annual income in excess of US$25 million.30 By 2017, Boko Haram had been forced to retreat from the large areas it had previously occupied in the north-east of Nigeria, driven back by the joint international military efforts of several countries in West and Central Africa. This created the need for them to reassert themselves. The likelihood of this group re-strategising and reconsolidating is high. Consequently, their acquisition of fissile material for the development and deployment of radiological ‘dirty bombs’ has increased in probability. The availability of this material on the continent and within Nigeria itself presents ominous opportunities for the group. Apart from large deposits of uranium ore found in Africa, several countries including South Africa, Morocco, Libya, Ghana, Egypt, the Democratic Republic of Congo (DRC) and Nigeria itself presently possess nuclear research reactors.31

The IAEA has reported no less than 12 incidents of natural uranium smuggling between 1995 and 2005 in Africa alone. In fact, illegal uranium mining at the Shinkolobwe mine in Katanga, DRC is presently a source of great concern. More importantly, this is where the source material for the Hiroshima and Nagasaki bombs was obtained.32 The proliferation of fissile material across the continent heightens the possibility of non-state actors like Boko Haram gaining access to it. Although there has only been one recorded theft of eight uranium fuel rods from a Kinshasa research reactor in 1997, the disturbing fact about this is that seven of the rods were never recovered.33

Within Nigeria itself, opportunities abound for terrorist groups like Boko Haram and other militant organisations to obtain fissile material for use in nuclear devices or dirty bombs. In 2004, Nigeria commissioned a 30-kW miniature neutron source reactor (NIRR-1) for the purpose of nuclear energy research.34 This nuclear facility is located at the Centre for Energy Research and Training at Ahmadu Bello University Zaria in the north of the country, where terrorist activities and Islamist extremism have been going on for centuries. The possibility of Islamist extremists infiltrating nuclear facilities and smuggling out fissile material has been an ongoing security concern for a number of years. An outright attack on a lightly secured facility is a second possibility that actually played out in 2007, when a nuclear research facility in Pelindaba, South Africa was raided by armed assailants, who breached its security perimeter and gained entry.35 Another concern is unsecured radioactive waste – namely 234 legacy sources presently located at the Ajaokuta Steel Company in Kogi State – that has not been disposed of and could easily be obtained by Boko Haram.36 To complicate matters further, the construction of a low to medium radioactive waste management facility at Nigeria’s Nuclear Technology Centre has been abandoned.37

Can Boko Haram build and use non-conventional weapons?

The poor state of nuclear security combined with the tenacity of Boko Haram makes Nigeria a prime location for the advent of nuclear terrorism. Knowhow on building a nuclear device is widely available, as is the key component, HEU, which can be found all over the world in dozens of military and civilian nuclear facilities – like the one at Ahmadu Bello University. Once Boko Haram has obtained enough HEU, a choice can be made between two types of nuclear device. The first is the gun-type mechanism, in which the HEU is smashed together to produce an explosion. The second type, which is more advanced, requires a chamber in which the HEU is compressed in a highly symmetrical manner in order to create an implosion. The gun-type mechanism is the more likely option for terrorist groups because it is simpler.38

In order to use the gun-type mechanism to activate a nuclear device, Boko Haram operatives would need to assemble a crude cannon that can smash HEU together – and the more highly enriched the uranium, the less advanced the weaponry that is needed. The viability of any terrorist group accomplishing such a task has been tested by US senator Joe Biden. In 2004 he asked scientists at three national laboratories to see if they could assemble the mechanical components of a gun-type bomb with commercially available equipment alone. A few months later, they reported back that they had succeeded.39 With over US$25 million in annual income, Boko Haram has the resources to obtain both the scientific knowhow and the materials needed to build and deploy a gun-type nuclear weapon.

Radiological dirty bombs

The threat of non-conventional weapons proliferation and terrorism goes beyond nuclear weapons – it also encompasses radiological dirty bombs. The raw materials used to create nuclear weapons are very dangerous; they contain highly radioactive substances that would pose a serious health hazard if dispersed in human populations using a detonation device. Plutonium and uranium could thus be weaponised in the form of a radiological dirty bomb, also known as a radiological dispersal device (RDD), which would cause widespread fatalities and cost billions of dollars in clean-up, evacuation and relocation operations.40

Terrorist groups like Boko Haram could easily build and use an RDD, given the widespread proliferation of fissile material – and more importantly given the dual-use materials that can produce the same radiological effects as fissile material from nuclear installations. Radiological dual-use materials from smoke alarms and medical services are among the most easily accessible; highly radioactive isotopes are in fact used in life-saving blood transfusions and cancer treatments in hospitals all around the world, including several in Nigeria. These isotopes include cesium-137, cobalt-60 and iridium-192, which can easily be used as base materials for a bomb or an RDD.41 The challenge is that most of the medical, commercial and industrial groups that handle these materials are not adequately equipped to provide the security needed to prevent them from being stolen. On the other hand, the lack of regulatory controls in many countries has led to thousands of instances of missing or stolen radiological material that cannot be accounted for. Recently, the James Martin Center for Nonproliferation Studies found in an alarming study that 170 incidents where nuclear or radiological material was lost, stolen or outside regulatory control occurred in 2014 alone.42

RDDs are viable weapons for terrorist groups like Boko Haram to pursue – and terrorist states have also attempted to obtain them. On 28 March 2002, Abu Zubaydah – a key al-Qaeda operative – was captured in Pakistan. He is widely believed to have told US investigators that al-Qaeda was ‘interested’ in building or obtaining a dirty bomb. Further evidence emerged on 8 May 2002, when Federal Bureau of Investigation (FBI) agents arrested Abdullah al Muhajir on charges of planning a radiological attack in the US at the direction of al-Qaeda operatives.

States that sponsor and support terrorist groups are likely to pass on fissile and radiological material to them. Iraq under Saddam Hussein is known to have sought radiological material for this purpose. In 1987, Iraq tested a bomb weighing 1400 kg that carried radioactive particles derived from irradiated impurities in zirconium oxide. A further 100 prototypes were designed from the casings of Muthanna-3 aerial chemical bombs, which were then modified to a 400-kg weight so that aircraft could carry more of them. It is likely that only 25 of these prototypes were destroyed, and that the other 75 were sent to the Al Qa Qaa State Establishment, a massive Iraqi weapons facility; their current status and whereabouts remain unknown.43

