# NU R5

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### 1NC – OFF

#### Next off is the regulations cp.

#### The United States federal government should substantially increase regulations on private sector conduct to enable creation of information technology standards through non-antitrust regulations.

#### 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.

### 1NC – OFF

#### Next off is the cap k.

#### Anti-trust is a capitalist psy op to pacify the working class, buy time to mystify unsustainable accumulation, and map competition onto subjectivity – homo economicus devalues life.

Lebow 19 [David Lebow – Lecturer on Social Studies at Harvard University and lawyer, “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal governmentality is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

Each device for upholding spending maintained the legitimacy of the depoliticized political economy, even as liberalization continued to strip the wage-dependent population of regulatory and redistributive safeguards. The end of the inflation era brought structural unemployment and weakened trade unions. The passing of the public debt regime meant cuts to social rights, privatization of social services, and a trimmed public sector. Growing private debt enabled people to hold on despite lost savings, and rising under- and unemployment. At every step, the neoliberal project was “dressed up” as a consumption project.19 Continuing consumption ensured legitimacy long enough to enact total transformation of the political economy.

The state could not buy time indefinitely. The 1970s had already witnessed the beginning of the transition from a manufacturing, production-oriented economy that exported surpluses to an import-based, finance and services economy focused on consumption. As the United States went from creditor to debtor, a system of “balanced disequilibrium” took hold.20 With impunity granted as the world’s reserve currency, the United States ran mounting budget and trade deficits. To finance them, it absorbed surplus capital from abroad, much of which wended its way to Wall Street. Banks used these profits to extend credit to the working- and middle- classes. Household debt funded consumption of imported goods, returning the surplus capital abroad, and completing the circuit of global trade. This system depended on the unsustainable condition of ever-increasing debt-based consumption. Consumption was notoriously reinforced by secondary markets in what was essentially private money (securitized derivatives and collateralized debt obligation) that was much riskier than assumed. Because increasingly irresponsible lending was integral to continuing the consumption that stabilized the macroeconomic system, it became a sort of vicious collective good that progressively magnified the scale of the inevitable crash.21 When in 2008 the debt finally proved unserviceable and the housing bubble burst, the private money disappeared and the disequilibrated global economic system fell into crisis.

Consumption based on private debt had provided an unstable bridge over the yawning inequality brought about by deregulation, financialization, globalization, and the diminished welfare state. When the 2008 crisis dried up credit, it revealed a divided “dual economy.”22 On one side is the primary sector of elite, highly-educated professionals who are collected in coastal urban centers and tied in to corporate management, technological innovation and oversight of global capital flows. On the other is the secondary sector of low-skilled workers primarily fixed in the heartland, for whom deregulated competition has brought under- or unemployment, job instability, depressed wages, exploding debt, and diminished prospects.

Unable to buy more time, the state’s breach of the postwar social contract has been exposed. The neoliberal system of capital accumulation was entrenched at the expense of broad and sustainable consumption. The results have been the politicization of defrauded citizens and a political economy plunged into legitimation crisis. Time has belied the premature conclusion that contradiction and crisis potential had been overcome by state capitalism. Contradiction was relocated into cross-cutting imperatives for the state to enable capital accumulation and distribute consumption. In hindsight, we find only a window of stabilization of an enduring crisis potential built into capitalist political economy. As Nancy Fraser puts it “on the one hand, legitimate, efficacious public power is a condition of possibility for sustained capital accumulation; on the other hand, capitalism’s drive to endless accumulations tends to destabilize the very public power on which it relies.”23 The political fallout from the 2008 crisis marks the end of the postwar social contract that had established conditions ensuring the continued coexistence of capitalism and democracy.

#### Capitalism drives extinction and structural violence

Allinson et al 21 [Jamie Allinson is Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Introduction. July 2021. Verso EBook. ISBN: 9781839762963 //shree]

This is the question that vexed us as we set out to write The Tragedy of the Worker. From the vantage point of the present, the history of capitalist development is, as Marx expected, the history of the development of a global working class, the proletarianisation of the majority of the world’s population. But the very same process of that development has brought us to the precipice of climate disaster. Our position, to recall Trotsky’s rationalisation of War Communism in 1920, is in the highest degree tragic.

It is now clear that we will pass what scientists have long warned will be a tipping point of global warming, accelerating the already catastrophic consequences of capitalist emissions. How do we imagine emancipation on an at best partially habitable planet? Where once communists imagined seizing the means of production, taking the unprecedented capacities of capitalist infrastructures and using them to build a world of plenty, what must we imagine after the apocalypse has befallen us? What does it mean that as capitalism has become truly global, the gravediggers it has created dig not only capitalism’s grave, but also that of much organic life on earth?

Our answers to these questions remain rooted in the politics of revolutionary communism. Our stance is not based on the fantasy of a homeostatic nature that must be defended but on the critique of the capitalist metabolism – the Stoffwechsel- that must be overthrown. Earth scientists are accustomed to speak in terms of ‘cycles’ by which substances circulate in different forms: the water cycle, the rock cycle, the nitrogen cycle, the glacial-interglacial cycle, the carbon cycle, and others. One way of registering the catastrophe of climate change is to see these cycles – most of all, but not solely, the carbon cycle – as disordered, under- or over-accumulating. But this is to ignore the more fundamental circuit of which these now form epicycles, like Ptolemy’s sub-orbits of the heavenly bodies: the circuit of capital accumulation, M-C-M′.

This circuit accumulates profit and produces death. Neither is accidental. It is for this reason that the debates that capitalist ruling classes permit among themselves on ‘adaptation’ versus ‘mitigation’ take place on false premises. What is to be mitigated is the impact of climate change on accumulation, rendered through the ideology of ‘growth’ as something that benefits everyone. What we are to adapt to are the parameters of accumulation, sacrificing just enough islands, eco-systems, indigenous – and non-indigenous – cultures to maintain its imperatives for a period of time until new thresholds must be crossed, and new life sacrificed to the pagan idol of capital. Already, capitalist petro-modernity builds a certain quantum of acceptable death into its predicates: at the very least, the 8.7 million killed by fossil fuels each year according to Harvard University are considered a price worth paying for the stupendous advantages of fossil capital. And the sky can only keep going up, as deforestation, polar melt, ocean acidification, soil de-fertilisation and more intense wildfires and storms tear the web of life into patches. If the necropolitical calculus of the Covid-19 pandemic appears crass, just wait until its premises are applied to climate catastrophe.

#### Vote neg for anti-capitalist commons – collectives should refuse commitments to competitive principle and the straitjacket of what’s “realistic”

Rose 21 [Nick. PhD in Political Ecology from RMIT University. Executive Director of Sustain: The Australian Food Network. From the Cancer Stage of Capitalism to the Political Principle of the Common: The Social Immune Response of “Food as Commons.” Int J Health Policy Manag 2021. 3-31-21. DOI: 10.34172/ijhpm.2021.20 //shree]

Silvia Federici provides a longer historical perspective, noting that ‘commoning is the principle by which human beings have organised their existence for thousands of years;’ and that to ‘speak of the principle of the common’ is to speak ‘not only of small-scale experiments [but] of large-scale social formations that in the past were continent-wide.’87 Hence a commons-based society is neither a utopia or reducible to fringe projects, and the commons have persisted despite the many and continuing enclosures, ‘feeding the radical imagination as well as the bodies of many commoners.’87 Federici acknowledges that commons and practices of commoning are diverse, that many are susceptible to cooptation and many are consistent with the persistence of capitalism; indeed some, such as charities providing social services (including foodbanks) during the years of austerity budgets in the United Kingdom (2010-2015), reinforce and stabilise capitalism.87 What matters to Federici is the character and intentionality of the commons as anti-capitalist, as ‘a means to the creation of an egalitarian and cooperative society…no longer built on a competitive principle, but on the principle of collective solidarity [and commitments] to the creation of collective subjects [and] fostering common interests in every aspect of our lives.’87

Federici’s analysis resonates with the political thought and proposals developed by Dardot and Laval in their 2018 work, ‘On Common: Revolution in the 21st century.’11 For Dardot and Laval, the common is likewise understood as a principle of political struggle, a demand for ‘real democracy’ and a major driving force behind the emerging articulation of a political vision and programme that transcends and overcomes the straitjacket logic of neoliberal ideological hegemony and its ‘policy grammar’ which appears to foreclose all alternatives and lock us forever into a capitalist realism in which ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism.’89 Eschewing Bollier’s ‘triarchy’ of a market/state/ commons coexistence, Dardot and Laval argue for a politics of the common based on an engaged citizenry that directly participates and deliberates in all decisions which impact it, and in the process not merely transforms the institutions responsible for the management of services and allocation of resources, but creates new institutions and new ways of being in the world.11

Dardot and Laval describe this form of politics as ‘instituent praxis’: the common, they argue, is ‘not produced but instituted.’11 This acknowledges the conventional understanding of Ostrom, Bollier and others of ‘the commons’ as residing in the rules – the laws – that a community establishes for the collective management and use of shared resources, but extends it much further and in a more radical direction. The essence of the commons, they argue, is not in the goods per se such as land or a forest or a seed bank ‘held in common,’ but rather in the process of their establishment as well as the ongoing negotiation that will surround their use and governance. Hence, Dardot and Laval distinguish the commons from the ‘rights’ tradition of property, arguing that ‘the commons are above all else matters of institution and government…the use of the commons is inseparable from the right of deciding and governing. The practice that institutes the commons is the practice that maintains them and keeps them alive and takes full responsibility for their conflictuality through the coproduction of rules.’90 To ‘institute’ in this context should not be misunderstood as ‘to institutionalise [or] render official;’ rather it is ‘to recreate with, or on the basis of, what already exists.’ 90 This messy, conflictual and evolving process is what Dardot and Laval insist will ultimately bring about a revolution, not in the form of a violent uprising or insurrection, but rather through the ‘reinstitution of society’ via the transformation of politics and economy from its current state of ‘representative oligarchy’ to full participatory and deliberative democracy.11 Such a vision is premised on a mass politicisation of society; in effect a return of mass popular political contestation and a turn away from the postpolitical era of the neoliberal consumer.91-92

### 1NC – OFF

#### Next off is the FTC DA.

**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, suffering, and extinction**

**Thomas 20** – Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn

Mike Thomas, 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](about:blank)

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.”

### 1NC – OFF

#### The Supreme Court will decline to overturn Roe v. Wade now—Roberts’ influence the conservative bloc is key

Ziegler 21 (Mary - law professor at Florida State University, “The potential silver lining for supporters of abortion rights,” 5/20/21, https://www.bostonglobe.com/2021/05/20/opinion/potential-silver-lining-supporters-abortion-rights/)

Dobbs v. Jackson Women’s Health involves a Mississippi law banning abortion at or after 15 weeks of pregnancy, with exceptions for some medical emergencies and severe fetal abnormalities. Most abortions — over 92 percent, according to the most recent data from the Centers for Disease Control and Prevention — occur in the first trimester, and if the Mississippi law is allowed to stand, those wouldn’t be blocked. But pro-choice Americans have reason to be concerned. To uphold Mississippi’s law, the court’s conservative six-justice majority would have to overturn at least part of Roe v. Wade and the abortion-rights cases that followed it. That’s because Roe recognized a right to choose abortion before fetal viability — the point at which survival outside the womb is possible — which is usually somewhere between 22 and 24 weeks. Because Mississippi’s ban would kick in much earlier, the court will be able to uphold it only by eliminating Roe’s language about fetal viability or by reversing Roe altogether. Of course, predicting the outcome of abortion cases has proved to be devilishly hard. In the early 1990s, the Supreme Court had a six-justice conservative bloc and a case teed up to reverse Roe, yet the justices balked when the moment came. It’s certainly possible that something similar could happen this time around. Chief Justice John Roberts, who cares about safeguarding the court’s legacy (and his own), may persuade his conservative colleagues not to go all the way to eliminating abortion rights.

#### Ruling against big business interests drains Roberts’ capital—counter to conservative lobbying efforts

Pickerill 17 (J. Mitchell – Professor of Political Science at Northern Illinois University & Cornell W. Clayton- - Professor of Government at Washing State University, “The Roberts Court and Economic Issues in an Era of Polarization,” p. 695-98, *Case Western Reserve Law Review*, Volume 67, Issue 3, https://core.ac.uk/download/pdf/214111285.pdf)

A. The Emergence of a Conventional Wisdom: The Roberts Court is Decidedly Pro-Business By now, the Roberts Court’s reputation as a pro-business Court has become something like the conventional wisdom for Supreme Court scholars and commentators. In 2008, Jeffrey Rosen wrote an article titled Supreme Court, Inc. in New York Times Magazine.7 Rosen argued that, whereas the Court had embraced a form of “economic populism” throughout most the latter half of the twentieth century, by the 2000s it had transformed into a decidedly pro-business venue.8 A generation ago, progressive and consumer groups petitioning the court could count on favorable majority opinions written by justices who viewed big business with skepticism—or even outright prejudice. The economic populist William O. Douglas, a former New Deal crusader who served on the court from 1939 to 1975, once unapologetically announced that he was “ready to bend the law in favor of the environment and against the corporations.”9 Today, however, as Rosen pointed out, “there are no economic populists on the court, even on the liberal wing.”10 In addition to quoting pro-business statements from members of the so-called liberal wing of the Roberts Court at the time, Rosen noted that, when compared to prior years, the proportion of cases involving business interests was up about ten percent during the early years of the Roberts Court.11 Rosen also highlighted several cases involving antitrust law, corporate mergers, punitive damages, and product liability in which the interests of big business seemed to be faring well in the Court.12 These cases didn’t seem to split the Roberts Court along conventional ideological lines. In a 2009 law review article, Rosen reported that, when he asked Justice Stephen Breyer about the Court’s probusiness orientation, “he did acknowledge that there might be a difference between constitutional cases, where Justices have strong preconceptions and philosophical commitments, and more technical, statutory cases, where they are more open-minded and amendable to argument.”13 Finally, Rosen explained the pro-business shift as a function of a decades-long effort by conservative and business groups to counter the effects of consumer groups and public interest litigation groups like Public Citizen. 14 In particular, he credited the U.S. Chamber of Commerce’s lobbying efforts and the National Chamber Litigation Center, established in 1977, for advocating business interests in state and federal courts. 15 Various examples and statistics indicated that through filing amicus briefs on behalf of business interests, the Chamber was successful both in persuading the Court to grant certiorari and on the merits in particular cases. Although Rosen’s article garnered much attention, he was not the only journalist or commentator claiming the Court was “probusiness.”16 For example, writing for Bloomberg Business, Michael Orey declared that the Roberts Court was “open for business.”17 And in an article in the Wall Street Journal, Brent Kendall explained that the Supreme Court is “making it easier for companies to defend themselves from the kinds of big lawsuits that have bedeviled them for decades.”18 Some legal academics agreed. For instance, Erwin Chemerinsky wrote that “the Roberts Court is the most pro-business Court of any since the mid-1930s.”19 All of this attention to the Roberts Court and its business decisions led to further academic research and scholarship examining whether and to what extent the Roberts Court could be considered “pro-business.”20 Much of the early characterization of the Roberts Court as “probusiness” has been based on specific Supreme Court decisions, such as Ledbetter v. Goodyear Tire & Rubber Co.21 and Riegel v. Medtronic, Inc., 22 or specific Supreme Court terms, such as the 2006 term in which the U.S. Chamber of Commerce won in thirteen of the fifteen cases in which it had filed a brief.23 Nonetheless, there have also been more systematic analyses of the Court and its disposition toward business interests. Lee Epstein, William Landes, and Richard Posner conducted one of the most well-known systematic empirical analyses of the Supreme Court and business interests.24 In their study, Epstein, Landes, and Posner selected Supreme Court decisions from the 1946 term through the 2011 term of the Court in which a business entity was a litigant.25 They analyzed the likelihood that business entities would prevail in the Court over time.26 Controlling for numerous factors, they concluded: Whether measured by decisions or Justices’ votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were. The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was antibusiness is more likely to be reversed than one in which the lower court decision was pro-business. The Roberts Court also has affirmed more cases in which business is the respondent than its predecessor Courts did.27 Thus, the Epstein, Landes, and Posner empirical study seems to confirm the conventional wisdom.

