## Inherency

#### [Brudney 1] The right to strike is Customary International Law – that should acknowledged by all just governments, but many fall short of recognizing *opinio juris* standards, which undermines international legitimacy.

Brudney 21

[James; 2/8/21; Joseph Crowley Chair in Labor and Employment Law, Fordham Law School; “The Right to Strike as Customary International Law,” THE YALE JOURNAL OF INTERNATIONAL LAW, Vol 46, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1710&context=yjil>] Justin -recut CAT

\*\* Brackets in original

II. THE INTERNATIONAL RIGHT TO STRIKE AS CIL That an international right to strike is widely recognized by governments does not mean the right has assumed the status of CIL. This Part seeks to forge that link, to show how the international right to strike qualifies as CIL. It begins (II.A) by identifying the two basic elements of CIL and explaining why the right to strike is an integral textual and conceptual component of FOA. It then establishes (II.B and C) that FOA and the right to strike satisfy both elements of CIL—a general practice accepted by States, stemming from a sense of legal obligation. While there are variations and qualifiers at the national level, the contours of CIL status are clear: a basic right subject to three substantive restrictions; a recognition that strikers retain their employment relationship during the strike itself; and certain procedural prerequisites or limitations. 105 This Part next demonstrates (II.D) that the two U.S. practices discussed earlier as deviating from the international right to strike—denying all public employees the right and authorizing permanent replacement of lawful strikers— contravene core aspects of the right to strike as CIL. Finally (II.E), this Part introduces the complexities of the U.S. position on FOA and the right to strike as international rights, reflected in the failure to ratify Convention 87 while both Congress and the executive branch embrace Convention 87 principles including the right to strike. A. Initial Definitions and Considerations 1. CIL Standards The two basic elements that determine the existence and content of a rule of CIL are first, the requirement of a general practice by States, and second, the requirement that the general practice be undertaken from a sense of legal right or obligation (opinio juris).106 The first element is objective: whether there is a sufficiently widespread and consistent practice of States endorsing and adhering to the rule. Evidence of such a general practice may include governmental conduct in connection with treaties; legislative or administrative acts; decisions of national courts; conduct in relation to resolutions adopted by an international organization; diplomatic acts and correspondence; and executive operational conduct on the ground.107 The second element, opinio juris, is more subjective: the general practice must be undertaken based on its acceptance as law, rather than being accepted based on mere usage or habit or some pragmatic motive. As is true for general practice, evidence of acceptance as law may come in a range of forms. These include public statements made on behalf of States; government legal opinions; decisions of national courts; treaty provisions; diplomatic correspondence; and conduct related to resolutions adopted by an international organization.108 2. The Right to Strike as Integral to FOA Freedom of association is one of the core principles on which the ILO was founded and continues to exist. 109 As set forth under Convention 87, FOA includes a series of integral elements, of which the right to strike is one. The two ILO supervisory mechanisms that have regularly applied or interpreted Convention 87 have understood it to include the right to strike from the early days of the Convention’s existence.110 Leading U.N. human rights covenants also recognize FOA as a basic right, including the right to strike as a component. 111 And the labor provisions of the 2019 U.S.-Mexico-Canada trade agreement include the following statement: “For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.”112 Accordingly, if FOA is seen as Customary International Law (CIL), and the right to strike is an essential component of FOA, then the right to strike should also be understood to be part of CIL. Consider in this regard the following integral elements of Convention 87. The fact that as part of FOA, workers and employers “shall have the right to establish and . . . to join organizations of their own choosing without previous authorization”113 means the State may not impose unreasonably high membership requirements that hinder the establishment of organizations, or require that members may not join several different organizations. 114 Similarly, the fact that under FOA, workers and employers “shall have the right to . . . elect their representatives in full freedom [and that] public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof,”115 means the State may not impose limits on candidates due to their nationality, literacy, political opinions, moral standing, or for workers, their non-employment in the employer’s occupation or enterprise. 116 And the fact that as part of FOA, workers “shall have the right . . . to organize their. . . activities and to formulate their programs” free “from any interference [by the public authorities]”117 means that worker organizations, in order to defend the occupational interests of their members, have the right to hold trade union meetings, the right to have access to places of work and to communicate with management, and the right to organize nonviolent protest action including strikes. 118 B. FOA and the Right to Strike as General Practice There is ample support that FOA is widely accepted in objective terms. Convention 87 has been ratified by 155 countries, or 83 percent of the 187 ILO Member States. 119 In addition, the ILO Constitution, endorsed by all members, specifies the critical role of FOA both in its 1919 founding document and the 1944 Declaration of Philadelphia as a constitutional addition.120 More recently, ILO Declarations issued in 1998 and 2008, again embraced by all members, make clear that even Member States that have not ratified Convention 87 are obligated to act in good faith to respect and effectuate FOA principles.121 Beyond the ILO realm, workers’ freedom of association, including the right to form and join trade unions and expressly the right to strike, is recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations General Assembly to be effective 1976.122 The Covenant has been ratified by 171 countries, including two of the four large-population countries that have not ratified Convention 87.123 Another major UN Human Rightstreaty, the International Covenant on Civil and Political Rights (ICCPR), also adopted by the U.N. General Assembly to be effective in 1976, recognizes FOA including the right to form and join trade unions. 124 The ICCPR has been ratified by 173 countries, including three of the four largepopulation countries that have not ratified Convention 87; its human rights committee has consistently recognized the right to strike as part of FOA under the Covenant. 125 Indeed, of the 187 ILO Member States, only 11 relatively smallpopulation countries have not ratified at least one of Convention 87, the ICESCR, or the ICCPR.126 FOA is also expressly recognized in a labor setting in the European Convention on Human Rights, which has been ratified by all 48 countries in the Council of Europe. 127 At a national level, the vast majority of constitutions provide for freedom of association, although some use general language that (unlike the international instruments just mentioned) does not specify workers or trade unions. 128 Apart from States’ nearly-universal embrace of FOA as a general matter, the right to strike itself has been broadly accepted by governments. As noted earlier, more than 90 countries have made a public commitment to the right to strike in their constitutions. 129 These commitments have translated to actual practice when national courts have relied on guidance from the CEACR and CFA in assuring compliance with their constitutional right to strike. Judicial interpretation of the international right as part of applying a domestic constitution often involves assuring compliance by governments or employers,130 though it also may require compliance by unions. 131 And compliance with the international right to strike may even emanate from application of a national constitution that endorses FOA without being explicit about the right to strike.132 Among the many national courts that have invoked the CEACR and/or CFA in support of a right to strike,133 two other cases worth noting involve Brazil and Kenya because neither country has ratified Convention 87. In 2012, the Labour Court in Brazil ordered reinstatement of workers terminated for participating in a work stoppage. 134 Under Brazil’s Constitution, “norms that define fundamental rights and guarantees are directly applicable.”135 Given that the Court found that the employer’s conduct had violated the principle of freedom of association and the free exercise of the right to strike, it seems that the “principle of freedom of association” was being directly applied as a matter of customary international law rather than through a ratified treaty or convention.136 In 2013, the Industrial Court of Kenya ordered the reinstatement of five workers dismissed for participating in a strike and strike-related activities. The Court’s reasoning derived from Kenya’s general participation in the ILO, including “respect for International Labour Standards,” rather than direct application of fundamental norms as in the Brazil case.137 The Industrial Court invoked a report by the CEACR and decisions by the CFA to support its decision; its recognition of FOA as an accepted international standard suggests that reports from the ILO supervisory bodies served as evidence of CIL.138 Finally, states’ widespread practice is reflected in the negotiation of trade agreements over the past two decades that recognize both FOA and the right to strike. Since 2003, labor provisions in U.S. trade agreements have regularly featured linkages to FOA as one of the fundamental ILO norms. 