Chemical and biological weapons

The most commonly used non-conventional weapons are chemical or biological in nature. The long history of chemical and biological weapons usage dates as far back as 600 BC when, during a siege, Solon of Athens poisoned the drinking water of the city of Kirrha.44 More recently – starting with the use of mustard gas during the First World War – nations have acquired chemical and biological weapons easily, deploying them against enemies and their own citizens alike. For terrorist groups like Boko Haram, chemical and biological weapons are uniquely suited to their agenda and as such present very attractive alternatives to nuclear; they are extremely difficult to detect, cost effective and easy to deploy. Aerosols of biological agents are invisible to the naked eye, silent, odourless, tasteless and relatively easily dispersed. Most importantly they are 600 to 2000 times cheaper than other WMDs. Recent estimates place the cost of biological weapons at about 0.05% of the cost of a conventional weapon which could produce similar numbers of mass casualties per square kilometre.45

The proliferation of chemical and biological weapons has proved to be very fluid over the past century due to advancements in technology. Production is comparatively easy via the commonplace technology that is used in the manufacturing of antibiotics, vaccines, foods and beverages, while delivery systems such as spray devices deployed from airplane, boat or car are widely available. Another advantage of biological agents is the natural lead time provided by the organism’s incubation period (three to seven days in most cases), allowing the terrorists to deploy the agent and then escape before an investigation by law enforcement and intelligence agencies can even begin. Furthermore, not only would the use of an endemic infectious agent likely cause initial confusion because of the difficulty of differentiating between a biological warfare attack and a natural epidemic, but with some agents the potential also exists for secondary or tertiary transmission from person to person or via natural vectors.46

Unlike their nuclear and radiological counterparts, biological and chemical weapons have been used for terrorism by both state and non-state actors. The challenges faced in preventing the use of these weapons through international control mechanisms include the increasing availability of larger quantities of substances, ease of use and most especially advanced technological deployment facilities that portend a high risk factor to larger populations. Table 1 catalogues the use of biochemical weapons in warfare and by terrorists and other groups or individuals over the past century, offering concrete historical precedent and empirical grounds for the potential future actions of Boko Haram. The data shows consistent recourse to the use of these weapons, in spite of the chemical and biological weapons conventions outlawing them. It can be seen that from the 1970s onwards there has been an increase in the use of biochemical weapons by religious cults and terrorist groups in pursuit of their agendas. The rise of Boko Haram and its ISIS affiliation could lead to a future where the use of biochemical weapons is the norm rather than the exception.

As stated previously, the contextual scenarios in Nigeria that validate this prognosis regarding Boko Haram’s possible actions are strongly supported by their ideological persuasions. The fact that Boko Haram embraces a jihadist world view which endorses the use of WMDs is strengthened not only by its affiliation to ISIS through ISWAP but also by the similarities in its strategic modus operandi. Like ISIS, Boko Haram both believes in the slaughter of other Muslims who are deemed to be in cahoots with infidels, and advocates for the destruction of civilian populations – whether Muslim or otherwise – that are regarded as obstructing the advancement or creation of their caliphate.47 This was practically demonstrated by ISIS in Syria and Iraq when they used chemical weapons against both civilian and military populations, as shown in Table 1.48

Nigeria’s counterterrorism strategy

The central control measure for preventing nuclear terrorism is to ensure at the international level that nuclear material does not fall into the hands of terrorist groups like Boko Haram and other non-state actors in the first place. This is very difficult to achieve, given the lax security measures found at nuclear installations all over the world. Recognising the danger, the US under the Obama administration committed in 2010 at a nuclear security summit in Washington DC to securing all nuclear material within four years in an effort to prevent nuclear terrorism.49 Nigeria was a participant of this summit and is also committed to implementing the agreements that were reached. These attempts by the Obama administration followed up on the efforts embedded in the landmark 1987 Convention on the Physical Protection of Nuclear Material (CPPNM), which was meant to prevent nuclear material from being obtained by terrorists. The provisions of this convention were amended in 2005, and by 2010 the Washington summit had created the needed sense of urgency regarding the security of fissile material.50 Negotiations around the CPPNM started in 1979,51 and over the decades the growing proliferation of fissile material has combined with the increase in global terrorism to raise the profile of the issue of fissile material security. As of 2016, a total of 93 states including Nigeria had ratified the CPPNM, resulting in tighter security around the world at nuclear installations and border controls.

Nigeria has been engaged for decades in international efforts to control nuclear proliferation and terrorism. The country has ratified and acceded to over a dozen international instruments since 1963, including the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the CPPNM (1987), the Amendment to the CPPNM (2006) and the International Convention for the Suppression of Acts of Nuclear Terrorism (2007).52 At the level of global collective security, Nigeria is involved in implementing the United Nations (UN) Global Counter-Terrorism Strategy, which was adopted unanimously by the General Assembly in Resolution 60/288.53 At the regional and subregional levels, the counterterrorism strategies of the African Union (AU) and the Economic Community of West African States (ECOWAS) have been ratified and are in the process of being implemented. In pursuance of effecting these various international agreements, Nigeria has also instituted their National Counterterrorism Strategy (NACTEST), which was revised in 2016. Presently the country is also working with the UN Counter-Terrorism Implementation Task Force (CTITF) on projects designed to build community resilience against terrorism, enhance cooperation among law enforcement agencies and strengthen judicial institutions.54

Towards an integrated chemical, biological, radiological and nuclear (CBRN) counterterrorism protocol

The CBRN terrorism threat in Nigeria is both real and present. The country has one of the highest rates of terrorist activities in the world; in fact, according to the 2016 Global Terrorism Index, Nigeria ranked third among 163 countries, with a terrorism death rate of 16.8% of the global total.55 Although attacks declined in 2017, Nigeria still retained third place on the Global Terrorism Index.56 Recently, Boko Haram has initiated a comeback that has seen renewed attacks and the abduction of more girls from schools in the north-east of the country. Security forces have continued to engage the group on the frontlines in their forest bases; with the assistance of local and international joint task forces, much of the conflict has been shifted to more remote areas in the north-east. Although the government security forces have gained the upper hand in their frontal clashes with Boko Haram forces, by January 2018 the group had successfully carried out several brutal assaults, including one on UN and Doctors Without Borders staff, shifting their strategy back to traditional hit-and-run guerrilla tactics. During Easter of the same year, a single attack utilising 5 suicide bombers resulted in over 29 dead and 84 wounded.57

The likelihood that Boko Haram may begin to use CBRN weapons is increasing, and biological and chemical terrorism is potentially more difficult to prevent than conventional terrorist attacks. Since the latter part of the twentieth century, the Internet has contributed to the spread of chemical and biological weapons knowhow, thereby increasing the likelihood of Boko Haram being able to obtain not only the ingredients needed to create biochemical weapons but also the information needed to build and successfully deploy them. Some of the base materials for such weapons even occur naturally, like castor beans, which can be processed to produce the dangerous toxin ricin and deployed against unsuspecting populations. Furthermore, live strains of very dangerous viruses like Ebola can be found in high-tech research labs, like those at the African Centre of Excellence for Genomics and Infectious Diseases (ACEGID) at the Redeemer’s University Ede in Osun State. If Boko Haram were to secure this virus and weaponise it, the age of biowarfare would arrive in Nigeria – with deadly consequences. More importantly, the materials that are needed to create most chemical weapons exist in large quantities as dual-use materials that can be purchased on the open market and ferried into the country via forged end-user certificates.

