# Round 6---NU 21

## 1NC

### Off

Notice-and-Comment CP

#### The United States federal government should delegate antitrust rulemaking authority to a new expert agency. The agency should begin notice-and-comment rulemaking to substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### Solves the case, engages notice-and-comment, and avoids courts DAs.

Rebecca Haw 11. Climenko Fellow and Lecturer on Law, Harvard Law School. J.D., Harvard Law School, 2008; M. Phil, Cambridge University, 2005; B.A., Yale University, 2001."Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal." Texas Law Review, vol. 89, no. 6, May 2011, p. 1247-1292. HeinOnline.

Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an obvious solution: give the power to interpret the Act to an expert agency.240 This idea has academic support already, 241 and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. The Agency Solution

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"--deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity-ex ante-that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

#### Key to democracy and court acquiescence---notice and comment engages participants and creates deference.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

Redressing antitrust’s democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.151 It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.152 The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.153 Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature’s goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and toward technocratic control, in service to a laissez-faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

#### Democracy solves war and extinction.

Christopher Kutz 16. PhD UC Berkeley, JD Yale, Professor, Boalt Hall School of Law @ UC Berkeley, Visiting Professor at Columbia and Stanford law schools, as well as at Sciences Po University. “Introduction: War, Politics, Democracy,” in On War and Democracy, 1.

Despite Churchill’s famous quip—“Democracy is the worst form of government, except for all those other forms that have been tried from time to time”2—democracy is seen as a source of both domestic and international flourishing. Democracy, understood roughly for now as a political system with wide suffrage in which power is allocated to officials by popular election, can solve or help solve a host of problems with stunning success. It can solve the problem of revolutionary violence that condemns autocratic regimes, because mass politics can work at the ballot box rather than the streets. It can help solve the problem of famine, because the systems of free public communication and discussion that are essential to democratic politics are the backbone of the markets that have made democratic societies far richer than their competitors. It can help solve the problem of environmental despoliation, which occurs when those operating polluting factories (whether private citizens or the state) do not need to answer for harms visited upon a broad public. And democracy has been famously thought to help solve the problem of war, in the guise of the idea of the “peace amongst democratic nations”—an idea emerging with Immanuel Kant in the Age of Enlightenment and given new energy with the wave of democratization at the end of the twentieth century.

### Off

Court Politics DA

#### The Supreme Court will decline to overturn Roe v. Wade now---Roberts’ influence on 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/>)

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

### Off

Congress CP

#### The United States Congress should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

### Off

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.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

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

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

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

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

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

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

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

### Off

Regs CP

#### The United States federal government, including the federal judiciary, should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards under Patent and Contract law and establish treble damages for violation.

#### The CP PICs out of antitrust 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.

### Off

Japan DA

#### New antitrust is applied globally---offends allies.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

#### Ends the Japan alliance.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy. 2

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations ” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the American Banana case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, inter alia, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the American Tobacco case (221 U.S. 106 (1911)) and the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory. 3

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,” 4 while F.A. Mann argued that “the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.” 5 Neverthele ss, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. 6 The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.” 7 The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the Timberlane case (549 F.2d. 9 th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint’s interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity. 8 Furthermore, not all U.S. courts have consistently applied the test of balancing interests. 9

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because British law did not require defendants to act in a manner prohibited by U.S. law. 10

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. 11 In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. 12 Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

#### Alliance strength solves every impact---extinction.

Richard Armitage 16. \*\*United States Deputy Secretary of State. \*\*John Hamre, president and CEO of CSIS. \*\*Ryozo Kato, Japanese lawyer and career diplomat who served as the Japanese Ambassador to the United States from 2001 to 2008. “The U.S.-Japan Alliance to 2030 Power and Principle.” Report of the Commission on the Future of the Alliance. 2/29/2016. https://www.spf.org/topics/finalreportfinal.pdf

The U.S.-Japan Alliance has helped to provide security and prosperity to the Asia-Pacific region and the broader international community for more than half a century. The Alliance enabled the United States and Japan to prevail in the Cold War, based on the principles of deterrence, democratic values, and free market dynamism. Today, the U.S.-Japan Alliance is as strong as it has been at any time during its existence. The Commission believes the Alliance will need **all of its current strength** and more, since the international security environment over the next 15 years will be as **challenging** and **uncertain** as any the **U**nited **S**tates and Japan have faced. In addition to challenges from a rising **China** and aggrieved **Russia**, the **U**nited **S**tates and Japan both have vital interests in the **Middle East**, which is an increasingly unstable and violent region. **Global challenges** such as **terrorism**, **nuclear proliferation**, and **climate change** will also require wise policy and firm action. One central characteristic of this emerging strategic dynamic will be intensified competition for power and influence across ideological, economic, and security spheres between liberal democracies on the one hand and ambitious or aggrieved authoritarian regimes on the other. The Commission believes that this competition need not—and in fact is unlikely to—result in war. Moreover, there are many areas in which countries from across the ideological spectrum can and will increase mutual cooperation, including macroeconomic coordination, countering violent Islamic extremism, responding to climate change, and reversing nuclear proliferation by states such as North Korea. Nevertheless, there remain fundamental questions about international norms where **leading democracies** like the **U**nited **S**tates and Japan will hold starkly different views from more authoritarian states. These include: the rights of citizens to choose their own governments; the rights of minorities within nations; the independent role of the judiciary and the press; the role of the private sector in the economy; freedom of navigation and flight in international sea and air space; and freedom of the Internet. In Asia, the **U**nited **S**tates and Japan will have to **shape the strategic environment** by encouraging responsible Chinese behavior and imposing costs for destabilizing activities. To that end, the **U**nited **S**tates and Japan will have to build up their own power, and use it wisely and firmly, to **preserve a world order** that favors both allies’ shared values. The United States and Japan have taken a number of very important actions in the recent past to strengthen the Alliance. These include Japan’s issuance of its first national security strategy, establishment of a National Security Council (NSC) and an associated permanent staff organization, increases in the defense budget, and passage of security legislation authorizing closer cooperation with the United States. The United States has stated an intention to rebalance U.S. strategic attention and military forces towards the Asia-Pacific region. Both countries have concluded updated bilateral Defense Guidelines for closer security cooperation and have reached an agreement for wider and deeper economic cooperation through the Trans-Pacific Partnership (TPP). These achievements provide a solid foundation for the continued actions that the Commission recommends in this report. The **U**nited **S**tates and Japan have unmatched strengths for the competitive environment they will face. Together the two allies account for 28 percent of the world’s gross domestic product (GDP) and 43 percent of the world’s wealth. The economies of both countries use and produce the highest levels of technology, and have the **r**esearch and **d**evelopment systems to stay at the cutting edge of discovery and innovation. Their citizenries are well educated, hardworking, and innovative. Their armed forces are among the world’s most advanced and are well led and trained. Their values of freedom and democracy have a universal appeal that has been repeatedly demonstrated in all parts of the world and particularly in Asia. The U.S.-Japan Alliance has endured for 60 years and adapted to meet an array of new internal and external challenges. The Commission believes that the United States and Japan must develop a shared vision of the world both nations seek in the next 15 years. Democracies need a vision to inspire their own citizens and to synchronize the efforts of their governments and private organizations. As partners in an increasingly interconnected and competitive world, the United States and Japan must also offer a vision that will gain the support of other countries. The Commission proposes the following vision for the U.S.-Japan Alliance: The United States and Japan seek a world in 2030 in which all nations are secure, peaceful, prosperous, and free. Working to build this world, the United States and Japan will make national contributions that reflect each nation’s respective capabilities, legal obligations, and traditions, but will always remain united on shared goals. The United States and Japan are global powers with global responsibilities, but their Alliance will continue to focus as it always has on the peace and prosperity of the Asia-Pacific region. Peace and Security: The United States and Japan will work together to:  preserve peace and stability in the Asia-Pacific region based on the Mutual Security Treaty through bilateral efforts to maintain a favorable balance of power and to deter and, if necessary, to defeat armed aggression and attempts at coercion against their own interests, and those of their allies and friends;  defend and preserve the existing order based on established international rules and norms;  seek peaceful, negotiated resolution of issues between nations, free from military force or coercion;  support multilateral organizations in developing solutions to global challenges; and  lead and participate in international actions against state and non-state actors that use terrorist tactics and criminal actions or otherwise threaten the safety of their citizens and those of their allies and friends. Prosperity: The United States and Japan will work together to:  support the unimpeded international flow of investment, goods, and services to raise the prosperity of all nations, especially those at lower levels of development;  provide assistance both through international organizations and directly to developing nations to improve all the aspects of economic development and governance, private sector competence, and human capacity, including women’s empowerment;  strengthen existing institutions such as the World Bank and International Monetary Fund that provide development assistance and seek to promote principles of good governance; and  play leading roles in reducing environmental threats to the health, and potentially the safety, of their own citizens and others around the world. Freedom: The United States and Japan will work together to:  support advancement of the principles expressed in the United Nations (UN) Universal Declaration of Human Rights;  ensure the observance of these principles in their own countries;  speak out and take clear public stands in the support of those principles; and  work over the long term, and when opportunities arise in the short term, to advance those principles in authoritarian countries as well as failing states. In this report, the Commission recommends a set of coordinated policies that will move the Alliance closer to achieving its shared vision of a peaceful, secure, prosperous, and free world. As major economic powers and democracies, Japan and the United States should continuously stress two foundational pillars of the Alliance. First, leaders and opinion makers in the United States and Japan need to strengthen and sustain public support in both countries for active international leadership, using the full range of foreign policy tools, including military capabilities when necessary. In the United States, the wars in Iraq and Afghanistan have caused debates in both the Republican and Democratic parties about the utility of force, particularly with respect to the Middle East. In Japan, although security legislation was enacted in 2015 to allow the exercise of the right to collective self-defense, there is persistent and substantial opposition to a more active security role for the military, and misgivings about the use of military force—even for purely defensive purposes. The Commission recognizes that military power cannot be the sole or even the primary instrument of national security policy. However, the potential employment of military force is often necessary to support diplomacy, deter aggression, and keep the peace; and the utilization of the armed forces, whether in the form of advisers, peacekeepers, or combat units, will remain essential to deal with some threats to peace and security in the future. The United States and Japan must have fully-funded, modern, and highly capable military forces, and they must be willing to employ them in support of the peaceful, secure, prosperous, and free world that they seek. Leaders in both countries have a responsibility to explain these realities to their publics. Second, in order to provide the foundation for the policies outlined in this report, both countries need to take action to support their economies, to resume economic growth in the case of Japan, and to sustain recovery from the recession of 2008 in the case of the United States. Without higher rates of economic growth, the United States and Japan will face significantly greater difficulties managing the international challenges that are likely to emerge over the coming 15 years. Both countries have the fiscal and monetary policy tools necessary to stimulate growth, but both must also undertake structural changes that require continued political attention. In the case of Japan these include: growing the workforce in the face of a falling national birth rate; increasing productivity through more widespread adoption of information technology; and reversing the growth of the highest debt levels of any advanced country. In the case of the United States these include: modernizing the country’s aging physical and cyber infrastructure; containing the costs of medical care and social security payments for the large generation now retiring; and providing real energy security by coupling the increased production of domestic oil and gas with reduced dependence of the transportation sector on oil. Both countries must also improve their educational systems to create the digital workforce of the future. II. The Strategic Environment through 2030 For the first time in nearly a quarter century, **the world** is witnessing **multiple momentous challenges** to the international order. **China**’s emergence, **Russia**’s resurgence, and the Islamic State of Iraq and the Levant’s (**ISIL**’s) barbarity are forcing the **U**nited **S**tates and Japan to address simultaneous, diverse threats to the international order. Within Asia, increasing prosperity and economic interdependence coincide with intensifying **friction among the major powers**. Changes in relative power, rapid expansion in the military budgets of some states, **territorial disputes**, historical animosities, **irregular threats**, and **nuclear proliferation** all present **serious risks** to regional security. Managing these challenges will require an understanding of how long-term trends, such as demographics, technology, and climate change, are likely to affect the strategic environment. Asia is the world’s most dynamic region, so understanding current trends and potential future discontinuities is essential if the United States and Japan are to adopt an overall strategy that is capable of adapting effectively to rapid shifts in the security environment. While regional trends in the Asia-Pacific region favor continued growth and economic integration, there are pockets of uncertainty that could threaten both economic progress and political stability. These include: obstacles to China’s economic transition from its past export-led growth model to a domestically driven model; the shrinking working age population in Japan, South Korea, China, Taiwan, and Singapore; and the over-reliance of countries such as Taiwan, South Korea, Malaysia, Thailand, and Australia on Chinese momentum to drive their own growth. Economic growth and integration in Asia have been driven by intra-regional trade as well as global investment flows and production networks, underpinned by the international financial institutions established at Bretton Woods and sustained since then with the active support of Japan and the United States. However, as the international economy has diversified, the original managers of global financial governance, such as the G-7, have lost ground to more inclusive but less effective groupings, such as the G-20. Moreover, progress on global trade liberalization at the World Trade Organization (WTO) has stalled. China is challenging the existing international financial institutions with the Asian Infrastructure Investment Bank (AIIB) and its new “One Belt, One Road” initiatives. At the same time, the Trans-Pacific Partnership (TPP), led by the United States and Japan, has the potential to reboot international trade liberalization and governance. Passage of TPP in Japan, the United States, and the ten other participating countries would boost economic growth in Asia by reducing barriers, establishing standards for ensuring protection of intellectual property in new areas such as e-commerce, empowering China’s economic reformers as Beijing is drawn by preferential tariffs to join TPP, animating negotiations on the Transatlantic Trade and Investment Partnership (TTIP), and perhaps eventually helping to revitalize the pursuit of global free trade agreements through the WTO. Governance of global trade and finance is in flux, but the forces of liberalization and integration are still present. Beyond these economic concerns the dangers of **climate** change and **ecological degradation** threaten the region. The ability of the major Asia-Pacific economies to cooperate in the face of all these **transnational challenges** will have **important implications** for the future strategic environment. While China and the United States are the world’s leading emitters of greenhouse gases (in that order), Japan is the world’s superpower in clean technology and energy efficiency. There are encouraging signs of U.S. and Chinese initiatives to curb greenhouse gas emissions as well as the recent agreement at the 2015 Paris Climate Conference, but these promises remain aspirational and unenforceable, requiring further efforts at bilateral, regional, and global cooperation to reduce carbon emissions.

### Off

States CP

#### The 50 states, DC, and all relevant territories should uniformly:

#### ---expand the scope of state antitrust laws to substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### ---grant jurisdiction to attorney generals to investigate and enforce these prohibitions.

#### ---set aside funds to their attorney general’s office for the purpose of enforcing these prohibitions.

#### States can pursue autonomous anti-trust enforcement even when conflicting with federal law.

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At the federal level, the U.S. antitrust laws—including the Sherman Act and the Clayton Act, which governs mergers and acquisitions—are enforced by the FTC and DOJ. States also have antitrust laws, which are enforced by state AGs and are often patterned after their federal analogs, but can contain important differences. States frequently collaborate with the federal antitrust agencies and/or other states on merger investigations. However, the Supreme Court has recognized that states are not required to do so, and have the right to make enforcement decisions that differ from other federal and state authorities.[[3]](https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950/#_ftn3) States have sometimes exercised this authority in order to “fill the gap” of perceived under-enforcement at the federal level. For example, in June 2017, the California AG sued to block Valero Energy Partners LP’s acquisition of two petroleum terminals in Northern California, despite the FTC’s decision not to challenge the deal. Several months later, the parties abandoned the transaction. More broadly, in recent years, there has been a growing trend of robust and autonomous state antitrust enforcement, as illustrated by major investigations and enforcement actions by state coalitions in the healthcare, pharmaceutical, telecom, and technology sectors, among others. Consistent with this trend, Colorado AG Phil Weiser—who previously served as Deputy Assistant Attorney General in the DOJ Antitrust Division under the Obama administration—has affirmed his commitment to “protecting all Coloradans from anticompetitive consolidation and practices…whether or not the federal government acts to protect Coloradans.” In keeping with this mandate, the Amendment will bring Colorado increasingly in line with states such as California and New York that have demonstrated an appetite for aggressive, independent antitrust enforcement, even where it may depart (or conflict) with federal action.

