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### T Prohibit---1NC

#### Prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97. Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis.

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Violation: The plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical affs must increase prohibitions on the practices themselves.

#### Vote neg for limits and ground---infinite behavioral remedies and no link uniqueness for offense.

### FTC DA---1NC

#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

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Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### States CP---1NC

#### The 50 states, territories and DC uniformly should substantially increase antitrust prohibitions on anticompetitive licensing practices by standard essential patent holders.

### Biz Con DA---1NC

#### Anti-trust law can’t be distinguished in specific industries. It’s enforced in generalist common law unlike regulation.

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

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

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

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable legal shifts wreck business confidence.

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Economic decline cascades and goes nuclear---their defense doesn’t assume post-COVID shifts.

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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.

### Forecasting CP---1NC

#### The United States should only allow the continuation of anticompetitive licensing practices by standard essential patent holders under antitrust law only when a team of the Good Judgment Project’s “super-forecasters” has determined that the activity reduces the numerical probability of harm to competition from an unacceptably high level.

\* The Good Judgment Project’s “Super-forecasters” are team members of the Good Judgement Project that have ended in the top 2% of forecasters tournaments, selected by Tetlock’s team.

#### It competes---the counterplan is a regulation not prohibition.

James Broaddus 50. February 6; Judge on the Kansas City Court of Appeals, Missouri; Westlaw, “City of Meadville v. Caselman,” 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### ONLY the counterplan solves the case---the plan can’t keep up with market changes.

AMC 07. Antitrust Modernization Commission. Deborah A. Garza, Chair. Bobby R. Burchfield ,Commissioner. W. Stephen Cannon, Commissioner. Dennis W. Carlton, Commissioner. Makan Delrahim, Commissioner. Jonathan M. Jacobson, Commissioner. Jonathan R. Yarowsky, Vice-Chair. Donald G. Kempf, Jr., Commissioner. Sanford M. Litvack, Commissioner. John H. Shenefield, Commissioner. Debra A. Valentine, Commissioner. John L. Warden, Commissioner. “Report and Recommendations.” https://govinfo.library.unt.edu/amc/report\_recommendation/amc\_final\_report.pdf

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.23 Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.24 In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.25 Prior commissions have made recommendations about both the substance and procedure of antitrust law.

#### Flexibility is key to super forecasting competition policy---the aff locks in policy failure.

Michelle Baddeley 17. Institute for Choice, University of South Australia. Journal of Behavioral Economics for Policy, Vol. 1, No. 1, 27-31, 2017. “Experts in policy land - Insights from behavioral economics on improving experts’ advice for policy-makers”. https://sabeconomics.org/wordpress/wp-content/uploads/JBEP-1-1-4-F.pdf

Whichever side one takes on these political divides, if the modern fashion is to allow subjective, partisan opinions to trump expert advice, what are the likely implications? Is it wise to be so mistrustful of experts? Expert advice is irreplaceable. Scientific experts and academics play a crucial role in developing new findings and insights to help inform policy, with implications across the range of human activity – from health and environmental policy through to competition policy, consumer protection and financial regulation – to name just a few. But to what extent are experts objective and impartial? Is their advice really impartial and unbiased, based around a cool and calculating objective assessment of evidence, after the careful application of robust research methodologies? In practice - uncertainty, insufficient information, unreliable data or flawed analysis can limit the expert’s ability to untangle the truth, and make it difficult for the policy-maker to assess the extent to which expert advice is reliable. Robust statistical methods, careful experimental design and clear hypotheses can guide the expert but impartial advice is also compromised by a range of economic, behavioural and socio-psychological constraints, some of which may be beyond the expert’s conscious control. Heuristics, biases and social influences driving experts can have significant negative consequences for the public, especially if misleading research findings are used to guide public policy.

This paper will explore some of these influences on experts’ judgement. In Section 2, some of problems around information, risk and uncertainty are outlined; in Section 3, key economic and socio-psychological constraints are explored. Policy implications and solutions are suggested in Section 3, focussing on how we can ensure that expert advice is devised and applied in the most robust and objective ways possible.

Information, risk and uncertainty

Risk and uncertainty is an unavoidable problem, especially for the scientific research that backs up expert judgement because it is about investigating novel, poorly understood phenomena. When information is scarce, a situation is profoundly uncertainty, and/or we have had no prior experience of an event or phenomenon, we cannot quantify the risk of one event versus another. Frequency ratios capturing the incidence of similar events in the past are of no use when there have been no similar events in the past. Given uncertainty, it is not possible to tell before the fact whether experts are right or wrong. It is not like we have given them a difficult mathematical problem which we can double check ourselves using a computer or calculator. With scientific research and expert advice – there is no way to know what the truth might be, and that is why we need experts to find it. And we can only judge expert judgements with the benefit of hindsight, if at all. This is a Catch-22: we need expert evidence to judge expert evidence.

An example of how policy-makers confront these problems of uncertainty and poor information affecting expert advice is the work of the Hazardous Substances Advisory Committee (HSAC) – an advisory committee to the UK’s Department for Environment, Food and Rural Affairs. This committee focuses on another complication arising from uncertainty – the difference between a risk and a hazard. Hazards exist, they are there – but if we know where they are, we can avoid them and thereby minimize our risk. The problem comes in knowing what and where the hazards are. Scientific experts on HSAC – including a range of toxicologists, environmental scientists and biochemists, as well as social scientists – assess evidence to help to inform the UK’s regulatory policy with respect to chemicals harmful to the environment and human health. Often a key constraint is that they are asked to provide advice around the likely environmental impacts of hazardous substances such as endocrine disruptors, antiobiotics and nanomaterials – often we do not know too much about these substances and their long-term impacts, especially for innovative technologies such as nanomaterials. HSAC has therefore devised a structure for assessing the quality of evidence when information is scarce and uncertainty is endemic –spanning not only the usual scientific evidence around experiments and field observation, but also including computational modelling and anecdotal evidence (Collins et al. 2016). For experts used to analysing large data sets, the latter would seem like an anathema but when experts are facing fundamental uncertainty the types of evidence they might use must expand accordingly. If we are forced to rely on anecdote, we need to understand what distinguishes good anecdotal evidence from bad anecdotal evidence: anecdotes that are corroborated across a range of sources are more reliable than single anecdotes, for example.

Economic and socio-psychological constraints

The problems of poor information, risk and uncertainty are not about the fallibility of individuals or even differences between individuals – either in terms of their individual differences and characters, and/or their susceptibility to biases and social influences. Once we introduce these additional constraints – which reflect the characters of the experts not the nature of the evidence – the opportunities for mistakes and misleading guidance increase significantly.

Individual differences

Individual differences seem to play a role, including in terms of innate ability to make judgements about uncertain futures. Philip Tetlock conducted a study which showed that, in forecasting uncertain future events, most experts are only just better than an ordinary person guessing at random (Tetlock 2006). In a second study, however – a collaboration with Dan Gardner – he showed that some particular individuals – experts or not – are “super-forecasters” who have a particular aptitude for forecasting (Tetlock and Gardner 2015). What ideal characteristics might enable these super-forecasters to predict so well? In a complex world, we need experts who are able to understand and analyse a wide range of evidence. Do we need experts who can cover a broad range, or experts who know a narrow field very well? Linking to Isaiah Berlin’s distinction between the fox-types who have a wide but relatively superficial knowledge, and the hedgehog-types who have a deep but relatively narrow knowledge, Tetlock (2006) argues that we may prefer to be advised by foxes – who know many little things, can draw on an eclectic range of evidence and are able to improvise relatively easily when evidence shifts. The hedgehogs, who know one area very well and focus on one tradition may be too inclined to impose formulaic and inflexible solutions.

#### Binding forecasting is key to spillover---solves security.

J. Peter Scoblic and Philip E. Tetlock 20. J. Peter Scoblic is Co-Founder of Event Horizon Strategies, a Senior Fellow in the International Security Program at New America, and a Fellow at Harvard’s Kennedy School. Philip E. Tetlock is Leonore Annenberg University Professor at the University of Pennsylvania, Co-Founder of Good Judgment, and a co-author of Superforecasting: The Art and Science of Prediction. “A Better Crystal Ball The Right Way to Think About the Future”. https://www.foreignaffairs.com/articles/united-states/2020-10-13/better-crystal-ball

The greatest barrier to a clearer vision of the future is not philosophical but organizational: the potential of combining scenario planning with probabilistic forecasting means nothing if it is not implemented. On occasion, the intelligence community has used forecasting tournaments to inform its estimates, but that is only a first step. Policymakers and consumers of intelligence are the ones who must understand the importance of forecasts and incorporate them into their decisions. Too often, operational demands—the daily business of organizations, from weighty decisions to the mundane—fix attention on the current moment.

Overcoming the tyranny of the present requires high-level action and broad, sustained effort. Leaders across the U.S. government must cultivate the cognitive habits of top forecasters throughout their organizations, while also institutionalizing the imaginative processes of scenario planners. The country’s prosperity, its security, and, ultimately, its power all depend on policymakers’ ability to envision long-term futures, anticipate short-term developments, and use both projections to inform everything from the budget to grand strategy. Giving the future short shrift only shortchanges the United States.

### Regs CP---1NC

#### The United States federal government should prohibit anticompetitive licensing practices by standard essential patent holders through non-antitrust regulations.

#### The United States federal government should grant private parties standing to bring suit and make the remedy of treble damages available.

#### The United States federal government should not substantially increase antitrust prohibitions on anticompetitive licensing practices by standard essential patent holders.

#### The counterplan PICs out of anti-trust legislation and the FTC and DOJ as enforcers---other agencies’ regulations solve.

Lawrence Fullerton et al. 08. Joel M Mitnick, William V Reiss, George C Karamanos and Owen H Smith. Sidley Austin LLP. Vertical Agreements The regulation of distribution practices in 34 jurisdictions worldwide. “United States.” https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through--vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf

5 What entity or agency is responsible for enforcing prohibitions on anticompetitive vertical restraints? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

#### Regs solve and increase flexibility.

Erik R. Puknys and Michelle (Yongyuan) Rice 20. Parnter at Finnegan and former patent examiner at the US Patent & Trademark Office. Associate at Finnegan, with experience in section 337 investigations before the U.S. International Trade Commission (ITC). SEP Users Should Jettison Antitrust For Patent, Contract Law. Finnegan. Law360. 10-15-2020. https://www.finnegan.com/en/insights/articles/CDMR-sep-users-should-jettison-antitrust-for-patent-contract-law.html

The Qualcomm and Continental decisions demonstrate that antitrust is an unlikely vehicle for resolving FRAND disputes. Unless the Ninth Circuit, sitting en banc reverses the panel decision in Qualcomm, the Fifth Circuit reverses the Continental decision, or the Supreme Court steps in to change things, antitrust challenges to SEP licensing practices face an uphill battle.

Contract and patent law, on the other hand, provide a different perspective and more flexibility for implementers during negotiations and in court. When negotiating FRAND terms, the parties should review relevant case law interpreting similar SSO policies, and the damages methodologies courts have endorsed or criticized. In addition, the parties should be mindful of creating a record of willingness and diligence and beware of engaging in behavior that could be characterized as bad faith. As in traditional contract settings, the covenant of good faith will play a role in the FRAND world. And that applies to both sides.

### Cap K---1NC

#### Capitalism causes extinction---creates endless climate and environmental crisis---Jevons Paradox means “tech fixes” only make it worse.

Jeremy Lent 10/13/21. Award-winning author. "Solving the Climate Crisis Requires the End of Capitalism". Resilience. 10-13-2021. https://www.resilience.org/stories/2021-10-13/solving-the-climate-crisis-requires-the-end-of-capitalism/

The global conversation regarding climate change has, for the most part, ignored the elephant in the room. That’s strange, because this particular elephant is so large, obvious, and all-encompassing that politicians and executives must contort themselves to avoid naming it publicly. That elephant is called capitalism, and it is high time to face the fact that, as long as capitalism remains the dominant economic system of our globalized world, the climate crisis won’t be resolved.

As the crucial UN climate talks known as COP26 approach in early November, the public is becoming increasingly aware that the stakes have never been higher. What were once ominous warnings of future climate shocks wrought by wildfires, floods, and droughts have now become a staple of the daily news. Yet governments are failing to meet their own emissions pledges from the Paris agreement six years ago, which were themselves acknowledged to be inadequate. Increasingly, respected Earth scientists are warning, not just about the devastating effects of climate breakdown on our daily lives, but about the potential collapse of civilization itself unless we drastically change direction.

The elephant in the room

And yet, even as humanity faces perhaps the greatest existential crisis in its species’ history, the public debate on climate barely mentions the underlying economic system that brought us to this point and which continues to drive us toward the precipice. Ever since its emergence in the seventeenth century, with the creation of the first limited liability shareholder-owned corporations, capitalism has been premised on viewing the planet as a resource to exploit — its overriding objective to maximize profits from that exploitation as rapidly and extensively as possible. Current mainstream strategies to resolve our twin crises of climate breakdown and ecological overshoot without changing the underlying system of growth-based global capitalism are structurally inadequate.

The idea of “green growth” is promulgated by many development consultants, and is even incorporated in the UN’s official plan for “sustainable development,” but has been shown to be an illusion. Ecomodernists, and others who stand to profit from growth in the short-term, frequently make the argument that, through technological innovation, aggregate global economic output can become “absolutely decoupled” from resource use and carbon emissions — permitting limitless growth on a finite planet. Careful rigorous analysis, though, shows that this hasn’t happened so far, and even the most wildly aggressive assumptions for greater efficiency would still lead to unsustainable consumption of global resources.

The primary reason for this derives ultimately from the nature of capitalism itself. Under capitalism — which has now become the default global economic context for virtually all human enterprise — efficiency improvements intended to reduce resource usage inevitably become launchpads for further exploitation, leading paradoxically to an increase, rather than decrease, in consumption.

This dynamic, known as the Jevons paradox, was first recognized back in the nineteenth century by economist William Stanley Jevons, who demonstrated how James Watts’ steam engine, which greatly improved the efficiency of coal-powered engines, paradoxically caused a dramatic increase in coal consumption even while it decreased the amount of coal required for any particular application. The Jevons paradox has since been shown to be true in an endless variety of domains, from the invention in the nineteenth century of the cotton gin which led to an increase rather than decrease in the practice of slavery in the American South, to improved automobile fuel efficiency which encourages people to drive longer distances.

When the Jevons paradox is generalized to the global marketplace, we begin to see that it’s not really a paradox at all, but rather an inbuilt defining characteristic of capitalism. Shareholder-owned corporations, as the primary agents of global capitalism, are legally structured by the overarching imperative to maximize shareholder returns above all else. Although they are given the legal rights of “personhood” in many jurisdictions, if they were actually humans they would be diagnosed as psychopaths, ruthlessly pursuing their goal without regard to any collateral damage they might cause. Of the hundred largest economies today, sixty-nine are transnational corporations, which collectively represent a relentless force with one overriding objective: to turn humanity and the rest of life into fodder for endlessly increasing profit at the fastest possible rate.

Under global capitalism, this dynamic holds true even without the involvement of transnational corporations. Take bitcoin as an example. Originally designed after the global financial meltdown of 2008 to wrest monetary power from the domination of central banks, it relies on building trust through “mining,” a process that allows anyone to verify a transaction by solving increasingly complex mathematical equations and earn new bitcoins as compensation. A great idea — in theory. In practice, the unfettered marketplace for bitcoin mining has led to frenzied competition to solve ever more complex equations, with vast warehouses holding “rigs” of advanced computers consuming massive amounts of electricity, with the result that the carbon emissions from bitcoin processing are now equivalent to that of a mid-size country such as Sweden or Argentina.

An economy based on perpetual growth

The relentless pursuit of profit growth above all other considerations is reflected in the world’s stock markets, where corporations are valued not by their benefit to society, but by investors’ expectations of their growth in future earnings. Similarly, when aggregated to national accounts, the main proxy used to measure the performance of politicians is growth in Gross Domestic Product (GDP). Although it is commonly assumed that GDP correlates with social welfare, this is not the case once basic material requirements have been met. GDP merely measures the rate at which society transforms nature and human activity into the monetary economy, regardless of the ensuing quality of life. Anything that causes economic activity of any kind, whether good or bad, adds to GDP. When researchers developed a benchmark called the Genuine Progress Indicator (GPI), which incorporates qualitative components of well-being, they discovered a dramatic divergence between the two measures. GPI peaked in 1978 and has been steadily falling ever since, even while GDP continues to accelerate.

Since 1978, Genuine Progress has been falling even while GDP continues to increase. Credit: Kubiszewski et al., Beyond GDP: Measuring and achieving global genuine progress

In spite of this, the possibility of shifting our economy away from perpetual growth is barely even considered in mainstream discourse. In preparation for COP26, the UN’s Intergovernmental Panel on Climate Change (IPCC) modeled five scenarios exploring potential pathways that would lead to different global heating outcomes this century, ranging from an optimistic 1.5°C pathway to a likely catastrophic 4.5°C track. One of their most critical variables is the amount of carbon reduction accomplished through negative emissions, relying on massive implementation of unproven technologies. According to the IPCC, staying under 2°C of global heating — consistent with the minimum target set by the 2015 Paris agreement — involves a heroic assumption that we will suck 730 billion metric tonnes of carbon out of the atmosphere this century. This stupendous amount is equivalent to roughly twenty times the total current annual emissions from all fossil fuel usage. Such an assumption is closer to science fiction than any rigorous analysis worthy of a model on which our civilization is basing its entire future. Yet, even as the IPCC appears willing to model humanity’s fate on a pipe dream, not one of their scenarios explores what is possible from a graduated annual reduction in global GDP. Such a scenario was considered by the IPCC community to be too implausible to consider.

This represents a serious lapse on the part of the IPCC. Climate scientists who have modeled planned reductions in GDP show that keeping global heating below 1.5°C this century is potentially within reach under this scenario, with greatly reduced reliance on speculative carbon reduction technologies. Prominent economists have shown that a carefully managed “post-growth” plan could lead to enhanced quality of life, reduced inequality, and a healthier environment. It would, however, undermine the foundational activity of capitalism — the pursuit of endless growth that has led to our current state of obscene inequality, impending ecological collapse, and climate breakdown.

#### Anti-trust is capitalist---competition inevitably replicates market collapse.

Richard Wolff 19 Professor Emeritus of Economics at University of Massachusetts, Amherst. Transcript from YouTube video: “Economic Update: Competition and Monopoly in Capitalism.” Democracy @ Work. December 9th, 2019. https://www.democracyatwork.info/eu\_competition\_monopoly\_in\_capitalism.

Today I'm going to devote the program to something many of you have asked me to present, to talk about, to analyze, and that is the question of monopoly. It has to do with the assertions we hear often these days that somehow our capitalist system, here in the United States and beyond, is being negatively affected because monopolies have replaced or displaced competition. The idea here is if only we can get competition back, recreate a competitive capitalism, why then the problems we face will go away. Today's program is a design to show you how and why that is not the case, to think about these things in a different way from this nice story that capitalism is basically fine; it's just the monopoly form we have to get rid of so we get back to the competition which we're all supposed to believe is wonderful and presents us with no problems to solve. So let's go, and let's do it in a systematic way.

First, it is of course easier, faced with a declining capitalism, a capitalism that's all around us with its extreme inequalities, with its instabilities – here we are, trying to cope with the effects of the Great Crash of 2008, even while we anticipate the next downturn coming down the road soon – an economic system that has shown (that is, capitalism) that it is not respectful of the natural environment; it is not, as the words now go, sustainable in a reasonable way. Yeah, we're surrounded by problems of capitalism. So it's comforting in that situation to get the idea from somewhere that this really isn't a problem of capitalism as a system but rather the problem brought in somehow from the outside – monopoly – a situation in which competition among many companies gives way in some way we're not quite sure about to a domination by one or a small handful of companies. And so the argument goes, we don't have to be critical of capitalism; we don't have to think about an alternative system. No, no, we just have to deal with this little detail, the monopoly problem. And if we can deal with that, well, we'll get back to a competition, to a competitive capitalism that is good.

There are three big mistakes involved in this way of thinking, which is nonetheless very widespread and very popular, more so now than in quite some years. First mistake: Capitalism has been wrestling with the problem of monopoly from day one. We have had repeated periods of monopoly. They have eventually led to movements, often of many people, to destroy or remove monopoly. We used to call that in America trust-busting, or antitrust. We even have a department within the Department of Justice in Washington devoted to antitrust activities. Yeah, we've been waging battles against monopoly over and over again, and you know why? Because we keep having monopolies over and over again. Google is a monopoly. Amazon is a monopoly. They're all around us: companies that have effectively no real competition. This is a problem that capitalism has always displayed. And that ought to lead you to wonder whether thinking about it as something we can do away with isn't maybe the best possible example of wishful thinking.

The second big mistake is to imagine that competition is some unmixed blessing. It never was, and it isn't today. A competitive market is a human institution. Like every other human institution, it has strengths, and flaws, and weaknesses. To think of competition as some magical perfection is a silly abnegation of your own rational capability to evaluate something. It's sort of advertising thinking. By that, I mean the advertiser tells you what's good about the product they've been told to advertise; they don't tell you what's bad about it. If you want to evaluate it, you don't talk to an advertiser because they only give you one side. The people who promote competition use advertising logic. We're not going to do that here. Competition is no unmixed blessing.

And finally, I'm going to show you that competition is itself the major cause of monopoly. So that even if we ever got back to a competitive capitalism, all that would mean is we're back in the process that produces monopoly – as it always has.

All right, so let's begin. I'm going to start with explaining how competition has all kinds of consequences that most of you, like me, don't like, don't want. It's a discussion, if you like, of competition's other side: you know, the part that the advertiser doesn't tell you about. The used-car salesman who wants you to buy that junk doesn't tell you about what happened last week in the car crash that that was part of, etc., etc.

All right, let's begin. One of the major reasons that American corporations shut down their operations in the United States and moved them to China, among other places, is because of – you guessed it – competition. They wanted to make more money than they had been before. They were afraid of other companies beating them in the competitive game, so they said wow, let's go to China, because there you can pay workers a lot less. There you don't have the same rules to obey. There they don't care that much about pollution as they do here. So we can save on all kinds of costs, and that will allow us to undercut our competitors. Yeah, one of the consequences of competition was the exodus of American companies to other parts of the world, and the enormous unemployment that resulted from it. Yeah, that was a result, among other things, of competition.

Here's another one: Capitalists, employers, seeking to compete with one another, often engage in what we call automation. They bring in machines that are cheaper to use than human laborers, and that gets them a step ahead of their competitors. Okay, if we replace people with machines, we throw those people out of work. That has an impact on them, their self-esteem, their relationship to their spouse, their relationship to their children, their relationship to alcohol – should I continue? What are the social costs of automation? They're huge. They've been documented over and over again. Competition provokes and produces automation.

Let me give you another example: Companies are competing, say, in the food business – you know, trying to get a customer like you or me to buy this kind of cereal rather than another. So they get their labs to go to work, and they discover we can replace wheat, which we used to put in our little flakes, with – Lord help us – some chemical that is cheaper than wheat. We're not going to worry about what that chemical does to your chemistry in your body because we can now lower the price of our cereal, because we're saving on wheat, and undercut the competitor. The human beings who eat this stuff will suffer, now and in the future, but competition left our producer of cereal no choice.

And in case you think I'm making some up, let me give you some concrete ones. The Boeing Corporation, the major producer of airplanes in this country, is in a crisis as a corporation. You know why? Because the 737 Max crashed a couple of times, killing hundreds of people. And you know why? It turns out they economized on safety measures, and training measures. And you know why they did that? Because they're in a very tight competition with European and other airplane manufacturers, and that leads them – as it usually does – to look to cut corners: that race for, quote, "efficiency." Yeah, it was competition that contributed to those deaths and to that problem. That's competition too. You can't whitewash this story; they're real. One of the ways Amazon beats its competition is it speeds up the work process. It has figured out ways to make people work much more intensely, using up their brains, their muscles, their nerves, in ways that cause real long-term physical damage to working people. That, too, is a result of the competitive effort.

And you know, it wasn't so long ago that children were part of the labor force. That's right, kids as young as five and six years of age. We were told they have little fingers, you see. They can be more productive than people who are adults with big fat fingers, you know – that doesn't work. And by the way, you should be grateful because poor kids are the ones we hire, and that gives their poor families more income than they would otherwise have. We heard those arguments. Competition, the companies said, required them to use the more productive, and the lower-wage, children rather than adults. So child labor was also a result of competition. It was so ugly and so troubling to so many people that finally there were movements in the United States and many other countries simply to outlaw child labor. So it became a crime for any employer to use a worker who was under 16 or 18 years of age. That was a way in which people said we are not going to allow competition among capitalists to destroy our children. They were recognizing that competition has an awful effect in what it does to children.

Well, it has many awful effects. So let's be clear: In the history of capitalism, the monopoly problem (which we're going to get to in the second half of today's program) is no worse, it's just different, from the competition problems. Capitalism goes through phases of competition and monopoly, going from one to the other, as I will explain. But we shouldn't bemoan the one in favor of the other, any more than vice-versa. These are neither of them solutions; they are both phases of the problem. And the problem is capitalism, which does its number on us both in the period when it's competitive and in the period when it's monopoly. People who want us to engage one more time in an anti-monopoly crusade are doing something that in the end evades the problem, which is the system – capitalism – not this or that form of that system, such as competition and monopoly.

We've come to the end of the first half of today's Economic Update. This gives me an opportunity to remind you, please, to sign up if you haven't already, to subscribe to our YouTube channel. It's a way easily for you to support us, doesn't cost any money, and it is a big help to us in terms of our reputation and what we can accomplish. Likewise, please make use of our websites. They are there for your communication with us. They are there for you to be able to, with a click of a mouse, to follow us on Facebook, Twitter, and Instagram. And finally, a special thanks goes, as always, to our Patreon community for their ongoing enthusiastic support. It means the world to us. My final, very final for this first half, is about a new book that we have just produced and released. It's a follow-up to an earlier volume I have spoken to you about that was called Understanding Marxism. For the same reason, we have now produced a brand-new book, just out, called Understanding Socialism. It is a response, as this program is, to issues, questions, comments you have sent to us in large numbers. It's an attempt to give an overview of the different interpretations of what socialism means, of what happened in countries like Russia and China that tried to create this – the strengths, the weaknesses, the lessons to be learned, what to do, and what not to do. Please, if you're interested and want to follow up, check us out, check the book out: lulu.com is how you find both books. And I will be right back; stay with us.

Welcome back, friends, to the second half of today's Economic Update. This program, as I explained, is devoted to the analysis of competition and monopoly as two interactive, sequential phases of capitalism as a system. The first part of the program was devoted mostly to competition, so let's turn now to monopoly. What is the basic definition and criticism of monopoly? Strictly speaking, monopoly is defined simply as a situation in which the producers of a particular commodity – shoes, software programs, haircuts, it doesn't matter – have been reduced to only one. Literally one seller – a monopolist. But in general language, it includes also situations where many producers who once competed with one another have been reduced to only a handful. The strict term for only a handful is "oligopoly," but we don't have to split hairs about this. "Monopoly" will be the word we use for either one or a very small number.