#### U.S. reproductive rights policy models globally

GFW 17 (Global Fund for Women; January 20; Feminist fundraising organization devoted to global gender justice movements; GFW, “Women’s movements matter more than ever: A critical moment for global women’s rights,” [https://www.globalfundforwomen.org/what-we-do/voice/campaigns/build-movements-not-walls/womens-movements-a-critical-moment-for-global-womens-rights/](about:blank))

We have decades of proof that U.S. policies and leadership directly influence policies and decisions globally, and we know that it is women who are often most acutely impacted—for better or for worse. For example, we know that U.S. policies can directly block women’s access to reproductive health and rights. The ‘Global Gag Rule’ prohibited U.S. foreign aid to any organization that delivers abortion services, but was repealed by President Obama. Before the law’s repeal, there was a massive chilling effect on many global efforts for reproductive health—and in one of his first executive actions as President, Trump reinstated and expanded the Global Gag Rule, which will have damaging impacts on women’s access to critical health care ranging from maternal care to sex education, to access to contraception and HIV and AIDS prevention and services. Conversely, the U.S. State Department’s leadership on issues such as ending child marriage has been a positive global force for advancing women’s rights. The U.S.’s stance on human rights is critical to protecting women’s rights all over the world—especially in armed conflict and political turmoil as it is in such scenarios that sexual violence escalates and women’s needs and voices are often silenced. At this moment of transition, women’s movements around the world are poised to ensure that women’s voices are heard and that human rights are not rolled back. They tell us that they will continue to advocate for key issues like reproductive rights, ending sexual violence in conflict, and girls’ rights. They are determined to grow and flourish, to make connections, and to work together across borders. “At a time of transition like this it is understandable to worry about the future, especially for women and girls,” says Musimbi Kanyoro, President and CEO of Global Fund for Women. “But I’ve worked my entire career with women’s movements around the world, and because of them, I remain hopeful. At this critical moment, women’s movements are becoming stronger, more global, and more inclusive than ever before. When they have access to the resources and tools that they need, they are a force to be reckoned with. As we commit to resisting regressions in women’s rights and advocating for what we believe in, let’s all work together to #BuildMovementsNotWalls.” Global Fund for Women spoke with our network of women activists and grassroots leaders from around the world to better understand their hopes and concerns in relation to the new U.S. President and his administration, and the potential for impact on their own work. From Brazil to Iraq, and from Nigeria to the Ukraine and Israel, women’s rights leaders are examining the potential repercussions for women and girls. They offer advice for people in the U.S. for movement-building and resistance, and share their hopes for a strong, collective force that will fight across borders against rollbacks to rights and threats to activists. A critical global moment for women’s rights The transition of power in the U.S. comes at a critical time for women’s rights around the world. Women all around the world are facing threats to their fundamental rights, ranging from abortion access and ending sexual violence to racial justice and environmental rights. Global movements for reproductive health and rights—including campaigns for access to contraceptives and safe and legal abortion—are at a critical moment. They are under threat in countless places, including in Latin America and the Caribbean where maternal mortality rates from unsafe abortions are highest, and facing powerful opposition from religious and cultural fundamentalists and others. Groups working with refugee women and girls also face a pivotal moment. The vast majority of Syrian refugee women and girls are hosted in Lebanon, Turkey, and Jordan, where women’s groups are focused on providing core services including anti-violence training and healthcare while empowering refugee women with knowledge about their rights, leadership skills, and economic opportunities—and these women’s groups are advocating for critical changes in national laws that restrict refugees’ access to jobs, hospitals, and other basic rights citizens have. Concerns are escalating about how the policies of a new U.S. administration may impact their work. Feminist activists globally are increasingly facing fears for their safety. For example, in Egypt, Turkey, and several other countries, we’ve witnessed an escalating crackdown on feminist and human rights activism, including harassment against women human rights defenders and threats to journalists and academics. In many places—such as the Inter-American Commission on Human Rights and Court—U.S. influence is a critical factor in enforcing mechanisms for their protection. In countries from Sub-Saharan Africa to Asia and the Pacific, grassroots women are coming together to protect their land and water rights amid climate change and increased violence to improve their own farming and local food sources, and to increase their economic opportunities. Women are standing up against rollbacks to rights, resisting the rise of conservatism, blocking dangerous anti-women policies, and fearlessly defending women’s rights amid conflicts and political and economic crises. Conservative leadership is on the rise in many countries around the world and women’s groups are joining forces to share their strategies of resistance. Connecting the dots in threats to fundamental rights globally—and learning together “As far as women and other civil society organizations [in Africa] are concerned, all progressive issues might suffer under a Trump Presidency,” says Bisi Adeleye-Fayemi, co-founder of African Women’s Development Fund and Global Fund for Women Board Member. “Women’s rights, sexual and reproductive rights, climate change, LGBTQ individuals, Muslim people, refugees… are not likely to get the attention they deserve—they will probably get the wrong kind of attention.” Indeed, policy stances in the U.S. will have a direct impact on global communities and situations. And by and large, many of the key human rights issues that are coming into play in U.S. domestic policy including access to reproductive health and rights and ending violence against women, are issues that are under the spotlight in other places around the world. U.S. leadership could play a significant role—either in moving the needle positively on these critical issues, or in condoning or precipitating the rollback of hard-won gains.

#### Expanding reproductive freedom slows overpopulation—extinction

Engelman 11 (Robert; May 2011; Vice President for Programs at the Worldwatch Institute, M.Sc. from Columbia University; Solutions, “An End to Population Growth: Why Family Planning Is Key to a Sustainable Future,” vol. 2)

In a joint statement in 1993, representatives of 58 national scientific academies stressed the complexities of the population-environment relationship but nonetheless concluded, “As human numbers increase, the potential for irreversible changes of far-reaching magnitude also increases. … In our judgment, humanity’s ability to deal successfully with its social, economic, and environmental problems will require the achievement of zero population growth within the lifetime of our children.”3 In 2005, the United Nations’ Millennium Ecosystem Assessment identified population growth as a principal indirect driver of environmental change, along with economic growth and technological evolution.4 In October 2010, a group of US and European climate and demographic researchers published findings from an integrated assessment model calculating the impact of various population scenarios on fossil-fuel carbon dioxide emissions over the coming century. If world population peaked at close to 8 billion rather than 9 billion, along the lines described in a low-fertility demographic projection published by the UN Population Division, the model predicted there would be a significant emissions savings: about 5.1 billion tons of carbon dioxide by 2050 and 18.7 billion tons by century’s end.5 What if we could prove wrong the popular conviction that a future with 9 billion people and a growing population is inevitable? Suppose we could demonstrate that world population size might peak earlier and at a lower level if government policies aimed not at reproductive coercion but at individual reproductive freedom? Suppose such policies aimed to help all women and girls prevent unwanted pregnancies and conceive only when they want to bear a child? This article presents new data on births resulting from women’s active intentions to become pregnant. The hypothesis it probes may appear counterintuitive: if, starting at any moment, all pregnancies in the world resulted from each woman’s intent to give birth, human population would immediately shift course away from growth toward decline within a few decades. An Ethical Basis for Action to Slow Population Growth What can societies that value democracy, self-determination, human rights, personal autonomy, and privacy do to include demographic change among strategies for environmental sustainability? An important answer may lie in a relatively untested set of principles adopted by almost all the world’s nations at a 1994 UN conference held in Cairo. The third of three once-a-decade governmental conferences on population and development, it produced a program of action that abandoned the strategy of “population control” by governments in favor of a focus on the health, rights, and well-being of women.6 An operating assumption of this program is that when women have access to the information and means that allow them to choose the timing of pregnancy, the intervals between births lengthen, average family size shrinks, and teen births become less frequent. All of these improve maternal and child survival and slow population growth.7 Experts disagree on how reproductive autonomy compares with other strategies in slowing that growth. Some assume economic growth is the most effective means, although birthrates rose along with prosperity in many countries after World War II and remain relatively high in several wealthy oil-exporting nations in which women have fewer rights and lower status than men.8 Moreover, some analysts argue that the arrow of causation operates more in the other direction, with low fertility stoking economic growth.9 There is a more robust and demonstrable correlation between female educational attainment and fertility. Worldwide, women with no schooling have an average of 4.5 children, while those who have spent at least a year or more in primary school have just three. Women who complete at least a year or two of secondary school have 1.9 children—well below replacement fertility rates. With one or two years of advanced education for women, average childbearing rates fall even further, to 1.7.10 On this basis alone, those interested in depressing population growth rates might want to focus on improving women’s educational attainment. Questions remain about whether education alone can bring about declines in fertility without other supporting conditions, especially easy, affordable access to a range of contraceptive options. Similar uncertainties cloud understanding of exactly how improved child survival and the empowerment of women affect fertility. Improving both factors certainly contributes to later births and smaller families and is valuable regardless of its demographic impacts. But without clear data on the magnitude of these influences, interventions related to schooling, child survival, and women’s empowerment are rarely seen as core aspects of governmental population policy. This brings us to family planning. Access to safe and reliable contraception has exploded since the mid-twentieth century. An estimated 55 percent of all heterosexually active women worldwide now use modern contraceptive methods, while an additional seven percent use less reliable traditional methods.11 As the use of birth control has spread, fertility has plummeted from a global average of five children per woman in 1950 to barely more than 2.5 today.1

## Innovation

### Innovation Now---1NC

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

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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.

### No China Leadership

#### No Chinese 5G dominance.

SCMP 19. South China Morning Post, citing a variety of experts, “China Experts: US Still Out Front In Tech Race Despite Pentagon Claim”, 11/3/2019, https://www.abacusnews.com/tech/china-experts-us-still-out-front-tech-race-despite-pentagon-claim/article/3036161

Chinese experts have rejected the claim by a senior Pentagon official that the US is lagging behind China in some key dual-use technologies.

Michael Brown, director of the US Department of Defence’s innovation unit, said at a seminar earlier this week that China was either competitive or catching up in the areas of hypersonics, artificial intelligence, quantum sciences, 5G mobile networks, genetic engineering, and space.

With the exception of hypersonics, these technologies had not only military applications but were also critical for long-term economic prosperity, making them important to the future of US-China competition, he said.

“I believe that national security and economic security are inextricably linked,” Brown told the think tank Centre for Strategic and International Studies in Washington.

China prepares to send its own astronauts to the moon 50 years after Apollo 11

But Chinese experts said China’s progress had been exaggerated and many of its achievements were only partial successes so far.

Hong Kong-based military commentator Song Zhongping said the US had been “unarguably more successful and experienced, far ahead of anyone” in space technology. “Look at Project Apollo and the Space Shuttle programme – decades later no other country has ever matched those achievements,” he said.

Despite breakthroughs in certain fields like 5G, there was more generally a clear gap between China’s digital information and electronics technologies and the world’s technological leaders, according to Beijing-based naval expert Li Jie.

In the field of hypersonics, China may have achieved milestones in glider vehicles, but in another important technology – ramjet engines – there was no evidence of any major breakthroughs, and the US was still far more experienced in the field, said Zhao Tong, senior fellow at the Carnegie-Tsinghua Centre for Global Policy.

China exhibited hypersonic missiles and drones at last month’s National Day parade, and has just launched a commercial 5G – fifth generation mobile network – service on Friday, which is the biggest in the world.

Huawei, China’s telecommunication giant has won contracts to construct the 5G infrastructures for many countries, despite the US campaign to ban Huawei equipment over security concerns.

Brown said China was “already ahead of the US in quantum sciences” – citing the Chinese launch in 2016 of Micius, the world’s first quantum communications satellite. China had also made more launches into space than the US in 2018 as it speeded up its space programme, he said.

Brown added the US had used Chinese equipment for genome sequencing, which meant China had more data on the genetic sequencing of the US population than the US itself, he said, and the US was also playing “a catch up game” with China in AI-based facial recognition.

5G is available now in China for just US$18

For the past 50 to 80 years, the US had led the way and set the standards in almost all important technologies and industries, he said. In doing so, the US had been able to build and shape a global ecosystem and enjoy its advantages since the end of World War II.

But, Brown warned, for China to set the pace for these technologies would be “game-changing”.

“Imagine what the world would look like if China was setting standards,” he said. “Over time, that means we have fewer levers to shape what the US wants to do, both from a global technology standpoint and also what are the values that are highlighted around the world as ones to be looked up to.”

### No Warming !

#### Warming’s not existential---framing it as such undermines solvency.

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.

### No Democracy !

#### Democracy and internationalism are resilient.

Stéphane Dion 19, 3-18-2019, Ambassador of Canada in Germany and Special Envoy to the European Union and Europe, "European liberal democracies facing populism: Reasons for cautious optimism," GAC, https://www.international.gc.ca/country\_news-pays\_nouvelles/2019-03-18-germany-allemagne.aspx?lang=eng//HM

The European Union is in populism’s line of sight; its structure, philosophy, and policies echo populism’s targets of choice: cosmopolitism, technocracy, supra-national compromises, trade agreements, restrictive budgetary rules, and, above all, open borders within the EU.

The EU relies on a constant need of compromises between member states and Brussels. Populism erodes shared values and the capacity to reach such compromises, making it, for example, more difficult to reach a common ground between the Macron plan for more extensive banking union and more generous mechanisms of solidarity, and Merkel’s preoccupations for more fiscal discipline and member state accountability.

But there is optimism to be shared. The fact is that opinion polls continue to show considerable support for democratic and accountable government and that a clear majority of Europeans cherish the view of themselves as tolerant, open, and diverse. Most Europeans continue to see the European Union with pride, as a grand achievement of and for humankind, a unique fabric of peace and democracy.

No other country followed the United Kingdom in its bitter attempt to exit the European Union. In fact, far from having created a domino effect, the sad spectacle of the Brexit saga is likely to have strengthened Europeans’ support for their union. In polls, the EU’s image is the most positive it has been since 2009, surpassing that of national governments and parliaments, including in Hungary and Poland.15 Meanwhile, Turkey and non-EU Balkan and East European countries want to join this union.

The EU borderless area, called as you know the Schengen zone, allowing the free mobility of 420 million people, covering 26 countries, 4.3 million square kilometers, is certainly a difficult entity to manage, but it is also quite an accomplishment, appreciated every day, in airports, train stations and highways by its citizens. Despite all the controversies about the Eurozone, there is no popular support to leave the common currency. The most Eurosceptic countries remain closer to a reformist approach rather than a rejectionist one.