139 The commitment by signatory states to FOA as understood under the 1998 ILO Declaration has been progressively strengthened during this period—from providing that parties “shall strive to ensure” protection of FOA under domestic laws140 to specifying that parties shall “adopt and maintain [FOA rights] in [their] statutes and regulations, and practices thereunder.”141 The latest trade agreement, involving the United States, Mexico, and Canada (approved as a successor to NAFTA) expressly provides that the right to FOA necessarily includes protection for the right to strike.142 Trade agreements involving EU countries also feature commitments to respect and implement under domestic law the principles of FOA as understood in the ILO context. 143 This wide network of similarly worded, mostly bilateral trade agreements addressing the subject of FOA constitutes additional evidence of general practice for CIL purposes. 144 The pervasive nature of actual practice regarding FOA and the right to strike does not mean that the right’s content is static or fixed. To be sure, there is broad acceptance of the two previously discussed features on which U.S. law is out of step: the prohibition on permanent replacements145 and public employees’ right to strike with certain exceptions. 146 And although particular limits on the right may vary from one country to another, there is an international consensus that the right exists and that any limits should be reasonable.147 The International Court of Justice (ICJ) does not require uniformity in practice in order to establish CIL, and indeed, it has countenanced some degree of variation: The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general be consistent with such rules.148 C. FOA and the Right to Strike as Opinio Juris There is also considerable support for the proposition that the general practice of states on FOA and the right to strike stems from acceptance as a matter of legal obligation. Admittedly, while the existence of opinio juris may be inferred from a general practice, the International Court of Justice (ICJ) has at times noted the insufficiency or inconclusiveness of such practice, instead seeking confirmation that “[states’] conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”149 Trade agreements, for instance, may represent treaty law and may qualify as evidence of general practice, but they are typically entered into by States that have specific economic or political objectives rather than from a desire to embrace obligations arising under international law.150 Further, it is possible that even with respect to ILO conventions, widespread ratification is in part a function of acculturation, insofar as endorsements across a region contribute to socialized acceptance of norms on FOA, reassuring peer countries that protecting rights to association including the right to strike will not place them in an inferior competitive position.151 That said, the ICJ often does infer the existence of opinio juris from a general practice and/or from determinations by national or international tribunals.152 And there are ample reasons to draw such an inference here. To start, FOA is consciously accepted as an obligation by ILO member states not simply through ratification of Convention 87 (covering more than 80 percent of them) but by virtue of membership itself. The ILO Constitution expressly requires support for FOA principles, and these principles are further imbedded through a tripartite governance structure that allocates power-sharing roles to worker organizations alongside governments and employers.153 Thus, ILO members understand there is an underlying obligation to respect FOA in law and practice.154 A second reason is that domestic law can provide relevant evidence regarding the presence of opinio juris among states. Commitments to FOA expressed in national constitutions, statutes, and court decisions are not necessarily evidence of a state’s belief that the principle is international as opposed to domestic law. Nonetheless, the International Law Commission has made clear that evidence of acceptance as law (opinio juris) “may take a wide range of forms,” including but not limited to “official publications; government legal opinions; [and] decisions of national courts.”155 In this regard, the CEACR in 2012 identified 92 countries where “the right to strike is explicitly recognized, including at the constitutional level”; the list includes six countries that have not ratified Convention 87.156 Recognition in domestic law of a right to strike alongside a conscious decision not to ratify Convention 87 could give rise to an inference that these six countries are rejecting the right as a principle of international law. However, as explained earlier, national courts for two of the six non-ratifying countries (Brazil and Kenya) expressly invoke ILO membership and/or principles as guidance in their domestic law decisions. 157 In addition, Canada—a country not listed among the 92 endorsing the right to strike in the 2012 General Survey— has since recognized a constitutional right to strike under national law, relying in part on international law principles including CEACR and CFA determinations. 158 The Canadian Supreme Court had previously been explicit in invoking Convention 87, ICESCR, and ICCPR as “documents [that] reflect not only international consensus but also principles that Canada has committed itself to uphold.”159 Further, a third country in the group of six—South Korea—has affirmed in its trade agreements with the United States and the EU its obligation to “adopt and maintain in its statutes and regulations, and practices” FOA in accordance with the ILO Declaration.160 And in various CFA complaints against South Korea for violating FOA principles, including the right to strike, the Government has disputed the facts of the complaints while at the same time recognizing that such rights are embedded in international law.161 Accordingly, a more relevant reference point in this setting may be that “when States act in conformity with a treaty provision by which they are not bound . . . this may evidence the existence of acceptance as law (opinio juris) in the absence of any explanation to the contrary.”162 Stepping back, domestic law on FOA and the right to strike, which for many countries developed after Convention 87 and its initial applications by the CEACR and CFA, may be viewed in part as a window into countries’ sense of obligation in law and practice. A state may at times adopt labor provisions of a trade agreement for reasons of comity or relative competitive advantage. These reasons may play a more modest role with respect to adoption of certain human rights treaties or ILO conventions. 163 But evidence of practice and obligation in the domestic law sphere—especially when informed by regard for international instruments—seems almost by definition to be a function of acceptance as law rather than susceptibility to strategic motivations. In this regard, there are numerous instances in recent years where governments have expanded their legislative protections for the right to strike following a period of dialogue with the CEACR, and that committee has recognized and applauded the changes in law.164 Of particular relevance to the U.S. setting, these expansions have included assuring the right to strike for public sector employees and prohibiting the hiring of replacements for strikers.165 A third reason to infer opinio juris (in addition to the centrality of FOA principles within the ILO Constitution and the strong evidence of FOA and rightto-strike practice and obligation under domestic law) involves recent statements from high officials in the United Nations indicating that the right to strike is understood by its leaders as CIL. In his 2016 report to the U.N. General Assembly, the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and association explained, “The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law.”166 In 2018, responding to a press briefing on a strike by U.N. employees following announced pay cuts, the Deputy Spokesman for the U.N. SecretaryGeneral reiterated the U.N. view that the right to strike is indeed CIL and did so in the context of the right being asserted by public employees not involved in the administration of the state: Question: Does the Secretary-General believe that U.N. staff have a right to take part in industrial action? Deputy Spokesman: We believe the right to strike is part of customary international law.167 These statements did not simply materialize in recent times. Two major U.N. Human Rights treaties—the ICESCR and the ICCPR—have been interpreted by their relevant treaty bodies to include a right to strike; these bodies have reaffirmed their joint commitment to the right to strike as part of FOA, and they regularly monitor governments’ record of compliance with this right. 168 And as noted earlier, the two treaties—each ratified by over 80 percent of U.N members—include a clause explicitly identifying respect for ILO Convention 87. In sum, the principles of FOA including the right to strike would appear to satisfy both prongs of the CIL test. The widely recognized general practice on strikes has sufficient shape and contours: a basic right, three substantive exceptions (public servants involved in administration of the state, essential services in the strict sense of the term, and acute national emergencies), a recognition that strikers retain their employment relationship during the strike itself, and certain procedural prerequisites or attached conditions. 169 There are variations in national practice and also disagreements at the margins about what the right to strike protects, but these aspects are not different in kind from diversity and contests regarding international rights prohibiting child labor, or for that matter domestic constitutional rights involving freedom of expression or the right to bear arms. As for opinio juris, a broad range of sources combine to establish that the general practice stems from a sense of acceptance and obligation: ILO foundation and structure; two widely endorsed United Nations human rights treaties; national constitutions; government representations; domestic legislative and judicial decisions that expressly refer to or impliedly accept international standards and practices; and contemporary U.N. leadership.