For example, there were once dozens of automobile companies, but very quickly their competition reduced them to basically three for much of the post-World War II period, and you know their names: Ford, General Motors, and Chrysler. And likewise there were once many cigarette producers, there were once many television-set producers, and they became very few, whose names, therefore, we all know.

What's the criticism of a monopoly or oligopoly situation? Again, very simple: The idea is, if there's only one seller of something, that seller can jack up the price way above what he might have otherwise because he doesn't have any competitor. If he had a competitor, if he raised the price, the competitor would get all the business because we'd all go to the competitor who hadn't raised the price rather than buy it at a higher price from the monopolist. So we don't like monopolies, because they can jack up their prices and their profits because they don't have a competitor. And if it's a few, a handful, well then we talk about things like cartels: arrangements when a few get together over dinner, or out on the golf course, and tell us what the price is. If you ever wondered why the prices of different cars, different cigarettes, and so on, are so close to one another – mm-hmm – that's because there are few sellers, and somehow they worked it all out. But the basic criticism is that a monopoly is a situation in which the seller of something jacks the price up way beyond what they could otherwise get because there are no more competitors.

So let's talk about this monopoly problem and where the monopolies come from. Well, the first and most important lesson is this: Competition produces monopoly. It's not something external, imposed on competition. It has nothing to do with human greed or anything else. Are people greedy? You betcha – some more, some less – but that's really a separate matter. It's competition that produces monopoly, and let me show you how that works. In competition, we have, by definition, a whole bunch of producers. They all produce the same thing. They compete with one another, hoping we, the consumer, will buy from one rather than the other. They compete in the quality of what they produce and in the price of what they produce. And we are supposed, as consumers, to go look for the best quality at the lowest price, and to patronize that one who offers that to us better than the others that we could buy from but choose not to.

Okay, that's a fair definition. Now let's follow the logic. Company A produces – however it manages it – a better quality and/or a lower price than Company B. So we all go to Company A. Company B can't find any buyers because it's not competitive. Or to say the same thing in other words, Company A outcompetes Company B. Here's what happens: Company B collapses. Because it can't sell its goods, we're all going to Company A. So Company B sooner or later declares bankruptcy. It can't continue. It lays off its employees, it stops buying inputs, because it can't compete. Good. Now what happens in Company A? Company A says hey, there's a whole bunch of workers that have just lost their job at Company B; they're trained in producing what we produce; let's go hire some of them. And likewise, Company A says, they're not using their computers, or their trucks, or their other inputs. They're going to have to sell them on the secondhand market. We can get some important inputs we need at a lower price than we would have to pay if we bought them new. So what begins to happen is, where before there were two companies, A and B, there's now one larger A, and B has disappeared. Or to say the same thing in simple English, A – the winner in the competitive struggle – eats, absorbs into itself, what's left of Company B.

And this process is repeated over and over, until 30, or 300, companies have become one, or two, or three. That's the result of competition. That's how competition is supposed to work. That's how competition does work. It's important to understand: Monopoly is where competition leads. And as if that weren't enough, let me make sure you understand this from the business point of view: It is the great dream of every entrepreneur to become the last one standing in the competition, to win the competition, not just because it makes you feel good you outmaneuvered your competitors, but because if you're the last one standing, you're the monopolist. The reward for having outcompeted the others is that you're now in a position to jack up the profits, and the prices, way beyond what you could have done before.

So we have a system that produces monopoly, and all the incentives for every entrepreneur in competition to work as hard as possible to become the monopolist. So why is anyone surprised that monopolies keep happening, because they're the whole point and purpose of capitalist competition. If you ever were – and we never have, but if you ever were – able to get rid of all the monopolies and re-establish competition, all you would be doing is setting this same process in motion again for the umpteenth historical time. In other words, fighting against monopoly is pointless as long as you have capitalism, because it is the endless reproducer of this problem – as it always has been.

Now, how do monopolies maintain themselves? If you're the only one standing, you're a monopolist. Or you're an oligopoly, you're a few, and you get together and jack up your prices together. The question becomes look, a monopolist makes very high profits – much higher than a competitor can achieve – and isn't that an enormous incentive for other capitalists to get in on that business? Because look at the profits they're earning, because they're the only one. Apple, Amazon, Google – the profits are staggering. Everybody wants to get in. So the way a monopolist has to think is, I've got to create obstacles that block other people from coming in to get a piece of the enormous profits my monopoly allows me to get. We call that in economics "barriers to entry." Monopolists need to create barriers. Let me give you a couple of examples.

The major soft drink makers in the United States – basically Coca-Cola and Pepsi Cola – they produce a drink that has sugar and coloring in it, and lots and lots of water. Let me assure you, there is nothing difficult or complicated about producing a mixture of sugar, color, and water. It doesn't take a genius; it never did. Pepsi and Coca-Cola make a fortune off of their product, as we know, and they have for decades. They have a virtual monopoly. Now, lots of other people could produce water, sugar, and color close to, if not identical with, whatever they produce, but they can't break through. They can't really get to that status. And you know why? Because Coca-Cola and Pepsi erected a barrier to entry. And the way they did that was with advertising. Every billboard, every magazine cover, every doorway of every institution you've ever been to has a picture of smiling, happy people drinking one or the other. You've learned: that's the drink, that's the drink. Another company might make a perfect substitute, but they can't afford the enormous cost of advertising. The advertising costs more than the water, and the sugar, and the color. What you pay for when you buy Pepsi and Coke is the advertising that got you to buy it. You're paying for being hustled. But it works, because it means other companies know that they can't get in there by cheaply producing an alternative, because you have to produce the advertising that goes with it, or else you can't do it. And so their monopoly is maintained.

Here's another way to maintain a monopoly: Get the government to step in. Here the famous example is the milk producers. Some years ago, there was a crisis with milk. There was contamination; people were getting sick. So the clever milk monopolies came in and said, we're going to support the enormously expensive, special equipment to guarantee pasteurization, and so on, of milk. Why did they support it? Because your small farmer, your small dairy producer, can't afford it, so they go out of business. Only the big, rich few that are left can afford the enormous equipment. They used governmental rules to create a barrier to entry.

Here's another way: corrupt public officials. President Trump denounces Huawei corporation because it compromises our national security. It denounces European car producers because somehow their shipping cars here compromises our security. Who cares? As long as the president blocks other companies from getting into the business that might compete with an American, a barrier to entry exists. Monopolists have been very creative in coming up with ways to preserve their monopolies.

I don't want to lose the basic point. The basic point is: Capitalism oscillates, back and forth between competition and monopoly – first this industry, then that one. For a while, Ford, General Motors, and Chrysler were the monopolies – or the oligopoly, if you like – in automobiles. But eventually, Toyota, and Nissan, and Peugeot, and Fiat broke the monopoly. In that case, it was foreigners who did it. And then we had some competition, and that, then, is now shrinking. The French – the last two producers in France – have just agreed to merge. You get the picture. Industry by industry, first this one, then that one, go through one phase or another.

The important point is: The phases are not our problem. They merge into, and incentivize, each other. Each provokes movement in the other direction. The point to understand is that the problems of a capitalist system are not about this oscillation of phases. We're not going to solve the problem of monopoly by getting rid of them and re-establishing competition. We've been there; we've done that; it reproduces monopoly; and it doesn't change the basic inequality, unsustainability, instability of capitalism. We need to get beyond that stale, old debate – competition versus monopoly – and face the underlying reality: Capitalism is the problem, and getting beyond it is the solution.

#### Vote neg for global syndicalism---pressures towards socialist state action are building, forces the hand of monopolies.

Cecilia Rikap 21. Professor of Economics and Coordinator of YSI States and Markets Working Group, Institute for New Economic Thinking. “Tilting the Scale Against Intellectual Monopoly Capitalism.” *Capitalism, Power and Innovation Intellectual Monopoly Capitalism Uncovered*. Routledge. 2021. 287-289

Capitalism is a system based on asymmetries and inequalities (of income, wealth, between classes, genders, races, countries and more). Quite striking for a system born from the motto “Liberté, égalité, fraternité”. As time passes by, this broken promise of modernity becomes all the more apparent. Inequalities deepen as knowledge is monopolized, digital surveillance reinforces firms and states control capacities over workers and citizens, and political conflicts never cease – with the US-China tech cold war at the current epicentre.

Social disrupts are an expected recurring outcome, and we have seen them everywhere in the 21st century. The specific motives differed, but there is a common root: people are fed up with capitalism’s growing inequalities, with a stagnant or even declining “middle class” in developed countries for several decades already and the highest gains accumulating at the global level for those in the richest 5% (Milanovic, 2016).

There is another shared feature; demonstrations are increasingly being organized online. The same technology that is used for surveillance, for broadcasting extreme right and even fascist ideas, and that drives the USChina world hegemony conflict, is also being used as a counterbalancing weapon. Internet, particularly social networks, is a powerful tool for the organization of grassroots movements. Workers’ unions can also learn from each other’s experiences online.

The absence or weakness of unions and social movements in some parts of the world has benefited intellectual monopolies rentiership and predation. For instance, hiring workers with a vendor contract not only hides the working relation (see Chapter 10) but also impedes unionization as it currently stands. Still, unions are adapting and workers organizing. In 2018, Google employees managed to stop the company from renewing an artificial intelligence contract with the Pentagon and to cancel its plans for a censored search engine for China. And, in 2020, 2,000 employees urged the company to cease selling technology to the US police after George Floyd’s killing. These initiatives should be taken by workers in other companies and contribute to unionization. Unions should be reconceived as a political actor capable of exercising their influence beyond wage claims. Workers’ organization is indispensable to counterbalance the power of intellectual monopolies, given both their global reach and states’ internal contradictions and limitations.

Peripheral countries should cease competing to attract outsourcing and offshoring by allowing worse wages and working conditions. As mentioned above in this chapter, world cooperation agreements to establish minimum labour regulations, forbidding new and old forms of informality and granting minimum working conditions are urgent. However, these agreements require great social pressures to take place. When it comes to transforming capitalism, social disrupts, grassroots social movements and unions play a crucial role.

To illustrate their paramount importance, let us briefly consider taxes. It is crystal clear that the global taxing system has failed. As pointed out in Chapters 7 and 10, global intellectual monopolies declare profits and IPRs in tax havens and use tax loopholes to minimize paid taxes. Global tax reform should consider the separation between ownership and control. Intellectual monopolies control production and innovation networks beyond their legal ownership and have the capacity to trickle down the burden of taxes. However, the intertwined relationship between global intellectual monopolies and their home (core) states renders highly unlikely to accomplish such global tax reform without intense social pressure. Even the recent US corporate tax reform was not – at least so far – successful in this respect (Clausing, 2020). Then, as far as tax havens are not eliminated, there will still be room for tax avoidance and evasion (Zucman, 2015). Countries acting as tax havens will not comply with a global reform unless huge social disrupt forces them to do so.

Additionally, workers’ protests must be coordinated at the level of the global production network because the production unit is no longer the factory but the network. The same applies to global innovation networks. Intellectual monopolies’ recognized employees have greater bargaining power than workers in subordinate firms, which are precisely those that generally need a more urgent improvement in their salaries and working conditions. “Workers of the world unite, you have nothing to lose but your chains” (Marx & Engels, 1848) can and must become an everyday reality for the French Revolution motto to be more than aspirational.

## Innovation

### Turn---1NC

#### Patent holdout is worse than holdup---DOJ and scholars prove.

Kirti Gupta and Urska Petrovcic 20. Ph.D. in Economics from the University of California, San Diego. Vice president of Criterion Economics and a senior fellow at Hudson Institute. Standards, Patents, and Antitrust Policy: The Road Ahead. Competition Policy International. 12-21-2020. https://www.competitionpolicyinternational.com/standards-patents-and-antitrust-policy-the-road-ahead/

Indeed, the DOJ and other scholars have indicated that “patent holdout” is potentially a greater risk than “patent holdup.” In explaining why the hold-up and hold-out problems are not symmetric, Assistant Attorney General Makan Delrahim said:

“It is important to recognize that innovators make an investment before they know whether that investment will ever pay off. If the implementers hold out, the innovator has no recourse, even if the innovation is successful. In contrast, the implementer has some buffer against the risk of hold-up because at least some of its investments occur after royalty rates for new technology could have been determined. Because this asymmetry exists, under-investment by the innovator should be of greater concern than under-investment by the implementer.11

Scholarly work has also pointed to the outsized danger of patent holdout. Epstein & Noroozi find that courts’ failure to recognize the symmetry of the FRAND principle, combined with their overreliance on liability rules (i.e., damages over injunctions), incentivizes the very patent holdout problem that FRAND was intended to avoid.12 Layne-Farrar describes important differences between traditional patent litigation and litigation over SEPs that make holdout more common in the SEP licensing context.13 Langus, Lipatov & Neven show that even if injunctions are available, SEP owners will sometimes accept below-FRAND rates, especially when litigation costs are high.14 Jacobson states that a concern for SEP owners is that greater difficulty in obtaining an injunction, and the concomitant reduction in bargaining leverage, creates a “costless option” for a potential licensee: negotiating in bad faith in an attempt to obtain a below(F)RAND royalty, with the worst-case- outcome being the (F)RAND royalty if litigation results.15

#### Holdout is worse---incentive to continue infringing.

Jonathan Barnett 20. Torrey H. Webb Professor of Law, Gould School of Law, University of Southern California. How and Why Almost Every Competition Regulator Was Wrong About Standard-Essential Patents. Competition Policy International. 12-21-2020. https://www.competitionpolicyinternational.com/how-and-why-almost-every-competition-regulator-was-wrong-about-standard-essential-patents/

B. Patent Holdout, Not Holdup

Some courts and regulators have expressed concern that a legal environment in which SEP owners have no plausible prospect of seeking an injunction against infringers would give rise to circumstances in which well-resourced infringers would have little incentive to negotiate or pay a licensing fee without first entering into a protracted and costly litigation process.  As the UK Supreme Court observed in August 2020 in its Unwired Planet decision: “[I]f the patent-holder were confined to a monetary remedy, implementers who were infringing the patents would have an incentive to continue infringing until patent by patent, and country by country, they were compelled to pay royalties.”10  Without a credible injunction threat, patent owners are inevitably exposed to “holdout” by infringers who have little economic reason to pay a license fee that can be contested, and perhaps more favorably negotiated, in the courtroom rather than the boardroom.  Protracted and recurrent litigations between innovators and implementers in the SEP licensing market — which have intensified approximately at the same time as antitrust and patent law have constrained SEP owners’ ability to pursue injunctive relief — testify eloquently to the force of this assertion.

#### Plan doesn’t solve.

Robert P. LoBue, 18. Partner at Patterson Belknap. “Cert Petition Asks How Far Does the Noerr-Pennington Doctrine Extend?” March 8, 2018. https://www.pbwt.com/antitrust-update-blog/cert-petition-asks-how-far-does-the-noerr-pennington-doctrine-extend

If the Court took this case, it could resolve the Circuit split and squarely tackle the question whether a multiplicity of petitioning acts can cause the forfeiture of Noerr-Pennington immunity absent a showing that any of the petitions was objectively baseless. To be sure, the Court recently denied review of a case from the Third Circuit, Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., which presented nearly the same question: whether the Court’s “objectively baseless” standard “applies to a ‘series’ of underlying cases.” While the odds of the Supreme Court granting a cert petition are always low, here the rather extreme nature of PRTC’s facts (it is challenging a series of 24 petitions whereas in Hanover, the antitrust plaintiff challenged a series of 4 petitions) may give this cert petition a leg up. In the end, resolution of this question raises both policy as well as pragmatic concerns. It is entirely possible that a dominant player in a market could initiate a proceeding heedless of its merits, expecting its mere pendency to thwart a rival whether by soaking up legal fees, scaring off investors, directly blocking entry, or otherwise. That player arguably gets a fortuitous free pass if the proceeding can later be justified as not objectively baseless, especially when the value of a potential favorable decision pales compared to the value of delaying the competitor’s entry. On the other hand, imposing a threshold screen that allows further scrutiny only of objectively baseless petitions gives deference to the principle that all parties are entitled to their day in court, and has the arguable benefit of being easier to assess, particularly on summary judgment, than an intent-based test. But resolving this tension doesn’t necessarily have anything to do with the number of litigations involved. Thus, the multiplicity question served up by PRTC may become merely a vehicle for revisiting the more fundamental core questions addressed in PREI and California Motor.

### AT: Sham Litigation

#### Plan doesn’t solve.

Robert P. LoBue, 18. Partner at Patterson Belknap. “Cert Petition Asks How Far Does the Noerr-Pennington Doctrine Extend?” March 8, 2018. https://www.pbwt.com/antitrust-update-blog/cert-petition-asks-how-far-does-the-noerr-pennington-doctrine-extend

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### Innovation Now---1NC

#### Empirics show patent innovation is doing great now

Alexander Galetovic et. al. 14. Professor of Economics at the Universidad de los Andes in Santiago. \*\*Stephen Haber is the A.A. and Jeanne Welch Milligan Professor at Stanford University. \*\*Ross Levine is the Willis H. Booth Chair in Banking and Finance at the University of California at Berkeley. Patent Holdup: Do Patent Holders Holdup Innovation?" Hoover Institute. May 2014. https://www.semanticscholar.org/paper/Working-Paper-Series-No-.-14011-Patent-Holdup-%3A-Do-Galetovic-Haber/ea38063babc29affc2139254e0ec0d14c5192f2a

5 Conclusions

Given the widespread, bipartisan calls for patent reform, there is stunningly little evidence that the current patent system is stymieing the commercialization of technology. Although reform proponents point to the rise in patent cases and the increased role of “trolls” in those cases, there is no evidence that litigation and trolls have materially hurt what actually matters: the products that we buy and the prices that we pay.

In this paper, we find that the rate of innovation—as reflected in prices—has rarely, if ever, been faster than it is today in exactly those industries that reform advocates point to as embodying the patent holdup problem. For example, the prices of goods produced by patent intensive SEP industries relative to other good produced in the economy have fallen by 90% since the early 1990s. Indeed the prices of goods produced by patent-intensive SEP industries have fallen at about twice the rate of other patent-intensive industries. Although reform advocates point to patent-intensive SEP industries as most prone to patent holdup, it is in these industries were innovation seems fastest. If patent holdup is slowing innovation, it is slowing it down to perhaps the fastest rate in human history.

Our analyses also shed a skeptical light on the direction of major reform proposals that envisage a greater role for regulatory-type bodies and a smaller role for the courts. Current reform proposals compare the messy reality of the current court-based system with an imaginary ideal—a perfectly functioning regulatory system. But, an enormous body of economic research suggests that such regulatory-based institutions are more prone to subversion than the courts.

Regulatory capture might be a bigger concern than the high cost of litigation. Before materially altering the U.S. intellectual property system—a bedrock institution underlying long-run economic growth—more serious work is need.

### Antitrust Decks SSOs---1NC

#### SSOs work---the aff disrupts that delicate balance

Michael A. Carrier 3. Assistant Professor at the Rutgers University School of Law-Camden. "Why Antitrust Should Defer to the Intellectual Property Rules of Standard-Setting Organizations: A Commentary on Teece & Sherry." Minnesota Law Review. 2003. https://www.researchgate.net/publication/228171398\_Why\_Antitrust\_Should\_Defer\_to\_the\_Intellectual\_Property\_Rules\_of\_Standard-Setting\_Organizations\_A\_Commentary\_on\_Teece\_Sherry

B. SSO RULES RESTRICTING INTELLECTUAL PROPERTY

SSO search, disclosure, and licensing rules do not have direct adverse effects on competition, such as harming consumers or raising price. Rather, they have significant procompetitive justifications.

Search rules merely require SSO members to search for IP that might read on a standard, an obligation that does not lead to anticompetitive effects.82 Disclosure rules provide useful information to members deciding on a standard. In particular, they inform the members of the SSO of the intellectual property that would be implicated by the selection of certain standards. Disclosure rules, again, differ from informationsharing arrangements that have warranted antitrust scrutiny.83 For rather than abetting the sharing among competitors of sensitive price information that reduces competition, the information produced by such rules prevents the strategic hiding and ex post exploiting of IP, activity that serves no legitimate purpose.

Licensing rules are even more critical in avoiding the holdup problem of patentees imposing onerous licensing terms after the adoption of the standard. They thus offer a significant pro-competitive justification by avoiding a potential bottleneck and contributing to the creation of a product that might not otherwise exist. Such rules bear some resemblance to other types of activity that have received substantial antitrust deference: (1) a blanket music license allowing the sale of rights to hundreds of copyrighted musical compositions, thereby reducing transaction costs84 and (2) cross-license agreements and patent pools, which resolve patent bottlenecks among owners of blocking patents that otherwise could unilaterally prevent the practice of a product with multiple patented inputs.85 Even the promulgation of specific licensing terms should be sanctioned. “Reasonable and nondiscriminatory” does not give precise notice of its content and does not prevent ex post holdup. More detail might. Moreover, such announcements have not, to date, appeared to foster collusion among patentees in the royalties they have charged.

C. PRO-COMPETITIVE BENEFITS OF IP-BASED SSOS

Intellectual property-based SSOs offer real pro-competitive justifications. Interoperability standards enable firms to use a common platform and enhance competition in the marketplace. They contribute to a greater realization of network effects and prevent buyers from being stranded in a product that loses the standards war.86 And they clear bottlenecks and create markets that might not otherwise exist.87 The IP rules of SSOs contribute to these benefits by reducing the likelihood of holdup by patentees.88

Further affirming the pro-competitive benefits of SSO rules, the industries in which SSOs have developed are those with the greatest potential for bottlenecks, patent thickets, and thwarted innovation. Mark Lemley has shown that SSOs have concentrated “in precisely those industries where the unconstrained enforcement of patents could be most damaging to innovation,” namely, computer software, Internet, telecommunications, and semiconductors.[[1]](#footnote-1) In these industries, the presence of multiple patented inputs in products increases the risk of holdup. Just as ominous, the industries are marked by “cumulative innovation,” with one generation’s patented invention based on those of previous generations.[[2]](#footnote-2) The clearing of patent thickets and fostering of cumulative innovation and new markets through SSOs offers perhaps the most powerful benefits for competition and innovation.[[3]](#footnote-3) Significant to begin with, the pro-competitive benefits of SSO rules are magnified even further in removing the potentially explosive landmines of the patent system.[[4]](#footnote-4)

These pro-competitive benefits are obvious when we return one last time to the paradigmatic example of a patentee announcing to the members of the SSO the terms of RAND licensing before the adoption of the standard. Even if the patentee and its competitors are members of the SSO and collectively possess market power, the activity should be upheld.[[5]](#footnote-5) Anticompetitive effects on price and innovation will be minimal, and the pro-competitive justifications of preventing holdup and allowing standardized products to come to market are significant, especially in industries that would otherwise be subject to patent thickets and holdups. Adherence to platitudes of “reasonable and nondiscriminatory” licensing does not mean much where the details are left vague and are the subject of dispute after the standard has been adopted. The clarity of SSO rules is not used to foster collusion, price fixing, or boycotts, but rather to eliminate ambiguity and prevent holdups at the point where the patentee has significant leverage. For these reasons, antitrust should defer to nearly all SSO rules restricting IP.

CONCLUSION

Teece and Sherry are correct that standard-setting activity is beneficial and that antitrust cannot have more than a limited role in policing the IP rules of SSOs. But this conclusion can be reached without resort to notions of one-size-fits-all antitrust, an overriding objective of speed, and the relative influence of IP owners vis-à-vis IP users in SSOs. It can comfortably be grounded in the heart of antitrust: in the lack of significant anticompetitive effects and in the presence of powerful procompetitive justifications. Although there is a role for antitrust in the analysis of SSO rules, long-settled antitrust jurisprudence dictates that it is only a limited role.

### US Tech Leadership---1NC/2AC

#### American tech dominance is high. Only antitrust threatens it.

Alden Abbott et. al 21. Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

### AT: AI Innovation

#### COVID has led to extremely sky rocketing AI innovation.

Joe McKendrick 9-27-21. Harvard Business Review, , "AI Adoption Skyrocketed Over the Last 18 Months," https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months

When it comes to digital transformation, the Covid crisis has provided important lessons for business leaders. Among the most compelling lessons is the potential data analytics and artificial intelligence brings to the table. During the pandemic, for example, Frito-Lay ramped up its digital and data-driven initiatives, compressing five years’ worth of digital plans into six months. “Launching a direct-to-consumer business was always on our roadmap, but we certainly hadn’t planned on launching it in 30 days in the middle of a pandemic,” says Michael Lindsey, chief growth officer at Frito-Lay. “The pandemic inspired our teams to move faster that we would have dreamed possible.” The crisis accelerated the adoption of analytics and AI, and this momentum will continue into the 2020s, surveys show. Fifty-two percent of companies accelerated their AI adoption plans because of the Covid crisis, a study by [PwC](https://www.pwc.com/us/en/tech-effect/ai-analytics/ai-predictions.html) finds. Just about all, 86%, say that AI is becoming a “mainstream technology” at their company in 2021. [Harris Poll](https://appen.com/whitepapers/the-state-of-ai-and-machine-learning-report/), working with Appen, found that 55% of companies reported they accelerated their AI strategy in 2020 due to Covid, and 67% expect to further accelerate their AI strategy in 2021. Will companies be able to keep up this heightened pace of digital and data-driven innovation as the world emerges from Covid? In the wake of the crisis, close to three-quarters of business leaders (72%) feel positive about the role that AI will play in the future, a survey by [The AI Journal](https://aijourn.com/report/ai-in-a-post-covid-19-world/) finds. Most executives (74%) not only anticipate AI will deliver more efficient make business processes, but also help to create new business models (55%) and enable the creation of new products and services (54%). AI and analytics became critical to enterprises as they reacted to the shifts in working arrangements and consumer purchasing brought on by the Covid crisis. And as adoption of these technologies continues apace, enterprises will be drawing on lessons learned over the past year and a half that will guide their efforts well into the decade ahead:

#### Incentives towards high AI innovation now.

Gartner, 9-7-21. "Gartner Identifies Four Trends Driving Near-Term Artificial Intelligence Innovation," https://www.gartner.com/en/newsroom/press-releases/2021-09-07-gartner-identifies-four-trends-driving-near-term-artificial-intelligence-innovation

Here are the four trends that are driving AI innovation, according to Gartner: Responsible AI “Increased trust, transparency, fairness and auditability of AI technologies continues to be of growing importance to a wide range of stakeholders,” said [Svetlana Sicular](https://www.gartner.com/en/experts/svetlana-sicular), research vice president at Gartner. “Responsible AI helps achieve fairness, even though biases are baked into the data; gain trust, although transparency and explainability methods are evolving; and ensure regulatory compliance, while grappling with AI’s probabilistic nature.” In fact, Gartner expects that by 2023, all personnel hired for AI development and training work will have to demonstrate expertise in responsible AI. Small and Wide Data Data forms the foundation of successful AI initiatives. [Small and wide data](https://www.gartner.com/en/newsroom/press-releases/2021-03-16-gartner-identifies-top-10-data-and-analytics-technologies-trends-for-2021) approaches enable more robust analytics and AI, reduce organizations’ dependency on big data, and deliver richer, more complete situational awareness. According to Gartner, by 2025, 70% of organizations will be compelled to shift their focus from [big to small and wide data](https://www.gartner.com/en/newsroom/press-releases/2021-05-19-gartner-says-70-percent-of-organizations-will-shift-their-focus-from-big-to-small-and-wide-data-by-2025), providing more context for analytics and making AI less data hungry. “Small data is about the application of analytical techniques that require less data but still offer useful insights, while wide data enables the analysis and synergy of a variety of data sources,” said Sicular. “Together, these approaches enable more robust analytics and help attain a more 360-degree view of business problems.” Operationalization of AI Platforms The urgency and criticality of leveraging [AI for business transformation](https://www.gartner.com/en/newsroom/press-releases/2020-10-01-gartner-survey-revels-66-percent-of-orgnizations-increased-or-did-not-change-ai-investments-since-the-onset-of-covid-19) is driving the need for operationalization of AI platforms. This means moving AI projects from concept to production, so that AI solutions can be relied upon to solve enterprise-wide problems. “Gartner [research](https://www.gartner.com/en/newsroom/press-releases/2020-10-19-gartner-identifies-the-top-strategic-technology-trends-for-2021) has found that only half of AI projects make it from pilot into production, and those that do take an average of nine months to do so,” said Sicular. “Innovations such as AI orchestration and automation platforms (AIOAPs) and model operationalization ([ModelOps](https://www.gartner.com/en/information-technology/glossary/modelops)) are enabling reusability, scalability and governance, accelerating AI adoption and growth.” Efficient Use of Resources Given the complexity and scale of the data, models and compute resources involved in AI deployments, AI innovation requires such resources to be used at maximum efficiency. Multiexperience, composite AI, generative AI and transformers are gaining visibility in the AI market for their ability to solve a wide range of business problems in a more efficient manner.