Despite the strong likelihood that populists and Eurosceptic parties will increase their representation in the next European Parliament, the risks are very low that the May 2019 elections will result in a Eurosceptic parliament. The popular support for these populist parties seems to have reached a plateau, as the migration flow has considerably diminished. Current projections give them around a third of the seats in the EU Parliament, which will make more difficult, but still probable, the negotiation of a functional and stable pro-EU coalition.

The selection of new Presidents of the European Commission and the European Council and the nomination of a new Commission is likely to be a complicated but not insurmountable task in the coming months.

Conclusion

I am confident that populism will not eviscerate liberal democracy in Europe, but it is, and will likely continue to challenge some of its key pillars, especially the rule of law, individual and minority rights, and social, political and religious tolerance.

### AT: Aff---Patent Holdout & Hold-up

#### 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)

### AT: Aff---Patent Thick

#### Patent thicket doesn’t assume standardization correction---the theory is purely theoretical

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

B. Patent Thickets

In 2001, Shapiro picked up one of the threads from the anti-commons debate, and pronounced the existence of a “patent thicket” in “several key industries”.[[11]](#footnote-11) The key extension here is the application of the anti-commons theory to high technology industries involved in standard setting. Shapiro argues that “[t]he need to navigate the patent thicket and hold-up is especially pronounced in industries such as telecommunications and computing in which formal standard-setting is a core part of bringing new technologies to market.”[[12]](#footnote-12) To bolster this claim, Shapiro cites the dramatic increase in patenting and the potential implications in terms of IP licensing costs in these two sectors. According to Shapiro, “the danger of paying royalties to multiple patent owners is hardly a theoretical curiosity in industries such as semiconductors, in which many thousands of patents are issued each year and manufacturers can potentially infringe on hundreds of patents with a single product.”[[13]](#footnote-13) Nonetheless, Shapiro does not present any evidence on licensing difficulties or “hold-up” within the semiconductor or telecommunications industries, instead referring to unsupported hypothetical results.

One of the key distinctions for patent thicket theory as applied to standard setting lies in the timing of licensing negotiations. For those technologies that are easy to invent around, Shapiro argues, “the patented technology contributes little if anything to the final product, and any ‘reasonable’ royalty would be modest at best.”[[14]](#footnote-14) But after the technology is included in a standard or after potential licensees have started manufacturing, the patent holder “can credibly seek far greater royalties, very likely backed up with the threat of shutting down the manufacturer…” Shapiro sees little relief for this ex post“hold-up” aspect of patent thickets short of reforming patent law.

One clear limitation of Shapiro’s argument, however, is that standardization only grants additional market power and thus enhances the essential patent holder’s ability to charge royalties when the patented technology can be easily designed around. In the presence of a technology for which there is no alternative as is often the case in complex industries, the ability of the holder of essential patents to seek significant royalty rates exists prior to the adoption of the standard.[[15]](#footnote-15) Standardization will certainly benefit essential patent holders as it stimulates the implementation of selected technologies and thus expands royalty revenues, but in the case of technologies for which there is no reasonable alternatives the ability of licensors to extract rents originates in the uniqueness of their patented inventions.

### AT: Aff---Royalty Stacking

#### Methodological errors hamper stacking thesis---predictions of the hypothesis were proven wrong

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

D. Royalty Stacking

In essence, this theory is a less extreme version of the anti-commons problem. Rather than grinding all innovation to a halt, the many IPR distributed across numerous rights holders lead to an extremely costly and inefficient outcome.

Royalty stacking can be explained simply. A firm wishing to produce a good, especially one embodying a technical standard, typically needs to acquire rights to the intellectual property underlying the good. When that good is comprised of multiple complementary components, each of which is necessary for production and each of which is covered by patents held by separate firms, the aggregate royalty fees for licensing all of the required pieces can, it is sometimes suggested, add up to a very large amount - perhaps so large that it is no longer economical for the manufacturing firm to make the good. This can allegedly happen even if each component’s patent is offered on “reasonable” terms. Stacking up so many reasonable terms would indeed lead to an unreasonable sum.

Four factors are implicit in the royalty stacking proposition. First, innovation must be sequential and cumulative, so that the patents are overlapping and interrelated.

Otherwise, royalties would not stack up. Second, there must be many patents for a given product, such as one embodying a technical standard. Otherwise, the stack would be small and either inconsequential or relatively easy to negotiate out of. Third, the many patents must be held by numerous, distinct rights holders. Otherwise, negotiating the use of the many patents would be fairly straightforward, involving a limited number of bilateral negotiations. Fourth, the given licensee or all licensees must have no patents to trade with licensors. Otherwise, cross-licensing would drastically reduce the risk of royalty stacking.[[16]](#footnote-16)

Lemley and Shapiro extend the discussion of patent hold-up and injunctions to royalty stacking. They note that “[a]s a matter of simple arithmetic, royalty stacking magnifies the problems associated with injunctive threats and hold-up, and greatly so if many patents read on the same product.”[[17]](#footnote-17) Lemley and Shapiro argue that a manufacturer’s margin is a limiting factor in royalty negotiations, but that amount typically leaves considerable room for patent holders to overcharge compared to the value of the technological contribution.

To give credibility to their claims, Lemley and Shapiro present two case studies as empirical evidence of the existence of a royalty stacking problem.

They begin with third-generation (3G) cellular technology, which involves several standards and allegedly several thousand patents disclosed as “essential” for each one. Those patents are held by a fairly large number of firms - for WCDMA, one of such standards, forty-one firms in all are represented, although roughly 75% of the patents are held by just four firms. At least on the surface, then, WCDMA would be a candidate for royalty stacking. Lemley and Shapiro argue that a royalty stacking problem actually exists on the basis of one questionnaire conducted before the standard was adopted. Firms that had declared patents as relevant for WCDMA were asked, hypothetically, what they would like to charge for their patents if they were found to be essential to the standard. Summing all of the answers (and not everyone responded) yielded a cumulative royalty rate of 130%. While it is a striking figure, it is also extremely misleading. What a firm will quote as its desired royalty in a hypothetical survey is quite different from what it can negotiate with real licensees (see our discussion of the horizontal constraints constraining essential patent holders’ ability to charge high royalty rates). Moreover, at the time of the questionnaire, the standard was not yet settled, so it was unclear what IP would in fact be essential. In reality, WCDMA technology is being licensed and has achieved remarkable penetration today, which belies any extreme cumulative royalty predictions made several years ago. Not only were Lemley and Shapiro’s predictions based on an inaccurate analysis, but they proved to be wrong.

Lemley and Shapiro then turn to the Wi-Fi standard for wireless communications. In their Wi-Fi case study, the authors again incorrectly assume that the mere presence of a large number of rights holders necessarily implies a royalty stacking problem. They also note that one patent lawsuit related to the standard ended with a 6% royalty rate award. Certainly if every patent holder were able to charge 6%, there would be a royalty stacking problem. But that cannot be assumed. First, technological contributions vary substantially across patents, so knowing that one patent was awarded 6% by the courts tells us nothing about the remaining IP––that one patent might have been the most pivotal for the standard. Second, court awarded royalties often include an element of punishment to ensure that future infringement is deterred. Finally, Lemley and Shapiro note that several of the Wi-Fi standard participants have already formed a patent pool, meaning a substantial portion of the standard’s IP is available in a single-price bundle.

## Cybersecurity

### No Cyber Impact

#### No cyber impact---non state actors lack capability, Russia and China don’t have an incentive.

Lewis 20 – (James A., PhD, a senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies (CSIS), Before joining CSIS, Lewis worked at the Departments of State and Commerce as a foreign service officer and as a member of the Senior Executive Service, a political advisor to the U.S. Southern Command for Operation Just Cause, the U.S. Central Command for Operation Desert Shield, and the Central American Task Force. Lewis served on the U.S. delegations to the Cambodian peace process and the Permanent Five talks on arms transfers and nonproliferation, and he negotiated bilateral agreements on transfers of military technology to Asia and the Middle East. He led the U.S. delegation to the Wassenaar Arrangement Experts Group on advanced civilian and military technologies. Lewis led a long-running Track 2 dialogue on cybersecurity with the China Institutes of Contemporary International Relations. He has served as a member of the Commerce Spectrum Management Advisory Committee, the Advisory Committee on International Communications and Information Policy, and the Advisory Committee on Commercial Remote Sensing and as an advisor to government agencies on the security and intelligence implications of foreign investment in the United States, 2020, “Dismissing Cyber Catastrophe,” [accessed 8/30/20], [https://www.csis.org/analysis/dismissing-cyber-catastrophe](about:blank), see)

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.

### Circumvention

**Expand the scope of antitrust refers exclusively to formal law not enforcement---the plan is circumvented.**

Sinisa **Milosevic et al. 18**. Commission for Protection of Competition, The Republic of Serbia. Dejan Trifunovic, Faculty of Economics, University of Belgrade, Belgrade, The Republic of Serbia. Jelena Popovic Markopoulos, Commission for Protection of Competition, The Republic of Serbia. “The Impact of the Competition Policy on Economic Development in the Case of Developing Countries”. Economic Horizons, May - August 2018, Volume 20, Number 2, 153 – 167. http://scindeks-clanci.ceon.rs/data/pdf/1450-863X/2018/1450-863X1802157M.pdf

The paper that analyzes the impact of the competition policy on the GDP growth in developing and developed countries in the Solow growth model framework is T. C. Ma’s (2011). The presence and **scope of the competition policy** is captured by the **SCOPE variable** that is defined in the paper by K. N. Hylton and F. Deng (2007). The overall effectiveness of the government’s application of policies, not only of the competition policy, is captured by the **EFFICIENCY variable** that is defined in the paper by D. Kaufmann, A. Kraay and M. Mastruzzi (2009). The results show that the **SCOPE** variable **is not significant** and the **formal existence of the competition law cannot influence economic growth**. The interacting variable of SCOPE x EFFICIENCY is named EFFLAW. For poor countries, the coefficient for this variable is 0.04 and is significant, whereas for rich countries the coefficient is 0.064 and is also significant. Therefore, the competition law must be **complemented with the effective enforcement of this policy.**

### 5G Irrelevant---1NC

#### 5G is so 2020---it’s all about 6G, and the US is winning.

Shirley Zhao et al. 21. Reporter for Bloomberg, cites multiple experts, with Scott Moritz and Thomas Seal, 2/8/21. “Forget 5G, the U.S. and China Are Already Fighting for 6G Dominance.” https://www.bloomberg.com/news/features/2021-02-08/forget-5g-the-u-s-and-china-are-already-fighting-for-6g-dominance

Most of the world is yet to experience the benefits of a 5G network, but the geopolitical race for the next big thing in telecommunications technology is already heating up.

For companies and governments, the stakes couldn’t be higher. The first to develop and patent 6G will be the biggest winners in what some call the next industrial revolution. Though still at least a decade away from becoming reality, 6G — which could be up to 100 times faster than the peak speed of 5G — could deliver the kind of technology that’s long been the stuff of science fiction, from real-time holograms to flying taxis and internet-connected human bodies and brains.

The scrum for 6G is already intensifying even as it remains a theoretical proposition, and underscores how geopolitics is fueling technological rivalries, particularly between the U.S. and China.

“This endeavor is so important that it’s become an arms race to some extent,” said Peter Vetter, head of access and devices at Nokia Oyj’s research arm Bell Labs. “It will require an army of researchers on it to remain competitive.”

Years of acrimony under the Trump administration have hit Chinese technology companies hard, but that hasn’t stopped the country from emerging as the leader in 5G. It has the world’s largest 5G footprint, and — despite multiple attempts by the U.S. to take it on — Huawei Technologies Co. towers over rival 5G vendors globally, mostly by offering attractive prices.

The development of 6G could give the U.S. the opportunity to regain lost ground in wireless technology.

“Unlike 5G, North America will not let the opportunity for a generational leadership slide by so easily this time,” said Vikrant Gandhi, senior industry director of information and communications technologies at consultancy firm Frost & Sullivan in the U.S. “It is likely that the competition for 6G leadership will be fiercer than that for 5G.”

It’s clear that 6G is already on the minds of policy makers in both Washington and Beijing. Former President Donald Trump tweeted in early 2019, for example, that he wanted 6G “as soon as possible.”

China is already moving ahead. The country launched a satellite in November to test airwaves for potential 6G transmission, and Huawei has a 6G research center in Canada, according to Canadian media reports. Telecommunications equipment manufacturer ZTE Corp. has also teamed up with China Unicom Hong Kong Ltd. to develop the technology.

The U.S. has demonstrated that it has the ability to seriously handicap Chinese companies, as in the case of ZTE, which almost collapsed after the Commerce Department banned it for three months in 2018 from buying American technology. Similar moves could hamper Huawei’s 6G ambitions.

Washington has already started to sketch out the 6G battle lines. The Alliance for Telecommunications Industry Solutions, a U.S. telecom standards developer known as ATIS, launched the Next G Alliance in October to “advance North American leadership in 6G.” The alliance’s members include technology giants like Apple Inc., AT&T Inc., Qualcomm Inc., Google and Samsung Electronics Co., but not Huawei.

The alliance mirrors the way that the world has been fractured into opposing camps as a result of 5G rivalry. Led by the U.S, which identified Huawei as an espionage risk — an allegation the Chinese giant denies — countries including Japan, Australia, Sweden and the U.K. have shut the firm out of their 5G networks. However, Huawei is welcomed in Russia, the Philippines, Thailand, and other countries in Africa and the Middle East.

The European Union in December also unveiled a 6G wireless project led by Nokia, which includes companies like Ericsson AB and Telefonica SA, as well as universities.

The lack of trust in Chinese companies like Huawei is unlikely to abate with 6G. Democracies are growing increasingly worried about how 5G technology is being used by authoritarian regimes, with fears that 6G could enable technologies such as mass drone surveillance. China is already using surveillance cameras, AI, facial recognition and biometrics such as voice samples and DNA to track and control citizens.

“Currently China seems to be doing everything in terms of surveillance and suppression to make sure that they lose future markets in the U.S. and Europe,” said Paul Timmers, a senior adviser at Brussels-based think tank European Policy Centre and former director of digital society and cybersecurity at the European Commission. “This indicates that the technical approach to 6G cannot be trusted to be decoupled from state ideological objectives.”

### US Wins Now---1NC

#### US winning the 5G race now.

DAN MAHAFFEE AND JAMES KITFIELD 7/29/21. Dan Mahaffee is senior vice president at the Center for the Study of the Presidency & Congress (CSPC). James Kitfield is a senior fellow at CSPC. “Bipartisan policies put America back into the 5G race against China.” https://thehill.com/opinion/technology/565456-bipartisan-policies-put-america-back-into-the-5g-race-against-china

Fortunately, in strengthening our digital infrastructure at home and meeting the technological challenge from abroad, the United States has a successful playbook in the recent race to field fifth generation, or “5G,” mobile networks that are designed to connect virtually everyone and every electronic device, and are poised to change the way the world communicates.