The chemical and biological weapons conventions represent control structures geared towards the containment of these non-conventional weapons, and to a large extent state signatories like Nigeria have implemented a good level of the instruments contained in them; however, some nations still maintain secret stockpiles and have used them in recent conflicts, like Iraq against Iran and Kurdish dissidents in the 1980s and 1990s, and the Syrian government, which is presently using them against its civilian population.

On the whole, the counterterrorism measures put in place to deal with the aftermath of a chemical or biological attack have gained more credibility in the international community. Although there is no dedicated international inter-agency mechanism for coordinating the response to terrorism involving the release of toxic chemicals or biological agents, there are mechanisms that have evolved in the context of humanitarian assistance and emergency response after natural catastrophes, such as earthquakes; these include the Global Outbreak Alert and Response Network (GOARN), the World Health Organization (WHO), the Global Early Warning System (GLEWS), the Global Framework for the Progressive Control of Transboundary Animal Diseases (GF-TAD) and the International Food Safety Authorities Network (INFOSAN). The primary inter-agency mechanism that coordinates responses to emergencies involving the agencies mentioned above is the UN Disaster Assessment and Coordination (UNDAC).58 To further strengthen inter-agency coordination in the wake of a terrorist attack of catastrophic proportions, the UN CTITF is also focusing on planning for such an eventuality.

At the local level, several key aspects of Nigeria’s NACTEST are presently being utilised. The strategy is divided into five work streams:

* Forestall: Prevent terrorism in Nigeria by engaging the public through sustained enlightenment and sensitisation campaigns and deradicalisation programmes.
* Secure: Ensure the protection of life, property and key national infrastructure and public services, including Nigerian interests around the world.
* Identify: Ensure that all terrorist acts are properly investigated, and that terrorists and their sponsors are brought to justice.
* Prepare: Prepare the populace so that the consequences of terrorist incidents can be mitigated.
* Implement: Devise a framework to effectively mobilise and sustain a coordinated, cross-governmental, population-centred effort.59

Presently, the first three aspects of these work streams are receiving full attention. However, in regard to WMDs, the counterterrorism strategy is lacking a well-integrated CBRN protocol for engaging with the work streams for preparation and implementation. Nigeria currently handles issues relating to nuclear and radiological matters through two institutions: the Nigerian Atomic Energy Agency (NAEC) and the Nigerian Nuclear Regulatory Authority (NNRA). It is therefore expected that, given the growing CBRN threat level in the country, these agencies will collaborate with the Office of the Security Adviser to the President in order to initiate a proper CBRN counterterrorism protocol.

The NACTEST does not currently include a dedicated protocol for handling CBRN threats; Nigeria is however involved in nuclear security at the international level, which has primarily provided for capacity-building and human resources development. Activities in these areas include the gradual process of converting the miniature neutron source reactor in Zaria from using HEU to low enriched uranium (LEU), partnerships for nuclear and radiological security with the US Department of Defence (DoD) and the IAEA, establishing a nuclear security support centre in the country, reviewing the 2012 design basis threat (DBT) for protecting nuclear and radiological material, the development of a programme for locating and securing orphan legacy radioactive sources, training security officers, the installation of a radiation portal monitor at the Murtala Muhammed International Airport in Lagos in 2008 and the acquisition of three more monitors for other international airports in the country.60

An integrated CBRN protocol would fall under the preparation and implementation work streams of the NACTEST. The protocol should include a strategy for detecting CBRN agents in the wake of terrorist events, followed by disaster response and countermeasure initiatives to be carried out by security, medical and disaster response teams. Given the availability of advanced technology, the integrated CBRN counterterrorism protocol should also include the deployment of handheld radiological and biochemical detectors to high-risk areas, and security forces and disaster response teams should be trained in their usage. Embedding a standard protocol in the NACTEST on how to prepare for and respond to CBRN events is essential for repositioning counterterrorist activities in the country to meet the present threat level. The US and Canada along with the UK and most other European countries facing CBRN threats have already repositioned accordingly in order to accommodate this new reality.

Conclusion

Any terrorist attack involving WMDs is the ultimate nightmare scenario. Fortunately, at least some of these potential attacks are preventable. If and when the nuclear security summit achieves its goals, the possibility of a nuclear terrorist attack in Nigeria will be immensely reduced. Unfortunately, the likelihood of radiological, chemical and biological attacks is more difficult to regress, making it all the more vital to integrate a CBRN protocol into Nigeria’s counterterrorism strategy.

Preventing such a tragic event from occurring will require very close ongoing monitoring of the strategic manoeuvrings of Boko Haram. From its inception to the present day, the organisation has depended on the looting of military armouries to source most of its heavy weapons and equipment. It has built up an impressive arsenal in this manner and there is no indication that the group will stop using this highly profitable strategy, which could be further employed to obtain advanced CBRN weaponry from facilities that are vulnerable to being raided. The civilian facilities mentioned in this paper are at high risk of being targeted in this fashion; hence, the recalibration of Nigeria’s CBRN counterterrorism protocols should include a security framework that provides military security for facilities like the ACEGID in Osun State and the Centre for Energy Research and Training at Ahmadu Bello University Zaria. Lastly, although the IAEA has assisted in the conversion of Nigeria’s reactor from HEU to LEU,61 the availability of fissile material at the facility means that the risk of radioactive dirty bombs being created from looted material is still present.

### Warming---Link---2NC

#### 3. VALUES---freedom to pollute and rights to consume guarantee overshoot

Dr. Chien-Yi Lu 21, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 3-4

This pessimism stems from the unavoidable transition of capitalism from its expanding form to a stationary one under severe scarcity of resources, as “whether we are unable to sustain growth or unable to tolerate it…,it seems beyond dispute that the present orientation of society must change” (1980: 110, original emphasis). Social tensions will inevitably rise when scarcity-propelled stationary or even slow-growing capitalism renders infeasible the usual method of appeasing the lower and middle classes by further deepening the grab into the nature to improve their economic positions, leaving the diminishing of the incomes of the upper echelons of society the only option (1980: 102). Given the widespread belief that “centralized authority will cope with crisis and unrest more ‘successfully’ than less authoritarian structures” and the historic pattern in democracies where “the pressure of political movement in times of war, civil commotion, or general anxiety pushes *in the direction of authority*, not away from it,” (1980: 128–9, original emphasis) Heilbroner concluded that intolerable socioeconomic strains will eventually exceed the capabilities of representative democracy, leading governments of these societies to resort to authoritarian measures (1980: 106).