### AT: Cyber War

#### No cyber war.

Lewis 20---senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies). Lewis, James. 2020. “Dismissing Cyber Catastrophe.” Center for Strategic & International Studies. August 17, 2020. https://www.csis.org/analysis/dismissing-cyber-catastrophe.

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

## Standards

### Holdups Fake---1NC

#### ‘Patent holdups’ are a lie. Antitrust policies are a greater threat.

Barnett ’18 [Jonathan, Ronald A. Cass, Richard A. Epstein, Douglas H. Ginsburg, Gus Hurwitz, David J. Kappos, Paul Michel, Adam Mossoff, Kristen Osenga, David J. Teece, and Joshua D. Wright; February 22; Professor at the USC Gould School of Law; Dean Emeritus of the Boston University School of Law; Law Professor at New York University; Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Law Professor at George Mason University; Law Professor at the University of Nebraska; Former Under Secretary of Commerce and Director of the United States Patent & Trademark Office; Retired Chief Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Professor at the University of Richmond School of Law; Thomas W. Tusher Professor in Global Business at the University of California at Berkeley; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; IP Watchdog, “Apply Evidence-based Approach to Antitrust Law Equally to Innovators and Implementers,” https://www.ipwatchdog.com/2018/02/22/evidence-based-application-antitrust-law/id=93755/]

As judges, former judges and government officials, legal academics and economists who are experts in antitrust and intellectual property law, we write to express our support for your recent announcement that the Antitrust Division of the Department of Justice will adopt an evidence-based approach in applying antitrust law equally to both innovators who develop and implementers who use technological standards in the innovation industries.

We disagree with the letter recently submitted to you on January 24, 2018 by other parties who expressed their misgivings with your announcement of your plan to return to this sound antitrust policy. Unfortunately, their January 24 letter perpetuates the long-standing misunderstanding held by some academics, policy activists, and companies, who baldly assert that one-sided “patent holdup” is a real-world problem in the high-tech industries. This claim rests entirely on questionable models that predict that opportunistic behavior in patent licensing transactions will result in higher consumer prices. These predictions are inconsistent with actual market data in any high-tech industry.

It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation. Given the well understood role that innovation plays in facilitating economic growth and wellbeing, a heavy burden of proof rests on those who insist on the centrality of “patent holdup” to offer some tangible support for that view, which they have ultimately failed to supply in the decade or more since that theory was first propounded. Given the contrary conclusions in economic studies of the past decade, there is no sound empirical basis for claims of a systematic problem of opportunistic “patent holdup” by owners of patents on technological standards.

Several empirical studies demonstrate that the observed pattern in high-tech industries, especially in the smartphone industry, is one of constant lower quality-adjusted prices, increased entry and competition, and higher performance standards. These robust findings all contradict the testable implications of “patent holdup” theory. The best explanation for this disconnect between the flawed “patent holdup” theory and overwhelming weight of the evidence lies in the institutional features that surround industry licensing practices. These practices include bilateral licensing negotiations, and the reputation effects in long-term standards activities. Both support a feed-back mechanism that creates a system of natural checks and balances in the setting of royalty rates. The simplistic models of “patent holdup” ignore all these moderating effects.

Of even greater concern are the likely negative social welfare consequences of prior antitrust policies implemented based upon nothing more than the purely theoretical concern about opportunistic “patent holdup” behavior by owners of patented innovations incorporated 2 into technological standards. For example, those policies have resulted in demands to set royalty rates for technologies incorporated into standards in the smartphone industry according to particular components in a smartphone. This was a change to the longstanding industry practice of licensing at the end-user device level, which recognized that fundamental technologies incorporated into the cellular standards like 2G, 3G, etc., optimize the entire wireless system and network, and not just the specific chip or component of a chip inside a device.

#### No holdups or “monoculture”---zero empirical proof---all innovation examples goes neg. Cites their solvency advocate that revoked his claim.

Keith Mallinson 16. Founder of WiseHarbor, providing expert commercial consultancy since 2007 to technology and service businesses in wired and wireless telecommunications, media and entertainment serving consumer and professional markets. He is an industry expert and consultant with 25 years of experience and extensive knowledge of the ICT industries and markets, including the IP-rich 2G/3G/4G mobile communications sector. His clients include several major companies in ICT. He is often engaged as a testifying expert witness in patent licensing agreement disputes and in other litigation including asset valuations, damages assessments and in antitrust cases. He is also a regular columnist with FierceWireless and IP Finance. “Mallinson on Patent Holdup and Holdout: for IP Finance 16th August 2016”. https://www.wiseharbor.com/pdfs/Mallinson%20on%20Holdup%20and%20Holdout%20for%20IP%20Finance%2016%20Aug%202016.pdf

“Patent holdup” is manifestly not a systemic problem. There is no empirical evidence of harm to markets or consumers, and such abundant proof of market success—particularly for innovative smartphones and the extensive 3G and 4G networks to which they are connected—including seven billion cellular connections and modest licensing costs totalling only around five percent of device prices.

Unmentionable claims

I came upon a paper entitled “Patent Holdup: Myth or Reality?” by Carl Shapiro, dated 6 th October 2015, which was circulated as a hard-copy and presented at an IEEE-SIIT conference at the Intelsponsored key-note address. In this, the author concedes that there are “few documented instances of actual holdups” and that they are “exceedingly difficult for researchers to detect and reliably quantify.” He has backed off from his previous claims of prevalence of “patent holdup” where he stated “patentees regularly settle with companies in the information technology industries for far more money than their inventions are actually worth. These companies are paying holdup money to avoid the threat of infringement.” Shapiro has retreated due to lack of empirical support for these original claims which is because portfolio licensing among many licensees on FRAND terms together with the courts ensure that holdup royalties are rarely demanded and are never paid. However, Shapiro takes another position where there is also no supporting evidence. He now claims that the social costs caused by the alleged “patent holdup” problem are in the actions taken to prevent holdup and in the opportunities forgone under the threat of “patent holdup.”

His 2015 paper is labelled a preliminary draft that should not be quoted, yet the verbatim thesis of this most outspoken author is evidently being adopted elsewhere; including in a speech by the US Department of Justice’s Chief Economist, Nancy Rose, at a George Washington University conference on “Patents in Telecoms” in November 2015. In this, she analogises that “patent holdup” is like dark matter in the universe – something that cannot itself be detected but is present. She said that the existence of dark matter can be inferred from effects on visible matter.

With the passing of ten months since Shapiro presented his paper at the IEEE event and with the DoJ’s name endorsing this latest development in “patent holdup” theory, I believe it is high time to shine some light on the flaws in arguments made by Shapiro and Rose by making their writings available and by rebutting them here. I do not see why they should enjoy the privilege of being heard and given the opportunity to persuade, while also indefinitely being able to shield their postulations from scrutiny or criticism.

A big bluff

At first glance of the Shapiro paper’s abstract it seems he is going to provide the empirical evidence supporting “patent holdup” theory that many of us have been asking and waiting for over many years. Instead, careful wording sidesteps this issue again and again. He states that “the general theory of holdup enjoys substantial empirical support.” This alone is woefully insufficient: critics of “patent holdup” theory claim these are inapplicable to patents in general and to SEPs in particular. Realising this while unwilling to admit this shortcoming, Shapiro goes on to state that “applying the same theoretical and empirical methodologies to “patent holdup” confirms that patent holdup is a substantial real-world problem.” This seems conclusive; but instead of supporting this assertion with any empirical observations in patent licensing, he merely inflates his claim by stating that “patent holdup is shown to be an especially difficult type of holdup to manage.” Patent holdup remains a theoretical problem absent specific empirical support.

In the paper’s main text Shapiro goes on to claim that he “debunk[s] the assertion that the theory of patent holdup lacks empirical support,” but he identifies no such empirical support there either. In his analysis he asserts that the “holdup problem” is actually “the potential for holdup” leading to costs in (1) preventing or mitigating actual holdup, (2) the deadweight loss associated with activities deterred by the prospect of holdup; and (3) the costs caused by actual holdup that nonetheless occur. However, he provides no more than descriptions of his assertions: as with his original theory (3), no empirical support for his revised theory, as indicated in (1) and (2), is provided either.

According to Shapiro and Rose, there are three ways in which the alleged problems with holdup can be mitigated or eliminated, each of which has social costs: vertical integration, long-term contracts and lessspecific investment. Shapiro maintains that, in general, this is all widely considered to be well established empirically. Even if one accepts that premise, it is also necessary to identify, depict and quantify with respect to costs how each of these effects is occurring in alleged “patent holdup.” Shapiro dismisses vertical integration with acquisition of all patents required for manufacture as not being viable because there are many patents under widespread ownership and because competing manufacturers also need to use the same patented technologies. He regards FRAND arrangements as costly and inefficient, but does not even assess these anecdotally, let alone empirically. Similarly, he presents no evidence that specific investments have been curtailed with products subject to patents in general or SEPs in particular.

#### Patent holdup theory is wrong.

Haber ’17 [Stephen and Alexander Galetovic; March 2; Political Science Professor at Stanford University; Economics Professor at Universidad de los Andes in Santiago; Journal of Competition Law & Economics, “The Fallacies of Patent-Holdup Theory,” Vol. 13, No. 1]

I. INTRODUCTION

Until the late 1980s, archaeologists maintained that the Ancient Maya were a peace-loving people whose elites were primarily concerned with the scholarly study of astronomy and mathematics. They believed this conjecture despite the fact that one could not walk through a Mayan ruin without tripping over immense stelae depicting grotesquely violent images of victorious warriors subjugating their captives.

The process by which archaeologists created a theory about peaceful forest dwellers in the face of self-evident facts to the contrary is a testament to the power of fundamental fallacies. Their first fallacy was the idea that the inscriptions on the stelae were different from other glyph-based writing systems: instead of being a mix of whole words and phonetic sounds, as is the case with Egyptian hieroglyphic and cuneiform, archaeologists and epigraphers maintained that each symbol in the Mayan script represented an entire word or concept. That fallacy led them into a second fallacy: they maintained that non-calendrical Mayan hieroglyphs were indecipherable. That fallacy allowed the emergence of a third fallacy: because the theory of peace-loving forest people could not be tested against written evidence, the gruesome images on the stelae could be explained away as depicting mythical gods, not actual people. Thus, the archaeologists arrived at the false conclusion that the Maya were peaceful folk.

The fact that it took four decades for these fallacies to be overturned, one by one, is a testament to the reluctance of scholars to reject fashionable theories.1 In point of fact, a Russian epigrapher had figured out the principles of Mayan translation in 1952, but it took two decades for American scholars to accept that his theory of Mayan writing was correct and theirs was wrong. It then took another decade for enough monumental inscriptions to be translated to convince archaeologists that the stelae did not depict mythical gods, but instead told the political history of Mayan kings—their birth, military conquests, and death. It took still another decade before a consensus emerged that the evidence that had been right in front of archaeologists all along contradicted their theory.

It would be comforting if the only field ever led astray by fundamental fallacies was Mayan archaeology, but that is hardly the case. Faulty premises often lead researchers toward conclusions that do not fit the facts—so much so that Nobel Laureate Richard Feynman made it the subject of his famous commencement address at the California Institute of Technology, in which he stressed the importance of bending over backward to do every test that might falsify a theory.2

A. An Influential Theory

Our concern here is with how fundamental fallacies gave rise to patent-holdup theory, which has guided antitrust and competition authorities around the world for nearly two decades. In the early 2000s, legal academics and antitrust economists asked an important question: does a decentralized system of technology development, in which complex, interoperable information technology (IT) products rely on standard-essential patents (SEPs) owned by many firms, allow SEP owners to “hold up” manufacturers, thereby stifling innovation and hurting consumers in the form of higher prices and lower-quality products?

The answer—patent-holdup theory—consists of five nested claims. First, that patent owners can systematically overcharge manufacturers for licenses to their patents through the economic mechanism of holdup—the opportunistic appropriation of a downstream firm's quasi rents (revenues in excess of short-run costs). Second, that when there are multiple patent holders, each practicing holdup on a downstream firm, cumulative patent royalty rates become astronomically high—a phenomenon patent-holdup theorists termed “royalty stacking.” Third, that the holdup problem is exacerbated when patented technologies are included in the industry standards necessary to make IT products interoperable and compatible. Fourth, that patent holdup, royalty stacking, and the inclusion of patented technologies in industry standards are strangling innovation, most particularly in SEP-intensive IT products. Fifth, that the government must intervene to solve this problem; the market, left on its own, will fail.

Carl Shapiro's seminal article provides a clear statement of the threat posed by patent holdup to innovation:

The holdup problem is worst in industries where hundreds if not thousands of patents, some already issued, others pending, can potentially read on a given product. In these industries, the danger that a manufacturer will step on a land mine is all too real. The result will be that some companies avoid the mine field altogether, that is, refrain from introducing certain products for fear of holdup.3

He clearly articulates the need for a public policy intervention: “I submit that this holdup problem is very real today, and that both patent and antitrust policymakers should regard holdup as a problem of first order significance in the years ahead.”4

The claim that patent holdup is common and is a threat to innovation can be found in any number of scholarly articles. Joseph Farrell, John Hayes, Carl Shapiro, and Theresa Sullivan state that “surprise hold-up may be largely a transfer, but anticipation of hold-up encourages a range of inefficient forms of self-protection, such as postponing or minimizing investment, or ensuring that standards use only antique technology.”5 Mark Lemley and Carl Shapiro concur:

In the long run, if products are expected to be subject to some degree of holdup, the firm may not find it worth incurring the costs necessary to develop, manufacture, and sell the product. Assertions based on the shut-down condition that royalty stacking is somehow a minor problem or that royalty stacking cannot stifle innovation or hinder the market penetration of products that have been developed are simply unfounded.6

Most recently, Fiona Scott Morton and Carl Shapiro warn that patent holdup and its related mechanisms threaten the Internet of Things (IoT), and suggest the need for antitrust intervention:

Failure to prevent Patent Holdup relating to tomorrow's information technology and communications standards is likely to cause significant social welfare loss in the years ahead. If new and more effective private solutions relating to standard setting do not emerge to promote innovation and protect consumers, antitrust enforcement is one of the only remaining remedies that seems feasible.7

Patent-holdup theory has also been influential among antitrust authorities around the world. Several Federal Trade Commission (FTC) reports8 and a joint Department of Justice (DOJ) and FTC report9 discuss the threat to innovation posed by patent holdup and royalty stacking, citing the academic literature. For example, one FTC report states:

Unless downstream actors—whether innovators or manufacturers—can mitigate the problem [of patent holdup], they may have to choose between the risk of being sued for infringement after they sink costs into invention or production, or dropping innovative or productive efforts altogether. Either option can injure economic welfare.10

These views are echoed by agency heads, such as the former chair of the FTC, the former Deputy Attorney General for Antitrust, and the European Competition Commissioner, who signal that they are willing to take action about the problem.11

Patent-holdup theory is also mentioned in amicus briefs that argue that patent holdup is a common occurrence. For example, a 2006 brief file by 52 intellectual property professors submitted in support of the defendant in eBay, Inc. v. MercExchange, L.L.C. states that:

[S]uch inappropriate “holdups” occur on a regular basis under the Federal Circuit's mandatory-injunction standard. Patentees can obtain revenue in excess of the value of their technology by threatening to enjoin products that are predominantly noninfringing and in which the defendant has made significant irreversible investments.12

It should therefore not be surprising that courts have been influenced by patent-holdup theory. For example, in eBay, Justice Kennedy's concurring opinion cites an FTC report that warns of the impact of patent holdup by firms that do not themselves practice their patents:

An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.13

The landmark Supreme Court eBay decision is not an outlier. Jonathan Barnett identifies thirty-seven federal court decisions that mention “patent holdup” or “royalty stacking.”14

B. The Stelae That Contradicted the Theory

Like the theory of the peaceful Maya, patent-holdup theory had its own set of facts—stelae, as it were—that contradicted the theory. Patent-holdup theorists asserted that innovation in SEP-intensive IT products was under threat: excessive royalties were discouraging new firm entry and reinvestment by existing firms. They called particular attention to the threat to innovation in mobile telephones and personal computers, as well as in extensions of those products in the IoT.15

Economists measure rates of innovation by examining relative rates of change of quality-adjusted prices,16 and one can download the publicly available, product-by-product, quality-adjusted price data compiled by the Bureau of Labor Statistics in order to carry out an analysis of innovation rates across products and within products over time.17 An analysis of that data shows that from 1997 to 2013, rates of innovation in phone equipment (which includes low-tech items such as fax machines and landline phones, as well as wireless phones) was 10 percent per annum faster than the economy-wide average. The data show that the rate of innovation in portable and laptop computers was faster still—31 percent per annum faster than the economy-wide average. Similar rates of innovation are observed in other SEP-intensive IT products such as video equipment, audio equipment, desktop computers, and televisions. Furthermore, rates of innovation in SEP-intensive IT products have not slowed over time relative to the rates of innovation in similar, non-SEP-intensive IT products.18 For example, the rate of innovation in SEP-intensive laptop computers compared with non-SEP-intensive mainframe computers shows that SEP intensity was associated with faster innovation.19

There are other hallmarks of innovation beyond falling quality-adjusted relative prices: one would expect to see rapidly increasing output even in the face of falling prices; and, because innovation is typically characterized by Schumpeterian creative destruction, one would also expect to see high levels of firm entry and exit. This is precisely what researchers do see when they examine data on the canonical case of the mobile phone industry. Between 1994 and 2013, the number of SEP holders increased from 2 to 128. Patent-holdup theory would predict that this increase should have dramatically slowed the rate of innovation. That prediction did not obtain in reality, however. Prices of mobile devices dropped very fast, while output grew sixty-two-fold. During this same period, there was rapid entry of new firms into the manufacture of phones and tablets—so much so that industrial concentration, measured with the number of devices sold, actually fell in this industry over time.20

According to patent-holdup theory, excessive patent royalties cause slow rates of innovation. As an empirical matter, the aggregate royalties paid by licensees in any industry can be estimated on the basis of the SEC 10-K and 40-F filings of the patent-licensing firms.21 The data on the canonical case of mobile phones shows that the cumulative royalty yield from the twenty-one largest patent licensors in the mobile phone value chain was only 3.3 percent of a mobile phone's average sales price in 2015. That ratio has been fairly stable since at least far back as 2007.22 Researchers have parameterized royalty-stacking models from the patent-holdup literature using actual price and quantity data, and have discovered that the royalty yield predicted by the models is more than twenty times higher than the actual royalty yield and about four-fifths of the price of a smartphone. They have also found that no individual patent licensor earns an individual royalty consistent with the hypothesis that it operated as a monopolist.23

The facts of fast and continuous innovation in the mobile phone industry—one of the stelae of patent-holdup theory—are evident to anyone with a smartphone in their pocket. Three decades ago, a mobile phone cost the current equivalent of $10,000, was the size of a brick, weighed a kilo, and enabled its user to make a half-hour call before going dead. Today, a smartphone has more computational power than the supercomputers that guided the Apollo missions to the moon, allows a user to produce and share data, video, and audio files with anyone on the planet, costs an average of $300—and also happens to make a phone call.

At the same time that there are self-evident stelae contradicting patent-holdup theory, there is no positive evidence in support of its core predictions. Damien Geradin and Miguel Rato,24 Damien Geradin, Anne Layne-Farrar and Jorge Padilla,25 Vincenzo Denicolò, Damien Geradin, Anne Layne-Farrar, and Jorge Padilla,26 Richard Epstein, F. Scott Kieff, and Daniel Spulber,27 Kirti Gupta,28 Anne Layne-Farrar,29 J. Gregory Sidak,30 and Edward Egan and David Teece31 review the literature on patent holdup, patent thickets, and royalty stacking.32 All of these studies reach the same general conclusion, which is perhaps best summed up by Layne-Farrar: “Certainly the theories have been developed, but the empirical support is still lacking. Despite the fifteen years that proponents of the theories have had to amass evidence, the empirical studies conducted thus far have not shown that holdup or royalty stacking is a common problem in practice.”33

C. Three Fundamental Fallacies and Their Origin

When theory and evidence disagree, there is either something wrong with the theory or something wrong with the evidence. We think that there is something wrong with the theory.

Patent-holdup theory conflates two different economic mechanisms: holdup and market power. Holdup means that one firm appropriates another firm's quasi rent—its revenues minus its short-run costs—through opportunistic behavior. A firm that is being held up, by definition, does not generate enough revenue to cover its long-run costs. Therefore, the firm will not reinvest once its capital wears out. This is not a long-run equilibrium. Market power, by contrast, means that a firm can set prices such that it appropriates a monopoly rent from a market. The exercise of market power can be a long-run equilibrium, because the downstream firms will cover their long-run costs and continue to reinvest as their capital equipment wears out.34 Thus, holdup and the exercise of market power are two different, mutually inconsistent economic mechanisms. One cannot simultaneously have a long-run equilibrium and not have a long-run equilibrium.

The conflation of holdup and market power leads to three fallacies that underpin patent-holdup theory. Once the mechanics of holdup are loosened from their moorings in economic theory, it becomes possible to simultaneously claim that patent holdup is a variant of holdup as it is understood in mainstream economics and define it in ways that are inconsistent with the meaning of holdup as it is understood in mainstream economics. Patent holdup elides key assumptions of the standard theory and transforms necessary conditions for holdup into sufficient conditions for holdup. The implications are fundamental. In the established theory, firms—working together—will make structural, contractual, and behavioral adaptations in order to prevent holdup, thereby sustaining trade and investment in equilibrium. In patent-holdup theory, by contrast, firms cannot adapt and solve the problem wrought by opportunistic renegotiation of a contract, because the game begins after the R&D is completed and manufacturers invest. Adaptations to prevent holdup are ruled out by construction, and market failure is inevitable.

The conflation of holdup and market power leads to a second fallacy. Patent-holdup theory claims that the same manufacturing firms can be held up many times over, resulting in a phenomenon called royalty stacking. In point of fact, however, holdup cannot occur many times over to the same firm. A firm's quasi rents (the difference between its revenues and its short-run costs) can be extracted only once. Any attempt to extract more revenues would cause the firm to shut down. Royalty stacking, by contrast, is about the exercise of market power by multiple input suppliers to downstream firms. Although this multiplicity of input suppliers might be an inefficient organization of a market, it nonetheless can be a long-run equilibrium, unlike holdup.

To claim that market power is being exercised, one needs to identify its source. In royalty stacking, the source is the patents themselves. A patent confers a temporary, limited property right that might confer some market power—and does so by design. Thus, in order to claim that there is a public policy problem, one needs to claim that the patents in question confer market power in excess of that which is conferred by the patent grants themselves. What could the source of that excess market power be? According to the theory, patent-holding firms are able to appropriate more than their incremental contribution to a product's value by virtue of the fact that their technologies have been made part of a standard. The users of the technology are locked into that standard and consequently can be subjected to patent holdup.

The conflation of holdup and market power leads to a third fallacy: patented technologies that are part of an industry standard add little or no value to the markets that they help to create. There are two problems with this fallacy—one theoretical and the other empirical. The theoretical problem is, as Nobel Prize winner Kenneth Arrow showed in 1962, that when an innovation is “drastic” (that is, much better than the alternatives on offer) a profit-maximizing monopoly will charge less than the technology's incremental value. The empirical problem is that the whole point of standard development organizations (SDOs) in IT industries is to make large technological jumps at a fast pace, so that manufacturers may produce superior products that consumers will adopt enthusiastically, thereby increasing the revenues of all the industry stakeholders.35 They are not in the business of small incremental improvements; they are in the business of creating drastic innovations.

### AT: BioTech---1NC

#### No biotech internal link---their evidence is from 2012 and about international standards---US standards don’t solve.

#### Lonien takes out the entire aff---it’s about how SSOs won’t incorporate patents now---the plan instills further fear that doing so would make them liable under antitrust.