### Innovation Adv---1NC

#### 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.[[1]](#footnote-1) 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.”[[2]](#footnote-2) 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.[[3]](#footnote-3)

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.”[[4]](#footnote-4) 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.”[[5]](#footnote-5)

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

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

5 Conclusions

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

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

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

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

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

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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.[[6]](#footnote-6) 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.[[7]](#footnote-7) 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.[[8]](#footnote-8) 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.[[9]](#footnote-9)

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.[[10]](#footnote-10) 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.

#### America leads on 5G now, BUT antitrust can flip it.

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

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

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

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

#### America’s now well-positioned to win the 5G race.

Mahaffee ’21 [Dan and James Kitfield; July 29; senior vice president at the Center for the Study of the Presidency & Congress; senior fellow at CSPC; the Hill, “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]

Too often hyper-partisanship and political dysfunction in Washington, D.C. act as a drag on our nation’s ability to unite to confront major challenges. Yet in two promising areas a rare bipartisan consensus has recently emerged on Capitol Hill: the imperative of empowering U.S. leadership and innovation in the fierce competition with China over advanced technologies, and the key role infrastructure investments in areas such as high-speed digital connectivity play in that competition.

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.

#### Antitrust in IP hammers innovation, especially in American 5G.

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

Although much of the excitement about 5G wireless technology focuses on how it will improve every aspect of our lives – from smart homes to smart cities, from healthcare to food to business to entertainment – this technology is also critical for an often-invisible, but even more critical, application: national security. 5G is a vast improvement over existing mobile technology, with massively increased speeds of data transfer and other enhanced capacities. The benefits this unprecedented speed and capacity will have for the United States military include improved surveillance and reconnaissance systems, new and more accurate methods of command and control, and integrated and streamlined logistics systems for increased efficiency.1 On the other hand, the same technological advancements facilitated by 5G technology may also give rise to new cybersecurity vulnerabilities.

Although it is the future of everything, 5G does not pose a potential problem in some far-off future. Today, the U.S. is already depending on a wide array of 5G technology suppliers for its national security system. For example, the national security programs of the Department of Defense (DOD) rely on continued access to telecommunication products made by companies with security clearance on a range of active classified and unclassified prime government contracts.2 Devices that rely on such wireless technology include those used to command troops in combat, control drones, target smart munitions, and perform other vital military functions.3 Allied partnerships with the U.S. also depend on its efforts to address cybersecurity in the next generation of wireless, 5G, and Internet of things.4

To ensure the safety of the systems on which the U.S. military relies and avoid unknown and unexpected cybersecurity vulnerabilities, the U.S. must remain an active and competitive participant in 5G development. Antitrust policies that undermine the intellectual property rights of U.S. innovators will diminish U.S. companies’ ability to invest in research and development (R&D) and to compete in the global 5G ecosystem. Even more important than increased economic growth, new jobs, and enhanced daily lives, these antitrust policies must be changed for the sake of U.S. national security.

#### China prefers peaceful rise.

Paul Heer 19. Served as National Intelligence Officer for East Asia in the Office of the Director of National Intelligence from 2007 to 2015, since served as Robert E. Wilhelm Research Fellow at the Massachusetts Institute of Technology’s Center for International Studies and as Adjunct Professor at George Washington University’s Elliott School of International Affairs. "Rethinking U.S. Primacy in East Asia." National Interest. 1-8-2019. https://nationalinterest.org/blog/skeptics/rethinking-us-primacy-east-asia-40972

But this policy mantra has two fundamental problems: it mischaracterizes China’s strategic intentions in the region, and it is based on a U.S. strategic objective that is probably no longer achievable. First, China is pursuing hegemony in East Asia, but not an exclusive hostile hegemony. It is not trying to extrude the United States from the region or deny American access there. The Chinese have long recognized the utility—and the benefits to China itself—of U.S. engagement with the region, and they have indicated receptivity to peaceful coexistence and overlapping spheres of influence with the United States there. Moreover, China is not trying to impose its political or economic system on its neighbors, and it does not seek to obstruct commercial freedom of navigation in the region (because no country is more dependent on freedom of the seas than China itself). In short, Beijing wants to extend its power and influence within East Asia, but not as part of a “winner-take-all” contest. China does have unsettled and vexing sovereignty claims over Taiwan, most of the islands and other features in the East and South China Seas, and their adjacent waters. Although Beijing has demonstrated a willingness to use force in defense or pursuit of these claims, it is not looking for excuses to do so. Whether these disputes can be managed or resolved in a way that is mutually acceptable to the relevant parties and consistent with U.S. interests in the region is an open, long-term question. But that possibility should not be ruled out on the basis of—or made more difficult by—false assumptions of irreconcilable interests. On the contrary, it should be pursued on the basis of a recognition that all the parties want to avoid conflict—and that the sovereignty disputes in the region ultimately are not military problems requiring military solutions. And since Washington has never been opposed in principle to reunification between China and Taiwan as long as it is peaceful, and similarly takes no position on the ultimate sovereignty of the other disputed features, their long-term disposition need not be the litmus test of either U.S. or Chinese hegemony in the region. Of course, China would prefer not to have forward-deployed U.S. military forces in the Western Pacific that could be used against it, but Beijing has long tolerated and arguably could indefinitely tolerate an American military presence in the region—unless that presence is clearly and exclusively aimed at coercing or containing China. It is also true that Beijing disagrees with American principles of military freedom of navigation in the region; and this constitutes a significant challenge in waters where China claims territorial jurisdiction in violation of the UN Commission on the Law of the Sea. But this should not be conflated with a Chinese desire or intention to exclusively “control” all the waters within the first island chain in the Western Pacific. The Chinese almost certainly recognize that exclusive control or “domination” of the neighborhood is not achievable at any reasonable cost, and that pursuing it would be counterproductive by inviting pushback and challenges that would negate the objective. So what would Chinese “hegemony” in East Asia mean or look like? Beijing probably thinks in terms of something much like American primacy in the Western Hemisphere: a model in which China is generally recognized and acknowledged as the de facto central or primary power in the region, but has little need or incentive for militarily adventurism because the mutual benefits of economic interdependence prevail and the neighbors have no reason—and inherent disincentives—to challenge China’s vital interests or security. And as a parallel to China’s economic and diplomatic engagement in Latin America, Beijing would neither exclude nor be hostile to continued U.S. engagement in East Asia. A standard counterargument to this relatively benign scenario is that Beijing would not be content with it for long because China’s strategic ambitions will expand as its capabilities grow. This is a valid hypothesis, but it usually overlooks the greater possibility that China’s external ambitions will expand not because its inherent capabilities have grown, but because Beijing sees the need to be more assertive in response to external challenges to Chinese interests or security. Indeed, much of China’s “assertiveness” within East Asia over the past decade—when Beijing probably would prefer to focus on domestic priorities—has been a reaction to such perceived challenges. Accordingly, Beijing’s willingness to settle for a narrowly-defined, peaceable version of regional preeminence will depend heavily on whether it perceives other countries—especially the United States—as trying to deny China this option and instead obstruct Chinese interests or security in the region.

#### No US-China war.

Timothy Heath 17. Senior international defense research analyst at the nonprofit, nonpartisan RAND Corporation and member of the Pardee RAND Graduate School faculty, and William R. Thompson, Distinguished and Rogers Professor at Indiana University and an adjunct researcher at RAND. "U.S.-China Tensions Are Unlikely to Lead to War". National Interest. 4-30-2017. https://nationalinterest.org/feature/us-china-tensions-are-unlikely-lead-war-20411?page=0%2C1

Graham Allison's April 12 article, “ How America and China Could Stumble to War ,” explores how misperceptions and bureaucratic dysfunction could accelerate a militarized crisis involving the United States and China into an unwanted war. However, the article fails to persuade because it neglects the key political and geostrategic conditions that make war plausible in the first place. Without those conditions in place, the risk that a crisis could accidentally escalate into war becomes far lower. The U.S.-China relationship today may be trending towards greater tension, but the relative stability and overall low level of hostility make the prospect of an accidental escalation to war extremely unlikely. In a series of scenarios centered around the South China Sea, Taiwan and the East China Sea, Allison explored how well-established flashpoints involving China and the United States and its allies could spiral into unwanted war. Allison’s article argues that given the context of strategic rivalry between a rising power and a status-quo power, organizational and bureaucratic misjudgments increase the likelihood of unintended escalation. According to Allison, “the underlying stress created by China’s disruptive rise creates conditions in which accidental, otherwise inconsequential events could trigger a large-scale conflict.” This argument appears persuasive on its surface, in no small part because it evokes insights from some of Allison’s groundbreaking work on the organizational pathologies that made the Cuban Missile Crisis so dangerous. However, Allison ultimately fails to persuade because he fails to specify the political and strategic conditions that make war plausible in the first place. Allison’s analysis implies that the United States and China are in a situation analogous to that of the Soviet Union and the United States in the early 1960s. In the Cold War example, the two countries faced each other on a near-war footing and engaged in a bitter geostrategic and ideological struggle for supremacy. The two countries experienced a series of militarized crises and fought each other repeatedly through proxy wars. It was this broader context that made issues of misjudgment so dangerous in a crisis. By contrast, the U.S.-China relationship today operates at a much lower level of hostility and threat. China and the United States may be experiencing an increase in tensions, but the two countries remain far from the bitter, acrimonious rivalry that defined the U.S.-Soviet relationship in the early 1960s. Neither Washington nor Beijing regards the other as its principal enemy. Today’s rivals may view each other warily as competitors and threats on some issues, but they also view each other as important trade partners and partners on some shared concerns, such as North Korea, as the recent summit between President Donald Trump and Chinese president Xi Jinping illustrated. The behavior of their respective militaries underscores the relatively restrained rivalry. The military competition between China and the United States may be growing, but it operates at a far lower level of intensity than the relentless arms racing that typified the U.S.-Soviet standoff. And unlike their Cold War counterparts, U.S. and Chinese militaries are not postured to fight each other in major wars. Moreover, polls show that the people of the two countries regard each other with mixed views —a considerable contrast from the hostile sentiment expressed by the U.S. and Soviet publics for each other. Lacking both preparations for major war and a constituency for conflict, leaders and bureaucracies in both countries have less incentive to misjudge crisis situations in favor of unwarranted escalation. To the contrary, political leaders and bureaucracies currently face a strong incentive to find ways of defusing crises in a manner that avoids unwanted escalation. This inclination manifested itself in the EP-3 airplane collision off Hainan Island in 2001, and in subsequent incidents involving U.S. and Chinese ships and aircraft, such as the harassment of the USNS Impeccable in 2009. This does not mean that there is no risk, however. Indeed, the potential for a dangerous militarized crisis may be growing. Moreover, key political and geostrategic developments could shift the incentives for leaders in favor of more escalatory options in a crisis and thereby make Allison’s scenarios more plausible. Past precedents offer some insight into the types of developments that would most likely propel the U.S.-China relationship into a hostile, competitive one featuring an elevated risk of conflict. The most important driver, as Allison recognizes, would be a growing parity between China and the United States as economic, technological and geostrategic leaders of the international system. The United States and China feature an increasing parity in the size of their economies, but the United States retains a considerable lead in virtually every other dimension of national power. The current U.S.-China rivalry is a regional one centered on the Asia-Pacific region, but it retains the considerable potential of escalating into a global, systemic competition down the road. A second important driver would be the mobilization of public opinion behind the view that the other country is a primary source of threat, thereby providing a stronger constituency for escalatory policies. A related development would be the formal designation by leaders in both capitals of the other country as a primary hostile threat and likely foe. These developments would most likely be fueled by a growing array of intractable disputes, and further accelerated by a serious militarized crisis. The cumulative effect would be the exacerbation of an antagonistic competitive rivalry, repeated and volatile militarized crisis, and heightened risk that any flashpoint could escalate rapidly to war—a relationship that would resemble the U.S.-Soviet relationship in the early 1960s. Yet even if the relationship evolved towards a more hostile form of rivalry, unique features of the contemporary world suggest lessons drawn from the past may have limited applicability. Economic interdependence in the twenty-first century is much different and far more complex than in it was in the past. So is the lethality of weaponry available to the major powers. In the sixteenth century, armies fought with pikes, swords and primitive guns. In the twenty-first century, it is possible to eliminate all life on the planet in a full-bore nuclear exchange. These features likely affect the willingness of leaders to escalate in a crisis in a manner far differently than in past rivalries. More broadly, Allison’s analysis about the “Thucydides Trap” may be criticized for exaggerating the risks of war. In his claims to identify a high propensity for war between “rising” and “ruling” countries, he fails to clarify those terms, and does not distinguish the more dangerous from the less volatile types of rivalries. Contests for supremacy over land regions, for example, have historically proven the most conflict-prone, while competition for supremacy over maritime regions has, by contrast, tended to be less lethal. Rivalries also wax and wane over time, with varying levels of risks of war. A more careful review of rivalries and their variety, duration and patterns of interaction suggests that although most wars involve rivalries, many rivals avoid going to war. Misperceptions and strategic accidents remain a persistent feature of international politics, and it may well be that that mistakes are more likely to be lethal in periods of adjustment in relative power configurations. Rising states do have problems negotiating status quo changes with states that have staked out their predominance earlier. Even so, the probability of war between China and the United States is almost certainly far less than the 75 percent predicted by Allison. If the leaders of both countries can continue to find ways to dampen the trends towards hostile rivalry and maintain sufficient cooperation to manage differences, then there is good reason to hope that the risk of war can be lowered further still.

### Cybersecurity Adv---1NC

#### 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.

#### 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**.**

#### Licensing doesn’t solve monocultured chips which is their IL on advantage 2---companies will all produce the same tech because of the standard.

#### No cyber impact.

James Andrew Lewis 20. Senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies. “Dismissing Cyber Catastrophe”. 8-17-2018. https://www.csis.org/analysis/dismissing-cyber-catastrophe

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.

#### No impact to the grid.

Jesse Dunietz & Robert M. Lee 17. \*Scientific American's 2017 AAAS Mass Media fellow, and a Ph.D. candidate in computer science at Carnegie Mellon University. \*CEO of industrial cybersecurity firm Dragos. “Is the Power Grid Getting More Vulnerable to Cyber Attacks?” Scientific American. 2017. <https://www.scientificamerican.com/article/is-the-power-grid-getting-more-vulnerable-to-cyber-attacks/>