Similarly, Ophuls contended that under conditions of ecological scarcity, if individuals are allowed to pursue their self-interest “unrestrained by a common authority,” the result is bound to be “common environmental ruin” (1977: 151). Accordingly:

the individualistic basis of society, the concept of inalienable rights, the purely self-defined pursuit of happiness, liberty as maximum freedom of action, and laissez faire itself all become problematic, requiring major modification or perhaps even abandonment if we wish to avert inexorable environmental degradation and eventual extinction as a civilization. (1977: 152)

To him, the only solution is “a sufficient measure of coercion;” and “democracy as we know it cannot conceivably survive” (1977: 151–2).

In the same vein, Ophuls and Boyan (1992) talked about the crucial role that “ecological mandarins” must play under resource scarcity. Concurring with Robert Dahl’spoint that “a reasonable man will want the most competent people to have authority over the matters on which they are most competent” (Dahl, 1970: 58), Ophuls and Boyan emphasized that “under certain circumstances democracy *must* give way to elite rule,” and “the more closely one’s situation resembles a perilous sea voyage, the stronger the rationale for placing power and authority in the hands of the few who know how to run the ship” (Ophuls and Boyan, 1992: 209, original emphasis). Given that ecology is esoteric and that only those with talents and training are qualified as specialists, “a class of ecological mandarins who possess the esoteric knowledge” is required to run the “ecologically complex steady-state society” well. Such a society

will not only be ostensibly more authoritarian and less democratic than the industrial societies of today (the necessity of coping with the tragedy of the commons would alone ensure that), but it may also be more oligarchic as well, with full participation in the political process restricted to those who possess the ecological and other competencies necessary to make prudent decisions. (1992: 215)

#### 4. CAPACITY---deep mitigation will never have popular support AND democracies have to be perfect across every country because pollution is trans-boundary---it’s try-or-die for a global political transition

Dr. Chien-Yi Lu 21, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 2-3 [language modified]

The doubt about the ability of democracy to handle climate challenges is palpable from the intellectual Left as well. Eric Hobsbawm offered a threefold explanation for his pessimism. To begin with, many of the strategies needed to avoid climate change would be extremely unpopular and therefore difficult to implement in a democracy. As a result, even as “the impact of human action on nature and the globe has become a force of geological proportions,” “no support will be found by counting votes” for measures required for mitigating these problems. Moreover, given that nature is border-blind, even if voters of some democratic states were sensible, the political mechanisms available to human kind in the 21th century are “effectively confined within the borders of nation-states” and “dramatically ill-suited” to deal with problems lying beyond their range of operation (2007: 113). Finally, democratic national governments are not the only relevant organizational entities that can have an effect on an increasingly globalized and transnational world. “A growing part of human life now occurs beyond the influence of voters, in transnational public and private entities that have no electorates, or at least no democratic ones.” Thus, “[d]emocracy, however desirable, is not an effective device for solving global or transnational problems”(2007: 118).

This wave of academic literature that questions the compatibility of democracy with timely and effective climate mitigation resonates with works dating back to the 1970s that focused on the role of democracy in environmental conservation. In An Inquiry into the Human Prospect, Heilbroner set to answer, in a world plagued by problems such as rapid environmental degradation, “is there hope for man?” Writing in 1974, he highlighted that:

the amount of CO2 in the air is expected to double by the year 2020… sufficient to raise surface temperatures on earth by some 1.5o to 3.0o … bring[ing] sea levels above the level of the land in the populous delta areas of Asia, the coastal areas of Europe, and much of Florida. Long before that it is feared that the rise in temperature would have irreversibly altered rainfall patterns, with grave potential effects. (1980 [1974]: 72)

With the approaching of the depletion of natural resources, Heilbroner expressed deep doubt about the ability of the democratic form of government in ensuring the survival of [hu]mankind.

[C]andor compels me to suggest that the passage through the gantlet ahead may be possible only under governments capable of rallying obedience far more effectively than would be possible in a democratic setting. If the issue for [hu]mankind is survival, such governments may be unavoidable, even necessary. (1980: 130)

### Warming---Impact---2NC

#### It’s fast, causes extinction, and turns all other impacts---transitioning from democracy is key

Samuel Malm 20, Master’s Degree from Uppsala University, Disciplinary Domain of Humanities and Social Sciences, Faculty of Arts, Department of Philosophy, “Does Climate Change Justify a Global Epistocracy?”, Digitala Vetenskapliga Arkivet, 8/11/2020, https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1448606&dswid=8040

Climate change’s negative impact on humans is hardly something up for questioning. The World Health Organization believes that between 2030 and 2050 the effects of climate change will be an additional of 250 000 deaths every year; due to diarrhoea, malaria, heat stress and malnutrition.1 Accordingly, we can expect millions of deaths to occur, and the increased frequency of natural disasters will push the expected death toll even further. Additionally, the rising sea levels, and other environmental consequences, will cause an unprecedented flow of climate refugees towards areas that still are unaffected by the change. If we thought the impact was huge from the people fleeing the Syrian civil war, or the present corona pandemic, we should expect the climate disaster to be countless times larger. The pressure on societies and intergovernmental organisations will become tremendous, and we would be naïve if we did not expect this pressure to create additional suffering and death. What is then the cause of climate change? It is the result of anthropogenic acts, i.e., it is our current way of living that is causing the heating of the planet. Like a greenhouse, our planet is becoming hotter by the way that carbon dioxide traps more heat in the atmosphere, and by consequent increase the global average temperature. Additionally, it sets off other reactions that add positive feedback to the warming, e.g., creation of water vapour or the reduction of ice caps.

Now, this paper does not intend to demonstrate the truth of these claims, and if the reader is still sceptical about climate change, and its anthropogenic cause, numerous sources can justify and explain these facts better, for instance, rapports from IPCC. 2 Accordingly, I will assume these facts to be true, and that climate change will cause a state of affairs that contains a great deal of suffering and death; besides the possibility of civilisational destruction or human extinction. Thus, the circumstances are dire. So, let us summarise these detrimental effects into a single claim. Here it is:

State Of Affairs No Reduction: A state of affairs where climate change causes tens of millions of deaths, countless instances of additional human suffering, and the possibility of causing a collapse of human life as we know it.

This is what I will take as the effect of doing nothing to halt climate change. This then begs the question: If our current behaviour has such terrible consequences, why have we not implemented policies that prevent climate change?

1.2 What is the nature of the problem?

There are two ways to answer this question: we can give a historical description of how the issue has been misconstrued by interests that have a lot to gain from the status quo or, that we are dealing with a special type of problem that is particularly difficult for us to confront.3 In this paper I will only deal with the second dimension. Additionally, we can divide this dimension into two groups: first, we can describe how humans, by their very nature, are poorly endowed to deal with such problems as climate change, secondly, that the problem of climate change is what sociologists call a “wicked problem”. I will discuss the first aspect later on when describing psychological barriers. Now, I want to address characterising climate change as a wicked problem.