Just a few years ago, China was so far ahead in deploying 5G networks that many experts believed the United States had already ceded the race. “China and other countries may be creating a 5G tsunami, making it near impossible [for America] to catch up,” analysts at the accounting firm Deloitte wrote. Analysts at Ernst & Young were equally blunt. “China is already in a leading role in the 5G development,” they wrote a few years ago, and “is poised to win the race to 5G.”

The math bore out those grim predictions. Excessive regulatory red tape meant that U.S. carriers were spending nearly three times as much as their counterparts in other countries to generate 5G network capacity. Between 2012 and 2016, the United States constructed on average three new cell sites a day when thousands are needed for 5G. At the time China was building roughly 460 new cell sites per day. As Federal Communications Commission (FCC) Commissioner Brendan Carr pointed out in a recent discussion hosted by the Center for the Study of the Presidency & Congress, “What it was taking us four years to do, China was doing every nine days.”

Fast forward to today. While the race for 5G leadership and onwards to 6G is far from over, the United States is now positioned to successfully compete thanks to measures that have empowered innovation, entrepreneurialism, and enterprise. Rather than trying to “be like China to beat China,” Carr noted, the FCC instead took steps to unleash America’s free enterprise mojo. The FCC thus moved to streamline approvals and cut the fees local governments levied on cell site construction. Freeing up spectrum across low-, mid-, and high-band frequencies allowed for U.S. carriers to innovate by using different frequencies and combinations of coverage.

Once again the numbers tell the tale. In 2019, with that more streamlined framework in place, U.S. carriers built over 46,000 new cell sites, a 65 fold increase. Meanwhile, internet speeds in the United States have more than tripled over the past four years, and more than 270 million Americans are now covered by 5G networks, helping to cut the digital divide separating the “haves” and “have nots” of this critical technology nearly in half.

In recent years both the Trump and Biden administrations have also taken a strong stand against reliance on Chinese companies such as Huawei and ZTE for 5G technology. Under China’s national intelligence law, these companies are legally required to conduct intelligence gathering when asked to by the Chinese Communist Party, which routinely engages in digital spying on dissidents, steals intellectual property, and hacks foreign governments and corporations.

With Huawei already having finalized more 5G contracts than any other telecom company, more still needs to be done to convince allies and partners of the serious risks of relying on Chinese firms for critical digital infrastructure. The Biden administration took a positive step in calling out Beijing’s digital transgressions when it recently rallied a broad and unprecedented group of allies — including the European Union and for the first time, the NATO alliance — to publicly condemn Beijing for malign activities in cyberspace that include hacking Microsoft email systems used by many governments and international corporations.

The good news is that the 5G race is afoot, and the United States is now in it to win it. That success offers clear lessons for the way forward. First, when it comes to infrastructure, we need to pair investments with streamlined deregulatory measures that ensure we are not, as Carr put it, “hitting the brake and the gas at the same time.” Thus unleashed, the American free enterprise system is more than a match for China’s centralized planning model and insistence on iron-gripped government control of the private sector.

### No Race---1NC

#### The “race” is a telecom-industry funded myth.

Nilay Patel 19. "Wait, why the hell is the ‘race to 5G’ even a race?." Verge. 5-23-2019. https://www.theverge.com/2019/5/23/18637213/5g-race-us-leadership-china-fcc-lte

This race is imaginary bullshit. It’s being foisted on us by huge telecom companies that know internet access is fundamentally a commodity and want something new to sell at high prices instead of competing to improve service and lower prices on the networks they have. After all, the United States “won” the “race” for LTE, but it bears repeating: our LTE networks are among the slowest in the world, and our prices among the highest. What did winning that race accomplish for the millions of people across the country that still can’t get a reliable LTE signal?

All I’m asking is that the next time you hear a wireless industry person talk about the “race” to 5G, stop and ask them why it’s a race. Ask who the competitors are, and what happens if we come in second place. See if you buy the answer. I suspect you won’t hear anything convincing.

**1NC – Clog**

**Antitrust fails---expanding scope opens the floodgates to litigation and makes enforcement impossible.**

Geoffrey **Manne, 18.** International Center for Law & Economics president & founder, Congressional Documents and Publications, “Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Hearing; "A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU."; Testimony by Geoffrey Manne, President and Founder, International Center for Law and Economics,” December 19, 2018. Lexis, accessed 6-1-21

II. The specious lure of excessively discretionary antitrust

Antitrust is an attractive regulatory tool for a number of reasons. As noted above, the vague, terse language of the Sherman Act readily lends itself to "interpretation" imbuing it with virtually limit-less scope. Indeed, the urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of the tech indus-try are framed in antitrust terms, even though they are mostly rooted in nothing recognizable as modern, economically informed antitrust legal claims or analysis. **But that attraction is precisely why we should care about the scope**, process, and economics of anti-trust and the extent of its politicization. Antitrust in the US has largely resisted the relentless effort to politicize it. Despite being rooted in vague and potentially expansive statutory language, US anti-trust is economically grounded, evolutionary, and limited to a set of achievable social welfare goals. In the EU, by contrast, these sorts of constraints are far weaker. Whether or not that is suitable for the particular political and historical circumstances of the EU is a separate question. But, undoubt-edly, applying a controversial legal regime to the United States -- a markedly different jurisdiction with a unique governance structure -- and upsetting more than a century of legal, technological, and social development, is deeply problematic. This conclusion is in no way altered by the fact that US antitrust law has become the outlier of global antitrust enforcement, compared to the EU's more "consensual" approach. n26 What matters is a policy's actual results, not whether it is widely adopted; the world is full of debunked beliefs that were once widely shared. And it is far from certain that the widespread adoption of the EU model is in any way indicative of superior results. It is equally (or even more) plausible that this model has proliferated because it naturally accommodates politically useful populist narratives -- such as "big is bad," robin hood fallacies and robber baron myths -- that are constrained by the US's more evidence-based and rational antitrust decision-making. n27 America's isolation might thus be a testament to its success rather than an emblem of its failure. But even if by some chance the European approach proved to be optimal for many other countries in the world, it is still dubious that its adoption would lead to improved economic performance in the United States. As has already been alluded to, the unique features of the US legal regime make it unlikely that the best policy for the EU would also happen to be the best one for America. The EU's more aggressive pursuit of technology platforms under its antitrust laws demonstrates many of the problems with its approach in general. I urge this subcommittee to consider not just whether the EU approach seems to permit the government to reach a preconceived outcome -- i.e., placing large tech platforms under increased antitrust scrutiny -- but whether it is truly desirable at all to emulate the EU's approach and to try to reach the goals of EU competition policy under US antitrust law. Endorsing the European approach to antitrust, in a naive attempt to bring high-pro-file cases against large Internet platforms, would prioritize political expediency over the rule of law. It would open the floodgates of antitrust litigation and facilitate deleterious tendencies, such as non-economic decision-making, rent-seeking, regulatory capture, and politically motivated enforce-ment. Bringing US antitrust enforcement in line with that of the EU would thus unlock a veritable **Pan-dora's box** of concerns that are currently kept in check. Chief among them is the use of antitrust laws to evade democratically and judicially established rules and legal precedent. When consider-ing this question, it is important to see beyond any particular set of firms that enforcement offi-cials and politicians may currently be targeting. An antitrust law expanded to consider the full scope of soft concerns that the EU aims at will not be employed against only politically disfavored companies, companies in other jurisdictions, or in order to expediently "solve" otherwise political problems. **Once antitrust is expanded** beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints**.**

# 2nc

## Regs CP

#### 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.

#### Deters injunctions, overburdens SEP owners, and links to the net benefit---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

#### “Expanding the scope” of “anti-trust laws” must be the DOJ and FTC.

Jarod Bona 21. Bona Law PC. "Five U.S. Antitrust Law Tips for Foreign Companies". Antitrust Attorney Blog. 1-16-2021. https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/

1. Two federal and many state agencies enforce antitrust laws in the United States

The United States government has two separate antitrust agencies—the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

Both of them enforce federal antitrust laws (among other laws). Their jurisdictions technically overlaps, but they tend to have informal agreements between each other for one or the other to handle certain industries or subjects. If you are part of a major industry, your antitrust lawyer may be able to tell you whether the DOJ or FTC is likely to oversee competition issues in your field.

#### 2. Jurisdiction: the plan expands the DOJ and FTC role.

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](about:blank)

There is a crucial battle playing out in the world of Internet access provision. While the Internet is the natural home of competing business giants and warring digital avatars, the contest that will have the most sweeping ramifications for the future of the Internet is the turf war being waged between the Federal Communications Commission (FCC), on the one hand, and the Federal Trade Commission (FTC) and the Department of Justice (DOJ), on the other.1 Nothing less than jurisdiction over the development of the Internet is at stake.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times.2 But it is the current iteration of the FCC’s “net neutrality” regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.3 For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service.4 Net neutrality has reinvigorated what may be described as an underlying interagency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose—to protect consumers and to promote allocative efficiencies in production—the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws “typically aim at similar goals—i.e., low and economically efficient prices, innovation, and efficient production methods” —regulation looks to achieve these goals directly “through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.”5 The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?6

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets— regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.7 Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.8 In the vast major- ity of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

This Article sets forth a framework to identify the boundaries between FCC regulatory power and antitrust authority. The goal is to pinpoint for Congress the problematic use of regulatory discretion in defining, or redefining, those boundaries and to propose the standard by which Congress may address inappropriate use of existing FCC jurisdiction. Specifically, this Article creates a new categorization of “procedural opportunism” and “substantive opportunism” to identify problematic, regulatory assertions of jurisdiction. The central issue examined in this Article is to posit what is (or should be) the boundaries of antitrust law in relation to the FCC’s regulatory authority. This important issue has reached a point of public crises in the current net neutrality debate.9 Rather than act reflexively, this is an opportunity for Congress to act clearly to redefine the boundaries between the two regimes that have otherwise been blurred by regulatory overreach.

#### 3. Legal code---antitrust requires Title 15 of US Code.

Sanjukta M. Paul 16. David J. Epstein Fellow, UCLA School of Law. The Enduring Ambiguities of Antitrust Liability for Worker Collective Action. Loyola University Chicago Law Journal. https://www.congress.gov/116/meeting/house/110152/witnesses/HHRG-116-JU05-Wstate-PaulS-20191029-SD002.pdf

Unlike the Clayton Act, which was the first legislative attempt at a labor exemption from antitrust,202 the Norris-La Guardia Act did not grapple directly with trade regulation in subject matter—even with how trade regulation applies to labor—although it had the effect of modifying its reach. Norris-La Guardia is not an antitrust statute. Instead, it is incorporated into Title 29 (“Labor”) of the United States Code. By contrast, the Clayton Act was conceived and written as an antitrust statute, was incorporated into Title 15, the antitrust and trade regulation section of the Code, and portions of it dealt with matters other than labor.

#### Antitrust authorities will share expertise with regulators.

FTC 06. “Creating Constructive Relationships Between Competition Policy and Sectoral Regulators: Submission of the United States”. (Paper presented at the Latin American Competition Forum Fourth Annual Meeting, San Salvador, 2006). https://web.archive.org/web/20070910185812/http://www.iadb.org/europe/files/news\_and\_events/2006/LACF2006/SesI\_USA\_EN.pdf

The relationships between sectoral regulators in the United States and the two federal antitrust authorities, the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), have evolved over the past 30 years. Prior to the 1970s, the regulators and the agencies interacted with each other relatively infrequently. At that time, the antitrust agencies began to engage in competition advocacy, through which they attempted to explain how various regulatory policies impacted competition and consumer welfare and the potential benefits of deregulation. As understanding of the economics of regulation has grown, federal sectoral regulators today increasingly embrace the goals of competition policy and tend to share a common set of policy objectives with the antitrust agencies. While differences remain in the case of some regulators, the competition agencies and sectoral regulators today increasingly coordinate and cooperate with each other, sharing industry and market expertise

#### Regs solve FRANDS disputes specifically 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.

#### Regs solve and applying antitrust to SSOs is bad---chills participation.

David J. Teece and 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 in Emeryville, CA, and a member of the California Bar. Standards Setting and Antitrust. Minnesota Law Review. 782. 2003. Pg. 1985-1986

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.

## Innovation

### Innovation Now---2NC

#### Data disproves holdup---no added benefit since industry is at growth capacity

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

3.2 Telephones: From a monopoly to a SEP industry

The alert reader may have noticed in Figure 3 that the price telephone equipment increased between 1992 and 1997. Is that an anomaly? Telephone equipment is interesting, because it turned into a SEP industry only recently. Indeed, until 30 years ago, local telephone services were provided by one monopoly, ATT, which manufactured equipment and did R&D. Thus, the long-run evolution of the relative price of telephone equipment allows us to compare industry performance under both regimes ---integration and SEP decentralization.

Figure 5, shows the price index of telephone and facsimile equipment (as calculated by the BEA’s price indices for personal consumption) and, to compare with a SEP industry, the price index of TV sets. As before, each price series is adjusted for inflation (it is a price relative to the CPI) and now the base year is 1951. We chose 1951 as the initial year of the series because TVs have been included in the CPI since 1951.

The relative price of telephone equipment did not change much between 1951 and 1971. It fell somewhat during the seventies but then shoot up until the late 1990s. Thus, in 1997 telephone equipment was more than 35% more expensive than in 1951. Nevertheless, since its peak in 1997, the relative price of telephone equipment fell precipitously and, as we have already seen, the quality adjusted relative price is roughly one-fourth of what it was 16 years ago in 1997. The original cell phone, Motorola’s DynaTAC 8000X, was introduced in 1983 and its retail value was $3,995, about $9,000 in today’s dollars.

The ATT monopoly was broken up in 1982 and long distance was liberalized. Yet the relative price of telephone equipment began to rise. This should not be surprising, because the ATT breakup created seven independent regional local monopolies ---it didn’t quite change industry structure. The grip of local fixed line monopolies on telephone equipment loosened only when mobile phones began to spread fast in 1999 and became an effective substitute of fixed phones.

Note that the trajectory of the relative price of telephone equipment is the opposite of what the patent holdup hypothesis would predict. As long as telephone equipment was used mainly by vertically integrated monopolies and unaffected by holdup, its relative price remained constant or increased. But when cell phone use diffused and telephone equipment became the quintessential SEP industry, prices plummeted, the opposite prediction of the patent holdup conjecture. Moreover, the trajectory of the relative price of telephone equipment contrast with that of televisions, which has fallen continuously since 1951, to about 1/250th in 2012 (─8.7% p.a.).9

Again, the behavior of the price of televisions is very different from that of other industries. Figure 6 compares the evolution of the real price of televisions between 1951 and 2012 with the evolution of the relative price of soft drinks, household electricity, pharmaceuticals and other medical products and cars, our non SEP industry.

Soft drinks cost about 20% more today than in 1951, and their relative price is constant since the mid-1990s. The price of pharmaceuticals, on the other hand, falls until the mid-1970s, but then increases. And the price of electricity shows ups and downs. The relative price of cars falls about 60% since 1951 (─1.6% p.a.), but this performance is modest compared with televisions.

As in all our analysis confirms our conclusion: over long periods SEP industries tend to show better performance than most other industries. There is no evidence in favor of the patent holdup conjecture.