Two weeks ago it was cyberattacks on the Irish power grid. Last month it was a digital assault on U.S. energy companies, including a nuclear power plant. Back in December a Russian hack of a Vermont utility was all over the news. From the media buzz, one might conclude that power grid infrastructure is teetering on the brink of a hacker-induced meltdown. The real story is more nuanced, however. Scientific American spoke with grid cybersecurity expert Robert M. Lee, CEO of industrial cybersecurity firm Dragos, Inc., to sort out fact from hype. Dragos, which aims to protect critical infrastructure from cyberattacks, recently raised $10 million from investors to further its mission. Before he founded the company, Lee worked for the U.S. government analyzing and defending against cyberattacks on infrastructure. For a portion of his military career, he also worked on the government’s offensive front. His work has given him a front-row view on both sides of infrastructure cybersecurity. [An edited transcript of the interview follows.] How concerned should we be about grid and infrastructure cybersecurity, and what should we be most worried about? The electric grid and most infrastructure we have is actually fairly well built for reliability and safety. We’ve had a strong safety culture in industrial engineering for decades. That safety and reliability has never been thought of from a cybersecurity perspective, but it has afforded us a very defensible environment. As an example: if a portion of the U.S. power grid goes down. We usually anticipate those things for hurricanes or winter-weather storms. And we’re good at moving away from the computers and doing manual operations, just working the infrastructure to get it back. Usually it’s hours, maybe days; never more than a week or so. A lot of these cyberattacks deal with the computer technology and the interconnected nature of the infrastructure. And so when they target it in that way, you’re talking hours, maybe a day, at most a week of disruption. For reasonable scenarios, we’re not talking about a long time of outages, and we’re not talking about compromising safety. Now, the scary side of it is [twofold]. One, our adversaries are getting much more aggressive. They’re learning a lot about our industrial systems, not just from a computer technology standpoint but from an industrial engineering standpoint, thinking about how to disrupt or maybe even destroy equipment. That’s where you start reaching some particularly alarming scenarios. The second thing is, a lot of that ability to return to manual operation, the rugged nature of our infrastructure—a lot of that’s changing. Because of business reasons, because of lack of people to man the jobs, we’re starting to see more and more computer-based systems. We’re starting to see more common operating platforms. And this facilitates a scale for adversaries that they couldn’t previously get. When you say our adversaries are getting more aggressive, what are you referring to? The key events are things like the Ukraine attack in 2015–2016, [in which a cyberattack brought down portions of the Ukrainian power grid], as well as two different campaigns in 2013–2014, BlackEnergy2 and Havex, [two malware programs that were deployed against energy sector companies]. Basically, far-reaching espionage on industrial facilities one year; the next year getting into industrial environments; and then culmination in attacks in 2015–2016. That’s aggressive in itself. For my own firm, what we’re seeing in the [overall] activity in the space is it’s growing. Over the last decade, I have seen adversary activity increase in some measure, and then around 2013–2014 just start spiking. What are the adversaries actually doing in these attacks? [There are two broad categories of attacks.] Stage I intrusions are those designed to gain information. These are the traditional espionage efforts we’ve become accustomed to hearing about, where information is stolen or deleted. A Stage II attack could result in temporary loss of power, physical damage to equipment, or other types of scenarios we often hear about. It is important to note these are not trivial to accomplish. If an attacker wants to progress to a Stage II attack, during the Stage I intrusion they have to steal information specific to [that] industrial environment. The 2013–2014 campaigns that I mentioned were exactly the kinds of Stage I activity that you’d want to use to pivot into a Stage II activity. And so they scared the heck out of all of us. But the stuff we’ve heard about recently—the nuclear site and about a dozen energy companies that were compromised in a phishing campaign that made the news—none of that sounded tailored toward pivoting into a Stage II. Once an adversary has broken into the “business networks” used for email, documents and so on, how far a jump is it for them to access the industrial control system (ICS) networks used to control and monitor the industrial equipment? In nuclear environments, [business networks and control networks are] airgapped—[i.e., computers on one network cannot talk to those on the other]—because of safety regulations. The idea that because you got into the business network you can easily move into the ICS network is ridiculous. That is not true with other industrial infrastructures—electric energy, oil and gas, manufacturing, etc. You absolutely have [ICS] networks that are connected up. The nuance here is that we have a joke in the community: you’ll get security folks who don’t know much about ICS coming in with penetration testers and saying, “Oh my gosh, I found so many vulnerabilities!” And so the joke is, why don’t I just sit you down at the terminal? I will give you 100 percent access. Now make the lights blink. There’s a big gap there. [So the challenge is] not so much getting access. It’s once you get access, do you know what to do in a way that’s not just going to be embarrassing? What motivation do these adversaries have to attack the U.S. grid? I do not feel that there is a legitimate reason for adversaries to disrupt or destroy industrial infrastructure outside of a conflict scenario. Ukraine and Russia is a great example. I don’t necessarily mean declared war, but in places where we see conflict, I think we’ll see industrial attacks: North Korea-South Korea, China-Taiwan. But there are some scenarios that concern me, where we might have our hands forced and not have clarity around what happened. I’m aware of at least one case where a skilled adversary broke into an industrial environment, and in the course of intelligence operations they accidentally knocked over some sensitive system that led to visible destruction and almost to multiple casualties. And the worst part is, we didn’t actually realize it was a failed operation until about a month after, because the forensics and analysis take time. So you could have a scenario where the U.S., Russia, China, Iran—big players—are doing intelligence operations on each other, are doing pre-positioning to have deterrence or political leverage, and mess up that operation in a way that looks like an attack that we do not have transparency on for some time. We do not have international norms around how to handle that. Outside of conflict scenarios, though, I don’t see the advantage to [deliberate] disruptive or destructive attacks. I think we haven’t seen it not because they haven’t wanted to, but because the return on investment is minimal. What’s really advantageous is sitting U.S. congressmen and policymakers fearing what can happen with industrial infrastructure. That fear drives policy far more than actually turning the lights off and having them realize [they will] come back on in six hours.

## 2NC

### Congress CP---2NC

### Regs CP---2NC

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

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

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

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

#### “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>

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.

#### Patent law solves---their solvency advocate. Emory reads Green.

1AC Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

3. Application of the Basic Legal Principles The antitrust principle is straightforward: industry-wide collaboration through SSOs to establish procompetitive standards is permitted only if it is no more restrictive of competition than reasonably necessary to enable creation of the standards. When standard setting predictably creates technology monopolies that, if unrestrained, will enable anticompetitive ex post opportunism that would otherwise not occur, an SSO that does not take effective measures to pre- vent or minimize such ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act. Under this principle, SSO procedures and FRAND rules should be evaluated based on whether they lead to reasonable SEP royalties, using the competitive ex ante licensing standard discussed above, which has been adopted by the courts in patent law. Put differently, FRAND rules should be evaluated based on their ability to prevent SEP holders from obtaining more than the ex ante value of their technology from implementers. This limitation would not prevent a SEP holder from proﬁting, perhaps greatly, from participating in the SSO and having its patented technology included in the standard. The SEP holder continues to be rewarded for its technology because the inclusion of its technology in the standard can still greatly increase the volume of licensing opportunities available to the SEP holder. Whether a particular set of FRAND rules are sufficiently effective in preventing ex post opportunism will depend on the particular circumstances. The procedural unfolding of the case will also depend upon the circumstances. As a general matter, the case would probably be structured as an ordinary Rule of Reason case.82 First, the plaintiff would have to demonstrate harm to competition as a result of the collaboration of the SSO’s members, many of which compete with one another. In this case, the harm to competition would stem from the ability of the SEP holder to exercise monopoly power by obtaining royalties in excess of the competitive, ex ante level. The decision to include patented technologies in the standard would be the allegedly unlawful agreement. Notably, the court need not determine what a FRAND royalty is; it would suffice to determine that market power has been created or exercised, and that existing SSO rules and policies were not adequate to prevent the competitive harm. The defendant, which could be the SSO or perhaps one or more SSO members, would win at this point if the plaintiff failed to show harm to competition. If might fail if the standard faces substantial competition and the court concludes that the SEP holder therefore does not have market power or if the SSO’s rules and policies are found to be effective in preventing ex post opportunism, even if the plaintiff or even the court thinks that other rules and policies would be preferable. Second, if the plaintiff makes the requisite showing of harm to competition, the defendant(s) would then have to show some procompetitive justiﬁcation— in this case, the beneﬁts of the standard. These two initial steps should be straightforward. Third, if as is likely the defendant is able to show a procompetitive justiﬁcation, the plaintiff would have to show that the SSO could have used available, reasonable alternatives to realize the efficiency beneﬁts with less or none of the competitive harms. The plaintiff might identify reasonable alternatives that would have led to a different standard, based on including unpatented technology in the standard or perhaps involving fewer SEPs or fewer owners of SEPs, which would be less subject to patent holdup. More likely, the plaintiff could suggest alternative SSO rules that would not change the standard, but would reduce the likelihood or extent of ex post opportunism. For example, the plaintiff might suggest more rigorous FRAND-type rules, such as rules that set forth more precise principles on which FRAND royalties are to be determined and the circumstances under which SEP holders might seek injunctions. Fourth, the burden would then shift to the defendant(s) to show that the beneﬁts of the standard could not have been realized if the SSO had adopted any of the proffered alternatives or that those alternatives were unrealistic.83 The plaintiff would be entitled to judgment if the court concludes that those beneﬁts could have been realized with less competitive harm if the SSO had adopted the standard with different IPR rules or policies. Our overall sense, based on experience and the empirical literature, is that the extant FRAND rules are generally useful, but tend to be inadequate because they are imprecise and leave unresolved such critical issues as (a) the meaning of a reasonable royalty, even conceptually; (b) the meaning of “non-discriminatory;” (c) to whom licenses must be offered; and (d) under what circumstances may a SEP holder obtain an injunction.84 These imprecise FRAND commitments are therefore not sufficient to adequately prevent ex post opportunism. The recent revisions to IEEE’s FRAND policy represent a signiﬁcant step in the right direction, but even this advance leaves important questions unanswered.85 If FRAND rules are inadequate in these ways, litigation involving extant FRAND rules would likely be resolved only at the ﬁnal, fourth step. The defendant would be able to demonstrate the beneﬁts created by the standard; the plaintiff would be able to demonstrate the creation of market power and that other reasonable and practical rules or policies would ameliorate the problem. The case would thus turn on whether the defendant is able to demonstrate that signiﬁcant beneﬁts associated with standardization could not have been realized if the SSO had adopted those other rules or policies. The court would have available a variety of possible remedies if the plaintiff prevails. Implementers that paid supracompetitive royalties or were unlawfully excluded in whole or in part from product markets as a result of the inadequate FRAND policies would be entitled to damages and, in some cases, to treble damages.86 If the unlawful SSO conduct is regarded as the collective action of the SSO and its members, which is likely to be the case in most instances, SSO members would be jointly and severally liable for the damages. Forward-looking injunctive relief aimed at restoring competition would need to be fashioned to the requirements of the individual case. For example, a court could order the SSO to adopt a new rule or policy proposed by the plaintiff. If the court is reluctant to take on that governance role, it might give the SSO a period of time—maybe ninety days—to develop a rule, subject to the court’s ultimate approval, which would adequately ameliorate the competitive problem created by the SSO. Alternatively or in addition, the court might order the parties to attempt to negotiate a rule or policy on which they can agree. And, depending on the circumstances, the court might order SEP holders, including at least those that were defendants in the case, to comply with the new SSO rules and policies.

#### Yes expertise.

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.

#### Over-enforcement is the problem, not under-enforcement.

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

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

#### Mandating patent licensing solves deterrence.

Lemley & Shapiro 13, \*Mark Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business, University of California at Berkeley and a Senior Consultant at Charles River Associates; (2013, “A SIMPLE APPROACH TO SETTING REASONABLE ROYALTIES FOR STANDARD-ESSENTIAL PATENTS”, (https://faculty.haas.berkeley.edu/shapiro/frand.pdf)

Under our approach, many of these issues should become moot, since the patentee cannot obtain an injunction (or transfer the patent to someone who can) against a willing licensee, and since competitors are not involved in jointly setting the reasonable royalty rate. If SSOs set clear, reasonable rules following the best practices we recommend, and parties follow those rules, there should be little or no need for antitrust to intervene. Indeed, even the risk of non-disclosure of a patent is lessened, since the patentee has committed to license its essential patents whether or not it discloses them. For the most part, the rules we have described are self-executing, meaning that even if a party tries to break the rules set by the SSO there still may be no need for antitrust to intervene. Thus, we suggest that parties who abide by these procedures—patentees, implementers, and the SSOs themselves—should be immune from antitrust liability for activities that merely follow those rules.107 They have entered into an arrangement that is on balance good for competition, one that allows patentees to receive reasonable royalties but prevents holdup and reduces the risk of monopolization by trickery. The fact that antitrust remains a last resort available when SSOs don’t follow best practices may have two practical benefits, however. First, under our approach the promise of avoiding the risk of antitrust liability will be a powerful incentive for both SSOs and patent owners to adopt the best practices we propose. Second, the risk of antitrust liability may be relevant when an individual patentee wants to adopt best practices but the SSO governing the standard has not yet done so. We propose that a patentee that unilaterally commits to the FRAND procedures we describe here should be immune from antitrust liability for following these procedures.108 A patentee’s unilateral binding commitment to arbitration could be enforced whether or not it was elicited by an SSO. Thus, just as the prospect of antitrust immunity might lure SSOs to adopt best practices, it might also lure patentees to implement those practices even if the SSO has not done so. Given the large number of standard-essential patents based on preexisting standards,109 and given that SSOs tend to update their IP rules rather slowly,110 this is not a small matter.

#### 3. BUT, antitrust deters injunctions, overburdens SEP owners, and links to the net benefit.

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

### Japan DA---2NC

#### But not locked in place.

Dr. Adam Liff 19. Assistant Professor of East Asian International Relations at the Hamilton Lugar School of Global and International Studies at Indiana University, Ph.D. and M.A. in Politics from Princeton University, and B.A. from Stanford University, “Unambivalent Alignment: Japan’s China Strategy, The US Alliance, and the ‘Hedging’ Fallacy”, International Relations of the Asia-Pacific, July 2019, p. 31

Nevertheless, **what is at present is not necessarily what shall forever be**. Japan’s leaders will continue to face a complex, dynamic, and potentially volatile strategic environment. Increasingly **difficult trade-offs** may **manifest**, especially if China’s military power, economic wherewithal, and willingness to attempt to drive wedges between the United States and its allies grow. An **exogenous shock** could also upset Japan’s basic trajectory. Indeed, this possibility appears **less remote** today given China’s and North Korea’s recent policies, geopolitical and **geo-economic shifts**, **US** relative decline, and President **Trump's skepticism** of alliances and free trade. Yet, even in this case, Japan’s continued pursuit of more **independent military capabilities** and strategic autonomy while simultaneously bolstering security cooperation with the United States and its regional partners seems more likely than a strategic realignment toward Beijing.

#### The plan’s unilateral approach breaks the Japan antitrust agreement---courts and agencies apply case law extraterritorially.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

Bilateral approach. The OECD has played a leading role in international efforts to avoid international conflicts over the extraterritorial application of competition law through the decades, “recognizing that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective sphere of sovereignty of countries concerned” and that “anticompetitive practices, investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries.”41 Since 1967, the OECD has adopted and revised a series of recommendations concerning cooperation between member countries that aim for two goals: more effective law enforcement and avoiding jurisdictional conflicts. In the context of the OECD recommendations, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration of other countries’ important interests while deciding the enforcement of its own competition law. Comity involves two aspects: first, a country’s consideration of how it may prevent its law enforcement actions from harming another country’s important interests, and second, a country’s consideration of another country’s request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting that country’s interest. These aspects have come to be referred to as “negative comity” and “positive comity,” respectively. 42

Following the OECD recommendations, bilateral cooperation agreements have been concluded between the United States and several other industrialized states such as Australia, Canada, and Germany to avoid friction in competition law enforcement.43 The milestone would be the U.S. and E.U. agreement of 1991 that set forth, inter alia, positive comity as well as negative comity for the first time in a bilateral agreement. This agreement was supplemented by a more detailed agreement on positive comity in 1998, which even provides for the deferral of enforcement proceedings by the requesting side under certain conditions. Although enforcement cooperation has been strengthened, the European Commission has explained that eliminating the jurisdictional “imbalance” was one of the main reasons the E.C. negotiated the positive comity provisions in the supplement agreement.44 In the Commission’s view, “it is clearly preferable … that the United States avail itself of the principle of positive comity when considering anticompetitive behavior taking place within the European Community rather than seeking to apply U.S. competition law. Through positive comity the Commission can retain control, where it wishes, of enforcement procedures addressing such behaviour.”45

Bilateral conflicts have frequently arisen between Japan and the United States over the latter’s extraterritorial application of antitrust laws, as the two countries hold divergent positions with regard to state jurisdiction under international law and against the background of increasingly expanding trade between the two countries. The Japan-U.S. Agreement, which was concluded in October 1999, should be the test case as to how effective a bilateral agreement could work for avoiding or mitigating potential bilateral conflicts. Several points should be elaborated upon here.

First, Article II stipulates the obligation of the competition authority of each party to “notify the competition authority of the other party with respect to enforcement activities” that may “affect the important interests of the other party. ” This notification procedure is the foundation of cooperation and coordination in the agreement and “important interests” are interpreted to include not only interests concerning competition law enforcement but also interests concerning sovereignty and other legal or policy matters.46

Second, Article VI stipulates that “each party shall give full consideration to the important interests of the other party throughout all phases of its enforcement activities.” In seeking an appropriate accommodation of competing interests, such factors as the conduct’s relative significance to the anticompetitive activities, the relative impact of the anticompetitive activities on the important interests, etc., should be considered. These provisions represent so-called “negative comity” and are expected to work toward avoiding jurisdictional conflicts, which may be caused, for instance, by the extraterritorial application of U.S. antitrust law, through such consideration for balancing interests tests. However, the fundamental gap with regard to their respective positions on jurisdictional justification or sovereignty, as shown in the Nippon Paper case, could not be bridged by this provision of (negative) comity itself.