During the ozone depletion, discovered in the late seventies, the world’s states quickly came together and implemented the Wien protocol in 1985; a protocol that set down some policies for protecting the ozone layer. Subsequently, in 1987 the Montreal Protocol was implemented, that resulted in the complete removal of the chemical substances that created the ozone depletion.4 Why have we not seen the same collective action towards climate change? Well, first, we must clarify that in the case of the ozone depletion, the solution was much easier to implement; it took the removal of a few ozone-depleting substances. However, solving the problem of climate change is much more wicked (supposedly) and is said to fall under a specific type of problem posited by Horst Rittel in the late 1960s; wicked problems.5 These are deep problems that do not present you with a clear solution. Now, my initial definition of the problem seems to fly against this deepness, i.e., I have claimed there is a clear solution. However, those that see it as a wicked problem would contend that my definition is only one way to conceptualise the problem, and that there is a spectrum of definitions that seem more or less correct. What does this mean? Dale Jameison describes this well:

“There are many different ways of conceptualising the problem of climate change, each of which finds different resources relevant to its solution and counts different response as success and failures. If the problem is fundamentally one of global governance, then new agreements and institutions are what are needed. If the problem is market failure, then carbon taxes or a cap and trade system is what is required. If the problem is primarily a technological failure, then we need an Apollo program for clean energy or perhaps geoengineering. If climate change is just the latest way for the global rich to exploit the global poor, then the time has come for a global struggle for justice. This problem of multiple frames is characteristic of what are called “wicked problems.” And wicked problems are extremely difficult for political systems to address successfully.”6

I understand the appeal to find all these different ways to conceptualise the problem of climate change. However, I do believe we are doing ourselves a disfavour if we explain the lack of action in preventing climate change, and by consequent justify this inaction, by appealing to this problem of multiple frames. We should ask why it is of benefit to consider all these multiple frames when trying to stop climate change? I take it that the answer to this is our desire for finding the most accurate conceptualisation of the problem so that we can implement the most optimal solution. I believe this is wrong. At its core, we know the solution to the problem (reduce greenhouse gases) and we should accept the risk that we will implement a sub-optimal solution. Waiting around for the most accurate conceptualisation of the problem is counterintuitive, especially when we contemplate the risk it entails. The goal should not be too solve this problem of multiple frames by, for instance, taking steps to secure a unanimous acceptance of some particular framing of the problem, and by consequent enact the most optimal solution to climate change. Setting this as our aim is just to promote even more inaction; we need to accept a sub-optimal solution. I believe this desire to find the optimal solution which does not entail people having to accept a reduction in their current standard (no one gets elected by promising to reduce economic growth and causing other detrimental effects on their electorate) better explains our inaction then characterising climate change as a wicked problem. As Broome writes: “the economics and politics of climate change has concentrated on finding the best solution to the problem of climate change.”7 Meaning that we are looking for a solution without sacrifice — and by consequent choose business as usual.

Nevertheless, I believe we should not put too much importance on the wickedness of the problem. We know what it takes, and our technological achievements are well-equipped to deal with the problem (since it also has created the problem). Implementing some policies that reduce greenhouse gases is better, even if they are sub-optimal, then postponing taking any preventive measures.

Nevertheless, before closing this section, there is one more aspect of the problem of climate change that we ought to face; the need for immediate action. This aspect is of high importance, and we should not take it lightly; even though it fills a short space in this paper. Climate change has been going on for a long time, and year by year we increase the yearly outpour of greenhouse gases into the atmosphere, e.g., the last year (2019) we increase the outpour even more.8 Additionally, we are taking a risk when we do not know what positive feedback we are potentially setting off by not reducing the outpour. Accordingly, we need to accept the fact that the problem of climate change has the character of demanding our immediate action.

1.3 Clarifications

Before turning to the argumentation for this paper’s thesis, some clarifications are necessary. One of these is the role of “political authority”. When I argue that we have good reasons to prefer an epistocracy, I am arguing that we ought to accept the epistocratic method as the political authority and that this authority is legitimate, i.e., it has some moral justification for establishing a normative relation between it (political authority) and the subjects. There are several conceptual accounts of “political authority”, and I will use the right to rule account. This account portrays a more morally robust account of the relation between an authority and a subject. It essentially describes a kind of ideal political community where a deeper moral connection is present. 9 I believe this is what we think of when trying to evaluate the legitimacy that a political system, as in a state, have in coercing a population, and the subjects have a moral duty to obey the authority. This will be the conceptual definition of political authority. It has a moral right to rule and coerce people into obeying its political system of institutions that regulate the behaviour of its subjects and set out the course for where the political entity is heading, i.e., which state of affairs we realise in the future.

2. INTRODUCING THE SOLUTION

In this section, I will demonstrate why we ought to accept The Solution as a true normative claim, i.e., why we ought to take political action to prevent State Of Affairs No Reduction from coming into existence.10 Here is the claim:

The Solution: Reduce the global outpour of greenhouse gases to a level that has an excellent chance of causing the avoidance of State Of Affairs No Reduction.

One helpful way to characterise the normativity of The Solution is as a navigational problem. Where do we want our global society to be heading? I believe we can characterise the possible directions as a binary choice between The Solution and Not-The Solution. The second option I describe as follows:

Not-The Solution: Continue the outpour of greenhouse gases with the consequences that State Of Affairs No Reduction has an excellent chance of being actualised.

Now, even though The Solution contains multiple ways to get implemented, they all share the same normative content of causing a reduction of greenhouse gases in the atmosphere.11 Accordingly, it is this goal, and how it dictates the changes needed in our global institutions that are of such vital importance. By contrast, Not-The Solution shares the same normative content of taking no action that will prevent State Of Affairs No Reduction. Given this binary choice, I believe our intuition tells us that we ought to choose The Solution. What could speak in favour of Not-The Solution? Is there some option of Not-The Solution that we have a better reason to prefer? Maybe someone would contend that the uncertainty that surrounds climate change gives us good reasons to postpone taking any action, or, that other goals are much more important. Now, before addressing these concerns, perhaps our intuition becomes stronger (that we ought to choose The Solution) if I provide some scenario that could work as an intuition pump. Here is such a scenario:

*The Bus Ride*: So, picture, if you will, a bus that is on a direct course towards a large tree that will cause a great deal of suffering and death upon impact. Inside, the people are busy doing whatever they see fit, spending their time to make the bus ride as comfortable and meaningful as possible. However, there is a group of scientists that have analysed and investigated the devastating effect of this course, and that they need to perform some necessary action to avoid the tree. Perhaps they all need to drop what they are doing and give up some of their time jolting the bus enough so that the bus will miss the tree.