## Advantage

#### [Brudney 2] Violations of CIL prevent multinational cooperation over labour and human rights issues.

Brudney 2

[James; 2/8/21; Joseph Crowley Chair in Labor and Employment Law, Fordham Law School; “The Right to Strike as Customary International Law,” THE YALE JOURNAL OF INTERNATIONAL LAW, Vol 46, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1710&context=yjil>] Justin -recut CAT

It is worth emphasizing this series of developments. United States political diplomacy and input from executive branch experts has helped the transnational legal process to strengthen the international right to strike. The U.S. has been a leading advocate on the international stage promoting both FOA principles and the right to strike—in its trade legislation, bilateral and regional trade agreements, and official positions at the ILO Governing Body. That the U.S. has not ratified Convention 87 does not mean it is somehow undemocratic or improper for U.S. officials to be bound by rules that U.S. influence helped create. To be sure, Sosa recognizes that Congress may “shut the door to the law of nations” explicitly or implicitly by treaties or statutes that occupy the field.271 And there is some domestic law that is inconsistent with the right to strike set forth in CIL. As discussed in Part I.C, this law notably includes a 1935 statutory provision exempting states as “employers” under the NLRA, thereby relegating public employees to state-by-state regulation of FOA and the right to strike; and a 1938 Supreme Court decision allowing private employers to hire permanent replacements for strikers.272 But these expressions of domestic law do not appear to be “controlling” in the relevant sense of addressing or responding to the CIL that is asserted here. The 1935 statutory provision and 1938 Supreme Court decision predate the promulgation of Convention 87 by a decade or more—hence they are not in any way responsive to the existence of FOA or the right to strike at an international level.273 The Court has relied on its 1938 statutory interpretation decision approving of permanent replacements in more recent decades.274 And there were legislative efforts in the early 1990s to overturn the permanent replacement doctrine that did not succeed. 275 It is possible to contend that despite the absence of legislative approval for permanent replacements, the Court’s continuing endorsement of its jurisprudence, and Congress’s failure to override those decisions, are sufficiently controlling in this context. On the other hand, there is a respectable and perhaps persuasive argument that these judicial decisions and instances of congressional inaction do not amount to a sufficiently comprehensive scheme of statutes and regulations addressing the precise issue.276 Relatedly, there is no indication that either the Court or Congress acted with a purpose to preclude the application of CIL in the right-to-strike setting, or even with an awareness that relevant CIL existed.277 In this regard, it is noteworthy that the international right to strike assumed increased visibility and importance beginning in the mid to late 1990s, following elevation of FOA as one of the eight fundamental ILO conventions and the promulgation of the 1998 Declaration. The Supreme Court in the context of admiralty law—relying on the law of nations—has applied recent CIL to overrule its own precedents, or to bypass or distinguish earlier statutory provisions. 278 In doing so, the Court has recognized the primacy of evolving developments in CIL so long as these changes in the law of nations are not directly contradicted by earlier federal statutory text. 279 Violations of CIL, like violations of international law generally, can produce friction between nations that hinders the accomplishment of foreign relations goals.280 As noted earlier, government officials and scholars have expressed concern in recent decades that failure to ratify Convention 87 and other fundamental ILO conventions can undermine U.S. standing on matters of international labor and human rights law.281 At the same time, the U.S. has been a leading advocate on the international stage promoting both FOA principles and the right to strike—in its trade legislation, bilateral and regional trade agreements, and official positions at the ILO Governing Body. And again, while CIL can give way when there is genuinely controlling positive law, such law must be meant to control an otherwise applicable CIL. The mere presence of a relevant statutory provision or judicial decision, without evidence that Congress or the court was aware the CIL existed, is unlikely to qualify. Moreover, if there is a potential conflict between established CIL and sufficiently clear federal statutes, the relative timing of these two sources of law becomes important. The Court has made clear that Congress can override CIL based on subsequent clear legislation.282 It is also well-settled that federal statutes and treaties are equal in authority such that “if a treaty and a federal statute conflict, ‘the one last in date will control the other.’”283 Given the status accorded to CIL as federal law comparable to treaties, it should follow that the last-in-time rule also applies to resolve any differences between an earlierenacted federal statute and a later CIL norm, at least one that meets the Sosa standard of definiteness, specificity, and widespread acceptance.284 Applying the last-in-time rule in our setting, the two most prominent divergences between CIL and existing federal statutory law would be resolved in favor of CIL. The NLRA doctrine allowing employers to permanently replace lawful strikers is not addressed at all in the text. It was derived from the 1935 law as part of a 1938 Supreme Court interpretation that has been relied upon in subsequent Court decisions through the late 1980s. The exemption of state and local government workers from federal law was itself part of the 1935 statute. Both the Court decisions establishing a permanent replacement doctrine and the text exempting state and local governments arose well before—and with no evident awareness of—the establishment and evolution of CIL on FOA and the right to strike. This CIL began emerging in the late 1960s and became fully developed from the late 1990s, continuing to the present.