Although an unilateral attempt to extend the application of domestic legislation extraterritorially violates the basic principle of territoriality in international law, the need for regulatory measures to be applied across national borders has also become a reality with the growth of transnational economic and social relations and the consequent emergence of a borderless society on a global basis. In this respect, the position of Japan is too rigid in resisting to accept the need for the extraterritorial adjustment of national competence, as evidenced in the negotiations between Japan and the United States for regulating transnational activities involving unfair competition across national borders.47

As seen above, the Government of Japan still formally rejects the effects doctrine; however, adjustment of extraterritorial jurisdiction that justifies extending jurisdiction with respect to foreign companies’ conduct abroad could be based on (a modified version of) the objective territorial principle, as has been applied in the Wood Pulp cases by the European Court. This justification could be compatible with the recent practice of the JFTC on the Nordion case and on the Exxon Mobil merger review.

Third, Article V stipulates that if the competition authority of a party believes that anticompetitive activities “in the other country adversely affect the important interests of the former party … [it] may request that the competition authority of the other party initiate the appropriate enforcement activities.” The requested competition authority shall carefully consider whether to initiate enforcement activities. These provisions represent the so-called “positive comity” and the requested competition authority is expected to take into account “the importance of avoiding conflicts regarding jurisdiction,” which is explicitly set forth in the article.

Positive comity may play an important role in export restrains (market access) cases where the requesting country’s interest is protection of its exporters’ interests.48 It has been observed that the Soda Ash case has positive comity aspects, where after U.S. trade officials complained that U.S. soda ash producers faced barriers to access in Japan, the JFTC conducted an investigation and issued a cease and desist order against Japanese producers.49 In such cases as the Fuji Kodak case, the United States could have invoked positive comity; however, U.S. enforcement agencies would have had to consider the similar position of Kodak in the U.S. market as that of Fuji in the Japanese market. Positive comity’s role may be limited in certain categories of export cartel cases because of the exemptions under the Export Trade Act in Japan and under the Webb Pomerene Act, etc., in the United States.

Positive comity under the Agreement raised concerns that it would further intensify U.S. demands for more vigorous law enforcement against anticompetitive conduct relating to market access while requests of positive comity from Japan to the United States would be rare. Nevertheless, such concerns seem off the mark. Apart from the voluntary nature of positive comity, the alleged conduct’s illegality under the requested state is a prerequisite to invocation of positive comity, and if any complaint is filed on an alleged illegal conduct, the JFTC would consider the possibility of enforcement in any case. Furthermore, Japan may request positive comity in such cases as alleged abuse of antidumping procedures against Japanese exporters by a U.S. company in the United States, even though Japanese competition law does not apply to protect Japanese exporters’ interests. Again, if Japan considers that a U.S. film maker’s conduct in the United States is anticompetitive, it may request positive comity to the United States, regardless of the fact that Japan claims to have no extraterritorial jurisdictional reach over the film maker’s conduct in the United States. In these situations, jurisdictional “imbalance” between the two countries could, to some extent, be eliminated.

The effectiveness of this agreement in terms of avoiding conflicts remains to be judged from how it will be applied in practice. Although this agreement is an executive agreement that is to be implemented within the framework of existing laws and regulations of the two states, the obligation to consider negative and positive comity will facilitate cooperation and coordination with a view to reducing conflicts. Comity is essentially voluntary but its flexibility may work better in solving a potential conflict, which ultimately depends on good working relations between the two governments, especially between the enforcement agencies, based on mutual trust. At the same time, it must be remembered that U.S. courts will not be bound by this agreement; therefore, effectiveness of both negative and positive comity under this agreement has significant institutional limitations with respect to U.S. case law.

#### 3. Narrowly defined core antitrust is uncontroversial---only the plan’s expansion offends allies.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

V. Conclusion

Within competition policy worldwide, a great deal of consensus exists about such practices as price fixing and other naked agreements in markets that we generally consider to be competitive, or unregulated. In the presence of that consensus, using national court systems to reach activities outside national boundaries is increasingly uncontroversial, unlikely to cause a great deal of harm, and often does much good. Indeed, importing nations typically have a greater incentive than exporting nations to apply their law to cartel agreements causing monopoly prices. The same thing can be said of a very small number of unilateral practices, such as improper intellectual property (IP) infringement actions or other abuses of IP rights, particularly when there is international consensus about the scope of these rights.

But when one moves away from these core concerns of competition policy, consensus breaks down to a very significant extent. A unique combination of antitrust jurisdictional doctrines then operate so as to impose the highly general United States antitrust statutes on foreign regulators-a task clearly beyond anyone's vision of antitrust's appropriate mandate. The broad view of extraterritorial jurisdiction and the narrow conception of comity developed in the Hartford Fire decision72 become affirmatively offensive to foreign regulatory prerogatives when the antitrust laws are applied beyond their traditional "core" concerns, and in ways that make the United States court little more than a substitute for the regulatory agency and for a foreign regulatory agency at that.

#### 4. True for the aff---the plan’s extraterritorial application creates conflicts in international IP law---causes protectionism.

David Morfesi 17. Director of MinterEllison's International Trade Group. The Pendulum Does What Pendulums Do: The Evolving Relationship Between IP and Competition Law. Regulating for Globalization. 7-12-2017. http://regulatingforglobalization.com/2017/12/07/the-pendulum-does-what-pendulums-do-the-evolving-relationship-between-ip-and-competition-law/

While the symposium on Application of Competition Policy to Technology and IP Licensing hosted by the Center for Transnational Law and Business at the USC Gould School of Law on 10 November 2017 was, for many reasons, worthy of a suite of scholarly articles (I particularly look forward to Professor Jonathan Barnett’s upcoming article in the Berkeley Technology Law Journal), I’ll try to do it justice in my inaugural blog post.

Featuring presenters including senior regulators from Australia, China, Japan, the UK and US, industry representatives from Microsoft, Qualcomm and Ericsson, and academics from India, Taiwan and the US, the highlight was the keynote address by Makan Delrahim, the US Assistant Attorney-General for the Antitrust Division of the USDOJ, who announced a reasoned, pro-IP and innovation policy towards the intersection of IP and competition law.

In discussing the competition law and policy implications of standard-essential patents (SEP) and fair, reasonable, and non-discriminatory (FRAND) licensing, the conference featured presentations offering empirical and anecdotal evidence, or lack thereof, of the evils of monopolistic “patent hold-up”, potential for monopsonistic practices by standard setting organisations (SSOs), and the possibility of cartel-like behaviour by technology implementers to reach more favourable licensing terms than would be achievable in an unfettered market. It was AAG Delrahim though, who gave teeth to the discussion, announcing what at least one commentator has called a “major pro-IP and pro-innovator shift in DOJ policy.”  In short, one of his significant proclamations was that regulators (the implication being both in the US and worldwide) have “strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate award for developing breakthrough technologies.”

The first impression I had upon hearing his presentation was not how major a shift it was, but rather how familiar it sounded. It was only later that I realised that the AAG, our host, Center Director Brian Peck, and I had all held positions in the Office of IP and Innovation (as it is now known) at USTR.  What we were hearing was not a dramatic policy shift, but rather a return to long-standing US policy in IP and competition law.  Core concepts, such as the fact that an essential element of a property right is the right to exclude, that the proper exercise of patent rights cannot violate competition law, and “that a unilateral refusal to license a valid patent should be per se legal,” all once taken as given, have now been labelled as a new direction.

What might be called the latest anti-IP shift in IP and competition policy may have only happened in the last ten years, but it continues to have dramatic impact globally. Qualcomm alone has faced fines of $975million in China (2015), $854million in South Korea (2016) and $774million in Taiwan (2017) for what were deemed anticompetitive licensing practices for its portfolio of SEPs.  Without commenting on the appropriateness of any of these decisions themselves, the evidence and arguments presented at the USC symposium, accentuated by the announcement of a US return to pro-IP policies concerning IP and competition law, beg the question of whether the basis for the law and policy underlying those decisions by national competition authorities is justifiable.

Finally, we get to the nexus with globalisation. While the matters above demonstrate how enforcement of competition law today often has extraterritorial consequences and impact, the improper enforcement of competition law can also conflict with rights and obligations under international trade law.  The line will likely remain blurred, but there are two sets of rights and obligations implied.  First, IP rights and obligations set out explicitly in international instruments (implemented under national law) such as the TRIPS Agreement may be in direct conflict with decisions such as these.  Regulatory decisions that find exercise and enforcement of IP rights, including seeking injunctive relief, violative of competition law consequently deny that IP protection provided for under a series of international agreements.  A patent holder could be enjoined from a unilateral decision not to grant a licence, and without the right to obtain an injunction themselves, a patent holder’s only remedy for infringement becomes the payment of a reasonable royalty.  In either case, exclusivity in the right is removed.

Second is the protection for foreign direct investment built into many trade agreements, including via the mechanism of investor-state dispute settlement. This could be implicated if the domestic mechanism for regulating anticompetitive behaviour is exercised in a way that may improperly expropriate the value of an investment in innovation by undermining the related intellectual property rights.

Viewed from a more subjective standpoint, what technology implementers might argue as a valid regulation of anticompetitive licensing practices by innovative patent holders, the innovator might see as a veiled barrier to trade, using competition law remedies to empower monopsonistic behaviour in a country that is home to large technology implementers.

While AAG Delrahim put the IP and competition community on notice that the US will be pursuing a more pro-IP policy and enforcement direction, and urged other competition regulators to do the same, the international trade community should take notice as well, and competition regulators should be equally concerned. Are current laws and polices grounded in evidence-based and economically sound principles –  strong enough to justify the largest fines levied in your regulator’s history, and capable of justifying a potential breach of concurrent international obligations?  Are these the least trade-restrictive measures to address any perceived competitive imbalance, or are contractual obligations and market forces sufficient to level the field?  When does regulatory action become a regulatory taking for which compensation should be made?

#### Economics key---uncertainty causes accommodation to China---assumes military ties.

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Lesson 2: Transactional Policies Undermine Alliances

It was not only the waning American military presence in the Pacific that sparked anxiety among U.S. allies in the 1970s. It was also the more transactional economic approach that Nixon embraced when he jettisoned the Bretton Woods system. The postwar alliance relationships the United States established in Asia were rooted in far more than defense guarantees. American trade and investment helped propel the region’s dramatic postwar growth, especially in allied nations like Japan and South Korea. The Vietnam War offered further economic benefits, fueling commercial exports and trade with allies and generating substantial U.S. economic assistance in return for allied contributions to the war effort.116 The United States upended these economic ties when it hit allies with a 10 percent tariff on imports and unraveled the Bretton Woods financial system while also winding down its wartime assistance.

Through these actions, the Nixon administration signaled that the United States was becoming less predictable and reliable — not only as a military ally, but as an economic partner as well. The end of dollar convertibility into gold, which became known as the “Nixon shock,” introduced new friction into U.S. alliance relationships right at the moment when U.S. allies were also beginning to explore new trade relationships with China. Over the next three decades, Asian allies sought increasingly closer economic ties with Beijing, which repeatedly capitalized on the perceived economic absence of the United States during both the Asian financial crisis and the more recent pandemic-induced recession. In short, transactional American economic policies accelerated the adoption of transactional allied security policies.

Looking forward, if the United States hopes to incentivize its allies to anchor rather augment, autonomize, or accommodate, it will need to focus on the economic underpinnings of its alliance relationships. Transactional relationships based only in shared short-term interests are difficult to maintain. Economic power and influence have given Beijing not just clout, but substantial leverage over U.S. allies and partners. One need look no further than China’s use of economic statecraft against Japan in 2010, the Philippines in 2012, Vietnam in 2014, South Korea in 2017, or Australia in 2020 to see the effect Beijing’s economic power is having in the region.117 Equally important, regional assessments of American decline are based largely on perceptions of waning U.S. economic influence and its inward turn on trade.118 U.S. leaders will need to assure allies that Washington has a plan to restore its economic leadership in the Pacific in addition to restoring its military presence. Better aligning U.S. alliances around shared principles and institutions will therefore be key for the United States going forward.

#### Extinction---Chinese aggression sets a precedent for global war.

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It has been decades since international relations in the world order dictated true competition for sea control, sea lines of communication, access to world markets, and diplomatic partnerships. However, it is becoming increasingly alarming that nations such as Iran, China and Russia seek to accumulate/consolidate power and re-define international maritime norms, potentially at the peril of diplomatic, economic, and military bonds that link NATO allies and critical partners.

Iran claims control of the Strait of Hormuz and has put the threat of closure or denial at the core of its asymmetric war strategy. In a 2019 statement in response to the U.S. plan to end waivers on Iranian oil exports, Alireza Tangsiri, head of the Iranian Revolutionary Guard Corps navy force confirmed that the Straits of Hormuz was a critical arrow in Iran’s proverbial military quiver. Tangsiri remarked that “If we are prevented from using it; we (Iran) will close it. In the event of any threats, we will not have the slightest hesitation to protect and defend Iran’s waterway.” 1

Renewed tensions between Iran and the United States, heightened further following the Trump administration’s decision to target Iranian Major General Qasem Soleimani, have renewed Iranian narratives about closing the Straits of Hormuz in an effort to break another set of renewed western sanctions. Carrying one-fifth of the world’s traded sweet crude oil, a possible interruption of oil and gas exports through the strategic waterway would have a significant, negative, impact on the global economy. 2 Moreover, it is not only oil. According to the International Energy Association, huge amounts of natural gas are also transported on that route with an estimated 33 billion cubic meters of gas, including from Iran and Qatar, passing through the Strait of Hormuz each year. 3

Likewise, China’s attempts to rationalize and assert control of 80 to 90 percent of the South China Sea, including waters allocated to neighboring sovereign states under the U.N. Convention on the Law of the Sea (UNCLOS) are equally troubling. 4 As author Bill Hayton aptly describes it in book The South China Sea: The Struggle for Power in Asia, the South China Sea is “both the fulcrum of world trade and the crucible for conflict.” 5 The challenge posed by China’s refusal to abide by international law in the South China Sea may potentially re-define the practical application of the concept of maritime freedom. Beijing is bullying its way through its selective application of UNCLOS to a maritime entitlement five times larger than permitted via the convention (China ratified UNCLOS in 1996) and customary international law, carving out an illegitimate sphere of influence. 6 In effect, if Beijing gets its way, the South China Sea will become a seaward extension of Chinese territory and the ruling Chinese Communist Party will ipso facto dictate what foreign vessels and aircraft can and cannot do. 7 The cascading effects for other critical SLOCs, from the Persian Gulf to the ever increasingly more accessible Arctic routes, could be severe if other coastal states, such as Iran and Russia, decide to press their own revisionist interpretations of maritime law. 8

Many Russia watcher and analysts support the premise that Russia, through its confrontation with the Ukrainian Navy in the Kerch Straits in November of 2018 and its subsequent restrictions on shipping, is similarly trying to rewrite the rules in the Sea of Azov, just as China has done in the South China Sea. Experts such as James Holmes, a professor of maritime strategy at the United States Naval War College, agree that the Russian actions in the Black Sea region pose a challenge to international maritime law.

“It’s an effort to set a precedent that Russia can then apply to other seas that it would also like to dominate if not control, much as the South China Sea is an expanse that China would like to ‘own,’ ” he said. “If Russia can define the Azov Sea as Russian territorial waters, there is no reason in principle it could not do so in the wider Black Sea, the Baltic Sea, Sea of Okhotsk, et cetera. So this is an easy win for Moscow and an easy place to set that precedent.” 9

In all of the examples above, the international norms and UNCLOS regulated system of maritime trade, commerce and military endeavors has come under direct challenge. In all such cases, it is incumbent upon maritime nations that believe in the freedom of the sea and require international sea based trade to maintain their quality of being, help defend this centuries-old concept that the high seas are a global commons. International waters belong to everyone and no one, with few, minor and narrowly defined exceptions. No state owns it, and no state can make laws dictating what others do there. 10 Operations, such as the ones listed above, threaten the freedom of the seas, seek to intimidate neighboring states and coerce weaker nations into violation of international law.

On a daily basis, surface naval forces of the NATO Alliance’s nations and partners are conducting peaceful operations across the globe. These joint forces at sea protect freedom of maneuver, secure the sea-lanes for global trade and economic growth, defend and promote key national interests and prevent competitors and adversaries from leveraging the world’s oceans against us. The navies of the democratic and peaceful countries of the world and the international maritime community share concern over safeguarding strategic sea lines of communication.

Versatile and scalable naval forces fulfill these crucial roles, which are the necessary preconditions to ensure the free movement of trade and commerce and to safeguard the interests of NATO and partner nations all the while maintaining a strictly defensive posture. The persistent forward presence and power projection of the Alliance’s naval forces backed by credible combat capability deters potential aggression and seeks to limit regional frictions from escalating to greater levels of conflict. These forces strengthen conditions that enable mutual prosperity.