#### Doesn’t solve biotech innovation.

Casey Johnston 17, 4-18-2017, "Why Silicon Valley Keeps Getting Biotechnology Wrong," Intelligencer, http://nymag.com/intelligencer/2017/04/why-silicon-valley-keeps-getting-biotechnology-wrong.html

Two years after the $9 billion start-up “unicorn” Theranos crumbled, Silicon Valley still appears to be struggling to learn its lesson when it comes to health and medical start-ups. Improbable-sounding companies continue to turn up with tens of millions of dollars in funding, no published research to back them up, and nothing but criticism from scientists. Last week, BuzzFeed News examined a new set of start-ups promising to detect cancer early via a simple blood test — Freenome, Grail, and Guardant — and found them on paths dangerously similar to the one Theranos was on just a few years ago. A year ago, Freenome promised to publish about its product in a scientific journal “very soon” to Fast Company, and still hasn’t. Cancer researchers told BuzzFeed very plainly that such a simple test would be miraculous but seemed improbably advanced beyond our current technology, which was also the case with Theranos’s miniature blood tests — and Freenome made its lofty promises only months after Theranos started to fall apart. Like a Kickstarter project well over its anticipated delivery date, one begins to wonder if it was all fake. Silicon Valley has a kind of blind spot when it comes to biotechnology, health-related start-ups, and other medical pursuits. The Theranos hype train was only stopped when The Wall Street Journal surfaced evidence that Theranos had misrepresented how far along it was in its research process to its investors, passing off mediocre test results as much more conclusive than they were. Venture-capital firms insist that the standard that needs to be met for investment is much higher for medical start-ups, which must prove that their technology works with data, not just a pitch. And yet somehow, when these start-ups finally surface to public consciousness, they don’t appear to pass even the most basic smell test with literally any experienced researcher in the field. There are some confounding factors to take into account: venture capitalists invest in ambitious businesses and expect a high failure rate; health start-up failures are highly visible in part because biotechnology businesses are more unusual, and because they tend to be involved with actual life-or-death human experiences. No one really cares about another Uber-alike (just as no one really cared about Uber until it had established itself) — but almost everyone has a personal relationship with cancer, and everyone wants a solution to it as soon as possible. But the fact that we all have bodies, and all need doctors may also be why Silicon Valley seems unable to avoid dabbling in medical technology. The intersection of future tech and health has become crowded with some of the country’s richest hobbyists. They love “biohacking” (there’s even a subscription box). They believe, almost to a man, that the singularity is a question of not if, but when. Elon Musk is very seriously investing in arming biological humans against computers; Peter Thiel takes human growth hormone, a popular practice among transhumanists, and has expressed interested in getting blood transfusions from young people as a way of reversing aging (to his credit, there is some published scientific evidence this might actually work, however fundamentally sinister it sounds). Larry Page, Sergey Brin, Mark Zuckerberg, Sean Parker, and Martine Rothblatt have all sincerely expressed interests in similar pursuits. They often seem less concerned with protecting humanity than their own consciousnesses, designing brain-machine interfaces that will both preserve their own copious knowledge reserves and merge them with the larger internet, turning each tech CEO, investor, and founder into an army of IBM Watsons, but smarter. There is a pervasive sense in Silicon Valley, bolstered by ten years of world-conquering success, that any sufficiently intelligent, sufficiently driven person can will what they want. The only thing slowing the unrelenting forward march of medical tech is funding. Solutions are an inevitability, and the realities of the human body are simply a set of inefficiencies that can, with enough time and attention, be brought to heel. The culture of Silicon Valley “meritocracy” affords its practitioners cynicism when confronted with realities other than their own: If you were dumb enough to trust new tech, or too poor to have more options, you deserve what you had coming. Health tech is certainly valuable and ripe for profit. Machines and medical tests used in hospitals for treatment and diagnosis are wildly expensive, but their cost is determined both by demand (high; no one wants to die, and enough people have insurance) and research (expensive, very costly to get right and get through all the hoops of being brought to market). For further evidence, look at the pharmaceutical industry. Investors who sense a rich potential for profit if only they can insert themselves at the right place in the process are not wrong, in that sense. But the “move fast and break things” mantra that has helped Silicon Valley disrupt countless industries over the last two decades is more dangerous when applied to medical science. The roadblocks that health tech companies run into are not qualitatively different from the ones that all tech companies run into. But when Uber or Airbnb run afoul of their respective laws, the result is abstracted lost money out of someone’s pocket — the government, independent contractors, independent businesses, other segments of the market. When Airbnb keeps viable apartments off the market so they can be rented short-term to its users, the money can theoretically be remanded if someone determines that Airbnb is doing something wrong. The “things” being broken by the current generation of unicorns are regulatory regimes. (Valuable, useful regulatory regimes, to be sure.) The “things” being broken by health start-ups are laws of science and ironclad guidelines for research. When a health start-up “moves fast and breaks things,” it can directly result in the death, dismemberment, and injury of real people. You can’t un-kill someone who died thanks to a bad diagnosis (at least, there’s no start-up hawking that yet).

#### No biotech safety---Gross is from 2015 and about the need for international regulations and the pathwork of GM policies---the aff doesn’t solve.

### AT: Food/Resources---1NC

#### Reject laundry list impacts---they haven’t read a terminal impact card---new block answers.

#### No resource or food conflict.

Agha BAYRAMOV 18. PhD candidate and lecturer at the department of International Relations and International Organization of the University of Groningen. “Review: Dubious nexus between natural resources and conflict.” *Journal of Eurasian Studies* 9(1): 72-81. Emory Libraries.

The arguments of scarcity adherents have been challenged by a number of scholars in terms of qualitative and quantitative findings. According to Stern (2016) the assumptions underpinning the scarcity notion are illogical due to the exaggeration of threats arising from oil ownership from misperceptions of market information. Furthermore, Koubi et al. (2013) explain that despite their strong empirical explanations, scarcity scholars have weak quantitative research results ones that fail to prove the link between resource scarcity and intrastate or interstate conflict. The reason for this is that some large-N findings contradict early results, which illustrate that the scarcity-conflict nexus is more complicated than scarcity scholars would have us believe. Dinar (2011), meanwhile, argues that natural resource scarcity may in fact be an important force for cooperation between states. However, scholars of natural resource scarcity have hitherto ignored the ways in which scarcity can spur cooperation (Deudney, 1999).

Considering these findings, three conclusions can be drawn from this section. First, scarcity is a complex term and it should not be equated with only natural resources. As it is explained by Kester (2016) some countries may suffer from scarcity of technical, knowledge and human capacity rather than natural resources. In light of this, without a proper capacity it is also possible to have scarcity within abundancy of resources. While supporting the scarcity argument, Andrews-Speed (2015) offer an alternative explanation that natural resources are not physically scarce but there are indeed economic, political, environmental and equity barriers that can lead to a scarcity of natural resources. Due to the strong rule of law, decent neighbourly relations and existence of strong norms for compromise and of multilateral institutions, the North Atlantic countries are highly unlikely to utilize force against or declare war to each other. However, these dimensions and buffers are currently lacking in the Middle East, Africa and Asia. As such, the U.S and Europe should work closely with these regions to prevent any resource disputes erupting (Andrews-Speed 15). Similarly, Gleditsch (1998) explains that some highly developed countries have population density, clean water, and land degradation problems but they still do not suffer from environmental violence. Thus the main issue might be that poor economic development, rather than environmental scarcity, leads to conflict. Kester (2016) names this situation as “second-order-scarcity” which refers to a lack of technology, economic capacity, and knowledge to stop resource scarcity. In this regard, it may be scarcity, itself, rather than natural resources that leads to conflict.

Second, conflict can be defined differently based on different dimensions. However, the common consensus is that conflict consists of multiple dimensions (political, economic, environmental, historical, cultural, and geographical etc.) rather than single factor. In this regard, scarcity of natural resources is not strong enough, by itself, to induce either interstate or intrastate conflict. It needs in fact to interact with other variables. Finally, related to the previous reasons, scarcity of natural resources might be a contributing or marginal reason for rather than the root cause of a given conflict. In other words, it needs to interact with non-resource factors in order to cause violence.

## Regs CP---2NC

### AT: PDB

#### 2. “Do both” is antitrust duplication---the disputes collapse resources, effectiveness, and signaling.

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Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

So how will the FTC and DOJ resolve their latest turf war? Perhaps they will revisit their clearance agreement and decide to split their authority by company or the business practice being investigated, based on prior agency experience, rather than by industry as Appendix A currently does. Or maybe Congress will decide to consolidate civil antitrust enforcement jurisdiction under one agency. That seems like a long shot considering the political implications. However, during the Senate’s antitrust oversight hearing, Sen. Josh Hawley proposed “cleaning up the overlap in jurisdiction by removing it from one agency” and “clearly designating enforcement authority to one agency.” One thing is sure—the agencies should not be duplicating civil antitrust investigations. Stay tuned.

#### 3. It’s duplicative and upsets the balance.

Claire Guo 19. Juris Doctor, Peking University School of Transnational Law. Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes, 18 J. MARSHALL REV. INTELL. PROP. L. 259 (2019). Pg. 278

The practice of three major jurisdictions suggests that the intersection of FRAND terms and antitrust laws is not a fixed process. Instead, it changes as the stipulations of FRAND evolve to have clarity and transparency. In particular, the practice suggests a general trend of less antitrust intervention into FRAND breaches when concrete competition harm is not present. One reason is that when FRAND has expanded into negotiation protocols, mere disobedience of FRAND procedurally without follow-up actions, such as filing injunctions or excessive demand, could not possibly give rise to antitrust concerns. The other reason is that the parallel enforcement of FRAND and antitrust laws is duplicative to some extent. Both FRAND and antitrust laws could be used to address the monopoly power and abusive conducts of SEPs owners resulting from the standardization process. Assuming FRAND has functioned effectively as expected, additional antirust intervention seems redundant and risks upset the balance already reached by FRAND obligation.

#### 4. Deters injunctions, overburdens SEP owners, and turns the case---impedes innovation.

Claire Guo 19. Juris Doctor, Peking University School of Transnational Law. Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes, 18 J. MARSHALL REV. INTELL. PROP. L. 259 (2019). Pg. 282

Another reason that antitrust laws need to step down from addressing FRAND violations is the risk of impeding innovation and standardization processes. The antitrust laws protect competition which is a public interest. That is why the enforcement of antitrust laws entails administrative fines and punitive damages. Breaking antitrust laws in EU and China may lead to fines of up to 10% of last year’s turnover of the undertaking.165 Qualcomm was fined both by NDRC for 1 billion dollars in 2015, and then by EU commission for over 1 billion dollars again in 2018.166 In the U.S., companies can be fined up to 100 million dollars or double gains/loss;167 private litigations also offer treble damages.168 Such tough penalties are imposed because the concerned antitrust violation hurts competition- an essential component of market economy and society progress. The U.S. courts are refrained from intervening in opportunistic FRAND breaches from lawfully obtained monopolization, because the evasion of a pricing constraint may hurt consumers but not the competitive process that warrants treble damages.169 Thus, when FRAND terms have effectively managed the monopoly power of SEP owner to the extent that mere FRAND breaches could not result in competition harm, the forceful intrusion of antitrust laws would only deter SEP owners from pursuing injunctions and devalue the essential patents.170 In the end, the antitrust liability may over burden the SEP owners to innovate or to promote standardization. 171

#### 5. Extending antitrust wrecks incentives for innovation.

Joanna Tsai and Joshua D. Wright 14. Economic Advisor to Commissioner Joshua D. Wright, Federal Trade Commission. Commissioner, Federal Trade Commission, and Professor (on leave), George Mason University School of Law. Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts. Forthcoming 80 (1) Antitrust Law Journal (2015). Written: 07-18-2014. Pg. 29-30

The refusal to extend antitrust law to provide a remedy for holdup or breach of contract mirrors the traditional economic approach. Indeed, economists have long viewed the holdup problem and ex post opportunism more generally as a problem sounding in contract law with its default substantive rules and remedies rather than in antitrust law.49 The risk of imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard setting bodies and to commercialize innovation (Froeb, Ganglmair, and Werden, 2012; Kobayashi & Wright, 2009, 2010). These effects would be unfortunate consequences of policy reforms and enforcement efforts designed to improve the competitive process. There is another economic reason—sounding in deterrence theory— to be concerned with the imposition of antitrust sanctions, including the prospect of treble damages and the damages associated with follow-on litigation, to regulate disputes under SSO contracts. The economic analysis of optimal legal sanctions and criminal punishments is built upon the foundational insight that penalties should be sufficient to induce offenders to internalize the full social cost of their crimes (Becker, 1968; Ginsburg & Wright, 2010). The logic of an optimal total sanction greater than the perpetrator’s expected gain from the violation, in the antitrust context, is a probability of detection less than one. It is difficult to justify with an economic rationale a damages multiplier, much less layering treble (or more, including follow-on actions) damages over standard contract damages, in the context of patent holdup where the probability of detection approaches one by definition. Because multiple damages are not required to generate optimal deterrence, remedies for breach of contract, or preventing the enforcement of the patent through estoppel, waiver, or other equitable doctrines, can serve to optimally deter undesirable patent holdup if they impose approximately single damages (Kobayashi & Wright, 2012). Antitrust enforcement remains available in cases of true anticompetitive price-fixing or deceptively manipulating standards. However, in the absence of empirical evidence to suggest SSOs’ adaptation of their IPR policies over time have been inadequate in minimizing the probability of holdup, there is little reason to bring to bear the blunt weaponry of antitrust rules and remedies to micromanage the competitive process in the name of improving SSO contracts. The evidence presented in Part V demonstrates that SSOs reduce contractual ambiguity and incompleteness in some areas, increase ambiguity in others, and choose to maintain incompleteness and ambiguity with respect to other contractual provisions. Critically, SSOs do in fact change IPR policies in the direction of providing greater protection against holdup. In sum, the evidence is consistent with the view of a vibrant and competitive contract process rather than one tainted by collusion or inadequate incentives to protect licensees

#### 6. It does not link to the net benefit---they won’t fill in more so than the status quo which is out uniqueness argument.

### AT: Agency Flip Flop

#### The CP solves deterrence---it imposes the same damages as the plan just under a different body of law!

#### Tsilikas.

#### 1. Doesn’t assume the counterplan creates damages---the only warrant is lack of penalty which the counterplan amends. Even if there are no damages, fiat means that the counterplan shuts down all who don’t use FRANDS immediately and there is no impact to the timeframe differential that can outweigh the net benefit.

#### 2. No expertise---agencies are poorly equipped and *they themselves* have found ex ante regs preferrable.

Damien Geradin 10. Professor of Competition Law and Economics at Tilburg University, a William W. Cook Global Law Professor at the University of Michigan Law School and a visiting Professor at the College of Europe, Bruges. Reverse Hold-ups: The (Often Ignored) Risks Faced by Innovators in Standardized Areas. Paper prepared for the Swedish Competition Authority on the Pros and Cons of Standard-Setting, Stockholm, 12 November 2010. Pg. 23

The above suggests that, in the absence of an exclusionary behavior, EU competition law is not the right instrument to address hold up cases allegedly committed by essential patent holders. The Commission and other antitrust authorities are simply poorly equipped to act as price regulators and they should thus not engage in such direction.73 Perhaps for this reason, during the Qualcomm investigation, Commission officials indicated on a number of occasions that it was preferable to prevent abuses by IPR holders from occurring, rather than addressing such abuses ex post through the application of EU competition rules.74 This seems to be the approach followed by the Commission in its recently released draft guidelines on horizontal cooperation agreements.75 In order to address the alleged exploitative behavior that may occur in the context of standardization, the draft guidelines provide that all SSOs should adopt “binding” rules on their members “to avoid the misuse of standardization process through hold-ups and charging abusive royalties by IPR holders.”76 While these draft guidelines will likely evolve in the months to come, they clearly indicate a desire on the part of the Commission to adopt a preventive approach to possible standard abuses.

#### Antitrust is inherently ad hoc and totalizing which collapses SSOs

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F. PROBLEMS WITH "ONE SIZE FITS ALL" POLICIES

It is common for commentators to suggest that the rules "should" or "must" be one way or another. For example, Mueller recently proposed that "[a]ny firm that participates in creating an industry standard and thereafter obtains patent rights in some aspect of the standard must, at a minimum, disclose the existence of any patents or pending patent applications that may be relevant to the standard."225

Such a proposal can be understood in one of two ways. The first is as a mandatory rule, specifying what the rules should be-whether as a general matter of public policy or as a consequence of application of antitrust principles-allowing for no deviation. The second is what is often termed a default rule, to be thought of as the general proposition to be applied in the absence of evidence to the contrary, but one that can be changed by the SSO if it chooses to do so. 226

These two interpretations have fundamentally different bases and policy implications. In our opinion, it is simply unnecessary to adopt mandatory rules in this area. SSOs are perfectly capable of adopting their own search, disclosure, and licensing rules, and of adapting those rules to the needs of the SSO participants. The results of Professor Lemley's survey indicate that SSOs have a variety of different rules. 227 There is no reason why a "one size fits all" mandatory-type approach is appropriate. 228

We find it is extremely telling that, at the recent FTC and Department of Justice (DOJ) hearings on the intersection between antitrust and intellectual property, both of the comments from SSOs expressed the belief that the current system worked reasonably well, and expressed concern that the antitrust authorities might adopt a "one size fits all" interventionist approach to standards issues.229 We believe that those comments, coupled with the results of Professor Lemley's survey showing the wide diversity of policies across SSOs, 230 strongly suggest that the antitrust authorities should proceed cautiously in this area.

In particular, we are concerned that antitrust intervention may reduce the clarity of the rules, thereby making participation in SSOs more risky and reducing the willingness of firms with valuable IP (and which therefore presumably have much to contribute to selecting the appropriate standard) to participate. If the SSO's rules are unclear, the obvious public policy solution is to encourage SSOs to adopt clearer rules on a going-forward basis.

Most significantly, we believe that intervention runs a significant risk of slowing down the standards-setting process, thus delaying the adoption of new standards and new products made in accordance with those standards, to the detriment of consumers and of society generally.

This is not, of course, to suggest that there will never be an appropriate role for antitrust scrutiny of the standards-setting actions of SSOs or their participants. There is no question but that the activities of SSOs can affect non-participants, and one rationale for antitrust intervention is to protect the interests of such non-participants from being adversely affected by decisions in which they did not participate or could not exert influence. And there are obvious examples of manipulation of SSO rules/policies, such as the "stuffing the ballot box" example of Allied Tube,231 in which antitrust intervention may be the only solution.

But we believe that the antitrust authorities are likely to give too little weight to the fact that SSOs, as voluntary organizations, must often walk a fine line between competing interests. In our view, ex post intervention runs the serious risk of failing to recognize the ex ante balancing of competing interests.

#### Antitrust decks SSO clarity and predictability

David J. Teece & Edward F. Sherry 3. \*\*Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California, Berkeley. \*\*Senior Managing Economist at LECG, LLC. "Standards Setting and Antitrust." Minnesota Law Review. 2003. https://scholarship.law.umn.edu/mlr/782/

E. ANTITRUST INTERVENTION AND CLARITY

As noted above, 218 we believe that clarity of the SSO's rules is a key desideratum. Unfortunately, in our opinion, ex post antitrust enforcement efforts are often likely to reduce clarity and predictability, rather than enhance it.

Up to this point, this Article has tacitly assumed that standards-setting activities can potentially raise antitrust concerns. But in our experience the nature of those concerns, and the legal basis for intervention, has rarely been articulated clearly. 219

We believe that the typical context 220 involves the claim that, by manipulating the standards-setting process (whether "actively" in an effort to "capture" a standard, or "passively" by improperly failing to disclose a relevant patent), the patent holder has gained improper market power in the technology market. Absent the need to comport with the standard (i.e., absent the "lock-in"), firms might (if feasible) find a way to avoid infringing the patent, by adopting an alternative technology. 221 But given that firms have a strong economic incentive to comport with the standard, the patent holder may be able ex post to extract a much higher price for the use of its patented technology than it would have been able to do absent the standard.

The antitrust concern here is not the proposition that the standard enhances the patent holder's market power per se. This is most readily seen in connection with patents held by non-participants in the standards-setting process. Adoption of a standard can confer a substantial windfall gain on nonparticipant patent holders, who (just like participant patent holders) may be able to extract higher royalties for the use of their patents than they would have been able to do absent the standard. But we know of no one who suggests that such conduct is an antitrust violation. Consequently, the "evil" that the antitrust law seeks to address in these contexts is the manipulation that led to the enhanced value of the patent, not the fact that a patent reads on a standard or the enhanced value per se.

It is one thing for the antitrust authorities to adopt clearly specified rules on an ex ante basis governing standards-setting organizations and practices. For example, if the antitrust authorities believe that the public interest will be best served by requiring fully open participation, then they could announce an ex ante rule (or ask Congress to pass a statute) requiring all SSOs to be fully open to all interested parties. If the antitrust authorities believe that the public interest would be best served if all standards were "open," in the sense that they did not implicate patent rights, then the antitrust authorities could announce an ex ante rule (or ask Congress to pass a statute) requiring that standards be "open" in that sense. 222

But it is something quite different for the antitrust authorities to use enforcement actions applying general antitrust principles to penalize conduct on an ex post basis in contexts where the rules are not clear, or, indeed, where the rules are explicitly to the contrary. For example, many of the public comments on the In Re Dell consent decree expressed concern that the scope of that ruling was unclear.223 Was it intended to apply solely to cases (such as the situation described by the FTC majority in Dell 224) where the SSO's policies required the firm's representative to certify in writing that his or her firm had no patents that read on the proposed standard? Or did the prohibition extend to other cases? For example, what is the appropriate antitrust rule (or policy) toward disclosure when the SSO's policies make it clear that it imposes no obligation to search for potentially relevant patents and that any disclosure obligation is limited to the personal knowledge of the individual representative?

#### New antitrust rules causes delay---kills SSO efficiency

David J. Teece & Edward F. Sherry 3. \*\*Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California, Berkeley. \*\*Senior Managing Economist at LECG, LLC. "Standards Setting and Antitrust." Minnesota Law Review. 2003. https://scholarship.law.umn.edu/mlr/782/

V. CAPTURING THE BENEFITS OF STANDARDIZATION THROUGH SSO-RULE CLARITY

A. THE BENEFITS OF STANDARDIZATION AND THE NEED FOR SPEED

It is widely recognized that standardization can yield significant social benefits.200 It is often less widely recognized that factors that delay the standards-setting process can impose significant adverse social costs. To generate the greatest social benefits, the standards-setting process must be both timely and efficient. This is especially true in fast-moving, high-tech industries. It does little good to take twenty-four months to set a standard when product life-cycles are eighteen months. A delay in setting a standard often means that new products get delayed, or markets do not develop.

1.The Social Costs of Delay

Public policies that slow the adoption of standards can have very detrimental economic effects. By way of illustration, suppose that the product life-cycle in the industry is three years, and that some factor delays the adoption of a standard for the next-generation product by six months. This delay causes the loss of one-sixth (the three-year product life-cycle, divided by the one-half-year delay) of the overall social gains realized by moving to the next generation product. It is not uncommon in many high-tech industries for new generation products to represent a 50-100% improvement or more (in terms of net consumer satisfaction) over the earlier product, as anyone who recalls the early days of cellular telephones or personal computers can appreciate. 20 2 If so, a six-month delay can result in losing 8-16% of the overall social value of the product line as a whole.

2. Consortia, Organizational Structure, and Efficiency

Special-purpose SSOs, sometimes called consortia, are often faster, and can be more focused and nimble, than more "formal" SSOs in setting standards. 20 3 Participation in specialpurpose SSOs is often limited to key players whose agreement is crucial to developing the standard. 20 4 With fewer participants, it is often faster and easier to reach consensus. Moreover, consortia are often less constrained by "due process" considerations than formal SSO counterparts that have formalized agendas and procedures. This in turn has led to a major shift away from the use of "formal" SSOs, and the proliferation of informal/voluntary SSOs and special-purpose consortia.

The difference is especially apparent in the distinction (discussed above 20 5) between voluntary standards and regulations. Regulatory bodies are often constrained by dueprocess considerations in ways that voluntary SSOs are not.20 6 As such, the regulatory process can often be much more timeconsuming than private standards-setting.

The shift from more-formal SSOs to less-formal consortia can potentially have an adverse effect on the openness and transparency of decision making if consortia lack the types of due process procedural safeguards that more-formal SSOs have. In our view, however, the absence of complex procedural rules should be seen as an advantage, not a disadvantage. So long as the SSO's rules are clearly specified in advance, firms can "know what they are getting into" and can decide whether to participate and whether to rely on (or adopt) the SSO's standard accordingly.

### AT: Their 1AC Evidence

#### 2. Qualcomm decision did not determine the scope of contractual obligations but said FRAND breaches were not an antitrust violation. The CP makes them a *contract* and *patent law* violation, which is in line with the Ninth Circuit’s decision.

Kirti Gupta and Urska Petrovcic 20. Ph.D. in Economics from the University of California, San Diego. Vice president of Criterion Economics and a senior fellow at Hudson Institute. Standards, Patents, and Antitrust Policy: The Road Ahead. Competition Policy International. 12-21-2020. https://www.competitionpolicyinternational.com/standards-patents-and-antitrust-policy-the-road-ahead/

However, U.S. courts have refused to use antitrust as a tool to enforce the obligations pursuant to a FRAND commitment. This was perhaps most clearly stated in 2020, in FTC v. Qualcomm, when the Ninth Circuit rejected the allegations that the FRAND commitment Qualcomm made to two standard-development organizations (“SDOs”) created an antitrust duty to license chip manufacturers.18 The Ninth Circuit did not determine the exact contractual obligations arising from the FRAND commitments.19 Instead, it said that showing a breach of those obligations would not suffice to establish a violation of antitrust law. The court emphasized that to succeed in its antitrust claim, the Federal Trade Commission (“FTC”) would have to explain how the breach of a FRAND commitment harmed competition. Ultimately, it failed to do so.20 In refusing to use antitrust as a tool to enforce the FRAND commitment, the Ninth Circuit emphasized that there are “persuasive policy arguments [for] . . . caution about using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation.”21 A few months later, in Continental v. Avanci, the court for the Northern District of Texas reached a similar conclusion.22 It emphasized that “[a]n SEP holder may choose to contractually limit its right to license the SEP through a FRAND obligation, but a violation of this contractual obligation is not an antitrust violation.”23 The court reasoned that to be unlawful under antitrust laws, a conduct must harm the competitive process, but found no evidence that a violation of a FRAND commitment would have such an effect.24

#### 3. The plan causes over enforcement that decks innovations.

MAKAN DELRAHIM 18. Assistant Attorney General Antitrust Division U.S. Department of Justice. The “New Madison” Approach to Antitrust and Intellectual Property Law. Department of Justice. 03-16-2018. Pg. 6-10

To understand what I mean when I say that patent hold-up is not an antitrust problem, it is important to step back to consider the purpose of antitrust law—what it does, and what it should not do. At its core, antitrust law aims to protect competition and consumers.19 Antitrust law is guided by a consumer welfare standard, which dates back to the origins of the Sherman Act.20 The ultimate focus on the consumer gained academic prominence in the late 1970s and 1980s through the intellectual leadership of Judge Robert Bork,21 Judge Frank Easterbrook,22 and others.23 This standard sharpens the focus of antitrust scrutiny to anticompetitive practices that are harmful to consumers, rather than competitors, so that the antitrust laws are not misapplied to advance social goals unrelated to consumer welfare and efficiency. Importantly, however, the consumer welfare standard is not synonymous with a policy always favoring lower prices.24 For example, high demand for an exciting new product may drive up its price, but that may simply reflect consumer preference for a superior product relative to alternatives.25 Antitrust law is intended to protect this behavior, not punish it, so that others will have incentives to innovate and compete themselves, all for the benefit of consumers.26 Such dynamic competition should be encouraged by our enforcement policies. Rather than focusing on prices in isolation, antitrust law instead protects consumers where practices also harm competition—that is, they harm some “competitive process” in a manner that causes harm to consumers in the form of above-competitive prices, lower output, or reduced efficiency.27 Indeed, directly showing harm to end-consumers is not always necessary to prove a violation of the antitrust laws. For example, where collusion among buyers pushes input prices down—what economists call a monopsony effect—that may violate the antitrust laws because there is harm to competition even though it results in lower prices.28 This is where theories that unilateral patent hold-up is an antitrust problem go wrong. Stating that a patent holder can derive higher licensing fees through hold-up simply reflects basic commercial reality. Condemning this practice, in isolation, as an antitrust violation, while ignoring equal incentives of implementers to “hold out,” risks creating “false positive” errors of over-enforcement that would discourage valuable innovation. Advocates of using antitrust law to reduce the supposed risk of patent hold-up fail to identify an actual harm to the competitive process that warrants intervention. If an inventor participates in a standard-setting process and wins support for including a patented technology in a standard, that decision does not magically transform a lawful patent right into an unlawful monopoly. To be sure, that decision gives the patent holder some bargaining power in claiming a piece of the surplus created by standardization. And, it would require the patent holder to live up to commitments as they would have bargained for it, enforceable by contract laws. But standard setting decisions are intended to be a recognition that a technology is superior to its alternatives. A favorable SSO decision, like a patent itself, is a reward for an innovator’s meritorious contribution whose wide-ranging benefits can ripple throughout the economy, contributing to dynamic competition. Arguments that inclusion in a standard confers market power that could harm competition typically rest on the unreasonable assumption that the winning technology is no better than its rivals.29 It is therefore unsurprising that proponents of using antitrust law to police FRAND commitments principally rely on models devoid of economic or empirical evidence that hold-up is a real phenomenon,30 much less one that harms competition. Since hold-up theories gained traction in the early 2000s, it is striking that they still remain an empirical enigma in the academic literature.31 Antitrust law demands evidence-based enforcement, without which there is a real threat of undermining incentives to innovate. That is why I believe so strongly that antitrust law should play no role in policing unilateral FRAND commitments where contract or common law remedies would be adequate.32 I worry that courts and enforcers have overly indulged theories of patent holdup as a supposed competition problem,33 while losing sight of the basic policies of antitrust law. They lose sight of the fact that antitrust law is not just remedial; it is, importantly, intended to deter through the threat of treble damages.34 As enforcers, we have a responsibility to ensure that antitrust policy remains sound, so that U.S. consumers continue to enjoy the benefits of dynamic competition and innovation, and so we do not export unsound theories of antitrust liability abroad, where economically dubious enforcement actions can have serious consumer-harming effects on U.S. businesses, consumers, and workers.