Accordingly, the world is the bus, the people on the bus is the world’s population, and the jolting of the bus is The Solution.12 I believe our intuition tells us that we ought to perform the necessary actions in order to prevent the bus from hitting the tree. What could possibly be more pressing? Do we have good reasons to do something else? Is the uncertainty of how bad the impact will be, and when it will occur, good reasons to not start jolting the bus?

Weighing different values against each other is tricky, and there are many scenarios where it is contentious if we should promote, for instance, equality or liberty. Some could argue that we ought to increase economic prosperity since it will maximise well-being for all humans; others will argue that securing peace takes priority; social justice; or environmental concerns. However, whatever we see as the road to the common good the implementation of The Solution is superior in its importance, because it secures that there will be a ground to put the road on. We will certainly not have social harmony in a state of affairs where climate disaster is present; the economy will suffer the consequences of the climatic impact on everything from production to transfer, and we have good reasons to believe conflict and tension will arise when the situation gets worse.

Now, perhaps some could say that it is immoral to demand that people make sacrifices to reduce greenhouse gases. I believe this is wrong. The implementation of The Solution will not demand a tremendous amount of hardship for the effect world population.13 Like Peter Singer’s case where we should sacrifice our clothes in order to save a child from drowning in a pond, we ought to sacrifice some niceties in order to save ourselves, and future generation from State Of Affairs No Reduction.14 Accordingly, the sacrifices necessary do not entail some morally questionable acts, i.e., reduce the level of greenhouse gases by killing off a portion of humans. I am talking about, for example, having to reduce flying to a necessary minimum, or, pay more in taxes so we can develop, and build, the technology that reduces the outpour of greenhouse gases, e.g., solar panels. Furthermore, it is the affluent world that will have to bear the biggest load of these necessary sacrifices. Especially, since the cause of climate change comes from the increased material standard enjoyed by people in affluent countries. They should, by consequent, accept the moral responsibility to combat the harm this wealth is causing, and going to cause. Or, put differently, the economic prosperity that has created this wealth is the cause of the climatic change, and the cost of emitting greenhouse gases has been an externality unaccounted for by either the consumers or the producers (a Pareto sub-optimal state of affairs). Additionally, it is common-sensical that if one group have very few resources, and another group has an abundance of resources, we should not solve a common problem by removing the few resources from the first group. The harm created by the amount of resources in the prosperous group should yield a good reason for them, bearing the bigger load.

Additionally, we should also accept that since anthropogenic acts cause State Of Affairs No Reduction, it leaves us with an additional moral reason to implement The Solution (leaving aside just the badness of State Of Affairs No Reduction). We bear the responsibilities of our actions, and these actions will harm countless future human beings.15 Even if we do not bear the responsibility of stopping climate change individually, we should not prevent our institutions from being reshaped in a way that solves the problem of climate change. I would even contend, if we are living in a democracy, we have a moral duty to use our political power (vote), so we take the necessary steps to implement something like The Solution.16 (Perhaps, this could also be interpreted as a reason for restricting universal suffrage (the democratic process) and justify an global epistocracy.) Possibly, in a counterfactual world where a non-anthropogenic event will cause a similar type of harm (for instance an impact by a meteorite), it could be argued that we have no responsibility to prevent this event since we are not the actors that create this event. I believe this is a weak argument for not preventing the impact from the meteorite. However, in the case of climate change that argumentation is not available since we are responsible for it.

One final thing is that The Solution is hardly a discriminatory or biased policy. Certainly, different groups will be affected differentially by the policy, and, as have been said, the affluent part of the world should bear the biggest load. However, the policy itself places no higher importance on any person or group. Satisfying, what Vandamme calls, a quality of (substantive) impartiality: “understood in a moral and substantive sense, as a property of public policies and of a political order, can be simply defined as not favouring some groups or individuals over others for morally arbitrary reasons.”17

2.1 Uncertainty of Climate Change

What then about uncertainty and the effect it has on the normativity of The Solution? Perhaps, someone would argue that since there is still uncertainty in the range of negative impact that climate change will have, and the lack of knowledge when things will start to get truly harmful, we can delay making any decision until the facts are in. I believe this is wrong. As Broome writes: “If you can costlessly delay a decision till all the information is in, you should delay it. But when delay itself is risky, it is not a sensible remark.”18 Choosing Not-The Solution and thus gamble in the hope that it will not have the consequence of suffering and death in order to avoid making a sub-optimal decision, that in hindsight is evaluated as unnecessary is, I believe, immoral and irrational.19 Accordingly, in the same way that it is rational to invest in a fire extinguisher, in case a fire starts in your house, it is rational to invest in the removal of the possibility of a climate disaster in the future. Why is this? I believe that Expected Value Theory is a good guide to adopt when facing uncertainty. Broome summarises this theory nicely:

“When the quantitative outcome of some process is uncertain, the expectation of the outcome is calculated as follows. Take each of the possible values of the outcome and multiply each by the probability of its occurring. Add up all of these products. The sum is the expectation. It is just a weighted average outcome, where the weights are the probabilities.”20

Even if it is a very small probability that climate change will have civilisational ending results, the great badness that this state of affairs constitutes should warrant our immediate action to avoid this scenario. Perhaps, there could be a case for not implementing The Solution if it would demand a large number of sacrifices, and by delaying this implementation we could remove additional uncertainty. For instance, what if people in The Bus Ride had to kill fifty per cent of the passengers, by throwing them off the bus, in order to avoid the tree. Certainly, given this tremendous sacrifice an argument could be had why we should delay implementing necessary precautions. However, even though the aggregation, of the small sacrifices every individual has to make, could become large, it does not constitute this tremendous sacrifice in The Bus Ride. The small sacrifices everyone have to make is easily overshadowed by the badness of State Of Affairs No Reduction. Accordingly, I still take it that we have better reasons to prefer The Solution than Not-The Solution even though climate change will always be immersed in uncertainty. We only have one opportunity to run this experiment, so we should not gamble with the outcome.

Nevertheless, I will not try and persuade the reader more of the badness of State Of Affairs No Reduction and that we ought to implement the Solution. Possibly, the discussion of the next section will bear some support for the accuracy of The Solution.

3. THE ANSWER

What we then must ask ourselves is: Which process for collective decision-making do we have reasons to believe will successfully implement The Solution? We could start with an unhelpful answer: The method that has the best chance to implement The Solution. Which method is this then? Here we get to the core of this paper’s thesis. I will call the answer to this question simply: The Answer. Here it is:

The Answer: Given that we ought to implement The Solution, and by consequent avoid State Of Affairs No Reduction, we have better reasons to prefer some form of global epistocracy, than a global democracy.