The freedoms to use the maritime domain—the oceans, the littorals, waterways, and seafloor; the rise of global information systems, especially the role of data in decision making and the security of data supporting operational decision making are shared fundamental areas of concern, not only for the individual nations and the Alliance in general, but also for the maritime industry.

Security in the global maritime commons is not a given. Without a comprehensive, shared understanding of what is occurring in the maritime domain, achieved through a robust Maritime Situational Awareness (MSA), vital opportunities to detect and mitigate threats or critical vulnerabilities at the earliest opportunity may be lost. A comprehensive MSA network is required to facilitate information sharing and can only be established with the cooperation of military forces, national law enforcement agencies, and close cooperation with the international maritime transportation industry. Understanding Pattern of Life is critical to identifying abnormalities that may be indicators to hostile or subversive actions.

The lack of modern and agile global and regional governance structures has generated friction between the globalized corporate sector, maritime authorities and military policy-makers that undermines the maintenance of persistence relationships necessary to enhance true maritime situational awareness. In an increasingly inter-connected, inter-dependent and rapidly changing globalized world, there continues to be an absence of persistent relationships between the ever-increasing number of key stakeholders in the global maritime community of interest.

Operating according to disparate mandates, objectives, areas of responsibility and jurisdiction, there is an obvious need to develop a shared network and develop a collaborative contribution to achieve a comprehensive MSA capability in which all stakeholders’ requirements are met and enhanced. In the maritime domain, our continued freedom of the global commons requires an understanding of persistent relationships, time, space, risk, oceanography, the global supply chain, critical infrastructure and the environment, as well as the nature of the risk, and the capabilities, readiness and location of one’s competitors. So as James Holmes so eloquently states, these clashes are not merely about the Strait of Hormuz or the South China Sea.

The world’s oceans and seas comprise a single interconnected body of water. Seagoing nations must stand on the principle that maritime freedom is likewise indivisible. If the maritime community in general relinquishes its inherent freedoms in the global commons in one body of water for the sake of placating a predatory coastal state such as China, the global maritime community stands the risk some other strong coastal state will mount similar challenges in some other strategic waterway.

### Innovation---2NC

### Cyber---2NC

#### Scope is not sufficient to solve.

Tay-Cheng Ma 11. Professor, Department of Economics, Chinese Culture University. “The Effect of Competition Law Enforcement on Economic Growth”. Journal of Competition Law & Economics, Volume 7, Issue 2, June 2011, Pages 301–334. https://academic.oup.com/jcle/article/7/2/301/1031182?casa\_token=CYnGqjkOtzwAAAAA:uLB97jLHKYta3keLCEOLQGcwg61bFW72SokNT\_8K3J5nh9m\_Sf-KyBNgVwJ91iYxg0ewZegeWsG6qA

With respect to the variables of primary concern, SCOPE and its interaction term SCOPE · EFFICIENCY (for brevity, hereinafter referred to as “EFFLAW”), the results show two interesting pieces of evidence. First, all regressions fail to show a statistically significant impact for SCOPE. Thus, the size or intensity of the competition law net is irrelevant to the economic growth. Second, the impact of competition law enforcement on productivity growth is asymmetrical between rich and poor countries. Column (C) indicates that the estimated coefficient for the interaction term (EFFLAW) of 0.04 is insignificantly different from zero for the poor group. This failure to find an impact of competition law on productivity among the poor countries parallels the inference of Gal.48 For these countries, competition legislation is neither harmful nor helpful in terms of aggregate productivity. As to the rich group, Column (B) shows that the estimated coefficient for EFFLAW of 0.064 is significantly positive. This indicates that countries exhibiting high efficiency in enforcing competition law will grow disproportionately faster if they have stricter regimes for the law. Thus, the impact of competition law on growth is not uniform between rich and poor groups. From the viewpoint of threshold externalities, the difference in the impact of law can be explained by the incidence of multiple regimes. The reasoning is that competition law affects economic growth through various production regimes in a way that is similar to that put forth by Azariadis and Drazen49 and by Durlauf and Johnson.50 This result reveals the fact that certain types of channels through which competition law has an effect on productivity growth are constrained by the socioeconomic infrastructure (LAW). Once this constraint is no longer binding, the impact of the competition law will increase with its scope and enforcement efficiency.

D. Competition Law Effect in the Rich Group

This subsection evaluates the magnitude of the effect of competition law on the growth of rich countries with different levels of governmental efficiency (EFFICIENCY). Since SCOPE is not significant, I drop it from the regression and report the regression results in Columns (D) and (E) of Table 4. First, Column (D) shows that the coefficient of EFFLAW is 0.044.51 Conditional upon the sample mean of governmental efficiency (⁠forumla⁠), for every one-point increase in SCOPE, GROWTH increases by 0.01 percentage points. To consider a concrete example of the implications of this evidence, take the case of Ireland, which has SCOPE =18 (25th percentile),52EFFICIENCY = 1.58, and GROWTH = 4.81 percent. Consider that Ireland were to revamp its competition statute, so that its SCOPE increases from the level at the 25th percentile to the one at the 75th percentile of the distribution (SCOPE = 21), which is equivalent to the level for the Netherlands. The results of Table 4 suggest that the maximum increase in GROWTH that would result is 0.21 percentage points. In other words, a 3 point increase in SCOPE could increase the growth rate from 4.81 percent to 5.02 percent.53

To highlight the importance of EFFICIENCY, Table 5 calculates the effect of SCOPE on GROWTH for countries with different levels of EFFICIENCY if one increases the SCOPE by three points.54 As I did above, I perform this calculation based on the estimation results in Column (D) of Table 4. For a country (for example, Morocco) at the 5th percentile of the distribution of EFFICIENCY (–0.18), the coefficient of EFFLAW reveals a negative effect of 0.044·3·(–0.18) = –0.02 percent on growth. In Morocco, a stronger competition law not only cannot support productivity growth, but might also slow down the potential path of growth. The overreach of antitrust law has not been found to increase productivity growth in any systematic way, and in some instances the intervention may even have retarded economic growth. To ensure a credible and impartial enforcement, the infrastructure landscape should provide the enforcing agencies an effective apparatus to enforce the law.

[TABLE 5 OMITTED]

Alternatively, if one performs this calculation for a country (for example, Portugal) at the 75th percentile of the distribution of EFFICIENCY (1.79), the result shows that the effect of a stronger competition law increases to 0.24 percentage points. In conclusion, a high SCOPE indeed can promote growth, but only on the condition that the agency can enforce the law effectively. Just as Crandall and Winston have indicated, a tough and broad antitrust policy must rest on adequate infrastructure that ensures that such policies can be enforced effectively. The mere adoption of a competition law is a necessary condition, but not a sufficient condition, to promote economic growth.

#### Endless future cases and delayed rulings, clogging the courts

Dave Danforth, 7-25. Aspen Daily News columnist, A founder of the Aspen Daily News. “Danforth: Antitrust laws buried under layers of complexity.” Jul 25, 2021. https://www.aspendailynews.com/opinion/danforth-antitrust-laws-buried-under-layers-of-complexity/article\_aa9916fa-ecdf-11eb-a815-73afcf72ee6d.html

In 1981, David Palmer, a lawyer for the Aspen Skiing Co., had a problem. Back then, the “SkiCorp” didn’t own all four Aspen ski areas, but only three: Ajax (Aspen Mountain), Buttermilk, and Snowmass. The fourth — Aspen Highlands — was separately owned and was on the warpath against the Ski Corp. Its owner, Whip Jones, had convinced a Denver federal jury that the SkiCorp, was bent on a bold, bad-faith bid to monopolize the Aspen skiing market. To corner the market, the SkiCorp, led by D.R.C. “Darcy” Brown, had manipulated the pricing of an all-Aspen ticket to severely harm Highlands. The jury, on June 18, agreed. It awarded what today would seem chump change — $7.5 million to Highlands. To appeal the ruling, Palmer would need a novel argument: that the Aspen market couldn’t be monopolized. If he could show that, he could re-argue a case on its way to the U.S. Supreme Court. Palmer had to hope nobody in Aspen would read his words. The Aspen skiing world was built on the notion that Aspen was unique. There is only one Aspen. Nobody can copy it. Hogwash, Palmer argued in a brief only judges were supposed to read. Aspen ski services aren’t at all unique, he wrote. Services available to Aspen skiers “are neither unique nor in any way different from the services provided by Vail, Crested Butte, Steamboat Springs, Heavenly Valley, Jackson Hole and Lake Tahoe.” The argument wouldn’t win the case, but it advanced it to the highest court. It also showed how **antitrust laws get so complex** they’re hard to understand. The case illustrates the rough sledding that antitrust warriors will face as the Biden administration hopes to reawaken a Justice Department slumbering over the last four years. It sees a new frontier in high-tech titans. The Aspen case eventually reached the Supreme Court in March of 1985. The justices had no dispute, ruling 8-0 for Highlands. In later years, the Aspen Skiing Co. would “monopolize” the market the easy way: it simply bought Highlands. The case showed how **simple concepts of ­monopoly law can get bogged down when buried under years of subsequent court rulings**. They all sought to clarify what Congress meant in 1892 when it outlawed any “combination or conspiracy in restraint of trade.” The law has been used by trust-busters seeking to break up everything from industrial complexes to a phone company. Along the way, it has **spawned a flock of subsequent court rulings**, citing concepts from the “essential facilities doctrine” to “duty to deal” and “predatory pricing” as warning signs of where monopolies might lurk. The Aspen case stands out. Nobody doubted that the “SkiCorp” wanted to injure Highlands when it decided, around 1977, to change the “cut” of the court-ordered joint four-area ticket unilaterally. Highlands had traditionally received about 19 percent of sales when the SkiCorp decided to drop it to 15 percent. Highlands was bound to be hurt, but the SkiCorp was adamant. It resented Jones and Highlands for running an inferior ski area with clunky lifts, piggy-backing on slick marketing largely produced by the SkiCorp. Palmer and the SkiCorp argued to the Supreme Court that they had no duty to cooperate — a legal concept — with a lower-class competitor. Unfortunately, the SkiCorp sabotaged its argument with a series of “**dirty tricks”** aimed at Highlands. In one infamous example, it produced a batch of Aspen skiing maps from which Highlands was simply air-brushed away. Nobody doubted that the Ski Corp and the headstrong Darcy Brown were out to get Jones and Highlands. But they fumbled, and their arguments **were buried** by the finer points of antitrust law. A similar episode arose in 1993 involving another strong figure: Robert Crandall, then CEO of American Airlines. The company had been sued by Northwest and Continental — two competitors — for predatory pricing. Crandall, the competitors argued, had sharply cut fares in the summer of 1992 in a bid to hurt the competitors and force them under. A federal jury convened in Galveston, Texas to hear the case. As in the Aspen case, the facts seemed clear as a bell. Crandall, a legendary and fiery CEO, had cut fares to retaliate against competitors for irritating fare cuts of their own. Wagers popped up in the gallery. Would Crandall throw a temper tantrum in court? But the case got sidetracked by a judge who, in a bid to write a road map for the jury, embedded a roadside bomb. Which “city-pairs,” the judge demanded the jury answer, did American intend to monopolize? The jury, having spent a week on the case, was thrown by the judge’s question. It decided a few hours into deliberating that it couldn’t answer, thus ruling in American’s favor. The simple retaliation got buried by clouds of antitrust rulings.

#### Prefer statistics.

Valeriano & Maness 18 – Brandon Valeriano, PhD, Chair of Armed Politics at the Marine Corps University, Cyber Security Senior Fellow at the Atlantic Council. Ryan Maness, an American cybersecurity expert, Defense Analysis Professor at Naval Postgraduate School. [How We Stopped Worrying about Cyber Doom and Started Collecting Data, Politics and Governance, 6(2), Cogitatio Press]

6. Expanding Cyber Security Data Our team has been coding cyber incident data since 2010 and serves as a unique example of how the process of collecting cyber security data and evidence can be done. Our first peer reviewed published work appeared in 2014 in Journal of Peace Research (Valeriano & Maness, 2014). In this article we note that cyber conflict is much more restrained than generally understood by popular discourse. Threat inflation is ripe in cyber security, and the real use of cyber tools seems to be to enhance the power of strong states.

The data that Valeriano and Maness (2014, 2015) have built challenges the cyber revolution perspective and does so with the tools of social science, and is a necessary turn given the general tone of the debate. We first determine that a viable data collection method in light of limited resources was to focus on states that are committed interstate rivals (Diehl & Goertz, 2001). This allows us to focus on those actors with an intense history of recent hostilities that should be the most likely users of cyber technology on the battlefield (Maness & Valeriano, 2018).

In our research (Maness & Valeriano, 2016; Maness, Valeriano, & Jensen, 2017; Valeriano & Maness, 2014, 2015), we have been able to marshal a massive amount of evidence that is useful in dissecting the actual trends on the cyber battlefield in a geopolitical context. We demonstrate that while cyber-attacks are increasing in frequency, they are limited in severity, are directly connected to traditional territorial disagreements, and mostly take the shape of espionage and low-level disruptive campaigns rather than outright warfare.

Given this data-based perspective, we question the dynamics of the cyber security debate and offer a countering theory where states are restrained from using more malicious cyber actions due to the limited nature of the weapons, the possibly of blowback, the connection between the digital world and civilian infrastructure, and the reality that any cyber weapon launched can be replicated and used right back against the attacker. Given all of these perspectives gleamed from the data, we must moderate our views about the transformation that is offered by cyber strategists who stress a more revolutionist tone (Lango, 2016).

Social science clearly matters for contemporary technological policy debates. Absent rigorous methods, much of what is in the field is basically guesswork. Our work really owes an intellectual debt to J. David Singer, who started the effort to quantify war at the University of Michigan with the Correlates of War (COW) project (Small & Singer, 1982). Our project builds on this methodology and uses many of the same coding strategies. We recognize that data is a work in progress and seek to build more and more knowledge through subsequent updates. By gathering the full picture, we can gain the perspective that really matters in these emerging policy debates regarding the cyber battlefield.

#### Err against catastrophe.

Lewis ’20 [James Andrew; 8/17/20; senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies; "Dismissing Cyber Catastrophe," https://www.csis.org/analysis/dismissing-cyber-catastrophe]

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.

## 1NR

### Court Politics---2NC

#### Antitrust rulings costs Roberts capital—create massive decision and error costs

Lambert 15 (Thom – Professor at the University of Missouri Law School & Alden F. Abbott, “Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies,” p. 796-97, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1754&context=facpubs)

The first thing to note is that antitrust adjudication poses hard questions. Challenges to concerted conduct-potential collusion-are often perplexing because many output-enhancing business arrangements (for example, joint ventures) involve cooperation among independent economic actors, often competitors. Adjudicators must determine whether the coordinated arrangement at issue is likely to increase market output, in which case the trade-restraining agreement is reasonable, or reduce it, in which case the requisite unreasonableness exists. In monopolization and attempted monopolization cases, adjudicators must determine if conduct that won business for the defendant vis-A-vis its rivals was just vigorous competition or crossed into unreasonable exclusion territory. To draw the necessary distinctions, judges and juries generally must assess conflicting testimony from economic experts and reach conclusions on such complicated subsidiary issues as the contours of the relevant market, the existence and size of entry barriers, and the elasticities of demand and supply for the product at issue. There are thus significant costs in simply reaching a decision as to whether a particular conduct violates the antitrust laws. If the conduct is challenged in court, the parties themselves, with the aid of lawyers and economic experts, must gather, process, and present a large amount of complex data. The jury or judge must then deliberate over the information presented and decide both subsidiary issues (for example, what exactly is the relevant market?) and the outcome-determinative question (for example, is the conduct "unreasonably" exclusionary?). Even before any court challenge, business planners must assess the likelihood that their contemplated conduct may be deemed to violate the antitrust laws. Taken together, the costs that business planners, litigating parties, and adjudicators face in assessing and establishing the legality or illegality of a practice constitute antitrust's "decision costs." Those are not the only costs associated with antitrust adjudication. Given the difficulty of distinguishing collusion from output-enhancing cooperation and unreasonably exclusionary conduct from vigorous competition, adjudicators will certainly make mistakes in deciding antitrust cases. Those mistakes, then, will themselves impose social costs. A mistaken acquittal of an anticompetitive practice-a false negative or "Type II error"-will tend to permit market power that causes resources to be allocated away from their highest and best uses.lS A mistaken conviction of a procompetitive practice-a false positive or "Type I error"-will squander social welfare by denying market participants the benefit of the efficient, wrongly condemned business practice. The latter sort of error is likely to be more damaging in the long run.19 Whereas market power, the result of a Type II error, tends to self-correct as firms enter the market and expand output in response to higher prices, judicial condemnation of an efficient practice will have economy-wide, not just market-wide, effects and may be corrected only by a subsequent judicial decision or a legislative fix. 20 Nevertheless, both false convictions and false acquittals tend to reduce social welfare, imposing "error costs."