#### [Meissner] That’s key to solve climate change - rigorous *opinio juris* compliance determines our ability to solve environmental crises.

Meissner 15

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The two-pronged requirement for the formation of customary law requires both state conduct and opinio juris sive necessitatis that are in compliance with a rule of law, and not merely with concepts of morality, courtesy, or ceremony.29 The ICJ has recognized the existence of “obligations of a state towards the international community as a whole” distinct from those that arise between individual nation-states.30 These are obligations erga omnes, which prohibit the use of state territory for acts that may harm other states, such as the spread of transboundary pollution.31 Consequently, as more states adopt environmental conservation measures, basic principles of environmental law have been incorporated into customary international law through state practice, multilateral treaties, and judicial decisions. Such internationally recognized norms include the precautionary principle, the polluter-pays principle, and the principle of transboundary harm.32 Debate has arisen, however, over the precise legal status of many international environmental norms and principles assumed to enjoy binding force as customary international law. For example, assertions about the prohibition on transboundary harm and the precautionary principle that are based on the utilization of texts produced by state and non-state actors, such as courts, intergovernmental and non-governmental organizations, and legal scholars, seem to characterize these norms as “declarative” rather than customary law.33 However, these ambiguous legal roots still contribute significantly to the process of custom generation, and allow the norms to play an important role in terms of voluntary compliance and in bilateral and multilateral negotiations.34 The consistent articulation of certain rules in conventional regimes lends support to the argument that such rules have achieved the status of customary international law.35 Many critics would argue that biodiversity protection has not yet crystallized into a peremptory international norm for two related reasons. First, it remains an extremely underdeveloped legal regime dependent upon a non-integrated mix of soft law declarations and regional initiatives.36 Second, it takes place within the evolving framework of the concept of sustainable development. Despite these defects, however, a colorable argument still exists that the prevention of biodiversity loss is at least carving a path towards becoming a principle of customary international law, even if it has not yet reached its final destination. The World Commission on Environment and Development’s Experts Group on Environmental Law, for instance, linked the obligation to cooperate closely with the principle of equitable utilization, stating that, “the duty to provide information may in principle pertain to many factors . . . which may have to be taken into account in order to arrive at a reasonable and equitable use of a transboundary natural resource.”37 States are therefore under a binding obligation to notify, in form, and consult with neighboring nations regarding domestic actions with the potential to affect shared natural resources.38 This standard facilitates international cooperation towards the effective application of the equitable utilization principle in environmental law Transboundary natural resources do not exist in isolation, but form an integrated whole within which the legal concepts of biodiversity conservation and human development coexist. Likewise, cultural heritage and migratory species— such as the tiger—do not stop at arbitrary national borders. Rather, they exist in a transboundary state themselves. As a result, and consistent with the principles articulated above, species and the communities that utilize them as part of their cultural heritage should be protected under customary international law. “Indeed, regardless of whether or not they have formally achieved customary status, the sophisticated and detailed articulation of the rules and principles of international environmental law provides a comprehensive set of reference standards and procedures to assist the consideration of transboundary environmental impacts and benefits” in a wide variety of areas, including species conservation and cultural heritage preservation.39 A Concept of “World Heritage Species” under the World Heritage Convention The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) was adopted by the UNESCO General Conference in Paris on November 16, 1972.40 In order to facilitate its goals of preserving sites important to the “common heritage of humankind,” the Convention called for the development of a World Heritage List to protect “cultural and natural heritage [sites] of outstanding universal value.”41 The notion of “outstanding value” embraces a common view of global history and recognizes that loss of such heritage would be irreplaceable. The World Heritage List “often serves as a catalyst to raising awareness for heritage preservation,” and can increase tourism to the heritage site, which in turn “can bring important funds to the site and to the local economy.”42 It can also serve as a catalyst for preserving the surrounding habitat of a site,43 often to the benefit of the species therein. Once a site is listed, parties must do their “utmost” to protect and conserve those sites and are precluded from taking “any deliberate measures” that might directly or indirectly damage listed sites.44 The concept of World Heritage Species has been discussed since early 2001, primarily in reference to the conservation of the world’s great apes.45 Whereas the World Heritage Convention protects cultural and natural sites of “outstanding universal value” to humankind, the World Heritage Species Protocol would protect species of comparable value.46 While the question remains open as to how to quantify such a value threshold, the increasing number of registers established by organizations such as UNESCO provide objective parameters for at least a prima facie determination of a given species’ international significance.47 Tigers, with their deep cultural connection to humans, clearly have such value, and their disappearance would constitute a critical loss for humanity. They, like other emblematic species, are “irreplaceable testaments to human evolution,” cultural pillars to many indigenous populations, and natural legacies to be passed on for future generations.48 Obviously, tigers are not cultural sites, such as monuments, buildings, or sites within the meaning of the World Heritage Convention. Therefore, any amendment to incorporate species into the World Heritage regime requires additional ratification by the parties; those who do not ratify the amendment would not be bound by it.49 However, a designation that highlights the significance of the area to the species, such as a “Malayan Tiger World Heritage Site,” could lend itself to listing under the current regime. As a result, the concept could benefit the conser vation of those species, such as the tiger, whose conservation status is diminished by a variety of threats or by a lack of political will, by bringing their conservation within the parameters of UNESCO’s World Heritage mandate. Consequently, a World Heritage Species register could be effectively established by amalgamating existing legal obligations with an emphasis on cooperative decision-making in species conservation and management.50 IV International Environmental Law and Human Rights A review of the existing multilateral agreements most applicable to tiger conservation—that is, CITES, the Convention on Biological Diversity, and the World Heritage Convention—concludes that none of these adequately protects the species from the various threats to their survival, including poaching and habitat destruction. It is therefore necessary to approach biodiversity conservation from a new perspective: its link to human rights and cultural identity. The 1972 Stockholm Declaration on the Human Environment triggered the discussion on adopting a human rights approach to environmental protection.51 In its preamble, the Stockholm Declaration clearly established the link between these two legal realms, stating, “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”52 Vice-President Christopher Weeramantry later accentuated this linkage in his eloquent separate opinion to GabˇcíkovoNagymaros. 53 For the most part, biodiversity exists within a matrix of resources lying within the sovereign boundaries of nation-states and the local sphere. This dynamic contributes to an acute tension between conservation needs and economic and social development needs, especially in Southeast Asia. For example, of the 15 countries that feature prominently in terms of diversity of higher species (reptiles, birds and mammals), none has an average annual per capita income greater than $2000.54 In fact, most of these countries register annual incomes that are among the lowest in the world, around $200–$500 annually.55 Conservationists recognize that many of the primary threats to species survival are often driven by poverty, and that poverty reduction is thus essential if conservation objectives are to be achieved.56 The Millennium Development Goals, which commit the international community to halving poverty by 2015, indicate that several important targets for poverty reduction in these regions have or will be met by 2015, but that progress in many regions is far from sufficient to meet its stated goals.57 A Human Right to a Healthy Environment The human right to a healthy environment is defined through diverse and controversial terminology. For present purposes, it refers to a human right to live in an environment of such minimum quality as to allow for the realization of a life of dignity and well-being.58 The focus—neither rightly nor wrongly—is on humans and the global disparity between communities and their development, rather than the environment in its own right.59 Principle 1 of the Rio Declaration provides that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”60 This principle was accepted without reservations by almost every nation and captures the ideals of linking a human right to a healthy environment with the principle of sustainable development, if not explicitly recognizing it as a right per se.61 Even if the right to a healthy environment cannot be regarded as a “human right” in any orthodox sense, it may still be considered a political and civil right, or an economic and social right, with particular applicability to indigenous peoples.62 The United Nations Declaration on the Rights of Indigenous Peoples, for example, contains complex language linking the rights of indigenous peoples, future generations, sustainable development, and the environment,63 as does the Organization of American States (O.A.S.) Proposed American Declaration on the Rights of Indigenous Peoples.64 Considering Principle 1 in conjunction with the contextual development of a right to a healthy environment, a right to sustainable development, and the rights of future generations, it follows that effects on health and a continuation of an established way of life are integral components of any right to a healthy environment for the local communities involved.65 Moreover, Article 27 of the International Covenant on Civil and Political Rights has been interpreted by the Human Rights Committee to ensure special entitlement to minorities and indigenous groups to have access to natural resources.66 Such entitlement necessarily entails a negative obligation not to interfere and a positive obligation to protect on the part of the state, in contrast to current international documents reaffirming exclusive state sovereignty over natural resources.67 A healthy environment thus entails more than a minimum quality of tangible resources, such as air, water, and shelter, and encompasses intangible elements, such as culture and a way of life. Emblematic species, such as the tiger, form pillars of cultural identity for communities around the world. For example, the Makah Tribe of the Olympic Peninsula in Washington is a seafaring culture in which whales and whaling hold a preeminent role in maintaining traditional culture and religious expression.68 Access to this species, a natural resource, is thus essential to their way of life and to enjoying a healthy environment. Without the whale, the Makah would not be able to realize their economic, social, and cultural rights to the full extent required by international law. Such a right consequently respects the complex linkages between local communities and their immediate environment and seeks to mitigate the global disparity in natural resource management, including of the species therein. As a result, the articulation of a human right to a healthy environment ultimately seeks to influence domestic decisions through international law.69 An international agreement on the issue would offer states an aspirational framework in which to operate to pursue the combined purposes of promoting human development and environmental protection. Such an endeavor, however, would require national conservation programs to move beyond principled legislation to the serious consideration of local needs and cultural norms.70 The interim gap between national and local levels of natural resource management capacity could be filled by non-governmental organizations, working with local communities to administer national programs. Moreover, the development of committed, sustainable sources of funding and enforcement must be pursued and may be more attainable if coupled with regional commitments that facilitate cooperation and accountability.71