#### 4. Courts and regulators have stated patent and contract law solve.

Jonathan Barnett 20. Torrey H. Webb Professor of Law, Gould School of Law, University of Southern California. How and Why Almost Every Competition Regulator Was Wrong About Standard-Essential Patents. Competition Policy International. 12-21-2020. https://www.competitionpolicyinternational.com/how-and-why-almost-every-competition-regulator-was-wrong-about-standard-essential-patents/

A. Contract Law, Not Antitrust Law

Some courts and regulators have expressed doubt whether competition law is even applicable in general to the enforcement of SEPs and especially to the interpretation of the “fair, reasonable and nondiscriminatory” (“FRAND”) commitment with which SEPs are typically associated.  Following this view, claims of patent holdup typically fail to meet the “antitrust injury” standard (which requires injury to competition, as distinguished from injury solely to an individual competitor), in which case any legal issues relating to the enforcement of SEPs or the interpretation of the FRAND commitment fall within the realm of patent and contract law, respectively.7  Notably, the decision in August 2020 by the Ninth Circuit reversing the district court in FTC v. Qualcomm and the decision in September 2020 by the Northern District of Texas dismissing an antitrust suit against the Avanci automotive 5G patent pool reflect this view, insofar as both courts stated that a purported violation of a FRAND obligation generally gives rise to a potential claim under contract, rather than antitrust, law.8  (The statement made by the European Commission in November 2020 that it may intervene in licensing disputes between patent owners and vehicle manufacturers in the automotive market runs counter to this tendency.9)

#### 5. The CP can impose the same treble damages as the plan.

Geradin et. al. 8. DAMIEN GERADIN, ANNE LAYNE-FARRAR, AND A. JORGE PADILLA. Damien Geradin, Ph.D. Cambridge (1995) is a Professor of Competition Law at Tilburg Law and Economics Center (TILEC) and a Partner at Howrey LLP; Anne LayneFarrar, Ph.D. University of Chicago (1999) and Jorge Padilla, D.Phil. Oxford (1992) are economists at LECG Consulting. THE COMPLEMENTS PROBLEM WITHIN STANDARD SETTING: ASSESSING THE EVIDENCE ON ROYALTY STACKING. 4-25-2008. Pg. 168-170

A. Patent Reform As a solution to holdup and other licensing problems, Shapiro (2006) calls for policy changes to improve patent quality, reducing the odds that weak patents are granted by the patent office. He argues that poor quality patents are the worst offenders in terms of holdout, holdup, and other IPR licensing inefficiencies. Thus, weeding out such patents at the U.S. patent office would go a long way to solving IPR licensing issues later on within (as well as outside of) standard setting. This is the least controversial of the proposals. It is widely recognized, and not just among the academics pushing for radical change in the patent system, that IPR reform is long overdue. To name just a few of the more recent examples, see the article by Nancy Gallini, the working paper by Mark Lemley, Doug Lichtman, and Bhaven Sampat, and the book by Adam Jaffe and Josh Lerner––all of which review, assess, and expound on the need for intelligent patent reform.99 We agree that patent reform would be helpful, on a number of fronts. As this article was being written, Congress appeared to agree as well. While some of the specific elements remain controversial, the Patent Reform Act of 2007 had been passed by the House of Representatives and was being considered by the Senate.100 The Act calls for a number of reforms, including, among other things: Damages calculations: The latest version would allow judges discretion in the method for calculating reasonable royalties. Judges could follow an apportionment analysis (based on the incremental value contributed by the patented technology), entire market analysis (where the full end product is used as the basis for royalties), or other criteria, such as the Georgia Pacific 15 factors. This provision would address concerns over patents on minor components obtaining large royalties by virtue of the calculations being based on the overall product sales.101 Of course, from a purely mathematical standpoint, an ad valorem royalty rate can be adjusted up or down as the base decreases or increases, rendering such concerns mute. For instance, a 2.5% rate on 100% of the product sales would be equivalent to a 5% rate on a 50% increment of the overall product sales. Willful infringement: The standard for establishing treble damages would be raised from its current negligence standard.102 Patent owners would have to present clear and convincing evidence that the infringer unreasonably disregarded prior notices, copied the patented technology outright, or behaved in some other blatant fashion. Accused infringers would be allowed to present a “good faith belief” defense. The theory behind this proposal is that with a reduced threat of treble damages, holdup should be less likely. Post grant review: Patents could be challenged more easily by third parties. During the so-called “first window of review,” up to 12 months after issuance, the patent would not be presumed valid, as it is today. Increased scrutiny should lead to higher quality issued patents. This proposal thus targets perceived low patent quality, the problem at the root of many other patent concerns. Lawsuit venue: The proper venue for patent infringement cases would be restricted so that the venue matched more closely the circumstances of the case. This would reduce “venue shopping,” where patent holders file suit in jurisdictions more likely to be favorable to their case.103 On a purely pragmatic note, we point out that regardless of whether this particular Act is ultimately passed (and in what form), well thought out patent reform would be complementary to existing voluntary market mechanisms, including property preempting investments, reputation effects, cross licensing, and patent pools. Solid patent reforms are probably among the best ways to alleviate the risk of royalty stacking and other licensing issues, as stemming the patent flood and eliminating weak patents would reduce overall patent counts and limit those remaining to valuable contributions. As with all reforms, patent reform should be done with care to avoid unintended consequences.104

#### Advantage 2 certainly solved by the CP. The CP means Qualcomm would not be able to violate FRAND commitments which means other firms would not follow their lead. Their evidence s about higher prices and reduced participation in standard setting which the CP certainly solves.

### AT: CPs compete off enforcement

#### 1. Clash, research depth, and holistic advocacy. It’s the core controversy in alliance research which makes it predictable OR aff choice solves their offense,

Erasmus School of Economics ND. The Erasmus Center for Economic and Financial Governance is an international multidisciplinary network of leading researchers and societal stakeholders initiated by researchers from Erasmus School of Economics and Erasmus School of Law. ECEFG conducts interdisciplinary research (law, economics and political science) and contributes to current debates in public and in academia on issues relating to European and global economic and financial governance. "Competition Policy." Erasmus Center for Economic and Financial Governance. xx-xx-xxxx. https://www.eur.nl/en/ese/affiliated/ecefg/research/competition-policy

Competition Policy Research in this field consists of **two broad areas**. The first area – **Theory and Implementation of Competition Law and Policy** – refers to fundamental and applied research into topics that are traditionally seen as the core of competition policy. The second area – **Scope of Competition Law and Policy** – refers to all research on the effect and desirability of including new considerations in competition law and policy in order to address the challenges of our time, such as the increasing power of big tech firms, or global warming. **Theory and Implementation of Competition Policy** This covers for instance collusion, abuse of dominance, mergers, market regulation and state aid. Some examples of research topics are: the practices firms can use to engage in collusion and its welfare consequences; the practices firms can use to abuse a dominant position and its welfare consequences; which practices can be considered proof of such activities; how to regulate access to a market; how to properly assess the effects of a particular practice or merger; the practices, by which the state and public authorities distort competition such as subisidies and tax measures the interpretation and application of EU and national competition law by Competition Authorities and Courts and the extent to which they achieve the goals of competition policy **Scope of Competition Policy** The effectiveness of European competition law and policy in combination with rapid technological changes have raised questions about its proper scope**. Which policy objectives can and should be pursued by means of competition law and policy, and which should be delegated to other legal fields and policies**? Some examples of specific research questions include: Can and should competition law be used to protect the privacy of consumers on the internet? Information gathered by firms can be used to increase their own profits. How does this affect consumers, and what does this depend on? Can and should competition law deal with market power derived from information gathering? For instance, should the big five tech giants be forced to divest activities? Should competition policy also include considerations of economic inequality or environmental effects? Can competition law remain effective if it is used for more than safeguarding fair competition?

### AT: Definitions

#### B. Core Antitrust Laws are Sherman, Clayton, and the FTC Act.

Kendall Kuntz 2/23/21. 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?” 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.

#### They are enforced by the FTC and DOJ

Diva Rai 20. Editor and Legal Blogger at iPleaders. "The Effect of Injunctive Relief on Antitrust: The United States position". iPleaders. 6-10-2020. https://blog.ipleaders.in/the-effect-of-injunctive-relief-on-antitrust-the-united-states-position/

There are two agencies which work for antitrust enforcement and focus on concerted action, exclusionary unilateral action, and merger review. These are the Department of Justice (hereinafter, DOJ) and Federal Trade Commission (hereinafter, FTC) and the three core antitrust laws being the Sherman Act, the Clayton Act and the FTC Act, which is solely enforced by the FTC prohibiting unfair methods of Competition and deceptive practices.

Coming to the Sherman Act, both DOJ and FTC can take action but only DOJ is empowered to take criminal enforcement action. Where section 1 of the Sherman deals with the concerted action, section 2 deals with the unilateral actions. All the concerted actions which result in restraint in trade and which can take place in the form of agreements, contracts, comes within the ambit of section 1 of the Act. There are agreements of IP Licensing which are evaluated under the rule of reason but there are also some of the agreements like that of market allocation, which invites a per se prohibition. Section 2 prohibits the monopoly power of the enterprises through the anticompetitive conduct. On the other hand, the Clayton Act generally deals with the Merger and Acquisition issues.

#### 3. Antitrust laws are enforced by the DOJ and FTC.

DOJ and FTC 16. Antitrust Guidance for Human Resource Professionals Department of Justice Antitrust Division Federal Trade Commission. https://www.justice.gov/atr/file/903511/download

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies’ hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

#### DOJ and FTC.

DOJ. “Business Resources”. https://www.justice.gov/atr/business-resources

The antitrust laws are enforced by both the Antitrust Division and the FTC’s Bureau of Competition. All criminal antitrust enforcement is handled by the Antitrust Division.

#### Federal antitrust is enforced by the DOJ and FTC.

NAR. National Association of Realtors. "Antitrust". https://www.nar.realtor/antitrust

Federal and state antitrust laws are designed to protect competition, and the opportunity of competitors to engage in business free of artificial restrictions on competition. Such restrictions include price fixing agreements, group boycotts, “tying” arrangements, and market allocation arrangements. Antitrust laws also make it illegal to operate a monopoly and abuse the power of one who has a monopolistic market position. Antitrust laws are enforced by the U.S. Department of Justice, the Federal Trade Commission, and similar state agencies and state Attorneys General.

#### 4. They are alternatives not subsets.

Stephen G. Breyer 87. SCOTUS Justice since 1994. California Law Review Volume 75. Issue 3. Article 15. “Antitrust, Deregulation, and the Newly Liberated Marketplace”.

On this view, antitrust is not another form of regulation. Antitrustis an alternative to regulation and, where feasible, a better alternative.3To be more specific, the classicist first looks to the marketplace to protectthe consumer; he relies upon the antitrust laws to sustain market compe-tition. He turns to regulation only where free markets policed by anti-trust laws will not work-where he finds significant market "defects"that antitrust laws cannot cure. Only then is it worth gearing up thecumbersome, highly imperfect bureaucratic apparatus of classical regula-tion. Regulation is viewed as a substitute for competition, to be usedonly as a weapon of last resort-as a heroic cure reserved for a seriousdisease.

#### 5. It is a jurisdictional question---antitrust authorities don’t intervene in regulatory concerns.

Babette E. Boliek 11. Associate Professor of Law at Pepperdine University School of Law. J.D., Columbia University School of Law; Ph.D., Economics University of California, Davis. FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries, 52 B.C.L. Rev. 1627 (2011). <http://lawdigitalcommons.bc.edu/bclr/vol52/iss5/2>

As argued in this Article, the recent Comcast decision should not be dismissed as an inconvenient hurdle to be sidestepped by reclassification; rather it marks a pivotal invitation to Congress to redefine the boundaries between the FCC and antitrust authorities. In the long wake of assorted jurisdictional tugs of war between the two regimes, and amidst a legacy of accusations of regulatory capture and administrative overreach,29 the net neutrality debate accentuates historic preferences for antitrust versus regulation, a subject which should be revisited and squarely addressed. Before that can be done, however, the rules of the road—the issue of jurisdiction—must be clearly decided.

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

#### 6. Overly broad definitions of regulation distort literature and outcomes. Regulation and antitrust are clearly distinct.

Mariateresa Maggiolino 15, Associate Professor of Commercial Law at Bocconi University, “The regulatory breakthrough of competition law: definitions and worries,” Chapter 1 in *Competition Law as Regulation*, 2015, pages 3-26.

As a consequence, our current perception of economic regulation cannot be anything but wide and far-reaching21 – so wide and farreaching that even competition law can be soundly characterized as a piece of economic regulation. For instance, it can be deemed as a market-harnessing mechanism that, in the interest of the public, realizes a form of legal control on businesses.22 Thus, to argue that current competition law is today taking the shape of a piece of economic regulation does not make much sense. In order to talk about ‘the regulatory breakthrough’ of competition law, we need to put aside any description of what happened in the de-regulation era, as well as any resulting broad and multiform notion of economic regulation. We need to consider a narrower, more specific and detailed conceptualization – in fact, a historically determined conceptualization – of what economic regulation is.

**[OPTINAL MARK---NO TEXT REMOVED]**

2.2 Competition Law as a Liquid Concept Notwithstanding the few US and EU provisions that directly associate competition law with anticompetitive arrangements and monopolistic conduct, our conception of what competition law is has changed over time according to the different goals that policy makers and scholars have assigned to it.23 Think, for example, of the rules applied to monopolistic conduct. During different periods, both US courts and EU antitrust institutions have interpreted and enforced them as if competition law was called to: (i) protect small businesses against the ‘dictatorship’ of big, concentrated and vertically integrated businesses; (ii) ensure fairness, justice, equity and redistribution; (iii) guarantee the process of competition; (iv) preserve economic welfare; and, in the sole case of the European Union, (v) support the creation of the Single Market.24 More generally, over the past fifty years or so antitrust scholars and practitioners have been divided between those who think that competition law can be used aggressively to achieve perfectly competitive markets and those who believe that, in practice, competition law can make only a modest contribution to the goal of protecting effective competition.25 Indeed, competition law provisions are so flexible and open-ended that they can mirror – and indeed have mirrored – the cultural insights as well as the political concerns and values of our social and political communities.26 For example, the transatlantic past preference for the welfare of small businesses (and, hence, for dominant firms’ rivals) was fed by the laissez faire alarm about bigness as such, the economic misconception that good business performances rest only with non-concentrated markets, and by the concern that economic power concentration would impair free markets and democracy.27 Likewise, the currently dominant idea according to which competition law consists of a set of legal rules that aims at preventing those business practices that may harm economic welfare – never mind whether total or consumer welfare28 – can be traced back to the neoliberal programme that the Chicago School embraced in the 1970s.29 In sum, competition law is a liquid concept. Therefore, in order to conceptualize the regulatory breakthrough of current competition law we must, first, assume that there exists a form of competition law – perhaps just a theoretical one – whose shape has nothing to do with a piece of economic regulation, and, second, verify that the shape of current competition law is taking on some regulatory contours. Further, if we want to explain the alarm that this regulatory transformation of competition law is producing, we must also show whether and how competition law loses something important when it is poured into a ‘regulatory container’3. THE POSSIBLE REGULATORY CONTOURS OF COMPETITION LAW Behavioural and social phenomena are often understood ‘in terms of a purposeful selection of facts from a far wider range of ways of looking at things’.30 Therefore, in order to grasp the terms under which competition law can become a regulatory enterprise – or a more regulatory enterprise – the following paragraphs go to the antipodes. They briefly consider and compare two extreme species of economic regulation and competition law, that is to say: (i) those sector-specific, rate-and-entry pieces of economic regulation that the US government actually ‘enforced’ in the United States until the end of the 1960s; and (ii) the notion of competition law that the Chicago School ‘theorized’ at the beginning of the 1970s. Indeed, these heterogeneous examples of economic regulation and competition law are optimal ‘sparring partners’ to reveal the possible lines along which competition law can assimilate to, or differentiate itself from, a piece of economic regulation. 3.1 Government ‘Actionism’ and Sector-Specific, Rate-and-Entry Regulations Since the second half of the 19th century and, in particular, for the period from the 1930s to the 1970s, in the United States the term ‘economic regulation’ was often used to denote what we today call command and control regimes.31 By using rigid rules backed by administrative enforcement and penal sanctions, independent governmental agencies presided over firms’ market actions in many sectors, such as trucking, airlines, telephone services, electricity, radio, television and natural gas. These agencies could prohibit certain forms of conduct, but also demand some positive actions by, say, prescribing the goods and services to be rendered, indicating the market to be served, deciding when plants needed to be built or modernized or determining how much should be invested in developing new technologies. Furthermore, those independent agencies could lay down conditions for entry into a sector, by determining which firms or individuals (or types thereof) were allowed to engage in which activities, and by controlling not only the quality of a production technique or of a service, but also the allocation of input and output, as well as the prices charged to consumers, or the profits made by enterprises. In brief, by the end of the 1960s the regulatory programmes implemented in the United States required independent authorities to act for a better future – i.e. to promote economic welfare, economic growth and the public interest – by imposing on firms what conduct to undertake and by taking in advance manifold detailed decisions on the market equilibria that these independent authorities believed were to be achieved. These programmes were made up of proscriptions as well as prescriptions, whereby public agencies were entitled to fully decide, manage and control private affairs.32 3.2 Neoliberalism and Chicagoan Conception of Competition Law At the beginning of the 1970s, the Chicagoan conception of competition law was totally defiant of government ‘actionism’. Because of its support for neoliberalism, the Chicago School called for the abolition of competition law, by endorsing full faith in the automatic free-market system it maintained that the government was the problem and not the solution. Then, if competition law was to be somehow tolerated, antitrust enforcers were to play a very residual role. They had to prohibit the sole business practices that harmed the competitive status quo, i.e. that produced a negative impact on the ‘natural functioning’ of the market.33 Further, enforcers had to identify the ‘natural functioning’ of the market by looking at the performance of total welfare, i.e. in full accordance with the main teachings of mainstream economics,34 and without pandering to political ideals or specific interests. In addition, and here, too, in order to limit government ‘actionism’, the Chicago School wanted antitrust enforcers to intervene only when there was no risk of making false positive mistakes. Therefore, they had to take their ‘hands off’ of any case, such as the monopolization cases, where the alleged harmful effects were somehow questionable and speculative. Also, just to control the negative consequences that could follow a wrong intervention, their remedies had to consist in mere cease-and-desist orders and injunctions,35 as the traditional US model of private enforcement envisaged.36 In brief, the overall conceptualization that the Chicago School made of competition law was thought to limit as much as possible the interference of public powers in private affairs. The neoliberal programme, indeed, assumed that the market mechanism made up of preferences, choices, transactions and contracts was alone capable of guaranteeing economic welfare, individuals’ self-determination and the aggregate sum of subjective value satisfactions.3 3.3 So Far, So Close In the light of the above terms of comparison, we can elicit many of the conditions under which the shape of competition law can acquire some regulatory contours. In general, the ‘regulatory metamorphosis’ of competition law happens – or starts happening – when competition law changes its goals, that is to say, when it does not limit itself to protecting total welfare, but pursues political and social aims, or even an economic goal other than the mere protection of the market’s ‘natural functioning’. For example, antitrust law may work to set the stage for better market equilibria and for higher levels of competition – it can work to maximize total and/or consumer welfare. In the latter scenario, then, antitrust law changes for another reason – because it modifies its targets. It focuses not only on those business practices that can harm total welfare, but also on the structure of the markets at stake, on the existing distribution of incentives and legal entitlements, on the spread of information and on business practices that do not maximize total and consumer welfare.38 In other words, a form of competition law that pursues different goals also puts the spotlight on different economic variables. When antitrust enforcers modify their targets, they accordingly use different tools and approaches – they impose not only bans, but also positive obligations establishing what economic agents should do in order to set the stage for better market equilibria.39 They abandon a mere ex post, backward-looking and facts-based attitude focused on the protection and the restoration of the status quo, to endorse a more ex ante, forward-looking and theory-laden position aimed at fostering market development.40 In brief, competition law may experience a regulatory breakthrough as long as it moves away from the minimalist archetype of the Chicago School – away from its goals, targets, tools and approaches. Or, at least, this is the ‘theoretical framework’ into which a regulatory transformation of competition law can be inserted. 4. THE TERMS OF THE PRESENT ‘REGULATORY METAMORPHOSIS’ OF COMPETITION LAW The above theoretical map of what might give a regulatory mould to competition law does not necessarily mean that such a transformation is actually taking place. Indeed, the mere existence of this theoretical map does not necessarily imply that this transformation has ever taken place – the Chicagoan notion of antitrust law is still influencing the US and EU practice, but it has never been fully endorsed, especially in the European Union. Therefore, one could argue that competition law has always been a sort of regulatory enterprise. However, this is not the place to make such a historic analysis. Moreover, this is not the place to discuss the many circumstances in which current US antitrust law and EU competition law look like a piece of economic regulation – the following chapters are devoted to thoughtful analysis of this twofold subject. Nevertheless, some clear facts suggest that today’s competition enforcers – and especially the EU Commission – are available to play a more active role in promoting the maximization of economic welfare (i.e. in pursuing a different goal), by affecting not only business conduct, but also market structures, the existing economic incentives, and the given legal entitlements (i.e. by targeting different variables). Hoping to set the stage for better market equilibria (i.e. endorsing a more ex ante approach), current antitrust enforcers are now more willing than they were in the past to ‘negotiate’ the content of their decisions (i.e. they are less subordinate to the results coming from the adversarial system) and to use sophisticated economic models41 to make educated guesses about future market developments (i.e. they are liable to be more theory-laden and to carry their assessment into the long run). Not by chance, indeed, do expressions such as ‘competition promotion’, ‘negotiated remedies’, ‘forward-looking decisions’, ‘market reorganization’ and ‘continuous monitoring’ belong to the vocabulary of today’s antitrust enforcers.42 For example, consider what the EU Commission does in duty-to-deal cases such as the Microsoft saga.43 In these cases, for the sake of what the Commission considers to be the public interest, it decides how to reshape property rights and distribute the incentives to compete and innovate among the players of the industries at stake. Thus, in duty-to-deal cases the Commission clearly acts as a regulator: it establishes where to drive markets on the basis of specific economic theories, such as the defensive leverage theory;44 it endorses a clear forward-looking perspective; and it imposes not only equitable relief and cease-and-desist orders, but also positive obligations impinging on structural variables. In so doing, the Commission takes into account the ‘industrial identities’ of the involved firms, that is to say, their history of meritorious competitive acts, whether they were previous state monopolists, or whether they deserve their market position or their intellectual property rights.45 In addition, consider the more frequent commitment decisions. They grant a great regulatory leeway to antitrust enforcers.46 Indeed, in issuing commitment decisions the EU Commission – not unlike the US agencies that adopt consent decrees – works as a mediator between the parties, knowing their diverse interests and facilitating the negotiation and conciliation of their opposite positions. Finally, do not forget that, according to some scholars, any antitrust agency or authority that adjudicates a case adopting the rule of reason is actually acting as a regulator that substitutes its economic evaluations for those of entrepreneurs. Namely, establishing whether a restriction is reasonable entails, inter alia, considering whether there could be a less restrictive alternative, that is to say, making an educated guess about how best to achieve a better market equilibrium: by using the option chosen by the entrepreneur or by using another option that the antitrust agency or authority envisages.47 In sum, there is room to argue that current competition law does not have the shape of the Chicago archetype. And this creates a sort of alarm. 5. THE REASSURING NATURE OF THE CHICAGO ARCHETYPE Probably, antitrust scholars are very fascinated by the Chicagoan notion of competition law because they were trained during the years of the Chicago bandwagon. Probably – and this is my personal belief – their diffidence towards a more ‘regulatory approach’ to competition law arises from the reassuring nature of Chicago antitrust, i.e. from the fact that the Chicago concept of competition law shelters – or seems to shelter – enforcers from the risk of enjoying too much discretion. Let me briefly elaborate the details of the argument. Basically, regulators enjoy a great leeway. They can establish (or interpret) what the public interest is and what rules could help to pursue it.48 Yet, information asymmetries as to present market scenarios, as well as limited knowledge as to possible and future market developments, inexorably affect regulators’ ability not only to identify what the optimal market equilibrium should be, but also to determine what changes to market structure, initial endowments and original entitlements should be continuously promoted so as to accommodate the dynamic achievement of this equilibrium. Therefore, regulators may make mistakes in defining (or interpreting) their goals and in elaborating and applying the rules that, over time, should allow these goals to be accomplished. In addition, the very same ignorance that increases the risk of making mistakes exposes regulators to another twofold risk – that of being manipulated and that of making value choices to the detriment of individuals’ self-determination. For example, technocrats themselves may try to influence the notion of public interest in order to preserve or expand their power and jurisdictional turf. In this way, they can deepen their intervention into the affairs of the regulated enterprises and control issues and firms more than necessary.49 Or, looking for better information to draw up and enforce their rules, regulators can be captured50 – they may fall under the spell of the regulatees and, thus, consider some rules to be in the public interest, although in fact these rules fulfil the interest of specific groups of firms.51 And even away from these species of manipulations, since regulators have no objective standard to establish what the public interest is and what rules could help in pursuing it, their decisions may, however, side with specific visions of the world. Their decisions are not neutral – they are value choices, at least partially. In contrast – and in a very reassuring way – the Chicago conception of competition law would have antitrust enforcers act like mere technicians who, by doing only what the economic technique tells them to do, can stay away from any form of discretion and are thus sheltered from mistakes, manipulations and conflicts of interests and values. Namely, suppose that the market is a cosmos – i.e. a ‘natural, spontaneous and necessary’ order governed by universal, unchangeable and objective rules that technicians may know and calculate.52 Assume, then, that economics is the domain of these rules – it is like a hard science that describes what the ‘natural’ functioning of the market is. In the light of these assumptions, as long as antitrust law ‘translates’ these economic rules into the legal realm – as the Chicago School wanted it to do – the risk of making mistakes is low and there is little room for manipulations, conflicts of interests and diverse political views.53 In other words, as long as antitrust enforcers pursue the protection of total welfare by forbidding the sole business practices that mainstream economics say harm it, their approach and tools are so tailored to the evil to be removed that they are little suited for anything else. True, one could argue that economics does not always supply definitive answers to be easily translated into the antitrust realm. Consider, for example, the case of antitrust decisions dealing with the duration and scope of monopolies and IPRs. Economics does not know where to strike the proper inter-temporal balance between creating and disseminating the incentives to compete and innovate. In such a situation, hence, the lack of an economic rule to be translated into the legal field could open the gate to mistakes, manipulations and value choices. To rebut this argument the Chicago School would argue that in those cases antitrust enforcers must take their hands off any negotiation or any other intrusive decision envisaging what the public interest could be. In the absence of any clear-cut economic rule to be translated into the antitrust realm, leaving things as they are, leaving markets free to polish themselves, should be the best way to limit the risks of prosecuting harmless conduct, of being at the mercy of a specific group of interests and of espousing a particular vision of the world. In brief, the less, the better. By conditioning antitrust enforcement to what mainstream economics teaches, and by supporting the ‘hands-off approach’ any time economics is not capable of formulating precise economic rules to qualify business behaviour, the Chicago archetype claims to limit as much as possible enforcers’ discretion and, as a consequence, the risks of making mistakes, of being manipulated, and of making value choices. In other words, the more competition law limits itself to replicate the most certain teachings of economics, the more it becomes a safe game – i.e. a matter of ‘truth’ – and this is something that no form of regulation, and no form of a more regulatory approach to competition law, can ever be.54 Yet, this narrative is misleading. 6. DEBUNKING THE REASSURING NATURE OF THE CHICAGO ARCHETYPE It may actually happen – as the Chicago School maintains – that some economic rules (and their layman rehashes) offer a true description of how markets work. In this case, anchoring antitrust law to economics really limits enforcers’ discretion as well as the consequences that this discretion is said to bring about in terms of mistakes, manipulations and value choices. Yet, even setting aside the case of economic rules that are too sophisticated to offer a realistic description of how competition develops,55 there are economic rules that, though correct and sound, depend so much on some detailed hypotheses that they do not offer one single applicable conclusion for the specific antitrust case at stake.56 Moreover, as seen above in the discussion about the duration and scope of monopolies and IPRs, there are cases where no economic rule can definitively establish what the ‘natural functioning’ of the market is. Hence, in these two cases, any antitrust decision translating one of those economic rules into the legal field is no longer a matter of pure technique.57 When there is no single and definitive economic rule to implement, antitrust enforcers also enjoy discretion – an amount of discretion that, notably, even the Chicagoan ‘hands-off approach’ cannot manage in a technical way. Indeed, the Chicagoan ‘hands-off approach’ shelters the system from manipulation because it does not leave any room for negotiation. Yet, it is not error-free, because if the natural course of the market is unknown, leaving things as they are can be as wrong as changing them. Moreover, the ‘hands-off approach’ is not value-free for at least two reasons. First, assuming that false positive mistakes are more serious than false negative mistakes means siding with the (neoliberal) belief that markets can refine themselves better than any government action can. Second, when dealing with a specific case, leaving things as they are may mean siding with specific interests and values – those interests and values that the particular status quo at stake reflects. For example, the choice not to impose a duty to deal on monopolists holding IPRs endorses two questionable theses – that judges and antitrust administrative authorities cannot second guess (IP) legislators’ choices, and that the overall level of innovation increases leaving the lead to dominant IP holders rather than to tiny followers. Besides, to test the neutrality claim of the Chicago School against more radical observations,58 it must be acknowledged that, as such, the ‘existing competitive status quo’ that Chicagoan competition law is intended to protect (in this case, by using the ‘hands-off approach’) is not neutral – it does reflect a mixture of value choices and political decisions. Indeed, competitive equilibrium is not simply ‘given’, like flowers and electromagnetic forces may be. Each competitive equilibrium results from the combination of many building blocks, such as individual preferences and the willingness to pay,59 which are determined in large part by the original distribution of wealth and legal entitlements that, in turn, result from many political choices, social pressures, and legal rules.60 Therefore, it cannot be neglected that markets move from, and result in, scenarios that are not value-free and neutral.61 As a consequence, if the competitive status quo is not neutral, a fortiori, the Chicagoan decision not to modify it is likewise not neutral. The latter is a political choice – to say the least, it is a conservative choice – that, as such, must submit to comparison with alternative options, i.e. with other, more progressive approaches.62 To be sure, the Chicago conception of competition law may well choose to protect the status quo without paying any attention to the possibility of changing it. In addition it may also choose – as is commonly recalled – to say nothing about the ways prosperity is used or distributed, arguing that those are matters for other pieces of law. Yet, in doing so, the Chicago notion of competition law cannot hide the political value of its choices. Notwithstanding the ostensibly neutral and technical set of principles that it uses, the foundations of the Chicago approach are politically determined. More, we cannot believe that these choices are more neutral than the ones underpinning some pieces of economic regulations. Hence, since the reassuring nature of the Chicago conception of competition law is questionable, we cannot use it to justify our alarm towards the alleged regulatory breakthrough of contemporary competition law.