#### Antitrust rulings are politically toxic for Roberts—pulled into partisan debate

Khan 20 (Lina M. – Academic Fellow at Columbia Law School, “The End of Antitrust History Revisited,” 3/10/20, https://harvardlawreview.org/2020/03/the-end-of-antitrust-history-revisited/)

Today, however, it is clear that what may have appeared as the end of antitrust history proved instead to be a prolonged pause in an enduring clash over the purpose and values of the U.S. antitrust laws.6 Over the last few years, the relative stability of the antitrust consensus has yielded to a sharp rupture.7 Two aspects of this break are most notable: first, the fact that the debate cuts to foundational questions about the goals of antitrust, and second, its highly public-facing nature. No longer relegated to law journals and practitioner conferences, antitrust has once again been thrust to the forefront of public conversation, prompting front-page headlines,8 congressional hearings and investigations,9 magazine covers,10 and discussion at a presidential debate.11 Antitrust law has been transformed quickly from a relatively settled and sequestered domain of expertise to an area of active debate, with its future now something to be constructed rather than inherited. Professor Tim Wu’s The Curse of Bigness is a book for this moment. In just under 150 pages, Wu offers a sweeping history of antitrust law and traces how it is that, in his view, antitrust became unmoored from its central tenets and animating principles. The book presents a diagnosis and a bold call to arms, seeking to recover a republican theory of antimonopoly and to rehabilitate robust antitrust enforcement. Writing about a specialized area of law for a generalist audience inevitably exposes an author to criticism, which Wu has drawn.12 But assessing the book solely as an academic contribution misunderstands the theory of change reflected in Wu’s choice of format. The Curse of Bigness is written for a mainstream audience because Wu believes that reinvigorating antitrust will require more than winning over academics or practitioners. Instead, informing and engaging the public — including advocates, organizers, policymakers, journalists, and other general readers — is a prerequisite for creating the political pressure needed to reorient antitrust around the antimonopoly values it has abandoned in recent decades.13 This Review builds on Wu’s book to explain the significance of the current rupture in antitrust and to situate it within a broader intellectual trajectory. Debates over the foundational purpose of antitrust are not new, and examining how this latest clash fits alongside previous contestations is essential for understanding what has yielded the current contestability and assessing the competing visions. Part I of this Review summarizes Wu’s chief contributions in The Curse of Bigness, focusing on three tenets that form the basis of the book. Part II offers an analytic breakdown of the overhaul in antitrust doctrine that is the subject of Wu’s critique, tracing the transformation of antitrust to changes in descriptive claims and normative assumptions that the Chicago School introduced. I argue that framing Chicago’s interventions this way lets us map the current antitrust debate with greater coherence. Doing so, moreover, reveals the limits of proffered correctives to the Chicago School and underscores the need for what has been called a “Neo-Brandeisian” program in law and political economy. Part III argues that a central component of the Neo-Brandeisian project should include reforming the institutional structure of antitrust law and policy. Although most critiques of present-day antitrust focus on doctrinal rules and the substantive legal framework that governs antitrust analysis, the exclusive reliance on a common law approach to antitrust is a key source and enabler of current dysfunctions. Complementing (or even largely supplanting) this common law structure with an administrative approach would both equip antitrust to keep pace with evolving business practices and new market realities and help democratize antitrust in the ways that Wu and other reformers champion.

#### Roberts’ capital is key—pushes Barrett and Kavanaugh in institutionalist directions

Robinson 21 (Kimberly; June 18; Reporter; Bloomberg Law, “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases,” <https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases>)

The U.S. Supreme Court’s newest justice is showing signs that she’s more aligned with John Roberts and Brett Kavanaugh in the center than she is with her other conservative colleagues, refusing to support broad rulings that could shake the court’s credibility. Amy Coney Barrett is “starting to show her stripes” as a moderate who prefers small movements in the law, not huge shifts, South Texas College of Law Houston professor [Josh Blackman](https://www.stcl.edu/about-us/faculty/josh-blackman/) said. The justices handed down victories to both liberals and conservatives on Thursday saving the [Affordable Care Act](https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf) again but siding with a religious group in the latest battle over [LGBT protections](https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf). Roberts, the chief justice, is viewed as an institutionalist who wants to conserve the public’s confidence in the court. So far, he favors incremental shifts in the law. “That’s been one of the Chief’s primary goals all along,” said Case Western Reserve law professor [Jonathan Adler](https://case.edu/law/our-school/faculty-directory/jonathan-h-adler). He recently gained an ally in Kavanaugh in this pursuit, and it appears Barrett may join their ranks. The court as a whole has has largely agreed in cases this year. The unanimous decision in the LGBT case was the 25th time the justices were unanimous in 41 rulings so far this term. There are 15 to go in coming days. But the big test for Barrett will be next term starting in October when the justices will tackle hot-button issues like guns, abortion, and possibly affirmative action. “It is a very conservative Court, even if we will only get glimpses of it this year,” said UC Berkeley law school Dean [Erwin Chemerinsky](https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/). Kicking the Can Both the Affordable Care Act and LGBT rulings were “very, very narrow,” Georgia State law professor [EricSegall](https://law.gsu.edu/profile/eric-j-segall/) said. In the Obamacare case, California v. Texas, the 7-2 majority handed down a procedural ruling to avoid undoing the landmark 2010 law. The justices said red states led by Texas didn’t have a legal basis—or standing—to challenge it. Only Justices Samuel Alito and Neil Gorsuch would have voted to gut the act, long a priority of Republicans. The LGBT ruling, while unanimous in its outcome, was splintered in its reasoning. Hiding under the 9-0 breakdown was a dispute about whether to overturn the court’s divisive ruling in Employment Division v. Smith, which sparked the passage of the bipartisan Religious Freedom Protection Act and mini state versions across the country. The court in Smith refused to require an exception from Oregon’s prohibition on peyote, saying religious objectors don’t get a free pass on “generally applicable” laws. On opposite ends in the court’s LGBT ruling were the liberal justices—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—along with Roberts, who wanted to uphold the court’s precedent in Smith, and the court’s most conservative members—Clarence Thomas, Alito, and Gorsuch—who wanted it overruled once and for all. In the middle was Barrett, joined by Kavanaugh, who acknowledged Smith‘s shortcomings but was concerned with the fallout should the court overrule it. “Yet what should replace Smith?” Barrett asked in a short concurrence. Both cases were a punt, Blackman said, with the issues likely to return to the court at some point in the future. End of the World But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a majority of the justices don’t think it’s the right time to make major changes in the law. “In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said. “Preserving the court’s own political capital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added. Adler said the court has developed a sort of 3-3-3 split—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices hesitant to overturn cases they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group. Adler said that split will create some interesting pressures for the three justices in the middle next term, when—as Segall said—"the world will end.” The end of the world was a reference—in part—to the court’s abortion case, which could call into question the landmark ruling in Roe v. Wade and later cases.

#### Both jurists are highly sensitive to political backlash AND receptive to Roberts.

Liptak ’21 [Adam; July 2; Reporter covering the Supreme Court, J.D. from Yale University; New York Times, “A Supreme Court Term Marked by a Conservative Majority in Flux,” <https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html>]

Justice Kavanaugh was in the majority more than any other member of the court. Indeed, over his Supreme Court career, which began in 2018 after a tumultuous and highly partisan confirmation fight, he has been in the majority 87 percent of the time in divided cases, beating the career records of all justices appointed since 1937.

In the last term, Justice Kavanaugh was in the majority in divided cases 93 percent of the time, followed by the chief justice, at 86 percent, and the two other Trump appointees, Justices Barrett and Gorsuch, at 79 and 75 percent. Those four justices make up the new center of the court, according to data compiled by [Lee Epstein](https://law.wustl.edu/faculty-staff-directory/profile/lee-epstein/) and [Andrew D. Martin](https://andrewdmartin.wustl.edu/meet-andrew-martin/biography/) of Washington University in St. Louis and [Kevin Quinn](https://lsa.umich.edu/polisci/people/faculty/kmq.html) of the University of Michigan.

Before the death of Justice Ruth Bader Ginsburg in September and the arrival of Justice Barrett the next month, voting patterns at the court were more predictable, with four-member liberal and conservative wings and Chief Justice Roberts in the middle.

This term, several justices mostly shared a generally cautious approach, Ms. Blatt said.

“Chief Justice Roberts and Justices Kavanaugh and Barrett strike me as institutionalist,” she said, “meaning they recognize that their place in our constitutional structure depends in large part on the public’s acceptance of the court as an independent branch of government free from politics.”

#### Liberals are holding firm---Roberts is compromising by swaying Barrett and Kavanaugh to narrow their rulings and decline to overrule precedent---that creates a centrist bloc.

Economist ’21 [The Economist; June 26; International newspaper; The Economist, “America’s Supreme Court is less one-sided than liberals feared,” <https://www.economist.com/united-states/2021/06/24/americas-supreme-court-is-less-one-sided-than-liberals-feared>]

In the autumn, America’s Supreme Court seemed destined for a momentous shift when Republicans rushed to confirm Amy Coney Barrett, a conservative judge, to succeed Ruth Bader Ginsburg, a liberal jurist who had died in September. In place of a wavering 5-4 conservative tilt that had held for decades, by the end of October the high court had a 6-3 majority of Republican appointees—the most unbalanced array in a century. Yet as the final rulings of Justice Barrett’s first term arrive (including, on June 23rd, a win for students’ speech rights and a loss for union organisers), the dynamics of the newly constituted Supreme Court seem more complex, and less extreme in their results, than many expected.

Justices have life tenure and evolve on the job; a few dozen cases constitute a limited introduction to the kind of judge Justice Barrett will turn out to be or how her presence will reshape the court. But in her first eight months in robes, it seems her votes have changed the result from the one if Ginsburg had ruled only three times: on June 21st, in a case involving the status of administrative patent judges, and in November and April, when Justice Barrett voted in favour of churches challenging covid-19 public-health regulations. The latter votes reflected the newest justice’s tendency to defer to those who object to rules that burden their religious lives.

But when she had a chance to extend this principle—as strongly demanded by religious conservatives—she demurred. In Fulton v Philadelphia, decided on June 17th, the Supreme Court unanimously sided with a Catholic social-service agency that had cried foul when Philadelphia’s city government sidelined it because the organisation would not approve same-sex couples as foster parents. According to a 1990 precedent, Employment Division v Smith, neutral laws that apply generally do not offend the First Amendment even if they indirectly hamper religious practice. But since Philadelphia allowed exceptions in its anti-discrimination rule (even though the city had not granted any), Chief Justice John Roberts wrote for the court, its ordinance was not “general” and therefore, given the impact on the foster-care agency, violated the constitution.

Despite the 9-0 result, Fulton was far from a full win for the Catholic plaintiffs. The foster-care agency had asked the justices to overrule Smith and clarify that all burdens on the exercise of religion potentially violate the constitution. Yet only three justices—led by Samuel Alito, who wrote an irate 77-page concurring opinion—were keen to abandon Smith. Chief Justice Roberts, Justice Barrett and Justice Brett Kavanaugh joined the three liberal justices to leave the three-decade-old precedent intact and resolve Fulton on narrow grounds. In fact, the majority opinion seemed to concede implicitly that anti-discrimination laws denting religious conscience do pass constitutional muster as long as they apply across the board.

A similar rift was on display in another significant case released on the same day: California v Texas, the third serious attack on the Affordable Care Act (aca) to reach the court since 2012. Each time the justices have taken up such a challenge, they have resolved it in favour of Barack Obama’s health-care law. And the margin has steadily widened, even as the court has grown more conservative—from 5-4 in 2012 to 6-3 in 2015 and 7-2 this month. During her Senate confirmation hearing last autumn, Democrats pointed to Justice Barrett’s criticism of the earlier decisions and warned that she may be crucial to dismantling the aca at last. This doomsday did not come to pass: with the exceptions of Justices Alito and Neil Gorsuch, the court again refused to strike down the aca and strip 31m Americans of health coverage.

In their counterintuitive challenge, Texas and 17 other Republican states claimed that the law had become unconstitutional when, in 2017, Congress eliminated the financial penalty attached to the “individual mandate”—the requirement that most Americans buy health insurance. In the end, the court did not touch that matter. Instead, the majority ruled that the plaintiffs had not been harmed and thus did not even have standing—ie, the legal right to bring the case.

Technical solutions helped the justices flick away other charged controversies. Late last year, when Donald Trump and his allies were litigating his electoral loss, the Supreme Court shot down two last-ditch lawsuits with deep procedural flaws. On December 8th a one-sentence order put a halt to a Pennsylvania state representative’s bid to stop his state from certifying Joe Biden’s win. And three days later, another terse order snuffed out Texas’s attempt to suspend Mr Biden’s victories in Georgia, Michigan, Pennsylvania and Wisconsin. For Stephen Vladeck, a law professor at the University of Texas and Supreme Court litigator, some of the court’s most important decisions of the term “may have been its decisions not to get involved”.

Yet in the run-up to the election, as emergency requests from Republicans to limit pandemic-inspired voting accommodations rolled in, the justices were active in policing election administration. The court blocked kerbside voting in Alabama, narrowed the window for absentee voting in the Wisconsin primary and reimposed witness requirements for mail-in ballots in South Carolina. These and other orders make up the so-called “shadow docket”—requests for quick relief, dealt with without oral argument or full briefing and often resolved without written opinions or even recorded votes. Mr Vladeck observes that two dozen significant cases have been handled this way since the autumn, compared with 58 cases on the regular docket.

Of the 50 cases the justices had settled by June 23rd, there had been just four 6-3 decisions along ideological lines and 24 unanimous rulings. Over the past three years, the court’s unanimity rate has hovered just below 40%, making this term, no matter what happens with the eight judgments that have yet to arrive, the most consensual since 2016.

But unanimity, as Fulton shows, does not always mean speaking with one voice. The three liberal justices (Stephen Breyer, Elena Kagan and Sonia Sotomayor) seem to have held their fire; in return Chief Justice Roberts crafted a narrow decision that gave the Catholic fostering agency a win without setting a precedent that would undermine gay equality. Justices Alito, Gorsuch and Thomas are itching to hasten a conservative revolution but, for now, the liberals, the chief and Justices Barrett and Kavanaugh are on a more cautious path paved with narrow rulings. Instead of split 6-3, the court is more like 3-3-3. Will these coalitions hold next year when the justices craft potentially landmark decisions on guns, abortion and maybe affirmative action? “We’ll know quite a lot more about the new conservative majority”, Mr Vladeck says, “this time next year.”

#### Our uniqueness prices it in.

Stevenson ’21 [Peter; May 20; Senior Political Producer; Washington Post, “Chief Justice John Roberts: From key swing vote to potential bystander?” <https://www.washingtonpost.com/politics/2021/05/20/chief-justice-john-roberts-key-swing-vote-potential-bystander/>]

When President Donald Trump made his third and final [Supreme Court](https://www.washingtonpost.com/politics/courts_law/supreme-court-abortion-roe-v-wade/2021/05/17/cdaf1dd6-b708-11eb-a6b1-81296da0339b_story.html?itid=lk_inline_manual_5) nomination, putting Barrett in the seat previously occupied by Ruth Bader Ginsburg, the court became more conservative than it had been [in more than 50 years](https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/?itid=lk_inline_manual_5). With a conservative majority on the court, Republicans hope justices could make a series of landmark decisions on issues their electorate is passionate about. At the top of that list is abortion rights.