#### [Spektor] That risks extinction – contrary models are incorrect.

Specktor 19 [Brandon; 6/4/19; Writes about the science of everyday life for Live Science, and previously for Reader's Digest magazine, where he served as an editor for five years; "Human Civilization Will Crumble by 2050 If We Don't Stop Climate Change Now, New Paper Claims," livescience, <https://www.livescience.com/65633-climate-change-dooms-humans-by-2050.html>] Justin

The current climate crisis, they say, is larger and more complex than any humans have ever dealt with before. General climate models — like the one that the [United Nations' Panel on Climate Change](https://www.ipcc.ch/sr15/) (IPCC) used in 2018 to predict that a global temperature increase of 3.6 degrees Fahrenheit (2 degrees Celsius) could put hundreds of millions of people at risk — fail to account for the sheer complexity of Earth's many interlinked geological processes; as such, they fail to adequately predict the scale of the potential consequences. The truth, the authors wrote, is probably far worse than any models can fathom. How the world ends What might an accurate worst-case picture of the planet's climate-addled future actually look like, then? The authors provide one particularly grim scenario that begins with world governments "politely ignoring" the advice of scientists and the will of the public to decarbonize the economy (finding alternative energy sources), resulting in a global temperature increase 5.4 F (3 C) by the year 2050. At this point, the world's ice sheets vanish; brutal droughts kill many of the trees in the [Amazon rainforest](https://www.livescience.com/57266-amazon-river.html) (removing one of the world's largest carbon offsets); and the planet plunges into a feedback loop of ever-hotter, ever-deadlier conditions. "Thirty-five percent of the global land area, and 55 percent of the global population, are subject to more than 20 days a year of [lethal heat conditions](https://www.livescience.com/55129-how-heat-waves-kill-so-quickly.html), beyond the threshold of human survivability," the authors hypothesized. Meanwhile, droughts, floods and wildfires regularly ravage the land. Nearly one-third of the world's land surface turns to desert. Entire ecosystems collapse, beginning with the planet's coral reefs, the rainforest and the Arctic ice sheets. The world's tropics are hit hardest by these new climate extremes, destroying the region's agriculture and turning more than 1 billion people into refugees. This mass movement of refugees — coupled with [shrinking coastlines](https://www.livescience.com/51990-sea-level-rise-unknowns.html) and severe drops in food and water availability — begin to stress the fabric of the world's largest nations, including the United States. Armed conflicts over resources, perhaps culminating in nuclear war, are likely. The result, according to the new paper, is "outright chaos" and perhaps "the end of human global civilization as we know it."