7. CONCLUSION

As often happens when we are confronted with complex social phenomena, the boundaries of the definitions that we use to address those phenomena are blurred. Therefore, in order to understand what we really mean when we talk about the ‘regulatory breakthrough’ of present competition law, we need to clarify the exact meaning of the terms ‘economic regulation’ and ‘competition law’. This chapter has explored the scope of these two labels and, using two specific forms of economic regulation and competition law as benchmarks, developed two theses. First: we do not err if we argue that competition law acquires ‘regulatory contours’ whenever its goals, targets, tools and approaches distance themselves from those of the Chicago archetype. Second: the main concerns about this ‘regulatory breakthrough’ are rooted in a fallacy – that, in contrast with economic regulation and any sort of regulatory conception of competition law, only the Chicago archetype guarantees neutrality. In fact, the chapter has shown that the Chicagoan theorization of competition law as well as the Chicagoan recipes to support it are value-laden, just as are any other kind of competition law and any example of economic regulation.

#### 7. IF antitrust agencies can regulate, it’s not via prohibitions.

Giovanna Massarotto 15, PhD from Bocconi University, Adjunct Professor of Competition Law there, currently Academic Fellow at the Center for Technology Innovation and Competition (CTIC) at University of Pennsylvania, “Antitrust Agencies: Watchdogs or Regulators,” George Mason University School of Law Journal of International Commercial Law, Vol. 7 No. 1, Fall 2015, http://www.georgemasonjicl.org/wp-content/uploads/2015/11/Fall-Issue-.pdf

C. How to Diverge Commitment Decisions/Consent Decrees from Prohibition Decisions

As the AT&T case shows, antitrust agencies can impose market rules in place of a regulator. But what are the concrete differences between commitment decisions/consent decrees and prohibition decisions? To clarify this distinction, I analyze some recent antitrust decisions. In Europe, the recent decisions on the payment sector are fitting to show such differences. In this sector, the Commission opened several investigations, all of which ended with both commitment decisions and prohibition decisions.

In particular, in September 2003 and June 2006, the European Commission sent two Statement of Objections on intra-European Economic Area (EEA) interchange fees, also known as multilateral interchange fees (“MIFs”), to Mastercard Europe SPRL and Mastercard International Inc.61The MIF is an interbank payment that concerns each transaction realized with a payment card. Mastercard, for example, adopted a business model for MIFs, which established a mechanism that effectively identified a minimum price merchants had to pay for accepting Mastercard cards. In practice, Mastercard’s MIF is a charge imposed per payment at merchant outlets. Similarly, in April 2009, the Commission sent a Statement of Objection to Visa Europe Limited, Visa Inc., and Visa International Services Association. In this proceeding, the antitrust issue also concerned the MIF applied by Visa and the assumption that such interchange fee could harm competition between merchants’ banks.62

Although the antitrust issue in both cases was almost identical, the antitrust decision adopted by the enforcement agencies differed. In Mastercard’s proceeding, the Commission identified an antitrust violation in adopting MIFs for cross-border payment card transactions; therefore, prohibiting Mastercard MIFs. The Court of Justice in September 2014 upheld the Commission’s Mastercard decision.63 Conversely in Visa’s proceeding, the Commission made Visa’s commitments legally binding. Similar to the Mastercard case, in the Visa proceeding, the Commission was concerned about “i) [r]ules on ‘cross-border acquiring’ in the Visa system that limit the possibility for a merchant to befit from better conditions offered by banks established elsewhere in the internal market. . . ii) All inter-bank fees set by Visa for transactions with consumer credit cards in the EEA.”64 The Commission identified these concerns and made the commitments legally binding in December 2010, establishing that: i) Visa must allow from 1 January 2015 acquirers “to apply a reduced cross-border inter-bank fee (0.3% for credit and 0.2% for debit transactions) for cross border clients;”65 ii) “Visa Europe agrees to cap its credit card MIFs at 0.3% for all consumer credit card transactions in the EEA where Visa Europe sets the rate.”66 Finally with regard to transparency, Visa offered to “simplify its inter-bank fee structure and make the invoicing of card acceptance services more transparent to merchants.”67

In sum, in the Mastercard case, after having investigated for four years, the European Commission concluded that Mastercard violated Article 81 of the Treaty (namely Art. 101 of the TFUE) and ordered it “to withdraw its intra-EEA cross-border MIFs within six months, or to adopt a MIF that fulfilled Article 101(3) TFEU Mastercard to apply its MIFs.”68 In the Visa case, the Commission accepted Visa’s commitments, according to which Visa would reduce cross-border inter-bank fees and cap its credit card MIFs. The differences between the two antitrust decisions are evident. The duration of the Mastercard EU antitrust proceeding was longer than that of Visa and ended with a discovery of an antitrust violation. This implied that Mastercard could no longer apply its MIF and that its clients, and competitors who were harmed by such MIFs could claim damages for this antitrust violation. In addition to the claims produced for damages and bad advertising, the Mastercard decision represents a precedent, according to which imposing MIFs for cross-border payment card transactions is illegal.

In contrast, no antitrust violation was found in Visa’s proceeding. According to Recital 13 of Regulation 1/2003, “[co]mmitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement.”69 Thus, Visa could continue to apply MIFs, respecting the terms of the commitment decisions. In contrast to the Mastercard prohibition decision, Visa’s commitment decision does not constitute a precedent, but only a settlement by which Visa agreed to take specific actions without admitting fault or guilt for the antitrust concerns that led to the Commission’s investigation.

Further, in July 2013, the European Commission proposed to the European Parliament and Council to implement European legislation that would cap, similar to the terms of Visa’s decision, the level of interchange fees payable by merchants.70 On December 17, 2014, the European Parliament and Council reached a political agreement on this Commission Proposal for a Regulation to cap inter-bank fees for card-based payments. Hence, in the Visa proceeding, the commitment decision seems to anticipate legislator intervention. The same Commission’s proposal on interchange fees legislation appears to be a result of the decision of the Visa case. Thus, the latter antitrust decision again shows the concrete regulatory effect of a commitment decision, as well as the main difference between such decision and the prohibition decision. Commitment decisions regulate the market, whereas prohibition decisions create case law.

IV. CONCLUSION

The U.S. AT&T consent decree and the EU Visa commitment decision are only a couple of examples of how antitrust agencies can compete or, more precisely, collaborate with the regulator to impose rules on markets. Consent decrees and commitment decisions are important antitrust devices that compete with prohibition decisions in drawing antitrust policy and in defining antitrust agency roles. Is the widespread use of consent decrees and commitment decisions appropriate in antitrust enforcement? Similar to a doctor in an emergency room, antitrust enforcement needs a tool to rapidly intervene to correct market failures, especially in dynamic markets where time is crucial. As with individuals suffering a health crisis, quick care is needed, and waiting is not opportune. Especially in Europe, commitment decisions often represent a painkiller. Commitment decisions and consent decrees can address the problem superficially, like a painkiller that alleviates symptoms but does not fight the disease.

#### 3. Predictability. our ev is from the most common federal sources.

#### Defining “antitrust” as “anticompetitive” violates elementary cannons of construction

SCOTUS 79 United States Supreme Court. “Colautti v. Franklin”. No. 77-891. https://caselaw.findlaw.com/us-supreme-court/439/379.html

Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See United States v. Menasche, 348 U.S. 528, 538 -539 (1955).

#### Kills predictability---especially when they are in the same sentence

Justice Bader Ginsburg 15. Associate justice of the Supreme Court of the United States. “Yates v. United States” https://www.law.cornell.edu/supremecourt/text/13-7451#writing-13-7451\_OPINION\_3

The Government acknowledges that, under its reading, §1519 and §1512(c)(1) “significantly overlap.” Brief for United States 49. Nowhere does the Government explain what independent function §1512(c)(1) would serve if the Government is right about the sweeping scope of §1519. We resist a reading of §1519 that would render superfluous an entire provision passed in proximity as part of the same Act.6 See Marx v. General Revenue Corp., 568 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 14) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”).

## Advantage 1 – Innovation

### No Patent Hold Ups---1NC

#### 2. Their MCSweeney evidence is from 2018---it’s about antrust agencies saying there needs to be come standard setting BUT there’s Zero systematic evidence of patent holdups

Jonathan M. Barnett 21. Director of the law school's Media, Entertainment and Technology Law Program at USC. “THE “LICENSE AS TAX” FALLACY.” Forthcoming, Michigan Technology Law Review (2021). https://papers.ssrn.com/sol3/Papers.cfm?abstract\_id=3503148

This ambitious campaign by competition regulators to reengineer SEP licensing markets is predicated on theoretical models of patent holdup and royalty stacking.141 These models of market failure yield empirically testable predictions and can therefore be assessed against the actual performance of real-world markets. If these theories are correct, then we should expect to observe that consumer prices would rise, output would fall, and, over time, SEP-intensive markets would attract less entry and R&D investment as private capital rationally shifted to more profitable opportunities. The wireless device market should be especially susceptible to this outcome since it is characterized by large numbers and fairly dispersed ownership of the SEP portfolio that is necessary to implement the relevant technology standard.142 Almost three decades of market performance have not supported these predictions. To the contrary: the wireless communications market appears to provide an almost textbook case of market efficiency, whether understood in static or dynamic terms. The market has exhibited continuous innovation in the upstream R&D and chip design market, robust entry into the downstream production market143, and consistent declines in quality-adjusted prices in SEP-intensive industries (both absolutely and relatively when compared to non-SEP-intensive industries).144 Contrary to holdup and stacking models that had mentioned anecdotal reports of double-digit SEP royalties145, subsequent empirical studies using different methodologies have found that patent licensors collectively impose an estimated aggregate royalty burden in a range of three to five percent of global handset revenues.146 That relatively modest royalty rate, which has remained largely constant over the lifetime of the industry, plausibly explains why the wireless device market has achieved broad and rapid adoption by intermediate and end-users, contrary to theoretical models that anticipate that the market would stall or shrink under high patent intensity and dispersed patent ownership.

The mismatch between empirical evidence and the regulatory consensus is striking and difficult to ignore. Even some scholars who argue that patent holdup remains a matter of pressing policy concern acknowledge that there is no systematic evidence of patent holdup, while emphasizing that it could nonetheless arise in particular circumstances.147 At a minimum, the gap between theory and evidence necessitates reconsidering the theoretical models that originally motivated the regulatory actions to undo existing licensing arrangements in wireless device markets. This reexamination exercise identifies several key oversimplifications in those models when compared to the real-world markets they purport to describe. Most importantly, the standard model assumes a single-period profit-maximization calculus, whereas wireless technology markets are characterized by multi-period payoff maximization games in which IP holders are typically repeat players that seek to maximize revenues over multiple technology generations (for example, 2G, 3G, 4G and so on), rather than a single iteration of the relevant standard (for example, 3G only).148 It is important to appreciate that the repeat-play character of the wireless market is inherent to the recursive character of R&D activity in this environment, which consists of a sequence of overlapping technology generations and sub-generations. While the holder of a critical 4G- related technology asset could elevate royalty rates to “exorbitant” levels in a single generation, it would pay the price upon launch of the 5G standard when licensees can select among competing technology systems or components, which would be evaluated based in part on the reputational capital held by the licensor. Even within a single generation, it is not necessarily the case that an IP licensor would maximize profits by selecting an “exorbitant” royalty rate since doing so would hinder adoption of its technology, limiting the sales base from which it can extract royalties. If the model is further enriched to reflect the real-world facts that innovators must initially compete with other technology standards for market adoption, standards competitions typically result in only one standard being adopted by the market (which implies that returns for the runner-up are zero), and even a dominant standard faces a rapid rate of technological and commercial obsolescence, an IP licensor has strong incentives to cultivate adoption of even its existing technology through a consistently modest royalty rate.

#### 3. First mover argument is irrelevant---Their evidence ignores a body of recent empirical research.

Jonathan M. Barnett 21. Director of the law school's Media, Entertainment and Technology Law Program at USC, 2/17/21. “Patent Groupthink Unravels.” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787557>

A largely unqualified consensus among substantial portions of the scholarly, policymaking, advocacy and business communities has taken the view that the U.S. patent system, since approximately the early 1980s, has endangered innovation by adopting historically strong forms of patent protection that facilitate opportunistic patent acquisition and litigation strategies. Based on this view, the Supreme Court, Congress, and federal antitrust regulators have taken a series of steps, approximately since the mid-2000s, that have significantly weakened patent protections and, for substantial categories of patent owners, largely precluded the possibility of securing injunctive relief against infringers. An accumulating and underacknowledged body of empirical research now indicates that this common understanding concerning the alleged failures of the U.S. patent system often relies on theoretical intuitions and anecdotal reports that ultimately lack compelling evidentiary support. Roughly concurrently, the U.S. Department of Justice, the U.S. Patent & Trademark Office and, to a lesser but still material extent, the U.S. Supreme Court have taken actions or issued statements that have incrementally enhanced certain protections for patent owners. Courts in the United Kingdom and the European Union have also taken steps to bolster the availability of injunctive relief for certain types of patent owners. This evolving policy “reset” reflects an emergent and nuanced re- assessment of the complex economic tradeoffs raised by robust forms of patent protection.

#### 3. It is methodologically suspect

Jonathan M. Barnett 21. Director of the law school's Media, Entertainment and Technology Law Program at USC. “THE “LICENSE AS TAX” FALLACY.” Forthcoming, Michigan Technology Law Review (2021). https://papers.ssrn.com/sol3/Papers.cfm?abstract\_id=3503148

147 Thomas F. Cotter, Erik Hovenkamp & Norman Siebrasse, Demystifying Patent Holdup, 76 WASH. & LEE L. REV. 1501, 1546-48 (2020); Jorge L. Contreras, Much Ado About Holdup, 2019 ILL. L. REV. 875, 896-98; Siebrasse, supra note 93, at 299. Other scholars dismiss the relevance of evidence that challenges patent holdup theory without consideration of all relevant studies or detailed examination of those studies’ substantive findings or methodology, see, e.g., Carl Shapiro & Mark A. Lemley, The Role of Antitrust in Preventing Patent Holdup, 168 U. PA. L. REV. 2019, 2041-42 (referring generally to empirical evidence contesting the existing of patent holdup, citing two of five major studies, and dismissing those studies’ relevance on the ground that they do not exclude the counterfactual in which patent holdup increased handset prices); A. Douglas Melamed & Carl Shapiro, How Antitrust Law Can Make FRAND Commitments More Effective, 127 YALE L. J. 2110, 2111, 2117-18 (2018). Specifically, the authors dismiss the relevance of empirical studies (while citing only one of five major studies, see supra note 146) that “purport to show that concerns about . . . ‘excessive’ royalties are unfounded” on the ground that these studies lack “proper controls” and therefore “do not prove a lack of costly opportunism by the owners of SEPs,” see id.). While the unknown counterfactual problem is a reasonable source of concern (which I address subsequently, see infra Parts III.B and C), a blanket dismissal of this well-developed body of evidence without undertaking any closer substantive or methodological inquiry or offering any alternative empirical approach is puzzling. Explanatory theories are always incomplete in some respect, which explains why reasoned inquiry must typically select among competing theories based on which theory displays the best fit with the available body of evidence, subject to an unavoidable residual level of uncertainty. An explanatory theory is not reasonably discarded solely because it fails to definitively exclude all alternative explanations, unless one of those alternative explanations can provide a more complete account of the relevant body of available evidence. For related observations, see Jonathan M. Barnett, Patent Groupthink Unravels, HARV. J. L. & TECH. (forthcoming 2021); J. Gregory Sidak, Is Patent Holdup a Hoax?, 3 CRITERION J. ON INNOVATION 401, 437-38, 446-47, 449 (2018) [hereinafter Sidak, Hoax].

#### 4. Holdups are fake---our ev assumes 5G.

Keith Mallinson 16. Founder of WiseHarbor, providing expert commercial consultancy since 2007 to technology and service businesses in wired and wireless telecommunications, media and entertainment serving consumer and professional markets. He is an industry expert and consultant with 25 years of experience and extensive knowledge of the ICT industries and markets, including the IP-rich 2G/3G/4G mobile communications sector. His clients include several major companies in ICT. He is often engaged as a testifying expert witness in patent licensing agreement disputes and in other litigation including asset valuations, damages assessments and in antitrust cases. He is also a regular columnist with FierceWireless and IP Finance. “Mallinson on Patent Holdup and Holdout: for IP Finance 16th August 2016”. https://www.wiseharbor.com/pdfs/Mallinson%20on%20Holdup%20and%20Holdout%20for%20IP%20Finance%2016%20Aug%202016.pdf

If “patent holdup” or the threat thereof was a systemic problem we could expect to observe incumbent licensors with entrenched or dominant positions across the industry, stifled innovation, inhibited market entry for implementers and inflated prices. Evidence is to the contrary, as illustrated by what has occurred in smartphones over recent years.

[CHART OMITTED]

Specific investments for most smartphone companies, including many new market entrants, are quite modest these days. The ease and extent of smartphone market entry, as illustrated in Figures 1 and 2, exemplifies this. This has been possible with standardized fundamental technology inputs readily available from third parties including 3G and 4G standard-compliant communications processors and RF chips together with applications processors and displays from merchant suppliers, commodity memories and open source operating system software. The Android OS used in 80 percent of smartphones is obtained royalty free. Market entry by garage-scale start-ups is a reality with all these tangible inputs, SEP-technology licensing on FRAND terms and the availability of product reference designs from MediaTek, Qualcomm and Spreadtrum at minimal up-front and fixed costs to smartphone companies including OEMs and ODMs.

#### 5. It’s fake---3G market post-Qualcomm proves AND other faulty premises.

Damien Geradin 10. Professor of Competition Law and Economics at Tilburg University, a William W. Cook Global Law Professor at the University of Michigan Law School and a visiting Professor at the College of Europe, Bruges. Reverse Hold-ups: The (Often Ignored) Risks Faced by Innovators in Standardized Areas. Paper prepared for the Swedish Competition Authority on the Pros and Cons of Standard-Setting, Stockholm, 12 November 2010. Pg. 5-7

Although the alleged ability of essential patent owners to hold-up standard implementers by charging them excessive royalties or imposing on them other unfair licensing terms has become a common fixture of the standard-setting literature, there is simply no empirical evidence that any industry standard has been significantly harmed by “hold-up”. In the Qualcomm case, for instance, the complainants, six large vertically integrated firms, argued that Qualcomm fees were “excessive and disproportionate” and that they would “hold back adoption of 3G.”16 This prediction proved entirely wrong as since 2005 the market for 3G phones has grown tremendously making 3G one of the most successful standards ever adopted. This paper is not suggesting that patent hold-up is not theoretically possible, and that it has never occurred, but that the occurrence of this problem is rare and that therefore the drastic remedies that the proponents of the hold-up conjecture propose are not justified (see Section IV below). This conjecture is indeed based on premises which, in practice, will rarely occur in the real world. First, this conjecture is based on the premise that sufficiently close alternative technologies existed at the time of adoption of a particular standard, and that standardisation eliminated technology competition. This may not necessarily be the case. There will be circumstances when there is no hold up as only one technological solution allows to perform a certain function. In this case, the royalties charged by the essential patent holder will not be higher than those it would have charged before the adoption of the standard in question as any market power this patent holder may hold pre-existed that standard and is due to the uniqueness or superiority of its technology. Standardization will increase the revenues of the essential patent holder when its licensing fees take the form of a per unit fee or a percentage of sales price, but this is due to the fact standardization grows volumes, not opportunistic behaviour on the part of the essential patent holder. Second, the hold-up conjecture assumes that licensing terms were unknown and unavailable prior to standardisation, which is often not the case. In fact, the majority of key patent owners and standard implementers commonly engage in ex ante licensing negotiations – that is, they routinely negotiate patent portfolio licenses or cross-licenses pertaining to an anticipated standard, or to a standard under development, well before the standard is finalised. IPR holders have a clear interest in engaging in such ex ante negotiations in order to build support among SSO members for their technology. Hence, if manufacturers are genuinely fearful that they are at risk of ex post “hold-up” by essential patent owners, they are at liberty to pursue pre-standardisation licenses systematically, and to be mindful during the standardisation process of any IPR holders who would have refused to enter in negotiations for such licenses. Third, the hold-up conjecture posits that standards implementers must have made significant technology-specific investments – and are thus “locked-in” – before an owner of essential patents is able to extract more favourable licensing terms than the value of its patent portfolio would warrant. In practice, there is indeed often a time lag between the formal adoption of a standard by an SSO and the beginning of significant investments by standard implementers. This time lag affords SSO members and potential implementers sufficient time ex post, in addition to that ex ante, to consider the licensing terms sought by the major essential patent IP owners. Finally, the hold-up conjecture is also based on the premise that firms whose market power may have increased as a result of standardisation will necessarily be able to exploit it. This entirely ignores the fact that firms which hold patents relevant for a standard also face a number of important constraints, such as their needs to license essential patents from some of their licensees (hence, giving these licensees a means to retaliate should the licensing terms be unreasonable) when they are themselves engaged in manufacturing standard-compliant products, their interest in making the standard affordable in order to drive volumes and stimulate their revenues, and the fact that standardization is a repeated game, hence allowing SSO members to punish firms seeking to hold up a standard.17

#### 6. Holdup is regulated and self-correcting

Damien Geradin & Miguel Rato 6. \*\*Professor of Competition Law and Economics and member of the Tilburg Law and Economics Center (TILEC) at Tilburg University \*\*Associate at Howrey LLP. "Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND." European Competition Journal. April 2006. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=946792

C. Patent Holdout and Hold-up

A related, but distinct, strand of the literature focuses on non-cooperation between firms. Under patent holdout and hold-up theories, a firm with relevant IP emerges after a standard is set and demands high royalty payments. Thus, the focus here is not on the existence of too many rights spread across a great many rights’ holders, but rather on the questionable behaviour of one individual rights’ holder. In some instances, the firm participates in the standard setting process, at least to some extent, but either does not declare its relevant patents to the standardization body or declares them but then prices those patents unreasonably during ex postnegotiations.77 The strategy of participating in a standard but not disclosing IPR has become quite risky in recent years, since a number of firms engaged in such tactics have been prosecuted for patent misuse or breach of antitrust laws.[[6]](#footnote-6) But, of course, some holdouts never directly participate in standard setting efforts. They instead watch the process from the sidelines and reveal their patents after a standard has been set.