By the time Trump took office, Republicans had succeeded in making the nomination of Supreme Court justices an issue that drives voter turnout in a way Democrats couldn’t. In exit polls conducted after Trump’s election in 2016, [one-fifth of voters said court nominations](https://www.washingtonpost.com/politics/2020/09/18/where-polling-stands-supreme-court-vaults-into-top-tier-campaign-issues/?itid=lk_inline_manual_8) were the most important factor in their vote, and those voters broke for Trump by a 15-point margin.

When Ginsburg died last September, handing Trump the opportunity to make a third nomination and swing the court even further to the right, it became a more urgent issue for Democrats. About two-thirds of Joe Biden supporters said Supreme Court nominees were “very important” to their vote in an August 2020 Pew Research [poll](https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/), while about 6 in 10 Trump supporters said the same.

But Trump was already on his way to nominating Barrett, a right-leaning justice who gave conservatives on the court what amounts to a majority. That got Republicans excited — and made Democrats nervous — about the possibility of the court making the kind of rulings conservatives have had on their wish list for decades, starting with overturning Roe v. Wade, the landmark abortion case.

#### Thumpers are snapshots, not trends---overall court politics are in ideological alignment.

Barnes ’21 [Robert; July 2; Reporter covering the U.S. Supreme Court; Washington Post, “Barrett moves Supreme Court to the right, but cautiously,” <https://www.washingtonpost.com/politics/courts_law/supreme-court-barrett-first-term/2021/07/02/34b576a6-da63-11eb-bb9e-70fda8c37057_story.html>]

If the right wing of the court is sometimes fragmented, the term’s decision-making ended Thursday with a burst of partisan acrimony over voting rights that held true to the court’s 6-to-3 ideological divide.

The court’s conservatives, all nominated by Republican presidents, interpreted a key section of the Voting Rights Act in a way that will make it much harder to challenge a spate of strict new voting regulations enacted across the country by Republican-led state legislatures.

The court’s three liberals, all nominated by Democratic presidents, united behind a fierce dissent written by Justice Elena Kagan. “The majority writes its own set of rules,” Kagan wrote, accusing the majority of inhabiting “a law-free zone” unconnected to the act’s words or Congress’s intent.

Alito, the majority opinion’s author, in turn accused Kagan of employing “misdirection” and embarking on a “radical project” to empower federal courts at the expense of state legislatures.

But vitriolic volleys between the court’s two ideological wings were more of an exception to the term than the rule.

“Perhaps the most remarkable feature of this term was that the entire court seemed to go out of its way to find common ground,” said Gregory G. Garre, who for a time was solicitor general under President George W. Bush. “The term saw surprising consensus across ideological lines in high-profile cases.”

The court was unanimous in ruling against the NCAA and its prohibition on colleges offering generous academic-related perks to student-athletes. The justices found a narrow way [to rule that Philadelphia must continue to allow a Catholic agency](https://www.washingtonpost.com/politics/courts_law/supreme-court-philadelphia-foster-care-lgbtq/2021/06/17/3408a0c4-cf6f-11eb-8cd2-4e95230cfac2_story.html?itid=lk_inline_manual_26) to participate in vetting potential foster-care parents even though it will not accept same-sex couples to be foster parents.

[The court ruled, 8 to 1, that a school had gone too far](https://www.washingtonpost.com/politics/courts_law/supreme-court-cheerleader-snapchat-free-speech/2021/06/23/09b905ba-d42a-11eb-a53a-3b5450fdca7a_story.html?itid=lk_inline_manual_27) in punishing a high school cheerleader for a profane, off-campus rant on social media, the first time in 50 years the court had sided with a student in a major First Amendment case.

#### Kavanaugh and Barrett have broken from the far right---each is unwilling to overturn major precedents, and empirically poor for religious causes.

Dorman ’21 [Sam; July 12; Reporter; Fox News, “Shapiro questions 'high hopes' for 'markedly unambitious' Barrett and Kavanaugh as SCOTUS ends term,” <https://www.foxnews.com/politics/shapiro-barrett-kavanaugh-supreme-court>]

Author Ben Shapiro is expressing doubt over whether [Supreme Court](https://www.foxnews.com/category/politics/judiciary/supreme-court) Justices Brett Kavanaugh and Amy Coney Barrett will live up to conservatives' expectations – echoing concerns that have arisen since recent decisions.

"So far, we have seen little from either Barrett or Kavanaugh to justify conservatives' high hopes for them," Shapiro told Fox News.

"To be sure, they haven't engaged in David Souter-type liberal rulings, or Anthony Kennedy-style vacillation. But they have been markedly unambitious in their judicial approaches, most obviously in Fulton, which should have presented a clear opportunity to overrule Employment Division v. Smith, and in their unwillingness to accept the Barronelle Stutzman case."

His comments were referring to two high-profile cases – Ingersoll & Freed v. Arlene's Flowers Inc. and Fulton v. City of Philadelphia – that have been closely watched by conservatives. Each touched on the conflict between religious liberty and the interests of same-sex couples while also providing opportunities for the court to deliver decisive wins to conservatives.

Like Shapiro, others in the media have indicated that Kavanaugh and Barrett – both contentious nominees of former President Donald Trump – were shying away from controversy in their judicial opinions. But some of the boldest criticism appeared to come from other conservative justices – specifically Clarence Thomas, Samuel Alito and fellow Trump appointee Neil Gorsuch.

In a recent op-ed for [Newsweek](https://www.newsweek.com/conservative-justices-warn-kavanaugh-barrett-lack-fortitude-opinion-1606947), law professor Josh Blackman pointed to various opinions in which those three seemed to suggest Kavanaugh and Barrett formed majorities that lacked the "fortitude" appropriate for handling major cases. That was the wording Gorsuch used in arguing the court should have gone further in Fulton.

Although the case was a partial victory for conservatives, it wasn't the win they had hoped for. For years, conservatives have been arguing for a removal of the precedent set by Justice Antonin Scalia in Employment Division v. Smith. Scalia, Barrett's mentor, ruled in that case that neutral laws with general applicability didn't violate the First Amendment's free exercise clause.

Rather than overturning Smith, Chief Justice John Roberts and Kavanaugh, who clerked for the longtime swing-vote Justice Anthony Kennedy, joined Barrett and others in a narrower decision. In separate, concurring opinion joined by Kavanaugh and Justice Stephen Breyer, Barrett criticized Smith but expressed concerns about replacing it with another standard. "We need not wrestle with these questions in this case, though, because the same standard applies regardless whether Smith stays or goes," she [said](https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf).

Gorsuch's opinion, which Thomas and Alito joined, suggested the majority was "dodging the question" of Smith. It added: "These cases will keep coming until the court musters the fortitude to supply an answer. Respectfully, it should have done so today."

Alito, in an opinion joined by Gorsuch and Thomas, similarly argued that the court took an ["easy out"](https://www.supremecourt.gov/opinions/20pdf/20-391_2c83.pdf) in declining to hear an excessive use of force case (Lombardo v. City of St. Louis). It's unclear how Barrett and Kavanaugh voted in that case, but cases generally need just four votes from the court to grant certiorari. Therefore, the three dissenters would have presumably only needed one of the other justices to vote in favor of hearing the case. The same was true for the Stutzman case (Arlene Flowers), which Gorsuch, Alito and Thomas were in favor of the court hearing.

In comparison to their conservative colleagues, Barrett and Kavanaugh similarly offered a more restrained support for a church seeking to block California's coronavirus-related restrictions. Whereas Gorsuch and Thomas would have granted the full injunction requested, Barrett and Kavanaugh said the church failed to show why the court should block a ban on chanting or singing. Many have noted that in doing so, Barrett used her first written opinion to effectively oppose people of faith.

#### Barrett and Kavanaugh are moderating and defecting from the conservative bloc---that foretells a liberal decision on abortion.

Gerstein ’21 [Josh; July 7; Senior Legal Affairs Reporter, B.A. in Government from Harvard University; Politico, “Trump’s Supreme Court shrinks from controversy,” <https://www.politico.com/news/2021/07/07/trump-supreme-court-courage-498459>]

As the court delivered its final decisions of the term in recent weeks, some conservatives complained they were not seeing as much of that trait as they would like.

Although the court continued to move in a conservative direction and split along the usual ideological lines as it handed down major 6-3 decisions on [voting rights](https://www.politico.com/news/2021/07/01/supreme-court-arizona-voting-rights-decision-497518) and [dark money disclosure](https://www.politico.com/news/2021/07/01/supreme-court-california-disclosure-law-donors-497554), divides on the right were also vividly on display in a series of high-profile cases this term, including the latest challenge to Obamacare and a case over Catholic social services group’s obligation to deal with same-sex couples seeking to become foster parents.

In the Affordable Care Act case, Justices Brett Kavanaugh and Amy Coney Barrett sided with the court’s liberals and other justices to reject the challenge 7-2 on standing grounds, over strenuous objections from Justice Samuel Alito and Neil Gorsuch.

And in the foster-care case, while the court ruled unanimously in favor of the Catholic organization, Barrett and Kavanaugh demurred on overturning a longstanding precedent limiting the right to defy laws for religious reasons.

That maneuver prompted Alito, Gorsuch and Justice Clarence Thomas to rip into their colleagues for signing onto “a wisp of a decision” that “might as well be written on the dissolving paper sold in magic shops.”

The fusillade of criticism continued in other cases, with Alito complaining that Barrett, Kavanaugh and other justices took an “easy out” by sending back to an appeals court a [case](https://www.politico.com/news/2021/06/28/supreme-court-police-abuse-case-496717) over the death of a suspect who was held face down on the floor in a St. Louis holding cell for 15 minutes.

The justices’ orders from their final conference before their summer break also contained other disappointments for social conservatives. The court refused to review a ruling in favor of a transgender high school student in Virginia seeking to use the bathroom of choice. And it turned down review of a long-running case involving a Washington state floral shop found to have violated a state anti-discrimination law by refusing to prepare arrangements for a same-sex wedding.

This was not, as Trump suggested in little-noticed remarks on the subject, the “courage” he was looking for from his prized Supreme Court picks.

After Obamacare managed another death-defying escape at the Supreme Court last month, Trump expressed dismay about Kavanaugh and Barrett voting to reject that challenge.

“I was disappointed, and that's the way it goes. Very disappointed, I fought very hard for them,” Trump [told David Brody of Just The News](https://justthenews.com/government/white-house/read-full-water-cooler-interview-president-trump-here) a few days after the 7-2 decision.

Asked whether the ruling led him to “second guess” his nomination decisions, Trump signaled that his disenchantment went beyond the Affordable Care Act case.

“Second guessing does no good, but I was disappointed with a number of rulings that they made,” he said.

To conservative activists, every disappointment conjures up fears anchored in recent history: They fight to confirm worthy jurists to open Supreme Court seats, only to see them moderate once in the chair itself. Two of Ronald Reagan’s picks, Sandra Day O’Connor and Anthony Kennedy, and one of George H.W. Bush’s, David Souter, would go on to take centrist positions on abortion and social issues.

There haven’t been many boldly conservative decisions from the Trump appointees so far, one conservative legal advocate involved in the Supreme Court confirmation process under the George W. Bush and Trump administrations acknowledged.

#### It triggers a flood of litigation that crushes abortion access nationwide.

Durkee ’21 [Alison; July 13; Staff Writer; Forbes, “Abortion Groups Sue Over Texas Law That Lets Citizens Sue Abortion Providers,” <https://www.forbes.com/sites/alisondurkee/2021/07/13/abortion-groups-sue-over-texas-law-that-lets-citizens-sue-abortion-providers/>]

Crucial Quote

“Texas legislators have tried for years to completely—and unconstitutionally— ban abortion. Now they’re trying a new tactic: giving complete strangers the power to sue anyone who provides or helps someone get an abortion,” Planned Parenthood President and CEO Alexis McGill Johnson said in a statement about the litigation. “This new law would open the floodgates to frivolous lawsuits designed to bankrupt health centers, harass providers and isolate patients from anyone who would treat them with compassion as they seek out health care. The cruelty is the point-–and we will not let it stand.”

Big Number

More than 80%. That’s the percentage of abortions performed in Texas that would soon be blocked if S.B. 8 goes into effect, as [projected](http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf) by the Texas Policy Evaluation Project at the University of Texas at Austin.

Chief Critic

In an emailed statement to Forbes Wednesday, Texas Right to Life Legislative Director John Seago said the anti-abortion organization “still [has] the utmost confidence in the innovative legal strategy and carefully drafted nature of SB 8” and said they “fully believe” the law “will ultimately be upheld and save countless preborn lives.”

Key Background

Texas’ law is part of a nationwide wave of abortion restrictions imposed by Republican state legislators, with the abortion advocacy group the Guttmacher Institute [reporting](https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion) 90 abortion restrictions that have already been enacted in 2021 as of July 1. While abortion is now legal under federal law under the 1973 Supreme Court ruling Roe v. Wade and outright bans on abortion have typically been struck down by the courts in light of that ruling, GOP legislators have passed abortion restrictions with an eye toward sparking court challenges that the conservative-leaning Supreme Court could use to overturn Roe. That could soon happen when the high court hears a challenge to Mississippi’s abortion ban next term, which will consider whether all bans on abortion before a fetus is viable are permissible under federal law and could weaken or overturn Roe should the judges rule in Mississippi’s favor. That ruling would have a substantial impact in Texas, where lawmakers also recently [passed](https://www.forbes.com/sites/alisondurkee/2021/05/26/texas-lawmakers-move-to-make-abortion-a-felony-if-roe-v-wade-is-overturned/?sh=57d2f5127036) a “trigger ban” that would criminalize abortion in the event Roe is overturned.

#### Population bomb outweighs nuclear war and collapses civilization.

Smail ’17 [Kenneth; Summer 2017; Professor of Anthropology Emeritus, Department of Anthropology, Kenyon College; The Social Contract, “The ‘Malthusian Dilemma’ Revisited: Excessive h999999uman numbers in a world of finite limits,” vol. 27]

More than half a century ago, at the dawn of the nuclear age, Albert Einstein suggested that we shall require a new manner of thinking, if humankind is to survive. Even though the aptly named “population explosion” is neither as instantaneous nor as spectacular as its nuclear counterpart, its ultimate consequences may be just as real (and potentially just as devastating) as the so-called “nuclear winter” scenarios promulgated in the early 1980s (Turco et al. 1983).

That there will be a large-scale reduction in global human numbers over the next two or more centuries appears to be inevitable. The primary issue may well be whether this lengthy and difficult process will be moderately benign or unpredictably chaotic. More specifically, is modern humanity capable of a comprehensive organized effort to compassionately reduce global human numbers, or will brutal self-interest prevail—either haphazardly or selectively—resulting in an unprecedented toll of human lives, not to mention the growing likelihood of a global civilizational collapse? Clearly we must begin our “new manner of thinking” about this critically important issue now, so that Einstein’s prescient and very legitimate concerns about human and civilizational survival into the twenty-first century and beyond may be addressed as rapidly, as fully, and as humanely as possible.

#### Excess birth rate turns every impact and slowing population growth solves them.

Smail ’17 [Kenneth; Summer 2017; Professor of Anthropology Emeritus, Department of Anthropology, Kenyon College; The Social Contract, “The ‘Malthusian Dilemma’ Revisited: Excessive human numbers in a world of finite limits,” vol. 27]

Consider the following thought experiments. Examine any late twentieth/early twenty-first century problem, whether environmental, economic, political, social, or moral, and ask whether its solution would be made easier—or more difficult—by a steadily growing population. Or conversely, imagine trying to resolve, or at least accommodate, these same problems in a context where population size—whether global or local—has either stabilized or slowly begun to decline. Or consider the following challenge posed by Bartlett (1998): “Can you think of any problem, on any scale, from microscopic to global, whose long-term solution is in any demonstrable way aided, assisted, or advanced by having larger populations at the local level, the state level, the national level, or globally?” Or finally, might it be legitimate to ask whether the Earth suffers not so much from a “shortage” of resources as it does from a “longage” (or surfeit) of people (Hardin 1999)?

In what follows, I take the position that increasingly rapid population growth during the past century has played a central role in causing, or at least in further exacerbating, the numerous systemic problems— ecological, economic, political, social, and moral—that currently face our species. Although recognition of this fundamental fact has been slow in coming, there is now a growing realization that “demographic fatigue” can not only overwhelm the efforts of many less-developed nations, particularly those whose populations and corresponding infra-structural needs double (or more) every generation, but can also sap the strength of even the most robust and stable political and economic systems (Brown et al. 1999).