#### [Mecklin] Weakening international law supercharges interlocking catastrophic risks, the combination of which risks extinction and multiplies every other threat.

Mecklin 21

John Mecklin, Bulletin of the Atomic Scientists, “This is your COVID wake-up call: It is 100 seconds to midnight.” 2021 Doomsday Clock Statement, January 27, 2021. *Founded in 1945 by Albert Einstein and University of Chicago scientists who helped develop the first atomic weapons in the Manhattan Project, the*Bulletin of the Atomic Scientists *created the Doomsday Clock two years later, using the imagery of apocalypse (midnight) and the contemporary idiom of nuclear explosion (countdown to zero) to convey threats to humanity and the planet. The Doomsday Clock is set every year by the Bulletin’s Science and Security Board in consultation with its Board of Sponsors, which includes 13 Nobel laureates. The Clock has become a universally recognized indicator of the world’s vulnerability to catastrophe from nuclear weapons, climate change, and disruptive technologies in other domains.* <https://thebulletin.org/doomsday-clock/current-time/> -CAT

* This card is also an independent disad to PICs

Humanity continues to suffer as the COVID-19 pandemic spreads around the world. In 2020 alone, this novel disease killed 1.7 million people and sickened at least 70 million more. The pandemic revealed just how unprepared and unwilling countries and the international system are to handle global emergencies properly. In this time of genuine crisis, governments too often abdicated responsibility, ignored scientific advice, did not cooperate or communicate effectively, and consequently failed to protect the health and welfare of their citizens. As a result, many hundreds of thousands of human beings died needlessly. Though lethal on a massive scale, this particular pandemic is not an existential threat. Its consequences are grave and will be lasting. But COVID-19 will not obliterate civilization, and we expect the disease to recede eventually. Still, the pandemic serves as a historic wake-up call, a vivid illustration that national governments and international organizations are unprepared to manage nuclear weapons and climate change, which currently pose existential threats to humanity, or the other dangers—including more virulent pandemics and next-generation warfare—that could threaten civilization in the near future. Accelerating nuclear programs in multiple countries moved the world into less stable and manageable territory last year. Development of hypersonic glide vehicles, ballistic missile defenses, and weapons-delivery systems that can flexibly use conventional or nuclear warheads may raise the probability of miscalculation in times of tension. Events like the deadly assault earlier this month on the US Capitol renewed legitimate concerns about national leaders who have sole control of the use of nuclear weapons. Nuclear nations, however, have ignored or undermined practical and available diplomatic and security tools for managing nuclear risks. By our estimation, the potential for the world to stumble into nuclear war—an ever-present danger over the last 75 years—increased in 2020. An extremely dangerous global failure to address existential threats—what we called “the new abnormal” in 2019—tightened its grip in the nuclear realm in the past year, increasing the likelihood of catastrophe. Governments have also failed to sufficiently address climate change. A pandemic-related economic slowdown temporarily reduced the carbon dioxide emissions that cause global warming. But over the coming decade fossil fuel use needs to decline precipitously if the worst effects of climate change are to be avoided. Instead, fossil fuel development and production are projected to increase. Atmospheric greenhouse gas concentrations hit a record high in 2020, one of the two warmest years on record. The massive wildfires and catastrophic cyclones of 2020 are illustrations of the major devastation that will only increase if governments do not significantly and quickly amplify their efforts to bring greenhouse gas emissions essentially to zero. As we noted in our [last Doomsday Clock statement](https://thebulletin.org/doomsday-clock/current-time/), the existential threats of nuclear weapons and climate change have intensified in recent years because of a threat multiplier: the continuing corruption of the information ecosphere on which democracy and public decision-making depend. Here, again, the COVID-19 pandemic is a wake-up call. False and misleading information disseminated over the internet—including misrepresentation of COVID-19’s seriousness, promotion of false cures, and politicization of low-cost protective measures such as face masks—created social chaos in many countries and led to unnecessary death. This wanton disregard for science and the large-scale embrace of conspiratorial nonsense—often driven by political figures and partisan media—undermined the ability of responsible national and global leaders to protect the security of their citizens. False conspiracy theories about a “stolen” presidential election led to rioting that resulted in the death of five people and the first hostile occupation of the US Capitol since 1814. In 2020, online lying literally killed. Considered by themselves, these negative events in the nuclear, climate change, and disinformation arenas might justify moving the clock closer to midnight. But amid the gloom, we see some positive developments. The election of a US president who acknowledges climate change as a profound threat and supports international cooperation and science-based policy puts the world on a better footing to address global problems. For example, the United States has already announced it is rejoining the Paris Agreement on climate change and the Biden administration has offered to extend the New START arms control agreement with Russia for five years. In the context of a post-pandemic return to relative stability, more such demonstrations of renewed interest in and respect for science and multilateral cooperation could create the basis for a safer and saner world. Because these developments have not yet yielded substantive progress toward a safer world, they are not sufficient to move the Clock away from midnight. But they are positive and do weigh against the profound dangers of institutional decay, science denialism, aggressive nuclear postures, and disinformation campaigns discussed in our 2020 statement. The members of the Science and Security Board therefore set the Doomsday Clock at 100 seconds to midnight, the closest it has ever been to civilization-ending apocalypse and the same time we set in 2020. It is deeply unfortunate that the global response to the pandemic over the past year has explicitly validated many of the concerns we have voiced for decades. We continue to believe that human beings can manage the dangers posed by modern technology, even in times of crisis. But if humanity is to avoid an existential catastrophe—one that would dwarf anything it has yet seen—national leaders must do a far better job of countering disinformation, heeding science, and cooperating to diminish global risks. Citizens around the world can and should organize and demand—through public protests, at ballot boxes, and in other creative ways—that their governments reorder their priorities and cooperate domestically and internationally to reduce the risk of nuclear war, climate change, and other global disasters, including pandemic disease. We have experienced the consequences of inaction. It is time to respond.