Nonetheless, Shapiro argues that hold-up is a regular occurrence: “[t]he principal finding in this paper is that the current U.S. patent system systematically over-rewards the owners of weak patents [defined as those covering only minor inventions], especially in the information technology sector where a single product can incorporate many patented features.”[[7]](#footnote-7) He develops a model in which patent holders use the threat of injunction to push firms into paying more for a licence than the underlying technology deserves. The intuition is that a manufacturer facing plant shutdown or a costly product redesign will be willing to pay considerably more than a patent is “worth” to avoid those costs.[[8]](#footnote-8)

Lichtman, however, offers a different view of the hold-up problem. He argues that at some point, a fragmentation of IP rights - so denigrated in the anti-commons theory - can actually be a good thing: “The large number of overlapping patents that makes it difficult for firms to license necessary rights at the same time dampens the costs associated with each specific failure to license […] some resources will come into efficient use precisely because there are so many patent holders who each can plausibly veto another firm’s use.”[[9]](#footnote-9) In other words, when a relatively large number of firms follow a patent holdout strategy, actual hold-up is far less attractive: “More patents means less money per patent holder. Less money, in turn, means less of an incentive for a firm to strategically delay in the hopes of being a patent holdout, and less of an incentive for an accidental patent holdout to actually bring suit.”[[10]](#footnote-10)

### FLOW

#### Expanded antitrust causes a wave of additional expansions---tanks current Big Tech innovation and economic output.

Wayne Brough 6-15. Policy Director at R-Street, Technology & Innovation. Washington wants to weaponize antitrust law to attack “Big Tech” and it is going to backfire horribly. R Street. 6-15-2021. https://www.rstreet.org/2021/06/15/washington-wants-to-weaponize-antitrust-law-to-attack-big-tech-and-it-is-going-to-backfire-horribly/

Solutions in Search of a Problem

As with many other regulatory incursions into the digital world, the renewed push for tougher antitrust laws is a solution in search of a problem. Both Republican and Democratic criticisms of Big Tech raise a litany of issues—from an anti-conservative bias to fake news and hate speech—none of which fall within the purview of antitrust law and anticompetitive behavior. Instead, the new regulatory regime under consideration is a punitive and political attack on politically disfavored corporations. Ultimately, that is the larger battle—abandoning the consumer welfare standard and its focus on demonstrable consumer harm in favor of a politicized regime that allows those in Congress greater control over private companies.

And while tech companies may be the exclusive focus of the current reforms, the scope of the proposed legislation could easily be expanded by a future Congress. Even today, many lawmakers are openly hostile toward a growing list of American businesses. Republicans have been vocal in calling for retaliatory measures against “woke” corporations deemed too progressive in their public stances. If policymakers continue to abandon economic principles, it would not be surprising to see calls for additional antitrust enforcement for any company that makes political waves.

Prior to the adoption of the consumer welfare standard almost 50 years ago, antitrust law was often confusing, economically suspect and even contradictory. In one notorious case, the Supreme Court blocked a merger where the merged company would have had a market share of merely 7.5 percent—hardly an example of market dominance. And economists examining antitrust enforcement prior to the consumer welfare standard found no correlation between antitrust enforcement and a reduction in the welfare losses from monopoly. Further research found congressional influence to be a better predictor of enforcement activity.

The consumer welfare standard helped rationalize antitrust enforcement and the case law that has emerged since its adoption has helped curb the political abuse of antitrust policies. Abandoning the need to identify demonstrable consumer harm would return antitrust law to an era characterized by arbitrary enforcement actions that many in today’s Congress seem to have forgotten. But the increased political oversight that comes with adopting more aggressive tools for antitrust enforcement poses a real threat to consumers, to innovation and to economic growth.

Abandoning the American Way in Favor of a European One

The bills introduced in the House can be interpreted as a turn toward a European approach to competition policy. Last year, the EU passed the Digital Markets Act, and the House proposals sound eerily similar. The EU started by defining “gatekeepers,” something similar to the “covered platforms” in the House bills. Restrictions on self-preferencing, interoperability requirements and other elements introduced in the House all have direct counterparts in the EU’s law.

The EU adopted its laws with a clear target in mind—American tech companies that were dominating markets in Europe and outperforming their European rivals. Politically, it made sense to rewrite the rules of the game in favor of homegrown talent. Among other things, this meant the EU could collect billion-dollar fines from American companies, all in the name of “fair competition.”

But the performance of European companies is probably the best reason not to follow the EU’s lead in redefining how we regulate competition. By virtually every measure, U.S. companies have been more innovative, more dynamic and more profitable than their European counterparts. There are more start-ups in the United States and they have greater access to capital. While the United States and the EU have economies of similar magnitudes, in 2019, U.S. startups had a valuation of $1.37 trillion compared to EU startups with an evaluation of $240 billion.

The rise of Silicon Valley is an American success story. Today the top five companies in the United States based on market capitalization are tech companies. They have led the digital revolution, providing consumers a virtually endless stream of new products at low or even zero cost in many cases. These are signs of a robust market that serves consumers well. It is important to remember that big does not equate to bad—sometimes a firm is large because it is efficient at serving its customers what they want. The tech sector supports 12 million jobs and more than $2 trillion in economic output. Current antitrust laws grounded in the consumer welfare standard are part of the institutional framework that make this possible. Congress should ensure antitrust laws fit best into the modern U.S. economy, but the House proposals are a radical departure that shifts the focus to protecting competitors rather than consumers. They would weaponize antitrust law, provide politicians a greater say in America’s boardrooms and replace economic efficiency with political expediency and preference.

#### Big Tech drives AI innovation and R&D investments---antitrust fractures it.

Nicole Hemsoth 20. Co-Founder and Co-Editor at the Next Platform. What Could Stifle American AI Innovation?. Next Platform. 5-21-2020. https://www.nextplatform.com/2020/05/21/what-could-stifle-american-ai-innovation/

There are many things the U.S. government can do, but innovating at a rapid pace in the ever-evolving world of artificial intelligence is not necessarily one of them.

Much of the work in deep learning hardware and software comes from the private sector, which various government agencies depend upon for their various directives. However, we are in an age of complicated antitrust conversations and unfortunately, many of the companies under the gun for such action are those who supply the feds with much-needed computational and algorithmic know-how and tools.

The Center for Security and Emerging Technology (CSET) issued a detailed brief this month reviewing the role of antitrust action and what it could mean for the Pentagon’s access to AI. Indeed, there are a number of other government entities that could feel the burn if some of the most prolific tech monopolies are divvied up, but the report is narrowly focused on the Pentagon specifically.

We talked with one of the authors of the report, Dakota Foster, a visiting researcher at CSET about the multi-layered question of antitrust, AI, and what governments stand to lose (and what smaller private companies and startups might gain).

One of the most interesting questions in the wake of potential antitrust action against some of the largest tech companies (Google Microsoft, etc.) is around innovation. How might it might stifled and what will the effect be on the agencies that rely on the swift pace of progress on strategically critical technology areas like AI?

“We estimate that antitrust action will likely reduce the net amount and diversity of data held by firms that are broken up and could also reduce firms’ R&D budgets,” Foster says. “However, the effect these losses will have on innovation remains unclear. Similarly, we expect firms’ computing resources to diminish with yet undetermined consequences; shared compute resources could perhaps more than compensate for any loss.”

The R&D problem of any potential antitrust action down the pike would be most keenly felt in R&D, which spurs the innovation of many of the platforms that have tricked into use in hyperscale, HPC, and enterprise settings as open source or simply inspiration. While plenty of work comes out of national lab and developer communities, few things can beat a near-limitless well of R&D funds to innovative and iterate.

Foster and colleagues argue that If “R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation.” They add that a “postbreakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.

“The debate over breaking up Big Tech has profound national security implications. The Pentagon maintains that the innovation and acquisition of AI technologies is critical to America’s national security. Defense Secretary Mark Esper recently called AI the most significant emerging technology for warfare, predicting that “whoever masters it first will dominate on the battlefield for many, many, many years.” Although others within and beyond the Pentagon stress the limits of AI, its potential is widely acknowledged. In order to develop and deploy new, strategically decisive AI tools, the Pentagon must rely on an AI innovation ecosystem in which large private-sector companies play a critical role. At the same time, the Department of Justice, the Federal Trade Commission, Congress, and state attorneys general have targeted many of the private sector’s largest and most innovative AI companies in ongoing antitrust probes.” – Dakota Foster, Visiting Researcher, CSET

## Standards

### No Resource Conflict

#### Our resources defense answers their warming and norms break down directly--- Digital shift means this won’t happen.

Kenny 20 Charles Kenny, Charles Kenny is a senior fellow and the director of technology and development at the Center for Global Development. He is the author of “Close the Pentagon: Rethinking National Security for a Positive Sum World.” 2-10-2020, "Why war for wealth has fallen out of fashion," TheHill, <https://thehill.com/opinion/national-security/481607-why-war-for-wealth-has-fallen-out-of-fashion> - BS

As the conflicts in Afghanistan and Iraq drag towards their third decade, and Syria’s civil war ticks towards 400,000 dead, it may seem trite to observe that nobody really “wins” a war. But it nonetheless represents a significant historic change, and one that can help account both for the fact that the number of wars is declining as well as the type and location of wars that remain. War always has been “negative sum,” in that any resource gain to the victor was matched by an equal loss to the loser and both sides paid in lives and arms. But those who prevailed on the battlefield could more than compensate for their military costs through occupation, plunder and enslavement. Anthropologist James Scott discusses the earliest wars in his book “Against the Grain.” He suggests that city-states such as Umma and Lagash in Mesopotamia fought over land and water, but most of all people, and that was still the case when Caesar brought back as many as a million slaves from his invasion of Gaul. People, land and resources remained prizes worth fighting over well into the 20th century. Germany’s demand for Lebensraum (“living space”) and Japan’s obsession with obtaining an independent oil supply helped motivate World War II, for example. But economic change means that land and the stuff on or under it no longer is the key to prosperity and power worldwide. The World Bank calculates a measure of global wealth that divides it into natural capital — land, oil, gold — physical capital, including roads and factories, and “intangible capital.” That last category includes education and the institutions and knowledge from double entry bookkeeping to phonics-based literacy programs that allow economies to produce more value with the same amount of physical inputs. In 2014, natural capital accounted for 9 percent of planetary wealth, according to the World Bank. That compared to 27 percent for physical capital and 64 percent — almost two-thirds — in intangible capital. The fact that wealth is driven by intangible ideas, institutions and relationships, rather than tangible goods and land, means that it can’t be expropriated by an invader. So even winning on the battlefield simply can’t pay off. Take one recent example: The Iraq war has cost the U.S. alone around $2.2 trillion, according to the Watson Institute at Brown University. Oil revenues earn the Iraqi government less than $100 billion a year. Even if President Trump carried out his one-time plan to expropriate the country’s oil, and despite Iraq’s huge share of global reserves, the war would not pay off economically. At the same time, intangible capital is “positive sum” — unlike a barrel of oil, if I use the technology of the internet, you can use it too — indeed, we both benefit from more people using it at the same time. That strengthens the payoff to peaceful cooperation and trade. For all of the continued horror of Syria, Iraq and Afghanistan, the changed basis of wealth and power helps to account for the global decline of war. Since 1975, an average of less than two interstate conflicts have been ongoing in the world each year, and recent years have seen even fewer. No major power war has erupted since 1939 — an 80-year stretch. Most of the wars that remain are in regions where resources still have an outsized share of wealth: The low-income countries most at risk of civil conflict see an average share of natural capital in total capital of just under one-half, for example. Territorial disputes in richer regions of the world have not gone away, from the South China Sea through Ukraine, the West Bank, Gibraltar and The Falklands. And wars often are launched for reasons of domestic politics or ideology disconnected from calculations of power or wealth. But that no developed country could ever “win” a war, in terms of wealth, may help explain why interstate conflict is so much out of fashion. And it also suggests a powerful solution for those who would like to see even greater global peace: Help the poorest countries grow out of resource dependency.

#### Burnout and geographic dispersion check disease.

Sebastian Farquhar 17. \*\*Project Manager at FHI responsible for external relations, M.A in Physics and Philosophy, Oxford. \*\*John Halstead, Global Priorities Project. \*\*Owen Cotton-Barratt, Research Associate in the FHI at Oxford, Lecturer in Mathematics at St. Hugh’s College. \*\*Stefan Schubert, PhD in philosophy, Researcher at the Centre for Effective Altruism. \*\*Haydn Belfield, Academic Project Manager, Centre for the Study of Existential Risk, Cambridge. \*\*Andrew Snyder-Beattie, Director of Research at FHI. “Existential Risk: Diplomacy and Governance.” *Future of Humanity Institute*. Oxford, Global Priorities Project. <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>.

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### No pollution impact.

Zeke Hausfather & Glen P. Peters 20. \*Director of climate and energy at the Breakthrough Institute in Oakland, California. \*\*Research director at the CICERO Center for International Climate Research in Oslo, Norway. "Emissions – the ‘business as usual’ story is misleading". Nature. 1-29-2020. https://www.nature.com/articles/d41586-020-00177-3

In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

# Octas 1NR

## FTC Tradeoff DA

### Top Level---2NC

#### **1. Algorithmic bias risks nuke war.**

Elsa B. Kania 17. Adjunct fellow with the Technology and National Security Program at the Center for a New American Security, 11/15/17. “The critical human element in the machine age of warfare.” https://thebulletin.org/2017/11/the-critical-human-element-in-the-machine-age-of-warfare/

Today, however, the human in question might be considerably less willing to question the machine. The known human tendency towards greater reliance on computer-generated or automated recommendations from intelligent decision-support systems can result in compromised decision-making. This dynamic—known as automation bias or the overreliance on automation that results in complacency—may become more pervasive, as humans accustom themselves to relying more and more upon algorithmic judgment in day-to-day life.

In some cases, the introduction of algorithms could reveal and mitigate human cognitive biases. However, the risks of algorithmic bias have become increasingly apparent. In a societal context, “biased” algorithms have resulted in discrimination; in military applications, the effects could be lethal. In this regard, the use of autonomous weapons necessarily conveys operational risk. Even greater degrees of automation—such as with the introduction of machine learning in systems not directly involved in decisions of lethal force (e.g., early warning and intelligence)—could contribute to a range of risks.

Friendly fire—and worse. As multiple militaries have begun to use AI to enhance their capabilities on the battlefield, several deadly mistakes have shown the risks of automation and semi-autonomous systems, even when human operators are notionally in the loop. In 1988, the USS Vincennes shot down an Iranian passenger jet in the Persian Gulf after the ship’s Aegis radar-and-fire-control system incorrectly identified the civilian airplane as a military fighter jet. In this case, the crew responsible for decision-making failed to recognize this inaccuracy in the system—in part because of the complexities of the user interface—and trusted the Aegis targeting system too much to challenge its determination. Similarly, in 2003, the US Army’s Patriot air defense system, which is highly automated with high levels of complexity, was involved in two incidents of fratricide. In these stances, “naïve” trust in the system and the lack of adequate preparation for its operators resulted in fatal, unintended engagements.

As the US, Chinese, and other militaries seek to leverage AI to support applications that include early warning, automatic target recognition, intelligence analysis, and command decision-making, it is critical that they learn from such prior errors, close calls, and tragedies. In Petrov’s successful intervention, his intuition and willingness to question the system averted a nuclear war. In the case of the USS Vincennes and the Patriot system, human operators placed too much trust in and relied too heavily on complex, automated systems. It is clear that the mitigation of errors associated with highly automated and autonomous systems requires a greater focus on this human dimension.

#### 2. Algorithmic bias in AI is an existential threat.

Mara Hvistendahl 19 – correspondent with Science magazine, 3/28/19. “Can we stop AI outsmarting humanity?” <https://www.theguardian.com/technology/2019/mar/28/can-we-stop-robots-outsmarting-humanity-artificial-intelligence-singularity>

Existential risks – or X-risks, as Tallinn calls them – are threats to humanity’s survival. In addition to AI, the 20-odd researchers at CSER study climate change, nuclear war and bioweapons. But, to Tallinn, those other disciplines “are really just gateway drugs”. Concern about more widely accepted threats, such as climate change, might draw people in. The horror of superintelligent machines taking over the world, he hopes, will convince them to stay. He was visiting Cambridge for a conference because he wants the academic community to take AI safety more seriously.

At Jesus College, our dining companions were a random assortment of conference-goers, including a woman from Hong Kong who was studying robotics and a British man who graduated from Cambridge in the 1960s. The older man asked everybody at the table where they attended university. (Tallinn’s answer, Estonia’s University of Tartu, did not impress him.) He then tried to steer the conversation toward the news. Tallinn looked at him blankly. “I am not interested in near-term risks,” he said.

Tallinn changed the topic to the threat of superintelligence. When not talking to other programmers, he defaults to metaphors, and he ran through his suite of them: advanced AI can dispose of us as swiftly as humans chop down trees. Superintelligence is to us what we are to gorillas.

An AI would need a body to take over, the older man said. Without some kind of physical casing, how could it possibly gain physical control?

Tallinn had another metaphor ready: “Put me in a basement with an internet connection, and I could do a lot of damage,” he said. Then he took a bite of risotto.

Every AI, whether it’s a Roomba or one of its potential world-dominating descendants, is driven by outcomes. Programmers assign these goals, along with a series of rules on how to pursue them. Advanced AI wouldn’t necessarily need to be given the goal of world domination in order to achieve it – it could just be accidental. And the history of computer programming is rife with small errors that sparked catastrophes. In 2010, for example, when a trader with the mutual-fund company Waddell & Reed sold thousands of futures contracts, the firm’s software left out a key variable from the algorithm that helped execute the trade. The result was the trillion-dollar US “flash crash”.

The researchers Tallinn funds believe that if the reward structure of a superhuman AI is not properly programmed, even benign objectives could have insidious ends. One well-known example, laid out by the Oxford University philosopher Nick Bostrom in his book Superintelligence, is a fictional agent directed to make as many paperclips as possible. The AI might decide that the atoms in human bodies would be better put to use as raw material.

Tallinn’s views have their share of detractors, even among the community of people concerned with AI safety. Some object that it is too early to worry about restricting superintelligent AI when we don’t yet understand it. Others say that focusing on rogue technological actors diverts attention from the most urgent problems facing the field, like the fact that the majority of algorithms are designed by white men, or based on data biased toward them. “We’re in danger of building a world that we don’t want to live in if we don’t address those challenges in the near term,” said Terah Lyons, executive director of the Partnership on AI, a technology industry consortium focused on AI safety and other issues. (Several of the institutes Tallinn backs are members.) But, she added, some of the near-term challenges facing researchers, such as weeding out algorithmic bias, are precursors to ones that humanity might see with super-intelligent AI.

Tallinn isn’t so convinced. He counters that superintelligent AI brings unique threats. Ultimately, he hopes that the AI community might follow the lead of the anti-nuclear movement in the 1940s. In the wake of the bombings of Hiroshima and Nagasaki, scientists banded together to try to limit further nuclear testing. “The Manhattan Project scientists could have said: ‘Look, we are doing innovation here, and innovation is always good, so let’s just plunge ahead,’” he told me. “But they were more responsible than that.”

#### 3. Turns the case---causes tech battles with other countries, erodes US leadership, and creates conditions for cyber-attacks through AI escalation.

#### 4. Link turns case. Expanded antitrust enforcement of anticompetitive practices causes backlash.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

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

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

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

### AT: Morris

#### The Morris evidence:

#### 1. It says the FTC previously went after SEP conduct---not that they will now! The line about future action is inconclusive speculation from a lawyer---not the FTC.

#### 2. The FTC has historically stayed out of patent holdup cases, which ensures the aff requires resources

Elizabeth A. N. Haas et al. 18. Partner at Foley & Lardner, 10/10/18. “DOJ and FTC Signal Shifts in Antitrust Enforcement of Essential Patent Disputes.” https://www.foley.com/en/insights/publications/2018/10/doj-and-ftc-signal-shifts-in-antitrust-enforcement

McSweeny noted that FTC challenges to hold-up on antitrust grounds have been relatively rare,6 with only seven significant actions since 1996 across both Republican and Democratic administrations. She also said that they have been important to protecting the integrity of the standard-setting process and concluded by writing that it is “imperative that the FTC continue to take hold-up seriously and not abdicate its antitrust enforcement mission.”

Conclusion

The New Madison Approach has been reported as representing a dramatic change to the enforcement of patent hold-up disputes, but its application remains to be seen. The agencies recognize that a claim for breach of contract may arise but intend to focus on the presence of market power or monopoly power before concluding that an antitrust claim arises. Further, both Delrahim and Simons have suggested a potential role for their agencies in supporting the rights of SEP-holders against SSOs in some situations. How the FTC litigates future matters concerning SEPs and FRAND commitments will merit close watching for any signals it sends regarding changing enforcement priorities, as will any intervention by either agency on behalf of SEP-holders.

#### 3. Deadlock prevents antitrust enforcement

Doesn’t interfere with privacy enforcement because there’s consensus. The plan changes this by FIAT

Eleanor Tyler 10/7/21. Legal Analyst on the Litigation team, with a focus on antitrust, at Bloomberg Law. “ANALYSIS: FTC May Be Headed Into Deadlock, Delaying Big Deals.” https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ftc-may-be-headed-into-deadlock-delaying-big-deals

The Federal Trade Commission may be about to pause, unable to act on antitrust enforcement and policy until President Biden’s nominee can be confirmed and seated.

On Oct. 8, Federal Trade Commissioner Rohit Chopra is stepping down to take up his new position as head of the Consumer Financial Protection Bureau. Because it takes a majority among the Commissioners present to conduct business, and because the remaining commissioners will be split 2-2 between Democrat and Republican appointees, the Commission may find itself sitting on its hands until an equally divided Senate can approve privacy expert Alvaro Bedoya, whom Biden nominated Sept. 20 for Chopra’s seat.

In the past, the Commission has typically managed to continue making decisions and bringing cases while short a member (or several). These aren’t normal times, however. Many actions could be easily conducted on a bipartisan basis, but decisions about antitrust policy—and, potentially, antitrust enforcement—have proven contentious. That poses a potential obstacle for deals currently under investigation at the FTC, which tend to be large deals and those with market overlap between the parties.

#### 4. Khan’s agenda can’t make it through.

Joseph M. Miller 21. Seasoned anti-trust attorney. Has served as Assistant Chief of the Health Care and Consumer Products Section of the US Department of Justice’s Antitrust Division, a lead attorney on DOJ antitrust investigations in multiple industries, and a trial attorney in the Federal Trade Commission's Bureau of Competition."Big News, But Maybe Not so Big?," National Law Review, https://www.natlawreview.com/article/big-news-maybe-not-so-big

Khan's views may make for interesting political discussions but she's a long way from implementing her agenda in a lasting way. First, and most immediately, the Commission will be split 2-2 as soon as Commissioner Rohit Chopra is replaced, which may come soon. Chopra has been nominated to lead the Consumer Financial Protection Bureau and if the next FTC nominee is a traditional democrat, in the mold of former FTC Chairs Bill Pitofsky or Jon Leibowitz, that person will be the swing vote on cases. Second, as Chair of the Commission she is running a federal agency which comes with significant management responsibilities. Recall that she is 32 years old and nothing on her resume suggests she has the experience to be effective in that aspect of her role. Third, I predict the career staff will resist her admonition to put her vision into practice -- she advocates for bringing cases that are contrary to current law -- and no one likes getting yelled at by a federal judge. Fourth, and relatedly, the courts will emphatically reject her views. Just this week a unanimous Supreme Court decided *NCAA v. Alston* and reaffirmed the consumer welfare standard and other values that Ms. Khan is fighting against.

#### 5. Other enforcement is all talk

JED GRAHAM 9/16/21. Writes about economic policy for Investor's Business Daily.

Khan is clearly using her bully pulpit to the utmost, trying to dissuade merger talks from reaching fruition.

But right now it's all talk. She has turned a few heads, but the S&P 500 and Big Tech leaders have kept cruising. Facebook stock is up 11% since Khan took the FTC's helm on June 15, while Apple has climbed 15% and Google stock 18%. That's despite reports that the Justice Department is preparing to file a second Google antitrust suit over its ad dominance.

The new antitrust enforcement regime may not change all that much "until they show that they can sue and win," Kovacic said.

#### 6. No major new cases

Brent Kendall 10/9/21. Legal affairs reporter in the Washington bureau of The Wall Street Journal. “Justice Department Makes Quiet Push on Antitrust Enforcement.” https://www.wsj.com/articles/justice-department-makes-quiet-push-on-antitrust-enforcement-11633800598

The five-member FTC voted 3-2 along partisan lines last month to formally withdraw those guidelines. The commission’s new chairwoman, Lina Khan, is a leading progressive advocate for overhauling antitrust enforcement. She has been laying the groundwork for changes at the commission as she settles into the job, but hasn’t yet spearheaded any major new cases.

### AT: XO/Mergers

#### No antitrust thumper---read evidence!

#### 1. Current enforcement is streamlined to enable focus on algorithmic bias.

Jeffrey J. Amato and Jay R. Wexler 9/28/21. “United States: FTC Ramps Up Tech Investigations, Reduces Investigators' Hurdles.” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1115450/ftc-ramps-up-tech-investigations-reduces-investigators39-hurdles

At its September 14, 2021 open meeting, the Federal Trade Commission (FTC) announced the passage of eight "omnibus" resolutions by a 3-2 party-line vote to authorize quicker investigations into prioritized issues. The resolutions allow staff attorneys to use compulsory process demands, which are usually issued as civil investigative demands or subpoenas, with approval from only one commissioner. Previously, agency staff were expected to receive approval from the full commission prior to issuing demands for information from companies. The resolutions aim to facilitate investigations into: unlawful conduct directed at veterans and service members; unlawful conduct directed at children; bias in algorithms and biometrics enabling discriminatory practices; dark patterns and deceptive online conduct that lure users into making unwanted purchases; repair restrictions that allegedly harm competitors and consumers; abuse of intellectual property; common directors and officers and common ownership; and monopolization offenses.

#### 2. FTC’s firmly committed not to push statutory limits

Cathy Anne McMorris Rodgers 21. American politician who is the U.S. Representative for Washington's 5th congressional district; Janice Danoff Schakowsky is an American politician who has served as the U.S. Representative from Illinois's 9th congressional district since 1999; Lori Ann Loureiro Trahan is an American businesswoman and politician who serves as the U.S. Representative for Massachusetts's 3rd congressional district; Lina Khan is Chair of the FTC; Rebecca Slaughter is Commissioner at the FTC, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer

Cathy Anne McMorris Rogers (4:00:11): I look forward to further conversations with you because I am concerned about rumors of the FTC acting outside of Congress and issuing a rule on privacy. And with that, I'll yield back.

Jan Schakowsky (4:00:25): Congresswoman Trahan. It's your five minutes.