3.3 Relative to what?

It might still be argued that, were it not for the holdup problem, prices of SEP industries’ goods would have fallen even faster. But the argument, “it could be even better,” begs the question “relative to what?”

A standard finding in the literature is that there is a negative relationship between an industry’s relative growth rate of productivity and the growth rate of its relative prices. Relatively quick price declines are good indicators of relatively quick productivity growth. Indeed, empirical studies show that the regression coefficient is roughly ─1! 10 Hence, if an industry experiences average productivity growth across all industries, its relative price does not change; and if an industry’s rate of productivity growth is one percentage point faster than the average, the industry’s relative price tends to fall by one percent faster as well.

Research also indicates that the maximum rate of long-run (over decades) productivity growth for an industry is typically less than 6% per annum. Thus, if average, cross industry annual productivity growth is 1%, the fastest rate of long-run relative productivity growth is about 5%.

Now, again consider the behavior of the relative prices SEP industry products. We found that the relative prices of SEP industries were falling by much faster than 6% per. Of course, the price data that we are using adjust for quality, so not all of the reported fall in the relative price of a SEP industry is due to productivity increases on the cost side. But it nonetheless shows that the performance of SEP industries is remarkable by any realistic standard. So the “without holdup it could be even better” is apparently saying that it could be even better than anything that is normally observed.

### SSOs Work---2NC

#### Standardization is high now causing innovation

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

A. Objectives and Benefits of Standardization

Industry standards ensure that products from multiple vendors are compatible and interoperable. A standard can be defined as a set of technical specifications which seeks to provide a common design for a product or process.[[18]](#footnote-18) The welfare benefits deriving from the existence of standards are obvious. By allowing complementary or component products from different manufacturers to be combined or used together, they increase consumer choice and convenience, and reduce costs.[[19]](#footnote-19) For instance, amongst other practical benefits, they allowed the authors of this paper to connect wirelessly to the Internet from different locations in search of relevant materials.[[20]](#footnote-20) These consumer benefits can be especially important in network markets, i.e. where the value of a product or a service to a particular consumer increases with the number of consumers using the same product or service.[[21]](#footnote-21) Examples of such markets abound in the information and communications technology (“ICT”) sectors, where protocols allowing devices to communicate seamlessly and networks owned by different providers to interconnect are essential.

In today’s technology-driven world, the importance of industry standardization, device interoperability and product-compatibility have become critical to promoting innovation and competition.[[22]](#footnote-22) Standardization has been one of the key factors explaining the significant growth in innovation and product differentiation in the ICT sector. Of course, achieving product compatibility through standardization usually entails making choices, the effects of which will represent a cost. Standardization may at some point and to some extent constrain a variety of technological options by reducing competition between rival technologies.[[23]](#footnote-23) As will be seen below, it may also raise issues related to access where, as is generally the case, the standard embodies proprietary technology covered by intellectual property rights (“IPR”).[[24]](#footnote-24)

### Magnifier---System Bias---2NC

#### Squo bias means additional policy stifles innovation

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/

D. POLICY IMPLICATIONS

The above analysis suggests that SSOs are likely to be biased toward a societally inefficient attitude towards IP when setting standards, for three reasons: (1) the rules of the SSOs are likely to favor the users of IP rather than the owners of IP, as the former outnumber the latter; (2) SSO participants tend to be engineers, with an engineer's bias against patents; and (3) royalties are treated as a private cost by manufacturers and end-users, despite the fact that from a societal standpoint they are best seen as a transfer payment rather than a (social) cost.77

This in turn suggests that both the antitrust authorities and the legislature should tread warily when making public policy in this area. The complaints of those who believe that they are being compelled to "overpay" for the use of others' IP embedded in the standard are frequently and forcefully stated.78 The more reasoned and quieter countervailing arguments focused on the social benefits of innovation and the need to compensate inventors for their efforts often are downed out by this din. The tension between static and dynamic views of efficiency is nothing new in the context of IP. But it suggests that policies that further burden IP and IP holders will only exacerbate the problem.

### Antitrust Decks SSOs---2NC

#### 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

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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

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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.

### Democracy

#### Democracy doesn’t solve war – increases hostility.

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Conclusion

It has become a stylized fact that dyadic democracy lowers the hazard of armed conflict. While the Democratic Peace has faced many challenges, we believe the most significant challenge has come from the argument that the pacifying effect of democracy is epiphenomenal to territorial issues, specifically the external threats that they pose. This argument sees the lower hazards of armed conflict among democracies not as a product of shared norms or institutional structures, but as a result of settled borders. Territory, though, remains only one geo-political context generating threat, insecurity, and a higher likelihood of armed conflict. Strategic rivalry also serves as an environment associated with fear, a lack of trust, and an expectation of future conflict. Efforts to assess democratic pacifism have largely ignored rivalry as a context conditioning the behavior of democratic leaders. To be sure, research demonstrates rivals to have higher probabilities of armed conflict and democracies rarely to be rivals. But fundamental to the Democratic Peace is the notion that even in the face of difficult security challenges and salient issues, dyadic democracy will associate with a lower likelihood of militarized aggression. But the presence of an external threat, be that threat disputed territory or strategic rivalry, may be the key mechanism by which democratic leaders, owing to audience costs, resolve and electoral pressures, fail to resolve problems nonviolently.

This study has sought a ‘‘hard test’’ of the Democratic Peace by testing the conditional effects of joint democracy on armed conflict when external threat is present. We test three measures of threat: territorial contention, strategic rivalry, and a threat index that sums the first two measures. For robustness checks, we use two additional measures of our dependent variable: fatal MID onset, and event data from the Armed Conflict Database, which can be found in our Online Appendix. As most studies report, democratic dyads are associated with less armed conflict than mixed-regime and autocratic dyads. In every one of our models, when we control for each measure of external threat, joint democracy is strongly negative and significant and each measure of threat is strongly positive and significant. Here, liberal institutions maintain their pacific ability and external threats clearly increase conflict propensities. However, when we test the interactive relationship between democracy and our measures of external threat, the pacifying effect of democracy is less visible. Park and James (2015) find some evidence that when faced with an external threat in the form of territorial contention, the pacifying effect of joint democracy holds up. This study does not fully support the claims of Park and James (2015). Using a longer timeframe, we find more consistent evidence that when faced with an external threat, be it territorial contention, strategic rivalry, or a combination, democratic pacifism does not survive. What are the implications of our study? First, while it is clear that we do not observe a large amount of armed conflict among democratic states, if we organize interstate relationships along a continuum from highly hostile to highly friendly, we are probably observing what Goertz et al. (2016) and Owsiak et al. (2016) refer to as ‘‘lesser rivalries’’ in which ‘‘both the frequency and severity of violent interaction decline. Yet, the sentiments of threat, enmity, and competition that remain—along with the persistence of unresolved issues—mean that lesser rivalries still experience isolated violent episodes (e.g., militarized interstate disputes), diplomatic hostility, and non-violent crises’’ (Owsiak et al. 16). Second, our findings show that the pacific benefits of liberal institutions or externalized norms are not always able to lower the likelihood of armed conflict when faced with external threats, whether those hazards are disputed territory, strategic rivalry, or a combination of the two. The structural environment clearly influences democratic leaders in their foreign policy actions more than has heretofore been appreciated. Audience costs, resolve, and electoral pressures, produced from external threats, are powerful forces that are present even in jointly democratic relationships. These forces make it difficult for leaders to trust one another, which inhibits conflict resolution and facilitates persistent hostility. It does appear, then, that there is a limit to the Democratic Peace.

### Not Existential---1NC/2AC

#### No extinction---new studies.

Nordhaus 20**.** Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816)

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is **a real climate debate** bubbling along in **scientific journals**, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But **most pessimists** do not believe that **runaway climate change** or **a hothouse earth** are plausible scenarios, **much less** that **human extinction** is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. **A richer world** will also likely be **more technologically advanced**, which means that energy consumption should be **less carbon-intensive** than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that **global economic growth** over the last decade has **reduced** climate mortality by **a factor of five**, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But **recent forecasts** also suggest that many of **the worst-case climate scenarios** produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also **very unlikely**. There is **still substantial uncertainty** about how sensitive global temperatures will be to higher emissions over the long-term. But **the best estimates** now suggest that the world is on track for **3 degrees of warming** by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

#### No credible scientific organization thinks warming causes extinction.

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First, no credible scientific body has ever said climate change threatens the collapse of civilization much less the extinction of the human species. “‘Our children are going to die in the next 10 to 20 years.’ What’s the scientific basis for these claims?” BBC’s Andrew Neil asked a visibly uncomfortable XR spokesperson last month.

“These claims have been disputed, admittedly,” she said. “There are some scientists who are agreeing and some who are saying it’s not true. But the overall issue is that these deaths are going to happen.”

“But most scientists don’t agree with this,” said Neil. “I looked through IPCC reports and see no reference to billions of people going to die, or children in 20 years. How would they die?”

“Mass migration around the world already taking place due to prolonged drought in countries, particularly in South Asia. There are wildfires in Indonesia, the Amazon rainforest, Siberia, the Arctic,” she said.

But in saying so, the XR spokesperson had grossly misrepresented the science. “There is robust evidence of disasters displacing people worldwide,” notes IPCC, “but limited evidence that climate change or sea-level rise is the direct cause”

What about “mass migration”? “The majority of resultant population movements tend to occur within the borders of affected countries," says IPCC.

It’s not like climate doesn’t matter. It’s that climate change is outweighed by other factors. Earlier this year, researchers found that climate “has affected organized armed conflict within countries. However, other drivers, such as low socioeconomic development and low capabilities of the state, are judged to be substantially more influential.”

Last January, after climate scientists criticized Rep. Ocasio-Cortez for saying the world would end in 12 years, her spokesperson said "We can quibble about the phraseology, whether it's existential or cataclysmic.” He added, “We're seeing lots of [climate change-related] problems that are already impacting lives."

That last part may be true, but it’s also true that economic development has made us less vulnerable, which is why there was a 99.7% decline in the death toll from natural disasters since its peak in 1931.

In 1931, 3.7 million people died from natural disasters. In 2018, just 11,000 did. And that decline occurred over a period when the global population quadrupled.

What about sea level rise? IPCC estimates sea level could rise two feet (0.6 meters) by 2100. Does that sound apocalyptic or even “unmanageable”?

Consider that one-third of the Netherlands is below sea level, and some areas are seven meters below sea level. You might object that Netherlands is rich while Bangladesh is poor. But the Netherlands adapted to living below sea level 400 years ago. Technology has improved a bit since then.

What about claims of crop failure, famine, and mass death? That’s science fiction, not science. Humans today produce enough food for 10 billion people, or 25% more than we need, and scientific bodies predict increases in that share, not declines.

The United Nations Food and Agriculture Organization (FAO) forecasts crop yields increasing 30% by 2050. And the poorest parts of the world, like sub-Saharan Africa, are expected to see increases of 80 to 90%.

Nobody is suggesting climate change won’t negatively impact crop yields. It could. But such declines should be put in perspective. Wheat yields increased 100 to 300% around the world since the 1960s, while a study of 30 models found that yields would decline by 6% for every one degree Celsius increase in temperature.

Rates of future yield growth depend far more on whether poor nations get access to tractors, irrigation, and fertilizer than on climate change, says FAO.

All of this helps explain why IPCC anticipates climate change will have a modest impact on economic growth. By 2100, IPCC projects the global economy will be 300 to 500% larger than it is today. Both IPCC and the Nobel-winning Yale economist, William Nordhaus, predict that warming of 2.5°C and 4°C would reduce gross domestic product (GDP) by 2% and 5% over that same period.

Does this mean we shouldn’t worry about climate change? Not at all.

One of the reasons I work on climate change is because I worry about the impact it could have on endangered species. Climate change may threaten one million species globally and half of all mammals, reptiles, and amphibians in diverse places like the Albertine Rift in central Africa, home to the endangered mountain gorilla.

But it’s not the case that “we’re putting our own survival in danger” through extinctions, as Elizabeth Kolbert claimed in her book, Sixth Extinction. As tragic as animal extinctions are, they do not threaten human civilization. If we want to save endangered species, we need to do so because we care about wildlife for spiritual, ethical, or aesthetic reasons, not survival ones.

#### Adaptation solves even if the most catastrophic outcome occurs.

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The most likely levels of global warming are very unlikely to cause human extinction.15 The existential risks of climate change instead stem from tail risk climate change – the low probability of extreme levels of warming – and interaction with other sources of risk. It is impossible to say with confidence at what point global warming would become severe enough to pose an existential threat. Research has suggested that warming of 11-12°C would render most of the planet uninhabitable,16 and would completely devastate agriculture.17 This would pose an extreme threat to human civilisation as we know it.18 Warming of around 7°C or more could potentially produce conflict and instability on such a scale that the indirect effects could be an existential risk, although it is extremely uncertain how likely such scenarios are.19 Moreover, the timescales over which such changes might happen could mean that humanity is able to adapt enough to avoid extinction in even very extreme scenarios.

The probability of these levels of warming depends on eventual greenhouse gas concentrations. According to some experts, unless strong action is taken soon by major emitters, it is likely that we will pursue a medium-high emissions pathway.20 If we do, the chance of extreme warming is highly uncertain but appears non-negligible. Current concentrations of greenhouse gases are higher than they have been for hundreds of thousands of years,21 which means that there are significant unknown unknowns about how the climate system will respond. Particularly concerning is the risk of positive feedback loops, such as the release of vast amounts of methane from melting of the arctic permafrost, which would cause rapid and disastrous warming.22 The economists Gernot Wagner and Martin Weitzman have used IPCC figures (which do not include modelling of feedback loops such as those from melting permafrost) to estimate that if we continue to pursue a medium-high emissions pathway, the probability of eventual warming of 6°C is around 10%,23 and of 10°C is around 3%.24 These estimates are of course highly uncertain.

It is likely that the world will take action against climate change once it begins to impose large costs on human society, long before there is warming of 10°C. Unfortunately, there is significant inertia in the climate system: there is a 25 to 50 year lag between CO2 emissions and eventual warming,25 and it is expected that 40% of the peak concentration of CO2 will remain in the atmosphere 1,000 years after the peak is reached.26 Consequently, it is impossible to reduce temperatures quickly by reducing CO2 emissions. If the world does start to face costly warming, the international community will therefore face strong incentives to find other ways to reduce global temperatures.

## Cyber

### No Cyberattacks---2NC

#### No terminal impact to cyber-attacks---that’s Lewis---prefer evidence from 2020 that speaks to COVID budget constraints and new age deterrence---

#### 1---No technical skills---it requires organization and technique actors do not possess---two decades of electrical companies prioritizing cyber securities has created strategic constraints. To achieve mass effect, multiple targets have to be hit at once---but it can’t be produced---2003 East Coast Blackout prove.

#### 2---Uncertainty---proves ambiguity is net good for deterrence---uncertainty over the US ability to attribute means all actors are unwilling to risk mass retaliation.

#### 3---Hysteria---our evidence says bunk reports of incoming cyber-attacks have been highlighted since the 90s yet in 25 years of threats there has not been a single event causing mass death or destruction—they’re made up to scare people into action.

#### 4---Economies—their robustness and growing threat under COVID eliminates any incentive Russia, China or Iran has to launch an attack.