#### It’s the only existential risk

Samuel Miller-McDonald 19, PhD Candidate in Geography and the Environment at the University of Oxford, “Deathly Salvation”, The Trouble, 1/4/2019, https://www.the-trouble.com/content/2019/1/4/deathly-salvation

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

## Innovation ADV

### Innovation---No Patent Trolls---Resilient---2NC

### Innovation---Patents Fail---2NC

#### Open innovation solves.

Clark D. Asay 15, Associate Professor of Law at the Brigham Young University Law School, J.D. from Stanford Law School, M.Phil from the University of Cambridge, “Enabling Patentless Innovation,” Maryland Law Review, Vol. 74, No. 3, 2015, accessed via HeinOnline

The story of open innovation may present an even more fatal challenge to each of these theories: a patent system, in whatever form, may be unnecessary to obtain the societal benefits that these theories all argue a properly constituted patent system helps encourage.

This is the argument of some in open innovation communities in its strongest form,47 and in many contexts, it appears to hold some credence. The free and open source software movement, for instance, is the flagship open innovation movement from which many other fledgling open innovation communities draw their inspiration. It has proven incredibly successful in yielding some of the most popular technologies in the world.48 And, much of this development activity has been pursued without seeking patent rights on the inventions. Other incentives appear to motivate such inventors than the right to exclude others from the invention in order to commercially exploit it themselves. 49 In fact, the very purpose of open innovation movements is to make the technology as widely available as possible, with few restrictions.

The licenses upon which these open innovation movements rely clearly illustrate this permissive intent. In addition to granting broad copyright licenses, many of the most important open licenses also include broad patent licenses.5° While many in open innovation communities do not pursue patents for ideological reasons, many of the most important licenses guarantee that, if the developers do own patents covering the technology, they will not assert them against subsequent users of the technology. Some of the licenses do not include explicit patent terms, although even these arguably include an implied patent license given the distinctly permissive wording and nature of such licenses. 51

## Citizen Petitioning ADV

### Disease D---2NC

#### Every empiric AND basic theories of evolution disprove any risk of extinction from disease

Bryan Walsh 20, Future Correspondent for Axios, Editor of the Science and Technology Publication OneZero, Former Senior and International Editor at Time Magazine, BA from Princeton University, End Times: A Brief Guide to the End of the World, Orion Publishing Group, Limited Edition, p. 183-185

Yet despite epidemic after epidemic, despite mass killers like smallpox and the 1918 flu, at no point has disease threatened humans with extinction. Even the Black Death, likely the most concentrated epidemic of all time, now appears as little more than a minor downturn in what has otherwise been a bull market for long-term human population growth. That’s true for animals as well. The International Union for Conservation of Nature reports that of the 833 plant and animal extinctions that have been documented since 1500, less than 4 percent can be attributed to infectious disease. Those species that were eradicated by disease tended to be small in number and geographically isolated—very much unlike human beings, who are both numerous and have spread to every corner of the world.38

With the exception of HIV—which can now be managed as a chronic condition with antiviral drugs—every major epidemic mentioned above took place before the dawn of modern medicine, before the development of antibiotics and widespread vaccines. Smallpox was even fully eradicated from the wild in 198039—the only known samples of the virus are kept at highly secure government facilities in Atlanta and Koltsovo, Russia.40 Plague is now so rare that when it breaks out in countries like Madagascar, it makes global news—yet fewer than 600 deaths from the disease were reported between 2010 and 2015. Studies have shown that most of the fatalities from the 1918 flu were actually due to secondary bacterial infections that today could be controlled by antibiotics,41 which were introduced less than a century ago. Influenza pandemics remain the great fear of infectious disease experts, but the most recent one in 2009 killed only about 284,000 people worldwide.42 That was fewer than the number of people who die from seasonal flu in an ordinary year.43

Modern science has defanged most infectious diseases, at least outside the developing world—and great progress has been made there in recent years—but basic evolution also plays a role in limiting the catastrophic potential of natural disease. Every pathogen faces a trade-off. In general, the more rapidly it kills, the harder it is to spread widely, because an extremely virulent disease would run out of victims and hit an epidemiological dead end. Pathogens that are highly transmissible, like influenza, rarely kill, even absent the countermeasures of modern medicine. The 1918 flu had a fatality rate of about 2.5 percent.44 That’s tremendously high by the standards of the flu, but it still meant that more than 97 out of every 100 patients survived. Even a virus like HIV—which kills slowly and shows no symptoms for years, permitting the infected plenty of time to spread the disease—is hindered because transmission requires direct contact with blood or with bodily fluids. The self-replication that makes infectious disease such an effective weapon also prevents it from becoming a true existential threat. What viruses and bacteria want—if packets of genes and single-celled organisms can be said to want anything—is to survive and to replicate. They can’t do that if they kill all humans.

#### Interconnectedness is balanced by increased immunity and advances in medicine and sanitation

Dr. John Halstead 19, Doctorate in Political Philosophy, “Cause Area Report: Existential Risk, Founders Pledge”, https://founderspledge.com/research/Cause%20Area%20Report%20-%20Existential%20Risk.pdf

However, there are some reasons to think that naturally occurring pathogens are unlikely to cause human extinction. Firstly, Homo sapiens have been around for 200,000 years and the Homo genus for around six million years without being exterminated by an infectious disease, which is evidence that the base rate of extinction-risk natural pathogens is low.82 Indeed, past disease outbreaks have not come close to rendering humans extinct. Although bodies were piled high in the streets across Europe during the Black Death,83 human extinction was never a serious possibility, and some economists even argue that it was a boon for the European economy.84 Secondly, infectious disease has only contributed to the extinction of a small minority of animal species.85 The only confirmed case of a mammalian species extinction being caused by an infectious disease is a type of rat native only to Christmas Island. Having said that, the context may be importantly different for modern day humans, so it is unclear whether the risk is increasing or decreasing. On the one hand, due to globalisation, the world is more interconnected making it easier for pathogens to spread. On the other hand, interconnectedness could also increase immunity by increasing exposure to lower virulence strains between subpopulations.87 Moreover, advancements in medicine and sanitation limit the potential damage an outbreak might do.