## Plan

#### Thus, the plan “Resolved: A just government ought to recognize an unconditional right of workers to strike.”

## Solvency

#### 1] [Brudney 3] Courts are normal means; they can enforce the right to strike as Customary International Law.

Brudney 21 [James; 2/8/21; Joseph Crowley Chair in Labor and Employment Law, Fordham Law School; “The Right to Strike as Customary International Law,” THE YALE JOURNAL OF INTERNATIONAL LAW, Vol 46, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1710&context=yjil>] Justin \*\* Brackets in original

In order for the international right to strike to receive protection in a U.S. domestic law setting, this CIL right must be cognizable in federal court. Workers asserting such a right would be seeking direct application of CIL, stemming from legal principles set forth in The Paquete Habana233 and subsequent cases. The Paquete Habana involved U.S. seizure of two Spanish fishing vessels during the Spanish American War. The Court relied on customary international law to hold that the vessels and their cargoes were exempt from capture as prizes of war.234 Justice Gray’s oft-quoted language, recognizing that CIL is part of the law of the United States, is as follows: International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . 235 In a number of decisions beginning in the 1960s, the Court has applied CIL rules when determining the legal status of submerged offshore areas, helping guide its application of federal statutes and treaties implicating the law of the seas. 236 The Court has also invoked CIL in determining when an instrumentality of a sovereign state becomes the “alter ego” of that state, a question not controlled by the relevant foreign sovereign immunity statute.237 Relatedly, the Court in Banco Nacional de Cuba v. Sabbatino238 relied on a judge-made principle of U.S. foreign relations law—the Act of State doctrine—to decline to examine the validity of the taking of property by a foreign sovereign government within its own territory.239 Turning to lower federal courts, the courts of appeals have regularly applied the Vienna Convention on the Law of Treaties “as an articulation of the customary international law of treaty interpretation, even though the United States is not a party to the treaty itself.”240 And at least one district court has recognized FOA and the right to organize as CIL when denying a motion to dismiss.241 Finally, the executive branch also has applied CIL in certain circumstances. Although the U.S. voted against adoption of the 1982 UN Convention on the Law of the Seas, the U.S. government accepts its key provisions regarding the maximum breadth of territorial sea and the extent of exclusive economic zones as CIL.242 In short, U.S. courts and executive branch officials have directly applied CIL and been guided by its teachings in a range of doctrinal settings. 243 As noted earlier, CIL on human rights has been deemed applicable in U.S. courts for suitably defined misconduct occurring in other countries. 244 These doctrinal precedents do not involve direct application of CIL in a domestic law setting akin to the labor and human rights claims being proposed here. That said, lower courts have invoked CIL when applying federal rules of decision in a range of domestic law contexts. Indeed, the use of CIL when applying and construing various federal statutes has increased markedly in recent decades.245 Examples include its use when applying an armed conflict statute to establish limits on detention of a U.S. citizen within the U.S.;246 when construing the same statute to help establish requirements for release and repatriation of a foreign national held on U.S. soil;247 and when limiting the scope of an immigration statute’s authorization of detention.248 In addition, CIL has been applied to help courts apply the choice between indefinite detention and exclusion under a different immigration statute,249 and to assist judicial construction of a statute regulating recovery of sunken warships in U.S. waters. 250 It is not obvious why CIL should be deemed inapplicable when construing federal statutes that implicate appropriately qualified labor/human rights misconduct occurring within our borders.251 Moreover, as previously noted, a number of other countries have accepted the right to strike as a principle of international law when applying their own domestic law despite their conscious decision not to ratify Convention 87.252 Once one accepts that recognized CIL has substantive traction in a domestic law setting, the focus should be on whether this CIL can be situated in relation to certain procedural or jurisdictional limitations that characterize the U.S. judicial context. Accordingly, application of CIL to sustain claims based on FOA and the right to strike requires consideration of how this CIL relates to other aspects of U.S. law. B. CIL as Federal Common Law A threshold question is whether U.S. courts should determine matters of CIL as federal common law or as state law in light of the Erie doctrine.253 The question has been extensively debated by able international law scholars,254 and I will not attempt to add new value in this setting. I am persuaded that CIL should be understood and litigated as federal common law, for reasons presented at length in a range of sources. 255 Indeed, as one international law scholar has recently and thoroughly explained, “[t]he law of nations was the original federal common law.”256 The basic contours of this position were set forth by the Supreme Court in Sabbatino, when it held that the Act of State doctrine is federal law, binding on the states and not within the scope of Erie. 257 In the words of Justice Harlan for an eight-member majority, “an issue concerned with a basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”258 Subsequently, leading commentators have joined the Court in concluding that Erie was never meant to apply to CIL;259 that federal courts’ incorporation of the CIL of labor and human rights follows post-Erie precedent recognizing and helping to create a federal common law for labor relations and for other uniquely federal interests;260 that CIL may reflect developments in the international arena of labor and human rights in addition to filling gaps with respect to jurisdictional statutes such as the ATS and the Torture Victim Prevention Act (TVPA); 261 and that CIL remains subject to the democratic checks of supervision, endorsement, or revision by the federal political branches.262 Relying on the weight of these arguments in Boyle v. United Technologies Corp., Justice Scalia for the Court recognized that a few areas involving “uniquely federal interests” are committed to federal control, including the development of federal common law, and he cited Court precedent on CIL as one such area.263 C. The Presence or Absence of Controlling Law As indicated in The Paquete Habana excerpt above, an important additional consideration is whether there is a treaty or any “controlling executive or legislative act or judicial decision” that would preclude federal courts from recognizing a right to strike as CIL. Lower court decisions invoking the “controlling law” principle from Paquete Habana have applied a fairly rigorous standard, relying on a comprehensive scheme of statutes and regulations addressing the precise issue,264 or on a treaty ratified by the U.S. directed to the same problem.265 These lower courts also have invoked Supreme Court statements that focus on the central role of legislative expression when concluding that certain controlling congressional acts were taken with a purpose to preclude the application of CIL to a particular situation.266 Under this standard, controlling U.S. domestic law does not preclude federal courts’ authority to recognize a right to strike as CIL; on the contrary, it arguably supports such authority. As an ILO member, the U.S. is a party to the 1944 Declaration of Philadelphia, the 1998 Declaration on Fundamental Principles and Rights at Work, and the 2008 Declaration on Social Justice for a Fair Globalization.267 Each of these core ILO commitments specifies the fundamental importance of FOA. Congress in two separate trade statutes has incorporated FOA as an “internationally recognized worker right.”268 In addition, the U.S. has ratified the ICCPR, which has incorporated the right to strike as part of FOA, and has signed the ICESCR, which expressly recognizes that right within its text. 269 And both the Administration’s 2015 statement at ILO Governing Body proceedings and its most recent trade agreement, drafted and executed by the Trump Administration, have specified that the right to strike is an integral part of FOA.270