#### No cyber impact---every scenario is empirically denied.

James Andrew Lewis 18 senior vice president at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” [https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/180108\_Lewis\_ReconsideringCybersecurity\_Web.pdf](about:blank), p. 7-11

The most dangerous and damaging attacks required resources and engineering knowledge that are **beyond the capabilities of nonstate actors**, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect. State Use of Cyber Attack Is Consistent with Larger Strategic Aims Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations. Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the **risk of retaliation**—a risk they manage by **avoiding actions that would provoke** a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace. **The reality of cyber attack differs greatly from our fears**. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents' goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be **counted on one hand**. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War. Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. **Terrorists do not seek to inflict economic damage**. The difficulty of wreaking real harm on large, interconnected economies is usually ignored. Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets. The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). **Russians want confusion, not physical damage**. Iran and **No**rth **Ko**rea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction. None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been **limited** in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but **do not have a major effect on the national economy**. In all of these actions, **there is a line that countries have been unwilling to cross.** When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. **Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts**. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless. It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are **very unlikely** to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States. There have been thousands of incidents of cybercrime and cyber espionage, but only a **handful** of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. **Cyber attacks are not random**. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO. There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. **Only two caused tangible damage**; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. **In no instance were there deaths or casualties**. **In two decades of cyber attacks, there has never been a single casualty**. This alone should give pause to the doomsayers. **Nor has there been widespread collateral damage**.

**Threat of retaliation checks cyber-attacks---AND, terrorists lack the capabilities.**

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Widespread belief that offense is easier than defense in cyberspace, that stronger states are increasingly vulnerable while weaker actors are increasingly empowered, and that the anonymity of cyber operations precludes effective deterrence leads many to argue that cyberspace brims with unprecedented, even revolutionary dangers. 2 Yet national security officials, defense firms, media pundits, and a burgeoning private cybersecurity industry all have **incentives to exaggerate the threat**, while the extreme secrecy of cyber operations complicates sober assessment.3 Critics of the cyber revolution argue that most actors **lack the capacity** to overcome **significant barriers** to weaponization in cyberspace, while those that have the capacity **lack the motivation** to use it, choosing instead to explore digital variations on traditional espionage and covert action.4 Nevertheless, even if breathless scenarios of a “digital Pearl Harbor” or “cyber 9/11” are **overblown**, cyberspace poses real challenges for international relations in theory and practice. As Austin Long argues in chapter 2, intelligence and coercion are increasingly linked, and cyberspace is increasingly valuable for intelligence. Recent events demonstrate that strategic actors are willing to use cyber operations as a tool of statecraft, even as the strategic results have proved ambiguous at best: Russian denial of service attacks and information operations in Estonia, Georgia, and Ukraine; relentless Chinese espionage campaigns and intrusive internet censorship; U.S.-Israeli sabotage of Iranian nuclear enrichment infrastructure; Iranian retaliation against Saudi Aramco and American banks; American cooptation of major internet firms for global signals intelligence collection revealed by Edward Snowden; criminal breeches of leading firms and government agencies exposing the private data of millions of citizens and government employees; North Korean harassment of Sony in Hollywood to protest a satirical movie; Russian attempts to influence the 2016 U.S. presidential election, and the list goes on. To paraphrase Clausewitz, cyberwar is politics by other means. Understanding the dynamics, magnitude, and likelihood of aggression online requires an assessment of the operational requirements for staging various types of cyber operations, the strategic benefits actors hope to gain through them, and the risks of unintended consequences. In this chapter we lay out a typology of cyber operations that combines the logic of technological possibility with the logic of strategic utility. We distinguish a number of myths that assume cyber attacks can provide high rewards at low cost from more realistic options that deliver variable rewards at variable costs. There is no free lunch in cyberspace. As a result of technical and political constraints on secret operations that depend on interconnections between adversaries, the coercive potential of cyberspace is more limited than generally appreciated. Because **voluntary connections** to the internet make cyber harms possible in the first place, aggressors must be careful not to provoke their victims to disconnect. The **social** and **economic value** of the internet both expands and **constrains the scope** for minor aggression like espionage, covert influence, and symbolic protest. Moreover, the availability of military instruments beyond the cyber domain creates potential for retaliation for unacceptable harms. There are **diminishing incentives** to “go big” with cyber warfare, **even** as an adjunct to battlefield **op**eration**s**, because victims have incentives to **mount major investigations** and **shift domains** to **punish cyber aggression**. Coercion still has an important role in cyberspace, nonetheless, especially when exploited in conjunction with other forms power such as military force. We thus delineate the ways in which the cyber domain can be used alone or in conjunction with other domains for **deterrence** or compellence. Strategic logic helps to explain the highly skewed distribution of cyber harms we observe historically. While information technology creates the possibility for harm, it is political and economic incentives that determine the probability of harm. Small-scale aggression online and computer crime is relatively appealing and thus more abundant; large-scale cyber attacks are more difficult and less desirable for initiators and thus far less likely to occur. This argument extends the logic of the **“stability-instability paradox”** pioneered in the 1960s. Mutually assured destruction may have restrained the superpowers from engaging in direct confrontations during the Cold War, but nuclear threats could not credibly prevent the exercise of proxy wars throughout the Third World. The mechanisms of restraint in the cyber domain are slightly different than in the nuclear world insofar as actors look to maintain connectivity and avoid military retaliation vs. mutual Armageddon, but the results are similar: we see little to none of the most dangerous behavior but a great deal of provocative friction. It turns out that cyber revolutionaries and cyber skeptics are both partially correct. We should expect to see a lot more creative exploitation of global information infrastructure, but threat actors have **strong incentives** to **restrain** the intensity of their exploitation.

#### Deterrence prevents cyber-attacks.

George Perkovich & Ariel Levite 17. \*\*Ken Olivier and Angela Nomellini Chair and Vice President for Studies, Carnegie; PhD, University of Virginia. \*\*Nonresident Senior Fellow and Nuclear Policy Program, Carnegie; PhD, Cornell. “Conclusions from Understanding Cyber Conflict: 14 Analogies.” Carnegie. [http://carnegieendowment.org/2017/10/16/conclusions-from-understanding-cyber-conflict-14-analogies-pub-73419](about:blank).

Again, nuclear war has not been experienced between adversaries who both possessed these weapons. Many argue that the unique, horrifying, and irreversible destructiveness inherent in nuclear weapons has encouraged restraint and, to date, made mutual deterrence work. In contrast, cyber attacks have become **commonplace**, albeit on a limited scale thus far, and **clearly** have not exhibited the mass-disruption potential they are widely believed to possess. Does the relative nondestructiveness of cyber weapons open the way to their potential use to achieve massive disruption? Or is the inability to confine and predict their effects (much as with biological weapons) a major cause of restraint? And would this unpredictability make deterrence as developed in the nuclear domain less tenable, as Steven Miller suggests?

Cyber weapons are more analogous to biological than to nuclear weapons in terms of their low visibility and the type of effects they could have.1 Thankfully, experience with biological weapons is limited, and the possession and use of these weapons are now banned by the Geneva Protocol of 1925 and the Biological Weapons Convention of 1972. The latter has not been universally signed or adhered to, and it does not preclude some future use of biological weapons that could have implications similar to cyber warfare. But for now it can be said the restraints on biological warfare are far greater than those on cyber warfare. On the one hand, as with biological weapons, the development, penetrations, and attacks—for offensive and defensive purposes—of cyber weapons could go undetected, at least for a time. They could remain concealed even after indications of their existence appeared. At least for some time, it could be difficult to distinguish reliably whether an effect was due to an attack or a natural occurrence, further complicating attribution in case of attack. Biological attacks, like cyber attacks, can have minor effects and can be temporary and eradicable. On the other hand, some cyber and biological attacks could be immediately detected and identified as such, and they could cause extensive and long-lasting damage. Just as with biological weapons, their effects may hinge on numerous factors, some of which are transient, thereby creating serious uncertainty about their real-world effects and further undermining the capacity to precisely tailor the damage they inflict.

The Contingent Future of Cyber Weapons

To summarize, the versatility of cyber weapons, the unbounded distance over which cyber intelligence gathering and attack can be conducted, the safety that cyber technologies afford their operators, the secrecy and difficulty of attribution they entail, the low cost of attacks, and the potential precision and reduced violence of their effects—all make these weapons not only more tempting to use but actually more usable than other coercive instruments are. Is their overall impact, then, stabilizing or destabilizing? If the uncertainty over attribution and the reduced scope, level, and duration of damage imposed by cyber weapons make states (and others) less inhibited to conduct such attacks, war and its escalation could become more likely. In parallel, the attractiveness of versatile cyber capabilities could diminish states’ attention to and investment in diplomacy and other instruments of statecraft. Conversely, cyber weapons could be unusually **stabilizing** in two ways—if the relative utility of cyber weapons makes them a **credible instrument of deterrence** or compellence and if they can serve as an **effective firebreak** against further escalation, thus reducing incidents of conflict or **capping escalation** in crises. The flip side is that many, if not most, of the states that are most capable of deploying potent cyber weapons are **themselves vulnerable** to the damage such weapons can inflict. Moreover, the uncertainty of cyber weapons’ effects and the risk that malware can be replicated and proliferated relatively easily have made leading cyber states **cautious** in using them, at least to date.

#### Prefer security experts over industry hype --- there’s no escalation risk.

Jon LINDSAY AND Erik GARTZKE 16. \*\*Assistant Professor of Digital Media and Global Affairs at the University of Toronto. \*\*Associate Professor at UC San Diego. “Coercion through Cyberspace: The Stability-Instability Paradox Revisited” in K. M. Greenhill & J. P. Krause eds. *The Power to Hurt: Coercion in Theory and in Practice*. Oxford University Press. Forthcoming.

Widespread belief that offense is easier than defense in cyberspace, that stronger states are increasingly vulnerable while weaker actors are increasingly empowered, and that the anonymity of cyber operations precludes effective deterrence leads many to argue that cyberspace brims with unprecedented, even revolutionary dangers. 2 Yet national security officials, defense firms, media pundits, and a burgeoning private cybersecurity industry all have incentives to exaggerate the threat, while the extreme secrecy of cyber operations complicates sober assessment.3 Critics of the cyber revolution argue that most actors lack the capacity to overcome significant barriers to weaponization in cyberspace, while those that have the capacity lack the motivation to use it, choosing instead to explore digital variations on traditional espionage and covert action.4 Nevertheless, even if breathless scenarios of a “digital Pearl Harbor” or “cyber 9/11” are overblown, cyberspace poses real challenges for international relations in theory and practice. As Austin Long argues in chapter 2, intelligence and coercion are increasingly linked, and cyberspace is increasingly valuable for intelligence. Recent events demonstrate that strategic actors are willing to use cyber operations as a tool of statecraft, even as the strategic results have proved ambiguous at best: Russian denial of service attacks and information operations in Estonia, Georgia, and Ukraine; relentless Chinese espionage campaigns and intrusive internet censorship; U.S.-Israeli sabotage of Iranian nuclear enrichment infrastructure; Iranian retaliation against Saudi Aramco and American banks; American cooptation of major internet firms for global signals intelligence collection revealed by Edward Snowden; criminal breeches of leading firms and government agencies exposing the private data of millions of citizens and government employees; North Korean harassment of Sony in Hollywood to protest a satirical movie; Russian attempts to influence the 2016 U.S. presidential election, and the list goes on.

To paraphrase Clausewitz, cyberwar is politics by other means. Understanding the dynamics, magnitude, and likelihood of aggression online requires an assessment of the operational requirements for staging various types of cyber operations, the strategic benefits actors hope to gain through them, and the risks of unintended consequences. In this chapter we lay out a typology of cyber operations that combines the logic of technological possibility with the logic of strategic utility. We distinguish a number of myths that assume cyber attacks can provide high rewards at low cost from more realistic options that deliver variable rewards at variable costs. There is no free lunch in cyberspace. As a result of technical and political constraints on secret operations that depend on interconnections between adversaries, the coercive potential of cyberspace is more limited than generally appreciated. Because voluntary connections to the internet make cyber harms possible in the first place, aggressors must be careful not to provoke their victims to disconnect. The social and economic value of the internet both expands and constrains the scope for minor aggression like espionage, covert influence, and symbolic protest. Moreover, the availability of military instruments beyond the cyber domain creates potential for retaliation for unacceptable harms. There are diminishing incentives to “go big” with cyber warfare, even as an adjunct to battlefield operations, because victims have incentives to mount major investigations and shift domains to punish cyber aggression. Coercion still has an important role in cyberspace, nonetheless, especially when exploited in conjunction with other forms power such as military force. We thus delineate the ways in which the cyber domain can be used alone or in conjunction with other domains for deterrence or compellence.

Strategic logic helps to explain the highly skewed distribution of cyber harms we observe historically. While information technology creates the possibility for harm, it is political and economic incentives that determine the probability of harm. Small-scale aggression online and computer crime is relatively appealing and thus more abundant; large-scale cyber attacks are more difficult and less desirable for initiators and thus far less likely to occur. This argument extends the logic of the “stability-instability paradox” pioneered in the 1960s. Mutually assured destruction may have restrained the superpowers from engaging in direct confrontations during the Cold War, but nuclear threats could not credibly prevent the exercise of proxy wars throughout the Third World. The mechanisms of restraint in the cyber domain are slightly different than in the nuclear world insofar as actors look to maintain connectivity and avoid military retaliation vs. mutual Armageddon, but the results are similar: we see little to none of the most dangerous behavior but a great deal of provocative friction. It turns out that cyber revolutionaries and cyber skeptics are both partially correct. We should expect to see a lot more creative exploitation of global information infrastructure, but threat actors have strong incentives to restrain the intensity of their exploitation.

### ---XT – 6G Outweighs

#### The 5G race is over but the US is leading on 6G

Camilo Bello 21. Consultant focused on Asia Pacific studies and has experience in strategic management, 2/10/21. “6G Technology, America’s Opportunity to Recover its Leadership from China.” https://elamerican.com/6g-technology-americas-opportunity/

The bet on the development of 6G technology opens the way to leadership for the United States, after having missed the opportunity that China took advantage of with 5G. Former President Donald Trump began developing what will be a wireless network 100 times larger than 5G.

Technology experts agree that China, with its technology star, Huawei, offers the best conditions in the 5G wireless network. However, the key to the U.S. is to turn to political unity to create the conditions for a transparent network.

Chinese leader Xi Jinping has focused on measures to strengthen the Chinese Communist Party (CCP), and has put all his efforts into dominating the technological field, which in turn gives him diplomatic and economic power with a view to overtaking the United States and the free world.

The United States has balanced the scales in the development of 5G technology but is preparing to lead in 6G technology, as it has strategic allies and a strategy in diplomatic defense around information transparency, being competitive in the face of the authoritarianism of the CCP.

The United States and 5G development

The United States ceded ground to China on its own 5G wireless network development. Former President Donald Trump insisted on developing 6G technology as a way to respond to the loss of leadership in the field.