Lori Trahan (4:00:32): Thank you Madam Chair, and Chair Khan, and fellow commissioners, thank you for your patience and for being here today discuss how this essential agency can better protect our consumers. President Biden's most recent executive order promoting competition in the American economy encouraged the commission to exercise the FTC's statutory rulemaking authority in regards to, and I quote, unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy. Now, in October 2020, Google Ads updated its policy to restrict the serving of high fat sugar, salt, food, and/or non alcoholic beverages advertising for minors under 18 in the United Kingdom, and in the European Union, but has refused to make similar changes here in the United States. A recent policy change by Facebook is a step in the right direction, but it's far from perfect when you consider that a May 2021 study by the Tech Transparency Project found that Facebook allows advertisers to target ads for electronic cigarettes, pill parties, and extreme weight loss product products to children as young as 13 across the US. Plainly, Facebook and Google are using troves of personal data belonging to teens and adults to target harmful advertisements in ways that are not transparent to users. So Chair Khan, would you consider these examples of the types of surveillance practices that may damage consumer autonomy and consumer privacy?

Lina Khan (4:02:05): Absolutely, Congresswoman.

Lori Trahan (4:02:06): Thank you for that. And Commissioner Slaughter. If the commission were to begin rulemaking today to protect consumers, including our children, from surveillance advertising, what would be the process under the Commission's existing Mag-Moss authority? And would the commission face difficulties? If you could speak to that it would be great.

Rebecca Kelly Slaughter (4:02:30): Thank you, Congressman. It's a great question. And I want to start by responding to suggestion from the ranking member of the committee that the Commission might act without Congress or outside of congressionally delegated authority. I want to be very clear: the commission cannot, should not, and will not, with my support, act outside of congressionally delegated authority. But we absolutely should look at the authority Congress has delegated to us, and it has specifically delegated to us rulemaking authority under Section 18 of the FTC Act, which is referred to as Mag-Moss, to promulgate rules to address unfair and deceptive acts or practices that are prevalent in interstate commerce. And so data abuses could fall very much into that category. Rulemaking under Section 18, to answer your question briefly, looks like APA rulemaking, but with much, much more process. So we can't begin with a notice of proposed rulemaking - we have to begin with an advance notice of proposed rulemaking that asks questions about the issues that we will consider. We have to notify Congress before we do that. We have to do then in a notice of proposed rulemaking identify any issues of material fact that are disputed, and again, notify Congress. And if there are issues of material fact, the statute requires us to have an informal hearing to adjudicate them. So it is a very process-intensive statute that requires lots of, and provides opportunity, for lots of participation. It is absolutely burdensome to the commission to do it. I think it's worth it for us to try. But we should make no mistake that it would not be a quick or fast effort.

#### 3. The warrant is mergers---broad merger review is streamlined now to preserve resources

Noah Brumfield 10/29/21. Allen & Overy LLP partner based in Washington, D.C. and Silicon Valley. “Antitrust in focus - October 2021.” https://www.jdsupra.com/legalnews/antitrust-in-focus-october-2021-5946092/

The U.S. Federal Trade Commission (FTC) has recently announced a string of important changes to its merger control policies and practice. Some, such as the use of “warning letters” we reported in last month’s edition, are in response to an expected “record-setting year” of merger filings which the FTC claims are straining U.S. agency resources. Others suggest that the FTC intends to take a more aggressive approach to merger control enforcement under the Biden administration.

This month, merging parties should be aware of two key developments.

Expanded information requests for in-depth reviews

The FTC has identified a number of changes which, according to its announcement, will streamline its in-depth (“second request”) merger review process while also ensuring more rigorous analysis. Some changes are intended to align FTC practices with those of the Department of Justice (DOJ). Others are more significant, and fit with new Chair Lina Khan’s push to expand the framework for assessing transactions beyond traditional merger control standards. For merging parties, it is likely that the measures will make complying with in-depth FTC merger reviews more difficult, unpredictable, and time-consuming.

#### No increase in merger enforcement.

Laurence Bary et al. 10/28/21. Antitrust lawyer in the Paris office of Dechert, with Mike Cowie, James A. Fishkin, Clemens Graf York von Wartenburg, Dennis S. Schmelzer and Delphine Strohl. “DAMITT Q3 2021: Where’s the Wave? No Uptick Yet in Significant Merger Enforcement Activity.” https://www.lexology.com/library/detail.aspx?g=42eaa9f3-e4f6-48d7-8680-29c7216a7f1f

Dechert has yet to see an increase in concluded significant U.S. merger investigations despite a surge in merger filings that began in the fall of 2020. Instead, we continue to see a decrease in concluded significant merger investigations year-to-date compared to this point in 2019 and 2020.

The average duration of significant merger investigations remains around 12 months, with significant variations below and above the average.

The Federal Trade Commission did not file a single complaint or consent decree in the third quarter, which may suggest that it is taking longer for consent decrees to be finalized under the new administration.

#### 4. And the executive order---agency follow on will be blocked.

Lewis Brisbois 21**.** Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force. Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.

#### The XO is empty talk that’s years from being implemented

Jeff Jaeckel 21**.** Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### 5. They’re giving everything else a pass.

Zephyr Teachout 10/29/21. Associate professor of law at Fordham Law School. “Why Judges Let Monopolists Off the Hook.” https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/

Americans have gotten far too used to the idea that corporate behemoths are free to acquire any company they want, engage in predatory behavior, and bully, squeeze out, or demand kickbacks from smaller rivals. Indeed, the U.S. government’s decision to let Facebook buy an obvious rival, Instagram, looks so wrong in hindsight—especially now that leaked documents have revealed Facebook’s seeming indifference to the many problems that its products cause or exacerbate—that Americans should utterly disavow the complex legal framework that allowed the Federal Trade Commission to rationalize that decision. Over the past several decades, establishing that a company has violated antitrust law has become an extraordinarily difficult process. And when violations of the law are hard to punish, authorities will usually give them a pass—as the FTC did with Facebook’s acquisition of Instagram. (Yesterday, Facebook rebranded itself as Meta.)

### Link---1NR

#### There is a tradeoff.

#### 1. FTC is cash-strapped---the plan destroys other enforcement priorities.

Nicolás Rivero 21. Technology reporter at Quartz. “Biden’s antitrust crusaders can’t crusade without Congress.” 3/11/21. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

#### 2. Limited resources force tradeoffs in enforcement decisions.

Bernard (Barry) A. Nigro Jr. et al., 21 – Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ, with Nathaniel L. Asker and Aleksandr B. Livshits, 1/5/21. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert. https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier9 and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar’s acquisition of RentPath, in part, because of limited FTC resources.10 Although the agencies will receive a modest budget increase for the current fiscal year,11 it is far short of what some think is needed.12 As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies’ budgets in the future is likely.

#### 3. It directly undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.

#### 4. Companies will drag out cases and drain FTC resources.

Michael Kades 21 – the director for markets and competition policy at the Washington Center for Equitable Growth, 7/28/21. “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law.” https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### 5. Congressional backlash scares them off from overexerting themselves.

Chris Jay Hoofnagle et al 19. Adjunct Professor of Information and Law - University of California, Berkeley, and Woodrow Hartzog, Professor of Law and Computer Science - Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law - George Washington University Law School. “The FTC can rise to the privacy challenge, but not without help from Congress.” Brookings. 8/8/2019. <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>

**Resources are the FTC’s greatest constraint**. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, **FTC attorneys make pragmatic choices in their case selection**. **At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources.** **The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy**.

### AT: No Spillover

#### Yes, spillover:

#### 1. Doesn’t answer the staffing link---even if fields are separated, staffers aren’t---the plan forces a tradeoff.

#### 2. Khan specifically ensures issues aren’t siloed between departments.

David E. Dahlquist 9/29/21. Partner, Winston & Strawn LLP. “FTC Chair Lina Khan Issues “Priorities” Memo. https://www.winston.com/en/competition-corner/ftc-chair-lina-khan-issues-priorities-memo.html

On September 22, Lina Khan, the recently confirmed chair of the Federal Trade Commission (FTC), released a memo to FTC staff and her fellow commissioners outlining her “Vision and Priorities for the FTC.” The memo does not have binding policy effects; however, it is a much-anticipated look into the mind of the new FTC chair for FTC employees and antitrust practitioners, as well as the general public. The memo is divided into five “strategic approaches,” three “policy priorities,” and three “operational objectives” with the overarching theme of pushing for the new school of antitrust regulation that includes a decreased focus on historical antitrust harms to consumer welfare generally in the form of higher prices, reduced output, or reduced innovation, in exchange for seeking to address harms to workers and competitors. See more on this growing divide in antitrust theory in this presentation. The memo outlines goals that will implicate companies across all American industries.

The strategic approaches Khan identifies are:

Holistic approach to identifying harms to include workers and competitors

Focus enforcement efforts to target root causes of incentives for unlawful conduct

Empiricism-driven approach to understanding market behaviors and practices

Forward-looking approach to anticipate problems and react swiftly

“Democratize the agency” by making it more in tune with real problems

The policy priorities Khan focuses on are:

Address market consolidation and focus greater scrutiny on dominant firms, including by revising the merger guidelines in coordination with the Department of Justice (DOJ)

Scrutinize “gatekeeper” dominant intermediaries and their extractive business practices

Focus on contract terms, especially take-it-or-leave-it contracts with non-competes, repair restrictions, and exclusions hurting competition or constituting unfair trade practices

The Operational Objectives Khan targets are:

Improve cross-bureau coordination so issues are not siloed into only the Bureau of Consumer Protection or the Bureau of Competition

Expand regional footprint to increase diversity of FTC talent and experiences

Hire additional staff to broaden agency competencies, including technologists, data analysts, financial analysts, and other experts from outside disciplines

#### 3. No siloes---areas overlap.

Aimee Imundo 18. Global Executive Counsel for Law and Policy, primary counsel on antitrust compliance at GE, 4/9/18. “Public Roundtable on Antitrust Criminal Compliance.” https://www.justice.gov/atr/page/file/1064291/download

So you need to think from two directions, one, how people are going to report, and two, what they're going to report. Our practice is not siloed by substantive area, whether something is cartel. It's not like my red phone rings with a cartel question, and the blue phone rings with a merger question, and the pink phone rings with sort of a joint venture question. The fact is the questions come in. And your business people don't know what bucket it goes into. It's into us, and indeed something that's in one bucket in one country will be in a different bucket in another country. And so just as Jillian said and Joel said, a lot of this is about giving legal advice. So you give enough legal advice, and you try to integrate antitrust kind of checkpoints and risk assessments into business practices as a way to try to flush out, if you will, the need for legal advice, wherever it comes in that kind of chain of events that will lead to a business arrangement.

#### 4. Privacy and antitrust specifically overlap

Lina M. Khan et al. 21. Chair of the Federal Trade Commission, 9/13/21. “FTC Report to Congress on Privacy and Security.” https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report\_to\_congress\_on\_privacy\_and\_data\_security\_2021.pdf

We will spend more time on the overlap between data privacy and competition. Many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over user data. The FTC has a structural advantage over our counterparts in other jurisdictions that focus exclusively on antitrust or on data protection. Our dual missions can and should be complementary, and we need to make sure we are looking with both privacy and competition lenses at problems that arise in digital markets.

#### 5. Their evidence is from 2005---prefer recency.

### AT: FTC Lacks Resources

#### You can’t insert re-highlightings---Dallas won’t evaluate them---creates a moral hazard and doesn’t change research practices.

#### 1. Current funding means the FTC’s managing its caseload, but only barely---the aff is a bolt from the blue, unplanned expansion of antitrust enforcement that forces tradeoff with privacy.

LEAH NYLEN 9/29/21. POLITICO's antitrust reporter. “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581

Despite all the friction, Khan’s admirers say the agency is finally back on the right track.

“The FTC is pushing as hard as they can right now, which is what we have needed for so long,” said Charlotte Slaiman, competition policy director for the advocacy group Public Knowledge, during POLITICO’s Tech Summit this month. She added: “I expect great things from the FTC.”

#### 2. Settlements prove FTC success.

Natasha Lomas 21. Senior reporter for TechCrunch, 1/12/21. “FTC settlement with Ever orders data and AIs deleted after facial recognition pivot.” https://techcrunch.com/2021/01/12/ftc-settlement-with-ever-orders-data-and-ais-deleted-after-facial-recognition-pivot/

The maker of a defunct cloud photo storage app that pivoted to selling facial recognition services has been ordered to delete user data and any algorithms trained on it, under the terms of an FTC settlement.

The regulator investigated complaints the Ever app — which gained earlier notoriety for using dark patterns to spam users’ contacts — had applied facial recognition to users’ photographs without properly informing them what it was doing with their selfies.

Under the proposed settlement, Ever must delete photos and videos of users who deactivated their accounts and also delete all face embeddings (i.e. data related to facial features which can be used for facial recognition purposes) that it derived from photos of users who did not give express consent to such a use.

Moreover, it must delete any facial recognition models or algorithms developed with users’ photos or videos.

This full suite of deletion requirements — not just data but anything derived from it and trained off of it — is causing great excitement in legal and tech policy circles, with experts suggesting it could have implications for other facial recognition software trained on data that wasn’t lawfully processed.

Or, to put it another way, tech giants that surreptitiously harvest data to train AIs could find their algorithms in hot water with the US regulator.

The quick background here is that the Ever app shut down last August, claiming it had been squeezed out of the market by increased competition from tech giants like Apple and Google.

However the move followed an investigation by NBC News — which in 2019 reported that app maker Everalbum had pivoted to selling facial recognition services to private companies, law enforcement and the military (using the brand name Paravision) — apparently repurposing people’s family snaps to train face reading AIs.

NBC reported Ever had only added a “brief reference” to the new use in its privacy policy after journalists contacted it to ask questions about the pivot in April of that year.

In a press release yesterday, reported earlier by The Verge, the FTC announced the proposed settlement with Ever received unanimous backing from commissioners.

One commissioner, Rohit Chopra, issued a standalone statement in which he warns that current gen facial recognition technology is “fundamentally flawed and reinforces harmful biases”, saying he supports “efforts to enact moratoria or otherwise severely restrict its use”.

“Until such time, it is critical that the FTC meaningfully enforce existing law to deprive wrongdoers of technologies they build through unlawful collection of Americans’ facial images and likenesses,” he adds.

Chopra’s statement highlights the fact that commissioners have previously voted to allow data protection law violators to retain algorithms and technologies that “derive much of their value from ill-gotten data”, as he puts it — flagging an earlier settlement with Google and YouTube under which the tech giant was allowed to retain algorithms and other technologies “enhanced by illegally obtained data on children”.

And he dubs the Ever decision “an important course correction”.

#### 3. Current FTC action solves.

K.C. Halm 21. Partner at Davis Wright Tremaine LLP, with Nancy Libin, 4/26/21. “FTC Warns of Greater Scrutiny Over Biased AI, Offers Best Practices to Mitigate Potential Harm.” https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2021/04/ftc-ai-bias-best-practices-guidance

Building on prior guidance issued in 2020, the Federal Trade Commission (FTC) recently warned in a new blog post that it will use its authority under existing laws to take enforcement action against companies that sell or use algorithms or artificial intelligence (AI) technology that results in discrimination by race or other legally protected classes. The agency urged companies developing or using AI to ensure their AI tools or applications do not result in biased outcomes because a failure to do so may result in "deception, discrimination—and an FTC [] enforcement action." The agency's latest pronouncement leaves no doubt that the FTC will be actively reviewing the market for potential bias or discrimination when AI-enabled applications and services are used to provide access to housing, credit, finance, insurance, or other important services. As our readers know, AI is emerging as a transformative technology that is enabling new systems, tools, applications, and use cases. At the same time, perceived risks arising from potential bias, discrimination, or other negative outcomes is leading regulators to look more closely at both the benefits and potential risks of the technology. To that end, the FTC is moving quickly to assert itself as a leading regulator with authority to oversee a broad range of AI providers, systems, and applications on the market. Basis of Potential AI-related FTC Enforcement Actions Three statutes provide the FTC significant authority to act in this area. Specifically, Section 5 of the FTC Act prohibits unfair or deceptive practices. The FTC's latest statement suggests that the agency believes it can use Section 5 authority, for example, to penalize entities selling or using "racially biased algorithms." Further, the agency also has authority to act under the Fair Credit Reporting Act (FCRA), which could be applied when an algorithm is used in a process that results in the denial of employment, housing, credit, insurance, or other benefits. Similarly, the Equal Credit Opportunity Act (ECOA)—which prohibits a company from using a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance—could be another basis for the agency to act. Thus, for example, if your algorithm results in credit discrimination against a protected class, you could find yourself facing a complaint alleging violations of the FTC Act and ECOA. Notably, the FTC's blog post is framed as both guidance and a reaffirmation that the FTC has been policing issues around AI and big data for many years and sends a clear signal that it intends to do so going forward. This reinforces Acting Chair Rebecca Kelly Slaughter's recent speech on algorithmic discrimination in which she cited a study demonstrating that an algorithm used with good intentions—to target medical interventions to the sickest patients—ended up funneling resources to a healthier, white population, to the detriment of sicker, patients of color. She asked the FTC staff "to actively investigate biased and discriminatory algorithms" and expressed an interest "in further exploring the best ways to address AI-generated consumer harms." Indeed, as we explained in recent blog posts, recent FTC enforcement actions reflect increased scrutiny of companies using algorithms, automated processes, and/or AI-enabled applications. The FTC's recent settlement with Everalbum is instructive in that it illustrates the agency's latest remedial tool: the so-called "disgorgement" of ill-gotten data. In the recent enforcement case, the FTC alleged that Everalbum, an app developer that used photos uploaded by users to train its facial recognition technology, failed to properly obtain users' consent. The agency also alleged that Everalbum made false statements about the users' ability to delete their photos upon deactivating their accounts. On these facts, the FTC secured a settlement and consent decree that required Everalbum to delete algorithms that used the data obtained without consent—a remedy that is akin to the "fruit of the poisonous tree" concept—and obtain consent before using facial recognition technology on user content. The FTC's latest reaffirmation of its authority to act in this area demonstrates that the agency will hold businesses accountable for using AI that may result in biased outcomes or for making promises that the technology cannot deliver. Its message is clear: "Hold yourself accountable – or be ready for the FTC to do it for you."

#### 4. FTC enforcement key to check algorithmic bias.

Heather Landi 21 – senior editor at Fierce Healthcare, 4/22/21. “FTC issues warning that using biased AI could violate consumer protection laws.” https://www.fiercehealthcare.com/tech/ftc-issues-warning-using-biased-ai-could-violate-consumer-protection-laws

The Federal Trade Commission issued a warning to businesses and health systems this week that the use of discriminatory algorithms could violate consumer protection laws.

It could signal that the agency plans to take a hard look at bias in artificial intelligence technologies.

"Hold yourself accountable—or be ready for the FTC to do it for you," Elisa Jillson, an attorney in FTC’s privacy and identity protection division, wrote in an official blog post.

The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of—for example—racially biased algorithms, Jillson wrote.

Using biased AI technology also could potentially violate the Fair Credit Reporting Act, which comes into play in certain circumstances where an algorithm is used to deny people employment, housing, credit, insurance, or other benefits and also the Equal Credit Opportunity Act, according to the FTC. The ECOA makes it illegal for a company to use a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance.

"Under the FTC Act, your statements to business customers and consumers alike must be truthful, non-deceptive, and backed up by evidence," Jillson wrote in the blog post. "In a rush to embrace new technology, be careful not to overpromise what your algorithm can deliver. For example, let’s say an AI developer tells clients that its product will provide “100% unbiased hiring decisions,” but the algorithm was built with data that lacked racial or gender diversity. The result may be deception, discrimination—and an FTC law enforcement action."

Jillson cited the example of using AI for COVID-19 prediction models to help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But a recent study in the Journal of the American Medical Informatics Association suggests that if those models use data that reflect existing racial bias in healthcare delivery, AI that was meant to benefit all patients may worsen healthcare disparities for people of color, according to Jillson.

One study that has been widely cited found that a commonly used healthcare algorithm that helps determine which patients need additional attention was found to have a significant racial bias, favoring white patients over blacks ones who were sicker and had more chronic health conditions. The algorithm used health costs to predict and rank which patients would benefit most from extra care that could help them stay on their medications or keep them out of the hospital. But researchers said that using health costs as a proxy for health needs is biased because black patients, facing disproportionate levels of poverty, often spend less on health care than whites.

The authors of the study, which was published in the journal Science, estimated that this racial bias reduces the number of black patients identified for extra care by more than half.

Citing that study, Jillson wrote that businesses need to test their algorithms—both before you use it and periodically after that—to make sure that it doesn’t discriminate on the basis of race, gender, or other protected class.

In a tweet, University of Washington School of Law professor Ryan Calo called the FTC's strong language a "shot across the bow."

The blog post signals "a shift in the way the FTC thinks about enforcing the FTC Act in the context of emerging technology. The concreteness of the examples coupled with repeated references to statutory authority is uncommon," Calo wrote.

The FTC outlined a number of recommendations for businesses and health systems to address bias in AI technology including being more transparent about the data being used and using independent researchers to evaluate the algorithms.

"As your company develops and uses AI, think about ways to embrace transparency and independence — for example, by using transparency frameworks and independent standards, by conducting and publishing the results of independent audits, and by opening your data or source code to outside inspection," Jillson wrote.

If an AI model causes more harm than good—that is, in FTC parlance, if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition—the FTC can challenge the use of that model as unfair, she wrote.

The stern warnings about selling and using discriminatory AI technology and overpromising on their capabilities suggest the FTC might be eyeing stricter enforcement.

#### 5. FTC enforcement keeps the AI industry in line.

Ryan Calo 21. Professor of Law, University of Washington, 4/27/21. “FTC warns the AI industry: Don’t discriminate, or else.” https://theconversation.com/ftc-warns-the-ai-industry-dont-discriminate-or-else-159622

The U.S. Federal Trade Commission just fired a shot across the bow of the artificial intelligence industry. On April 19, 2021, a staff attorney at the agency, which serves as the nation’s leading consumer protection authority, wrote a blog post about biased AI algorithms that included a blunt warning: “Keep in mind that if you don’t hold yourself accountable, the FTC may do it for you.”

The post, titled “Aiming for truth, fairness, and equity in your company’s use of AI,” was notable for its tough and specific rhetoric about discriminatory AI. The author observed that the commission’s authority to prohibit unfair and deceptive practices “would include the sale or use of – for example – racially biased algorithms” and that industry exaggerations regarding the capability of AI to make fair or unbiased hiring decisions could result in “deception, discrimination – and an FTC law enforcement action.”

Bias seems to pervade the AI industry. Companies large and small are selling demonstrably biased systems, and their customers are in turn applying them in ways that disproportionately affect the vulnerable and marginalized. Examples of areas where they are being abused include health care, criminal justice and hiring.

Whatever they say or do, companies seem unable or unwilling to rid their data sets and models of the racial, gender and other biases that suffuse society. Industry efforts to address fairness and equity have come under fire as inadequate or poorly supported by leadership, sometimes collapsing entirely.

As a researcher who studies law and technology and a longtime observer of the FTC, I took particular note of the not-so-veiled threat of agency action. Agencies routinely use formal and informal policy statements to put regulated entities on notice that they are paying attention to a particular industry or issue. But such a direct threat of agency action – get your act together, or else – is relatively rare for the commission.

What the FTC can do – but hasn’t done

The FTC’s approach on discriminatory AI stands in stark contrast to, for instance, the early days of internet privacy. In the 1990s, the agency embraced a more hands-off, self-regulatory paradigm, becoming more assertive only after years of privacy and security lapses.

How much should industry or the public read into a blog post by one government attorney? In my experience, FTC staff generally don’t go rogue. If anything, that a staff attorney apparently felt empowered to use such strong rhetoric on behalf of the commission confirms a broader basis of support within the agency for policing AI.

Can a federal agency, or anyone, define what makes AI fair or equitable? Not easily. But that’s not the FTC’s charge. The agency only has to determine whether the AI industry’s business practices are unfair or deceptive – a standard the agency has almost a century of experience enforcing – or otherwise in violation of laws that Congress has asked the agency to enforce.

### Extra---2NC

#### FTC covers all core antitrust law.

Emilia R. Rubin 19. J.D. Candidate, University of California, Hastings College of the Law. “The Heavy Burden of a Lighter Touch Framework The Inadequacy of Antitrust Laws as a Substitute for Net Neutrality.” Summer 2019. Hastings Science and Technology Journal 10.2, 229-261.

The FCC additionally justified repealing the 2015 Order by relying on the ability of both the FTC and private citizens to bring antitrust actions challenging any anticompetitive conduct in the internet sector.115 The FTC enforces three laws with respect to antitrust law: the Sherman Act, the FTC Act, and the Clayton Act. These are the three core federal antitrust laws in effect today. The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” The standard for assessing business conduct under the Sherman Act is a two-pronged approach: (1) per se illegality if the conduct is considered “so harmful to competition that they are almost always illegal;” and (2) rule of reason analysis if the conduct does not fall into an established anticompetitive category articulated under law.116

#### They’re tasked with enforcing antitrust laws.

Katie Canales 20. Tech reporter at Business Insider, 12/9/20. “Facebook was just hit with 2 big antitrust lawsuits. Here's what 'antitrust' means and how 'trust-busting' laws attempt to keep the biggest firms in US history from growing too powerful.” https://www.businessinsider.com/what-is-antitrust-laws-big-tech-hearing-2020-7

There are three core federal US antitrust laws you should care about: the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. The last would lead to the creation of the Federal Trade Commission, which is the main government entity tasked with enforcing antitrust laws today.

1. 9*. See* Lemley, *supra* note 4, at 1954. [↑](#footnote-ref-1)
2. *. See* Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 29 (1991). [↑](#footnote-ref-2)
3. . For arguments that innovation is the most important economic efficiency and should count as the most powerful pro-competitive justification, see Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 55 VAND. L. REV. (forthcoming 2003); Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 80015 (2002). [↑](#footnote-ref-3)
4. . The presence of SSOs in industries with the greatest potential for bottlenecks warrants antitrust deference in a way that deference on account of the balancing of “competing interests” the authors claim is undertaken by SSOs does not. *See* Teece & Sherry, *supra* note 1, at 1985. [↑](#footnote-ref-4)
5. . This example assumes an open SSO. For the dangers of closed SSOs excluding competitors, see *supra* notes 76-77 and accompanying text. [↑](#footnote-ref-5)
6. See e.g. *Rambus*, cited at footnote 182 below. [↑](#footnote-ref-6)
7. See Carl Shapiro, “Injunctions, Hold-Up, and Patent Royalties,” Working Paper, Draft 17 April 2006, http://faculty.berkeley.edu/shapiro/royalties. [↑](#footnote-ref-7)
8. Mark Lemley echoes many of the same arguments, without any models: “Our goal should be to create a world in which patent owners can get paid for the technology they contribute, but in which what they get paid bears some reasonable resemblance to what they actually contributed.” See Mark Lemley, “Ten Things to Do About Patent Holdup of Standards (and One *Not* to),” working paper 2006. [↑](#footnote-ref-8)
9. See Douglas G. Lichtman, “Patent Holdouts and the Standard-Setting Process”, *University Chicago Law and Economics, Olin Working Paper No. 292*, May 2006. Available at SSRN: http://ssrn.com/abstract=902646 at 13. [↑](#footnote-ref-9)
10. Id. at 10. [↑](#footnote-ref-10)