#### 2] [Chow and Schoenbaum] Unconditional can be interpreted to mean preventing from adding additional exceptions to international law. In the absence of alternative non-contextual definitions, prefer mine –

Chow and Schoenbaum 17 [Daniel Chow and Thomas Schoenbaum; 2017; Professor Chow served as a law clerk to the Honorable Constance Baker Motley, chief judge for the Southern District of New York, following graduation from law school, and then became an associate with Debevoise and Plimpton in New York. He came to Ohio State in 1985 and teaches International Law, International Transactions, Jurisprudence, Asian Law, and Property. He is a member of Phi Beta Kappa, Thomas J. Schoenbaum is presently the Harold S. Shefelman Professor of Law at the University of Washington in Seattle. He received his Juris Doctor degree from the University of Michigan and his PhD degree from Gonville and Caius College, University of Cambridge (UK). He is also Research Professor of Law at George Washington University in Washington DC. He is a practicing lawyer, admitted in several U.S. states and before the Bar of the Supreme Court of the United States. He has been a professor at the University of North Carolina at Chapel Hill and was Associate Dean at Tulane University in New Orleans, “International Trade Law: Problems, Cases, and Materials,” Aspen Casebook Study] Justin

1. Belgian Family Allowances helped to establish two basic principles of GATT jurisprudence: MFN applies to internal measures (in this case the 7.5 percent levy), and the same treatment extended to France and others (foregoing of the levy) must be extended unconditionally to all other WTO members. The unconditional extension of MFN must occur even if Norway or Denmark did not have a system of family allowances. While Belgian Family Allowances interprets the unconditional extension of MFN to mean without any conditions, it is also possible to interpret this requirement to prohibit any additional conditions beyond what is required of the original recipient of the benefit or privilege. See Matsushita, Schoenbaum, Mavroidis and Hahn The World Trade Organization: Law, Practice and Policy 167-177 (3d ed. 2015).

## Framing

#### The standard is maximizing expected wellbeing. Prefer:

#### 1] [Bostrom] Extinction first – You can’t be 100% sure about any framework, so you must keep people alive to make future ethical determinations.

Bostrom 12

[Nick Bostrom, Faculty of Philosophy & Oxford Martin School University of Oxford. “Existential Risk Prevention as Global Priority”. 2012. www.existential-risk.org/concept.html]

These reflections on moral uncertainty suggest an alternative, complementary way of looking at existential risk; they also suggest a new way of thinking about the ideal of sustainability. Let me elaborate. Our present understanding of axiology might well be confused. We may not now know — at least not in concrete detail — what outcomes would count as a big win for humanity; we might not even yet be able to imagine the best ends of our journey. If we are indeed profoundly uncertain about our ultimate aims, then we should recognize that there is a great option value in preserving — and ideally improving — our ability to recognize value and to steer the future accordingly. Ensuring that there will be a future version of humanity with great powers and a propensity to use them wisely is plausibly the best way available to us to increase the probability that the future will contain a lot of value. To do this, we must prevent any existential catastrophe.

#### 2] Degrees of wrongness – If I break a promise to meet for lunch, that’s not as bad as breaking one to take a dying person to the hospital. Only the consequences explain why the second one is so much worse than the first.

#### 3] Aggregation – States lack unified intent. Because different people have different ethical systems, the only non-arbitrary way to aggregate is to help the most people.

## Theory

#### Interp: Debaters at all TOC bid distributing tournaments must disclose all broken positions on their NDCA wiki page under the correct side with open source.

Violation: Graphical user interface, text, application, email

Description automatically generated

#### Standards:

#### 1] Accessibility: There is a section of literature base and evidence that is blanketed by paywalls and online protections disclosure means that even in the face of inaccessible evidence, debaters can still understand the crux of the arguments that are being detailed/Accessibility is an independent voter: we cannot have any debate without the ability to participate.

#### 2] Research Burdens: The more disclosure happens the better – the more access we have to opponent cases, the more motivated we will be to read, learn and block out.

Nails 13 A Defense of Disclosure (Including Third-Party Disclosure) by Jacob Nails [NSD, Update](http://nsdupdate.com/author/nsd_update/) October 10, 2013

In theory, the increased quality of information could trade off with quantity. If debaters could just look to the wiki for evidence, it might remove the competitive incentive to do one’s own research. Empirically, however, the opposite has been true. In fact, a second advantage of disclosure is that it motivates research. Debaters cannot expect to make it a whole topic with the same stock AC – that is, unless they are continually updating and frontlining it. Likewise, debaters with access to their opponents’ cases can do more targeted and specific research. Students can go to a new level of depth, researching not just the pros and cons of the topic but the specific authors, arguments, and adovcacies employed by other debaters. The incentive to cut author-specific indicts is low if there’s little guarantee that the author will ever be cited in a round but high if one knows that specific schools are using that author in rounds. In this way, disclosure increases incentive to research by altering a student’s cost-benefit analysis so that the time spent researching is more valuable, i.e. more likely to produce useful evidence because it is more directed. In any case, if publicly accessible evidence jeopardized research, backfiles and briefs would have done LD in a long time ago..

#### No claim to why can’t disclose if u claim “small school” then what’s the bl for small school ? what counts as a smaller school? It’s a norm – if small school deb8ers don’t do it then big school deb8ers don’t need to ido it destroying debate b/c we don’t have the same access to materials – before u say that I can’t say that – am a small school deb8er too, only ld deb8er in school , other thanthe pf team prolyl the only active one.

#### And there r tons of successful small school deb8ers that do disclose 🡪 norm setting for debate most impt

#### Voter: Fairness is a voter since if the rounds been skewed its impossible to determine who the better debater was. Education- constitutive purpose ie why schools fund. Competing interps: 1. Reasonability causes a race to the bottom where we read increasingly unfair practices that minimally fit the brightline 2. Necessitates judge intervention to see if we meet th brightline and 3 collapses because we use offense defense paradigm. Drop the debater on theory: 1. Drop the arg is the same thing since the argument was their entire advocacy text. 2. Its key to deterring future abuse No RVIs – a] illogical – fairness is a burden just like the aff has the burden of inherency b] norming – I can’t concede the counterinterp if I realize I’m wrong which forces me to argue for bad norms c] chilling effect – debaters are scared to check real abuse which means inf abuse goes unchecked d] substance crowdout – prevents 1AR blipstorms and allows us to get back to substance