# 1NR

## Torts CP

### 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

### AT: Strikedown

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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]

### AT: Antitrust Key---AT: Predictability

#### 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.

### AT: Antitrust Key---AT: Treble Damages

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

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

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

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

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

#### They’re comparatively larger than antitrust

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

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

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

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

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

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

### Back Contamination---2NC

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

Dr. Rhawn Gabriel Joseph 17, Ph.D., Editor of the Journal of Cosmology, “NASA is the Inquisition: NASA's 50 Year History of Defaming Scientists Who Discovered Evidence of Extraterrestrial Microbial Life”, 1/1/2017, http://cosmology.com/NASAIsTheInquisition.html

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2NR

## Lobbying ADV

### Nigeria---Yes Modelling---2NR

#### The U.S. model is the key driver of Nigerian democracy

Dr. Moses E. Ochonu 20, Cornelius Vanderbilt Chair in History and Professor of African History at Vanderbilt University, PhD and MA in African History from the University of Michigan, BA in History from Bayero University, Graduate Certificate in Conflict Management from Liscomb University, “Liberal Democracy Has Failed in Nigeria”, Africa Is a Country, 2/7/2020, <https://africasacountry.com/2020/02/liberal-democracy-has-failed-in-nigeria>

More than twenty years later, I am ashamed to admit that I was duped. I am not the only one. Backed by millions of dollars from Western pro-democracy foundations and governments, Nigeria’s civil society and pro-democracy activists sheepishly adopted the rhetorical claims of liberal democracy. We all assumed that liberal democracy was the only form of democracy and that any modification of or deviation from its proclaimed ideals was sacrilegious. Twenty years later, civilian rule in Nigeria has not brought the vaunted benefits of democracy—development, accountability, and civic freedoms.

The legitimizing rhetoric of post-Cold War democratization was that even if democracy fails to improve the lives and civic freedoms of Nigerians and other African peoples, there is a consolation prize: the electoral mechanism of voting out nonperforming governments, which would, over time, entrench a culture of accountability. This claim has floundered spectacularly in Nigeria. As bloody and manipulated presidential, legislative, and governorship elections since 1999—and especially the violent sham elections of February 2019—have shown, Nigerians’ votes count for little. Failed incumbents endure in office by brazenly subverting the electoral will of the people. The violent, chaotic gubernatorial elections in Kogi and Bayelsa States in November 2019 were another chapter in this grim history, demonstrating that Nigeria’s crisis of electoral legitimacy is deepening rather than abating.

Since 1999, Nigeria’s civic arena has also constricted under the weight of increased state repression. The recent arrest, detention, and courtroom re-arrest of journalist and activist, Omoyele Sowore, in defiance of court orders and ongoing judicial proceedings signify the recent descent into the raw, unabashed tyranny of military rule. Mr. Sowore was released last December, along with former National Security Adviser, Sambo Dasuki, who had spent more than four years in detention, but only after US senators wrote a strongly worded letter to the Nigerian government on the matter.

The truth is as compelling as it is bitter: the dreams and promises of democratization have morphed into an elaborate, haunting mirage. Did Nigerians make a mistake by uncritically adopting liberal democracy, and if so should they heed the counsel of their country’s acclaimed novelist, Chinua Achebe, and go back to when the proverbial rain started beating them and make amends?

The adoption of liberal democracy in Nigeria was not an organic product of homegrown political struggles. Nor did it emanate from the deliberative and ideological disputations of Nigeria’s vibrant civic public sphere. Instead, democratization was predetermined by a toxic mix of three crosscutting phenomena: the post-Cold War search for a new logic of neocolonial control and domination; the suffocating global ubiquity of a pro-democracy slush fund disbursed strategically by governmental and non-governmental Western actors; and the ideological certitude and arrogance of a unipolar political formation located in the Global North.

As with other democratization projects in Africa, Nigeria’s democratization was birthed by and remains beholden to the Washington Consensus, which posited economic and political liberalization as an all-purpose solution to Africa’s developmental and governance challenges. Proponents claimed it had a universal applicability, and was the endpoint of human political evolution, suitable for all times and all places. The ideological factor proved particularly decisive as a catalyst for the spread of liberal democratic claims and assumptions to Nigeria and the rest of Africa. Nigeria’s democratization was coextensive with the neoliberal fetishization of liberalization as the preeminent organizing idiom of the new global order.

#### Nigeria models the U.S.

Jered McCarthy 6, Professor at the University of Oregon, "A Country Report on Nigeria", <http://www.kiwispanker.com/papers/nigeria.html>

Since its independence, Nigeria has had three constitutions. The first one replaced its former, the Lyttleton Constitution of 1954, which created a federal administrative system with the country of Nigeria. This separated the powers from the great strength of the central government, something that most corrupt societies fear. The 1960 Independence Constitution declared Nigeria to be a united republic and to force the removal of the British monarchy and to replace it with a 5-year term president.7 The second constitution created the Second Republic in 1979. It replicated the United States constitutional system rather than the British. After the military regained control in 1984, the system diminished. These years saw major blood shed and a variety of military coups. Civilian order was restored in 1988 with the Third Republic; this was the first time the Sharia Law (Laws set in accordance with Islamic beliefs, like in Iran and many other Islamic nations) was even considered to be included in the constitution. Later, history would repeat itself and offer the civilian government back to the control of the military elite. These years were known as the Abacha regime; it was later replaced by the new civil Constitution of the Fourth Republic lead by Olusegun Obasanjo, a Yoruban Christian from the western states. This constitution is much like the U.S. constitution as well; it has a well executed system of checks and balances and all three of the branches reflect that of the U.S. model. Except that the new constitution will make certain that no one ethnic group can dictate the whole federal government. Executive Branch As listed above, the early government replicated that of the British government and placed a Prime Minister as the Head of Government. Under the second government, the Republic replicated that of the American way. Today, Nigeria continues to follow the U.S. model and it elects a President for two 4-year terms by a popular vote. The president governs with his senior government ministers and at least one of these ministers must come from each of the 36 states and must be confirmed by the Senate. The vice president, alike the U.S., is the second in command; though he or she must come from a different part of the country than the president, thus dividing the country to prevent ethnic majority rule. Today's vice president is a Muslim from the North, named Abubakar Atiku.10 Legislative Branch Alike the executive branch of government, Nigeria's National Assemble mimics that of the United States. It has a bicameral federal system that checks and balances the other two branches. The Senate (or the upper-chamber) represents the 36 states and the Federal Capital Territory of Abuja (much like the U.S.). It contains 109 members (3 from each state and one from the federal territory) and each state is divided into three districts. Senators are elected for 4-year renewable terms. The Senate also will elect a president to preside over the Senate; this person will serve as the third person in line in case of the death of the president.14 The House of Representatives is the lower-chamber and contains 360 members who are all elected on a popular basis in each of his district. Each member is elected for the same duration as those of the Senate. They also elect their own Speaker or the House.6 Judiciary Branch The Supreme Court is much like the U.S.'s system whereas it has both federal and state courts. The Judiciary branch of Nigeria's institution remains as the final corner of the triangle for Nigerian checks and balances. Although Nigeria does copy the American model very closely, there is one area where it is far reverse. In the Northern states, where Islamic decree is massive, the courts practice Sharia law to help convey ideas and judgments in that particular region.