### US Wins Now---2NC

#### US leadership in 5G now.

Steven P. Bucci 20. Ph.D., visiting fellow who focuses on cybersecurity, military special operations, and defense support to civil authorities @ Heritage, 10/9/20. “Nationalizing 5G Is the Wrong Way for the U.S. to Compete With China.” https://www.heritage.org/technology/commentary/nationalizing-5g-the-wrong-way-the-us-compete-china

The U.S. is maintaining its leadership in 5G, and the nation’s carriers are already far into their respective deployments of secure 5G networks. The DOD’s recent request for information for a single, nationwide wholesale network will not lead to a tangible solution to the race to 5G, rather it will lead to a solution in search of a problem.

Driving a DOD-centric, or a DOD proxy-centric, solution is a fool’s errand. It is founded on a belief that the federal government can move faster and more effectively than the private sector. This has not been true for decades.

This assumption ignores the great strides that have been made by the existing American players on the 5G field already. These private sector companies are the repositories of the expertise and experience in the telecom field, not the government. Thinking that the government or a jerry-rigged organization with political connections will somehow pull together the expertise out of thin air is nonsense.

#### The US will win the 5G race---antitrust not key.

Stella Soon 19. Tech reporter. “Here’s how the US can beat China in the race for dominance in next generation networks.” CNBC. 11-26-2019. [https://www.cnbc.com/2019/11/26/5g-race-how-the-us-can-beat-china-in-the-competition-for-dominance.html](about:blank)

While China has embraced next generation networks at a faster pace, experts say the U.S. still has some advantages in the competition for dominance.

U.S. technology companies have already been working on autonomous vehicles, augmented reality, and virtual reality, which one analyst explained could be the first few killer applications of 5G.

While China has embraced next generation networks at a faster pace, experts say the U.S. still has some advantages in the competition for dominance.

China rolled out its 5G networks nationwide on Nov. 1, with three of its state-owned carriers offering plans for the service. One week later, Beijing said it launched research and development efforts into 6G networks.

5G refers to mobile networks with super-fast data speeds that can support technologies like driverless cars. While 6G refers to the next generation of networks, 5G is still in its early stages as much of the world still operates on 4G networks.

“There will be a tendency to cast these developments as another sign that the United States is losing the race for the next generation of communication technologies,” Adam Segal, director of the digital and cyberspace policy program at CFR, wrote in a separate note earlier this month.

“But the United States still has strengths to play,” Segal said. “U.S. companies can dominate the applications and services that run over 5G.”

Just because China switched on its networks first does not mean that the competition is over.

That’s where the United States’ innovative capacity could give it an advantage, said Paul Triolo, geo-technology practice head at Eurasia Group. U.S. technology companies have already been working on autonomous vehicles, augmented reality, and virtual reality, which he explained could be the first few killer applications of 5G.

“Even as China rolls out 5G a little faster, the U.S. will eventually roll out 5G in enough breadth and scope that U.S. will be able to innovate on top of it,” said Triolo.

### No Race---2NC

#### There’s no “winning” the “race.”

John Lee 20. Senior analyst at the Mercator Institute for China Studies, 7/31/20. “The Global War for 5G Heats up.” https://thediplomat.com/2020/08/the-global-war-for-5g-heats-up/

It is unlikely that many nations will commit to a “trusted vendor” community for 5G solutions defined by the total absence of Chinese technology. Most will probably take the middle road typified by Singapore, which in June announced that European vendors will supply its major 5G network core without excluding Huawei, while also signing agreements to accelerate integration with China’s Shenzhen-oriented digital tech-ecosystem. Others, like Japan and India, are hedging by indigenizing development of next-generation networks, potentially accelerating global technological fragmentation.

Even in Europe, the short-term outlook for Huawei remains mixed. The “5G Toolbox” progress report urges member-states to institute plans for mitigating extant dependencies on “high-risk suppliers” and avoiding such dependencies in future. That most have yet to do so is unsurprising, given that Chinese vendors’ share of 4G RAN products across Europe is estimated at over 50 percent. With phase-one 5G roll-outs being built on previous-generation equipment, banning Huawei implies a massive exercise in physically replacing gear, and dependence on one or two vendors whose equipment may not meet performance expectations.

The U.S. campaign against Chinese technology faces mixed success if it continues to be framed as an ideological crusade. Most foreign actors do not see the issue in such stark terms, while Washington’s capacity to force choices through “weaponized interdependence” will be diluted the more it is used. The outcome of a “scorched earth” approach to 5G decoupling is less likely to be a future networked world safe for like-minded democracies, than acceleration of a “6G arms race” and the rise of a global “splinternet”.

# 1nr

## FTC DA

#### Unchecked AI causes mass inequality and extinction. That’s Thomas.

#### **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](about:blank)

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--- 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

**2--- FTC is focused on privacy enforcement now.**

Liisa **Thomas 8/12**/21 – partner and Leader of the Privacy and Cybersecurity Practice Group @ Sheppard Mullin, with Kari Rollins & Charles Glover, “FTC Signals Focus on Healthcare and Technology Platforms, Among Others.” https://www.eyeonprivacy.com/2021/08/ftc-healthcare-technology-platforms/

The FTC recently voted to authorize the use of compulsory processes—the FTC’s primary investigatory tools—on what it calls “key law enforcement priorities.” The resolutions allow investigators to take actions like issuing subpoenas and civil investigations demands (commonly referred to as “CIDs”) in a variety of areas. Of note is the inclusion of both healthcare markets and technology platforms, signaling a potential FTC interest in those sectors.

These resolutions compliment the agency’s existing authority to investigate deceptive or unfair acts, and comes on the heels of the blow the FTC suffered as a result of the Supreme Court’s AMG decision. For those in the healthcare and technology platform space, this may signal an **increase in privacy and data security scrutiny** by the FTC.

Putting it Into Practice: The authorization of the use of compulsory processes suggests that the FTC will not be backing off from bringing actions to enforce against unfair and deceptive practices. We will continue to monitor to see the impact this may have on privacy and data security cases brought by the agency in the healthcare and technology platform industries.

#### 3--- FTC ramping up enforcement against biased AI now.

Mark McCarty 9/15/21. Writer for BioWorld. “FTC eyes streamlined enforcement for algorithm bias, drug patents and right to repair.” https://www.bioworld.com/articles/511439-ftc-eyes-streamlined-enforcement-for-algorithm-bias-drug-patents-and-right-to-repair?v=preview

The U.S. Federal Trade Commission (FTC) has taken a more assertive stance regarding enforcement of several considerations, most conspicuously about mergers and acquisitions. However, the agency’s push for less cumbersome processes has now been applied to a host of considerations pertinent to the life sciences, including bias found in artificial intelligence algorithms, abuse of drug patents, and repairs for medical equipment, a signal that more frequent and more rapid FTC enforcement is on the near horizon.

#### 4--- Biometric Tech – the FTC is targeting biometric data privacy now.

Nerissa Coyle **McGinn 21** – Chief Diversity Partner; Co-Chair, Diversity Committee, Loeb & Loeb LLP. March 2021. “FTC, Federal and State Lawmakers Signal Focus on Biometric Data.” https://www.loeb.com/en/insights/publications/2021/02/ftc-federal-and-state-lawmakers-signal-focus-on-biometric-data

The Federal Trade Commission (FTC) recently reached a proposed settlement with the California-based developer of a photo storage app accused of deceiving consumers about how it used facial recognition technology. Everalbum Inc., a technology company that develops and markets facial recognition technology for businesses, launched a consumer photo storage service and app with a feature that used facial recognition software to sort and tag users’ photos. The company enabled the feature by default for most of its mobile app users and without the option to turn it off, in violation of its own stated policies.

That the FTC brought an enforcement action against Everalbum is hardly surprising—the agency has been pursuing technology companies that fail to live up to their own privacy representations for some time. But the proposed settlement with Everalbum over the use of facial recognition software goes far beyond any previous settlement in terms of the affirmative actions the app maker is required to take. This, together with a statement by Commissioner Rohit Chopra about the settlement, signals a **shift in FTC enforcement policy** around the use—or misuse—of facial recognition software and perhaps the larger category of biometric technology.

The FTC settlement is also one of the latest developments in the attempt to regulate at the intersection of individual privacy and emerging biometric technology, which identifies individuals using their faces, fingerprints, hands, retinas and irises, and voices, among other physiological markers, and includes facial recognition technology.

Key Takeaways:

The Everalbum settlement required the deletion of tainted data. This signals a potential shift in how the FTC may enforce against future privacy violations (biometric or otherwise), since the requirement to delete the data collected is likely a more significant penalty than any fine.

While no federal law exists at the moment regulating the collection and use of biometric data, the FTC has signaled that it intends to **focus in this area**.

#### 2--- Current 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.

#### 3--- Agency’s streamlining current enforcement in order to balance its priorities

FTC 9/14/21. Media Contact Peter Kaplan. “FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload.” https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas

At the joint recommendation from its Bureau of Consumer Protection and Bureau of Competition, the Federal Trade Commission voted to approve and make public a series of resolutions that will enable agency staff to efficiently and expeditiously investigate conduct in core FTC priority areas over the next ten years.

The Bureaus recommended that the Commission authorize eight new compulsory process resolutions in these essential areas: (1) Acts or Practices Affecting United States Armed Forces Service Members and Veterans; (2) Acts or Practices Affecting Children; (3) Bias in Algorithms and Biometrics; (4) Deceptive and Manipulative Conduct on the Internet; and (5) Repair Restrictions. (6) Abuse of Intellectual Property; (7) Common Directors and Officers and Common Ownership; and (8) Monopolization Offenses.

“These resolutions enable the FTC to take swift action against a whole host of illegal conduct in important areas of concern to the Commission,” said Holly Vedova, Acting Director of the Bureau of Competition. She noted that, “Companies engaging in conduct implicated by these resolutions should be forewarned: the FTC looks forward to aggressively using these resolutions and will not hesitate to take action against illegal conduct to the fullest extent possible under the law.”

“Harmful practices – especially those targeting children, veterans, and marginalized communities – will not be tolerated by this Commission,” said Samuel Levine, Acting Director of the Bureau of Consumer Protection. “Today’s resolutions ensure our staff can rapidly respond to allegations of abuse and fight fraud without delay.”

Specifically, the resolutions approved by a Commission vote of 3-2 will allow:

Service members and Veterans: harmful business practices directed at service members and veterans are a source of significant public concern, and, now, FTC staff will be able to expeditiously investigate any allegations in this important area.

Children under 18: harmful conduct directed at children under 18 has been a source of significant public concern, now, FTC staff will similarly be able to expeditiously investigate any allegations in this important area.

Algorithmic and Biometric Bias: allows staff to investigate allegations of bias in algorithms and biometrics. Algorithmic bias was the subject of a recent FTC blog.

Deceptive and Manipulative Conduct on the Internet: this omnibus expands a previous omnibus resolution on deceptive practices, which expired on Aug. 1. The existing resolution, has enabled the FTC to develop investigations and bring cases in a variety of areas including day trading services, tech support scams, the BOTS Act, payment processing, and the deceptive marketing of goods and services online, including pandemic-related goods like fake Clorox products and face masks. In addition to the areas covered by the existing resolution, this expanded version covers the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

Repair Restrictions: enhances the FTC’s ongoing investigations into restrictions on repair and builds on the FTC’s recent Policy Statement on Right to Repair. It would cover a wide range of anti-consumer and anti-competitive abuses and facilitate staff’s impending investigation of violations of the Magnuson Moss Warranty Act’s anti-tying provisions.

Abuse of Intellectual Property: allows staff to investigate abuses of intellectual property rights. Conduct involving abuse of intellectual property rights has been a source of much anticompetitive and deceptive conduct in many different areas, including pharmaceuticals, technology and gasoline refining, and this omnibus will allow staff to expeditiously investigate allegations in this area.

Common Director and Officers and Common Ownership: facilitates investigations of both ownership stakes in competing companies that may be anticompetitive as well as interlocking directorates that may violate Section 8 of the Clayton Act, 15 U.S.C. § 19. Interlocking directorates and common ownership continue to raise significant competitive concerns.

Monopolistic Practices: Market power abuses by tech companies and other large companies are rightly a source of bipartisan concern. This omnibus will allow staff to more expeditiously investigate market power abuses by dominant firms that are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets.

Compulsory process refers to the issuance of demands for documents and testimony, through the use of civil investigative demands and subpoenas. The FTC Act authorizes the Commission to use compulsory process in its investigations. Compulsory process requires the recipient to produce information, and these orders are enforceable by courts. Civil investigative demands and subpoenas are assigned to a Commissioner for review and authorization by the FTC’s Office of Secretary, typically on a rotating basis or according to availability. The Commission has routinely adopted compulsory process resolutions on a wide range of topics. The resolutions announced today will broaden the ability for FTC investigators and prosecutors to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact. Each omnibus covers investigations into competition or consumer protection conduct violations under the FTC Act.

Streamlining and improving efficiency at the agency is vitally important given the increased volume of investigatory work created by the surge in merger filings. Having already doubled between 2010 and 2020, the number of mergers filed with the antitrust authorities this year hit a record-setting pace of 2,067 acquisitions for the first seven months alone. With these resolutions in place, the FTC can better utilize its limited resources and move forward in earnest to quickly investigate potential misconduct. The Bureaus are now authorized to take steps to ensure that any compulsory process orders are enforceable.

#### 4--- Thumpers are priced in.

William C. MacLeod 7/2/21. One of the top rated Antitrust Litigation attorneys in Washington, DC. “Chopra, Khan, Slaughter Take Control of the Federal Trade Commission.” https://www.adlawaccess.com/2021/07/articles/chopra-khan-slaughter-take-control-of-the-federal-trade-commission/

With an unprecedented attack on policies the Federal Trade Commission had long embraced, the new majority of Democratic Commissioners revealed a bold enforcement agenda that would circumvent Supreme Court decisions and avoid Congressional limits.

It was a meeting like none the Federal Trade Commission has ever held. On one week’s notice, the Commission adopted new rules to impose civil penalties on substandard Made-in-USA claims, removed judges and safeguards from rulemaking proceedings, rescinded its 2015 enforcement policy statement on unfair methods of competition, and granted staff more authority to issue subpoenas and civil investigative demands. The vote on every issue followed party lines. Republican Commissioners, Noah Phillips and Christine Wilson, voted against all, and the Democratic Commissioners, Chopra, Khan, and Slaughter, rejected all amendments. Chair Khan announced that public meetings will become regular events at the FTC.

Made in USA Claims

Commissioner Chopra took the lead on the Made-in-USA (MUSA) rule, which would impose civil penalties on claims that do not meet FTC standards for domestic content, whether those claims appear on labels or in marketing. He criticized the Commission for years of allegedly allowing deceptive claims to persist and wrongdoers to escape fines. Imposing fines, he said, was one way of recovering the power the Commission was denied in the Supreme Court’s decision in AMG Capital Management v. FTC, which held that Section 13(b) of FTC Act did not authorize the Commission to obtain monetary relief.

Phillips opposed the rule, saying that Congress had not given FTC the authority to cover off-label claims; it had authorized MUSA rules only for product labels. Unless and until Congress granted authority for expedited rulemaking on advertising claims, which Congress is now considering, he insisted that the FTC was bound to use the more restrictive Magnusson-Moss procedures. Wilson objected to the short notice announcing the meeting, objected to the exclusion of staff from the meeting, and warned that it was unwise to disregard a unanimous Supreme Court that had just admonished the Commission for exceeding its authority to obtain money in consumer protection cases.

Expediting Rulemaking

Foreshadowing an ambitious regulatory agenda was a motion to streamline new rules under Section 18 of the FTC Act. The motion would remove the chief administrative law judge from the role of presiding officer in rulemakings. The FTC Chair would preside. The motion also proposed eliminating the requirement of a staff report to accompany a rule recommendation. Slaughter said these were unnecessary “self-imposed” limits. Chopra praised the proposal for helping end the era of “perceived powerlessness” at the FTC

Phillips and Wilson objected, citing concerns that removing the judge would threaten the independence of the rulemaking process – an extensive fact-finding exercise – and lend support to challengers who claim that FTC rules are politically motivated. As for staff reports, Phillips remarked that these gave the Commissioners and the public some confidence that a rule would not inflict unnecessary harm on the economy. Wilson reminded her colleagues that zealous rulemaking in the 1970s precipitated an existential crisis for the agency. It closed its doors after public resistance and widespread ridicule prompted Congress to defund the FTC. Not until the Commission promised a return to responsible enforcement was it allowed to reopen. The FTC delivered on that promise with a series of policy statements clarifying unfair acts and practices, illegal deception, and necessary substantiation for advertising claims.

Wilson proposed posting the procedural changes for comment. It failed 3-2. Phillips proposed retaining the chief judge and the staff report. It also failed to attract a Democratic vote. Rulemakings without a judge and without a staff report passed without a Republican vote.

Rescinding the Competition Policy Statement

In a sweeping departure from a bipartisan antitrust policy, the Commission rescinded its 2015 Policy Statement on Unfair Competition. Khan argued that the FTC should not have to show a likelihood of harm to competition in order to declare conduct unfair. In her view, the FTC Act was intended to circumvent the Supreme Court’s adoption of the Rule of Reason in antitrust cases – a requirement that condemned restraints of trade only when their anticompetitive effects outweighed the procompetitive benefits. The Rule of Reason made it too hard to prove violations, said Khan, and the FTC’s policy statement improperly confined the agency to an enforcement policy indistinguishable from the standards that DOJ applied.

Wilson regarded the rescission as an abandonment of the consumer welfare standard, the framework of antitrust analysis for half a century. She expressed fears that if competition policy were not designed to benefit consumers, it could be coopted by special interests. She added that when the FTC had failed to apply a standard consistent with the antitrust laws in the past, its decisions had often been reversed on appeal. (The FTC lost a string of appeals in the 1980s when it attempted to prohibit refusals to deal, price discrimination that might be competitive, supplier-distributor pricing policies, and practices that could facilitate collusion.) Phillips noted that the Supreme Court’s decision in NCAA had just applied the Rule of Reason in holding for plaintiffs, so it was hardly a bar to successful prosecution. Of concern to the Republicans was a proposal in Congress that would eliminate the FTC’s competition authority altogether.

Proposals to seek comment on the rescission were voted down on party lines. Competition policy at the FTC will depend on future Commission actions.

Targeting Sectors and Suspects

Finally the FTC identified seven areas in which it would adopt omnibus resolutions authorizing compulsory process – civil investigative demands and subpoenas enforceable in court. The Commission typically authorizes compulsory process when it identifies specific companies or conduct – like a merger or a deceptive practice – warranting intensive and urgent investigation. These resolutions covered broad sectors of the economy and authorized investigations under practices any law the FTC enforces. As explained in its press release, the Commission’s crosshairs are focused on these sectors and individuals:

Priority targets include repeat offenders; technology companies and digital platforms; and healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals. The agency is also prioritizing investigations into harms against workers and small businesses, along with harms related to the COVID-19 pandemic. Finally, at a time when merger filings are surging, the agency is ramping up enforcement against illegal mergers, both proposed and consummated.

https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities

With these resolutions, the FTC delegated the decision to issue compulsory process to the staff and a single commissioner. In the past, an investigation into a new area could not use compulsory process until the commission voted on the resolution. These omnibus resolutions dispensed with that procedure. Khan hailed the move as cutting “red tape bureaucracy.” Wilson countered that the Commissioners were abrogating their sworn responsibilities of supervision. This last comment reveals the import of the change. If Chopra departs to the Consumer Financial Protection Bureau, which he has been nominated to direct, the Democrats will lose their majority. These resolutions will allow staff to open investigations, demand documents, and conduct depositions without the approval of the Commission. All the staff will need is the approval of a commissioner.

The Future of FTC Enforcement

In short, July 1, 2021 was an extraordinary day in the history of the FTC. It is an unmistakable harbinger of a Commission that is aiming to ramp up enforcement beyond the levels it sought to achieve in the 1970s. None of the supporters of the agenda had answers to the dissenters’ repeated questions: How will the agency overcome the obstacles that stymied its unbridled ambitions in the past? How will it respond to the resistance it will face from Congress, the courts, and the public it is supposed to serve? The public at this meeting, Phillips noted, was scheduled to comment after the Commission had made its decisions, so that their testimony would not be taken into account before the votes.

How far the Commission can take this agenda will be difficult to predict until the inevitable allegations of unauthorized investigations, arbitrary and capricious rules, unpredictable decisions, and deprivations of due process make their way to higher authorities. Safer predictions: We will see the fruits of yesterday’s decisions in the form of CIDs, subpoenas, proposed rules, and new interpretations of a century-old competition statute. Businesses and citizens will face the first engagement. Then Congress and the courts will join the fray. For a preview of potential outcomes, there is no better place to start than the rich literature of FTC history.

5 --- No Biden xo

#### Plan is different.

Masuda et. al. 21. Funai, Eifert & Mitchell, Ltd. Masuda, Funai, Eifert & Mitchell, Ltd. is a U.S. law firm headquartered in Chicago, Illinois, “The Implications of President Biden's "Executive Order on Promoting Competition in the American Economy" 8.18.21. https://www.masudafunai.com/articles/the-implications-of-president-bidens-executive-order-on-promoting-competition-in-the-american-economy?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration

On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” (the “Order”), affirming the policy of the Biden administration to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To achieve this, the Order, among other things, directs regulatory agencies to assert oversight over certain business practices and encourages regulatory agencies to develop and/or strengthen rules. The Order includes 72 initiatives by more than a dozen federal agencies.

The Order specifically cites the areas of “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” The scope of this order is broad. On the other hand, the Order itself does not create new regulations or laws, leaving the specific implications of it vague.

#### 2--- Historically FTC intervenes in FRAND and patent disputes.

Elizabeth A. N. Hass et. al. 18. James T. Mckeown, John F. Nagle, Kate E. Gehl. Partner and litigation attorney with Foley & Lardner LLP, and current vice chair of the firm’s national Antitrust Practice Group. partner in Foley & Lardner LLP's Milwaukee office, is a member and the former chair of the firm’s national Antitrust Practice and is a former member of the firm’s Management Committee.  senior counsel and litigation lawyer with Foley & Lardner LLP. DOJ and FTC Signal Shifts in Antitrust Enforcement of Essential Patent Disputes. No Publication. 10-10-2018. https://www.foley.com/en/insights/publications/2018/10/doj-and-ftc-signal-shifts-in-antitrust-enforcement

FTC’s Approach to FRAND Violations

Although the DOJ’s New Madison Approach has attracted considerable publicity, historically the FTC, and not the DOJ, intervened most frequently on behalf of implementers in FRAND disputes over the past two decades. Accordingly, Chairman Simons’ recent comments – even if representing his personal views – may mark a more significant change in enforcement actions in the United States.

Speaking to the Global Antitrust Enforcement Symposium at Georgetown University Law Center,4 Simons echoed his counterpart at the DOJ, stating, “We agree with the division leadership that a breach of a FRAND commitment standing alone is not sufficient to support a Sherman Act violation. The same is true even for a fraudulent promise to abide by a FRAND commitment. More is needed.”

#### 3--- Historically proven---wide ranging studies and enforcement.

Alden F. Abbott 20. General Counsel, U.S. Federal Trade Commission. Keynote Address, IP Watchdog CON2020 Virtual Conference. 9-17-2020. https://www.ftc.gov/system/files/documents/public\_statements/1581598/abbott\_ip\_watchdog\_speech\_09-17-20.pdf

For over 20 years, the FTC has used policy tools to address emerging issues at the intersection of antitrust and IP. These efforts include convening public hearings to examine issues such as the role of patent quality and the role of antitrust in promoting innovation. • 2003 FTC Report on the Patent System; 2007 joint FTC-DOJ Report on Antitrust Enforcement and IP Rights (how antitrust and IP can align with the patent system to promote innovation); 2009 FTC Report on Biologic Drug Competition; and 2011 FTC Evolving Marketplace Report (emphasis on notice to public of what a patent protects and remedies for patent infringement). • Also, FTC Act 6(b) reports (e.g., 2016 Patent Assertion Entities Report). • Section 6(b) empowers FTC to conduct wide-ranging studies that do not have a specific law enforcement purpose, enhance quality of policy dialogue. • Also, FTC files amicus briefs and advocacy letters.

#### 4--- FTC pursued patent law to SCOTUS.

Noah Joshua Phillips 19. Commissioner on the Federal Trade Commission. IP and Antitrust Laws: Promoting Innovation in a High-Tech Economy. 2019 Patents in Telecoms and the Internet of Things Public Workshop ACT | The App Association. 03-20-2019. Federal Trade Commission. Pg. 11

Some courts took different views, with some applying the aforementioned “scope of the patent” test, permitting virtually all such settlements. But the FTC pursued the issue all the way up to the Supreme Court. In its 2013 Actavis decision, the Court held that such “large and unjustified payments” flowing in the wrong direction raise a red flag indicating that the settlements may have anticompetitive effects.28 Several pharmaceutical drug manufacturers responded by arguing “large and unjustified payments” referred only to cash payments, and began exploring various in-kind payments instead. This included arrangements like a commitment from the branded manufacturer not to introduce an authorized generic, which would undercut the revenue the generic challenger in such cases would otherwise earn. It also led some settling parties to attempt to disguise cash payments as part of other side deals. This conduct underscores the need for the Commission to be on the watch for creative attempts to manipulate regulatory regimes or to evade liability.

The internal link is tradeoff ---

#### The plan forces tradeoffs---resources are extremely limited.

Alden Abbott 21 – Senior Research Fellow, Mercatus Center, 4/29/21. “Lack of Resources and Lack of Authority Over Nonprofit Organizations Are the Biggest Hindrances to Antitrust Enforcement in Healthcare.” https://www.mercatus.org/publications/antitrust-and-competition/lack-resources-and-lack-authority-over-nonprofit

Appropriate federal antitrust and consumer protection enforcement is good for the American economy. It promotes enhanced competition and consumer welfare. Regrettably, however, the effectiveness of federal enforcement in achieving these benefits is threatened by insufficient resources. As FTC Acting Chair Rebecca Kelly Slaughter explained in her April 20 testimony before the US Senate Committee on Commerce, Science, and Transportation, FTC employment has remained flat despite a growing workload, with merger filings doubling in recent years. Lauren Feiner reports on that testimony:

“The absence of resources means that our enforcement decisions are harder,” [Slaughter] said. “If we think that we have a real case, a real law violation in front of us, but a settlement on the table that is maybe OK but doesn’t get the job done, we have to make difficult decisions about whether it’s worth spending a lot of taxpayer dollars to go sue the companies who are going to come in with many, many law firms worth of attorneys and expensive economic experts, versus taking that settlement.”

I can attest to the accuracy of Slaughter’s observation, based on my experience as FTC general counsel in the Trump Administration. During my tenure, the FTC did indeed have to contend with resource limitations that adversely affected merger enforcement decision-making.

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)
11. See Carl Shapiro, “Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting,” in *Innovation Policy and the Economy*, Volume I, Adam Jaffe, Joshua Lerner & Scott Stern, Eds, MIT Press, 2001. [↑](#footnote-ref-11)
12. See Shapiro, supra note 72, abstract. [↑](#footnote-ref-12)
13. Id., p. 7. [↑](#footnote-ref-13)
14. Id. [↑](#footnote-ref-14)
15. But the incorporation of a patented technology into a standard does not always create market power. A patented technology may be so fundamental to the subject matter of a standard as to have no viable alternatives. A technology also may be so superior to its alternatives that a standards body may have no practical choice but to incorporate it into a standard. In either case, any market power that may be enjoyed by the patent owner would arise from the market's demand for the invention and not from its incorporation into the standard. Moreover, the incorporation of the patented technology into a standard may not confer market power at all if alternative standards exist or if the standard otherwise fails to secure market acceptance.” See Joseph Kattan, “Disclosures and Commitments to Standard-Setting” (2002) *Antitrust* 22. 77 See, for example, the discussion of Wang’s refusal to license its Single In-Line Memory Modules (SIMMs), after lobbying JEDEC to adopt the technology as a standard, in Janice M. Mueller, “Patent System Reform: Patent Misuse Through the Capture of Industry Standards,” (2002) *Berkeley Technology Law Journal*, 659. [↑](#footnote-ref-15)
16. This assumption raises the problem that in most high-technology industries, most licensors are also licensees, and therefore will be able to reduce any eventual royalty-stacking. [↑](#footnote-ref-16)
17. See Lemley & Shapiro, supra note 51, at 2. [↑](#footnote-ref-17)
18. See Herbert Hovenkamp, Mark D. Janis & Mark Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, (2003-04 Supplement) at 35.1. [↑](#footnote-ref-18)
19. See Amy A. Marasco, “Standards-Setting Practices: Competition, Innovation and Consumer Welfare”, testimony before the Federal Trade Commission and Department of Justice, available at http://www.ftc.gov/opp/intellect/020418marasco.pdf, p.3 (“Standards do everything from solving issues of product compatibility to addressing consumer safety and health concerns. Standards also allow for the systemic elimination of non-value added product differences (thereby increasing a user’s ability to compare competing products), provide for interoperability, improve quality, reduce costs and often simplify product development. They also are a fundamental building block for international trade.”) [↑](#footnote-ref-19)
20. Shapiro illustrates the benefits of standardization with the following anecdote: “during the great Baltimore fire of 1904, fire fighters called in from neighboring cities were unable to fight the blaze effectively because their hoses would not fit the Baltimore hydrants. The following year, national standards for fire hoses were adopted.” Carl Shapiro, “Setting Compatibility Standards: Cooperation or Collusion?”, in Rochelle Dreyfuss, Diane Zimmerman & Harry First, Eds., *Expanding the Bounds of Intellectual Property*, Oxford University Press, 2001 at Section I. [↑](#footnote-ref-20)
21. See Mark Lemley, “Intellectual Property Rights and Standard-Setting Organizations”, 90 (2002) *California Law Review*, 1889. [↑](#footnote-ref-21)
22. See Marasco, supra note 7. [↑](#footnote-ref-22)
23. On the other hand, standardization promotes competition within a standard, i.e. between products implementing the standard. See David Teece & Edward Sherry, “Standards Setting and Antitrust”, (2003) 87 *Minnesota Law Review*, 1913, at 1915. [↑](#footnote-ref-23)
24. See Shapiro, supra note 8, at Section III. [↑](#footnote-ref-24)