#### Accessible family planning stops a global wave of civil wars

Ellen H. Starbird 16, director of the Office of Population and Reproductive Health at USAID, et al., 6/20/16, “Investing in Family Planning: Key to Achieving the Sustainable Development Goals,” Global Health: Science and Practice, Vol. 4, No. 2, p. 191-210

As a multi-sectoral intervention, family planning also contributes to reaching vulnerable populations, mitigating conflict, and achieving state stability and peace. Goal 10. Reduced Inequalities: Reduce Inequality Within and Among Countries Family Planning Promotes Inclusive Societies by Addressing the Needs of Disadvantaged Populations SDG 10 states, “There is growing consensus that economic growth is not sufficient to reduce poverty if it is not inclusive. … To reduce inequality, policies should be universal in principle paying attention to the needs of disadvantaged and marginalized populations.”111 Unmet need for contraception is often highest among the most disadvantaged and vulnerable—adolescents, the poor, those living in rural areas and urban slums, people living with HIV, and internally displaced persons. These groups have the fewest resources and are the least able to deal with the demands of an unexpected pregnancy. Postpartum women have especially high unmet need: 61% of women within 1 year of their last birth have an unmet need for modern contraceptive methods.112 Effective family planning programs reach these underserved populations and will need to accelerate efforts in this area if the universal access goals of SDGs 3.7 (universal access to sexual and reproductive health-care services), 5.6 (universal access to sexual and reproductive health and reproductive rights), and 10 (reduce inequality) are to be achieved. A 2015 study showed that, overall, the poor-rich gap in contraceptive use is diminishing, and even more so when family planning programs are strong. Gaps remain in many sub-Saharan African countries.113 The poor-rich gap in contraceptive use is diminishing, but gaps remain in many sub-Saharan African countries. At the individual and household level, experts note that identifying the effect of demographic factors on economic welfare has “proved elusive,” and finding the links between household poverty and childbearing has “proved contentious.”8 As discussed under the SDGs for poverty, education, and equality, some studies show that more women are likely to enter the labor force with fewer children114; families who received family planning and maternal-child health services were more likely to have higher incomes and greater savings and assets53,115; and fewer children per family leads to increased household savings and increased investments in each child.116 A study from Pakistan found that the direct effect of more children of all age/sex combinations on savings is negative and substantial,117 and a study from Nigeria found that household size was linked with the probability of being poor.118 These few studies suggest that new research is needed on fertility’s effects on household income and savings. Goal 16. Peace, Justice, and Strong Institutions: Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All, and Build Effective, Accountable, and Inclusive Institutions at All Levels Family Planning Contributes to Peace and Stability Studies have shown that a large “youth bulge” (defined as a high proportion of youth 15 to 29 years old relative to the older adult population) is associated with a high risk of civil conflict.119 That is, states with youthful age structures—especially within a politically organized minority120—are more likely to experience armed, intrastate conflict and other types of violence. The political impact of fertility decline is significant. As a country and its population age, studies show that the probability of attaining and maintaining a liberal democracy is increased.121 Currently, more than 40 countries are “young,” with total fertility rates above 4 children per woman. However, in another 70 countries the demographic transition is more advanced, and the chances for liberalization—and stability—are greater.122 In many of the “young” countries, large numbers of alienated youth cannot find jobs and are easy recruits for radical groups that can provide a regular salary. While family planning is not the sole solution, it is important to understand that the high proportion of jobless youth relates to the overall population structure and the sluggish economies that cannot support even menial jobs for everyone. Other experts also see the “youth bulge” as a possible precursor to violence. They urge such countries to consider increasing support for girls’ education, family planning, and youth employment, contending that “the pill is mightier than the sword.”123

#### Causes great power war and fractures the international order

Bruce D. Jones 17, vice president and director of the Foreign Policy program at Brookings and a senior fellow in the Institution's Project on International Order; and Stephen John Stedman, Fall 2017, “Civil Wars & the Post–Cold War International Order,” Daedalus, Vol. 146, No. 4, p. 33-44

The effects of civil wars on international orders also differ across historical eras. Civil wars may be fought over principles that undermine the norms and rules that undergird an international order. Civil wars may tempt intervention by great powers, who must learn prudence lest their involvement lead to direct military confrontation. The spillover of civil wars can ripple across borders and undermine regional balances of power. When those regions are of great-power interest, the containment of civil wars becomes an imperative for international order. Much has been asserted about the relationship between civil war and the post–Cold War international order. During the last twenty-five years, pundits have repeatedly argued that the mere occurrence of particular wars, such as Somalia and Bosnia in the 1990s or Libya and Syria more recently, prove that international order is weak and tenuous. Civil wars have played an outsized role in a popular narrative of international disorder. According to this narrative, civil violence, terrorism, failed states, and the number of refugees are at unprecedentedly high levels. The world is falling apart, most people are worse off than they were thirty years ago, and globalization is to blame. By almost every measure, this narrative is empirically incorrect. Over the last thirty years, there has been more creation of wealth and a greater reduction of poverty, disease, and food insecurity than in all of previous history.1 During the same period, the numbers and lethality of wars have decreased.2 The success of the post–Cold War era in managing civil wars–bringing multiple wars to an end and ameliorating several others–has contributed to a more peaceful world. Great-power confrontations have been few and great-power war a distant memory. As measured by increased trade and reductions of arms expenditures as a percentage of gdp, international cooperation has risen to unprecedented levels.3 Indeed, international cooperation has been a fundamental characteristic of the international order since the collapse of the Soviet Union. Nonetheless, the post–Cold War international order is currently under substantial pressure, and in some areas, progress has reversed. The Russian annexation of Crimea and invasion of Ukraine signals a return to a militaristic approach to its border with Eastern Europe, while China's aggressive policies in the South China Sea promise that its relations with its neighbors will be tense and dangerous. And after a fifteen-year historic reduction in the numbers of civil wars, there has been a recent, major spike, mostly centered in the Middle East. Russian intervention in Syria and Saudi Arabian intervention in Yemen, and their indiscriminate use of force, run counter to the way the United Nations and its member states have managed civil wars over the past twenty-five years. The paralysis[stasis] of the UN Security Council in responding to the conflicts in Ukraine and Syria conjures up memories of the Cold War, when proxy competition was the predominant response to civil wars.

#### Roberts in the majority would produce a narrow decision preserving Roe

Gerstmann 21 (Evan - Professor of Political Science and International Relations at Loyola Marymount University, J.D. from the University of Michigan, Ph.D. in Political Science from the University of Wisconsin; "No, The Supreme Court Is Not About To Overrule Roe v. Wade," 5/18/21 <https://www.forbes.com/sites/evangerstmann/2021/05/18/no-the-supreme-court-is-not-about-to-overrule-roe-v-wade/>)

The Supreme Court has agreed to hear a case about Mississippi’s nearly total ban on abortions after 15 weeks into a woman’s pregnancy. The press is filled with dire warnings that the Court’s new six-Justice conservative majority will use this case to overturn or sharply scale back Roe v. Wade. That is the 1973 case that established a constitutional right to an abortion. Such a result is very unlikely. The much more likely result is a narrow decision holding that states are allowed to present evidence in courts that abortions cause pain to fetuses after a certain point in a pregnancy. Even if the Justices allow this evidence, that doesn’t mean that they will allow major new restrictions on abortion. And if the Court eventually upholds the Mississippi law, that would be because the state proved two things in court: 1) abortions after 15 weeks cause severe pain to the fetus; and 2) women have ample opportunity to get an abortion prior to 15 weeks into their pregnancy. These are both very hard claims to prove. Mississippi tried to present evidence in court that fetuses develop the capacity to feel pain somewhere between 14 and 20 weeks into a pregnancy. The judge hearing the case refused to hear the evidence reasoning that the Supreme Court has held that the only constitutional standard that matters in abortion cases is “viability”—can the fetus survive outside of the womb? There is a good chance that the Supreme Court will hold that the judge erred in excluding that evidence. The Court has repeatedly held, in the context of cases about cruel and unusual punishment, that the state has an obligation to avoid the infliction of unnecessary pain. Also, as the federal appellate court pointed out, at least two quite pro-life Justices wrote that avoiding fetal pain was a strong government interest. Justice Harry Blackmun (the author of Roe v. Wade) and Justice John Paul Stevens (the Court’s most liberal Justice for many years) wrote that they considered "it obvious that the State's interest in the protection of an embryo ... increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." So the most likely outcome of this case is a narrow ruling that states can present evidence in court about when a fetus begins to feel pain. Many will likely see this as a Trojan horse to eliminate the right to an abortion. But courts will only allow laws like Mississippi’s to stand if the state can make a convincing showing that fetuses feel pain after 15 weeks. The evidence that fetuses are capable of feeling pain at 20 weeks, much less 15 weeks, isn’t very strong, so the states will have a lot of trouble with that. Also, even if the Supreme Court does allow states to submit evidence of fetal pain, and even if the states can make a strong showing that fetuses feel pain 15 weeks into a pregnancy, any pain-based restrictions on abortion would still be unconstitutional if they impose an “undue burden” on a woman’s access to abortion. Any law that has the purpose or effect of creating a substantial obstacle to a woman getting an abortion is unconstitutional under this standard. This means that states would not only have to demonstrate that 15 week-old fetuses can feel pain, but also that women can consistently tell when they are pregnant early enough that the 15-week limit would leave them sufficient time to procure an abortion if they wish to. Because women can have what appear to be periods even when they are pregnant, the states will have a difficult time on this issue as well. Nonetheless, there is a good chance the Supreme Court will give them the opportunity to make their case. With the current state of medical knowledge they will probably fail, but medical knowledge changes with time and the Court is likely to keep the door open for new evidence. What about the fears that the Court isn’t really in good faith here and is just looking for a back door way to limit abortion? That doesn’t seem to be the case. As noted, even the Court’s most liberal Justices have expressed genuine concern over the fetal pain issue. And if the Court were really trying to find an indirect way to allow more abortion restrictions, it passed up a golden opportunity when it took this case. The lawyers for Mississippi asked the Court to rule that abortion providers can’t go to court to challenge abortion restrictions. They wanted a ruling that only the pregnant women themselves can challenge these limits. Because individual women usually have fewer resources and a short window to challenge restrictions before they give birth, they would be much less effective at bringing these cases. When the Supreme Court agreed to hear this case, it refused to consider the question of whether abortion providers can be kept out of court. So it doesn’t look like their secret motive is to limit abortions as much as possible without explicitly saying so. Of course, the Supreme Court is not always predictable. None of the three Trump appointees have long records of deciding abortion cases. And Chief Justice John Roberts will have control over who writes the Court’s opinion if he is in the majority. But if he isn’t in the majority, that decision will be made by the Court’s most conservative (and strongly pro-life) Justice, Clarence Thomas. So nothing is certain. But given the current political climate (including Senate Majority Leader Chuck Schumer’s warning that the Justices “will pay the price” if they vote against abortion rights) Roberts will probably keep this decision for himself and produce a narrow opinion.

#### Roe will survive – Roberts is still able to move the court – either Kavanaugh or Barret could side with him.

John Fritze, 7-19-2021, [John Fritze has covered politics for nearly two decades and is now the Supreme Court correspondent for USA TODAY. Stops along the way in Albany, Indianapolis, Baltimore and the occasional trout stream. "Overturn Roe v. Wade? Conservative divisions could signal narrower outcome in abortion case", USA TODAY <https://www.usatoday.com/story/news/politics/2021/07/19/division-among-supreme-court-conservatives-complicates-overturning-roe/7492770002/> //]

When the Supreme Court agreed in May to hear a challenge to Mississippi’s ban on most abortions after 15 weeks of pregnancy, many saw it as a decisive move in the decades-long effort to overturn Roe v. Wade. Though that remains one possible outcome, many of the high court's most significant decisions in recent months underscore that its six-justice conservative majority does not always operate in lockstep. A look at some of their past opinions and statements on abortion offers a more nuanced view that complicates pat predictions. The Mississippi case, which the court could hear as early as November, will probably be the most closely watched on its docket in the next year – generating frenzied debate on one of the nation's most polarizing social issues before the 2022 midterm election. Unlike other disputes, the suit raises fundamental questions about the right to abortion. "I don't know if there's a path to uphold the Mississippi law without reconfiguring abortion rights at least a little bit," said Neal Devins, a law professor at William & Mary Law School. But "I see no prospect for Roe being overturned." Mississippi approved its prohibition on most abortions after 15 weeks in 2018 and is one of 16 states with pre-viability bans that have been blocked by federal courts, according to the Guttmacher Institute, a research group that supports abortion rights. The law has no exception for rape or incest but allows abortions in cases where there is a medical emergency or "severe fetal abnormality." Roe concluded that women have a right to an abortion during the first and second trimesters but that states could impose restrictions in the second trimester. Two decades later, the court upheld that right but overturned the trimester framework and allowed states to ban most abortions at the point of viability, when a fetus can survive outside the womb – roughly 24 weeks. Pre-viability bans in conservative states are intended to challenge the court's precedent in those two cases. The question for the nation's highest court in the Mississippi case, Dobbs v. Jackson Women’s Health Organization, is where states may draw the line on prohibiting abortions. The answer, expected next year, will turn on how the conservative majority balances precedent against a generations-old struggle to weaken Roe. Here’s a look at what the justices have said or written on abortion: Roberts' minimalism Chief Justice John Roberts brings an especially interesting history to the Mississippi case. In the court’s most recent major abortion decision, a plurality led by Associate Justice Stephen Breyer struck down a Louisiana law last year requiring abortion providers to have admitting privileges at nearby hospitals. Roberts gave Breyer and the court's other liberals the fifth vote needed to reach that outcome. Instead of signing onto Breyer's opinion in June Medical Services v. Russo with the three other liberal justices, Roberts wrote a concurrence in which he concluded that a 2016 precedent forced his hand. The court, Roberts wrote, must "treat like cases alike” and the Louisiana law was nearly identical to one from Texas the court invalidated years before. The move squelched an outcry from liberals, who probably would have framed a different outcome as a political flip-flop after two conservatives joined the court in the four years after the Texas case. But by declining to sign the plurality opinion, Roberts gave conservatives a chance to pursue other anti-abortion laws, even though he had sided with Breyer and the liberals. Though no longer a swing vote, Roberts built similar coalitions this year between conservatives and liberals with narrow opinions that moved the court in a conservative direction more slowly than some had predicted. Assuming Roberts lands in the majority in Dobbs, experts said, he could attempt to repeat that high-wire act by crafting an opinion that undercuts Roe without directly overturning it. That could kick legal fights about the constitutionality of abortion down the road. "I think what he would like to see from the court on an abortion case ahead of the midterm elections is something more narrow, something that does not explicitly overrule Roe, but something that perhaps eliminates viability as a salient concept in the court’s abortion jurisprudence," said Melissa Murray, a law professor at New York University. That "would send the lower federal courts into a bit of disarray trying to determine whether a 12-week ban or six-week ban was permissible under the new standards," she said. "And that would set up a spate of litigation for the next two years." Kavanaugh in the middle When Associate Justice Brett Kavanaugh made the short list in 2018 to replace retiring Associate Justice Anthony Kennedy, some conservatives questioned his commitment to the anti-abortion cause. They pointed to one of his only opinions on the U.S. Court of Appeals for the District of Columbia Circuit that dealt with the issue: the case of a 17-year-old immigrant in federal custody who sought the procedure. Kavanaugh appeared eager to avoid sweeping constitutional questions about abortion and immigration. When the appeals court in 2017 permitted the teen to end her pregnancy, Kavanaugh did not join a stemwinder of a dissent raising those issues. Instead, he wrote a more limited dissent defending the idea of having the teen first meet with an American adult sponsor, similar to a foster parent. During his confirmation hearing, Kavanaugh called the court’s decision in Roe "precedent on precedent" and described the notion that women have a constitutional right to abortion as something that has been "reaffirmed many times over 45 years." Since then, Kavanaugh has emerged as the median justice, landing in the high court's majority in 97% of all cases during the 2020-2021 term, according to statistics compiled by SCOTUSblog. Kavanaugh dissented in June Medical, breaking with Roberts and asserting "additional factfinding is necessary" to evaluate whether Louisiana’s law would have closed the state’s abortion clinics. Mary Ziegler, a Florida State University law professor, said abortion rights advocates will try to appeal to Kavanaugh's fealty to precedent. Abortion opponents, she predicted, will try to convince him to do what "you sort of assume he wants to do" while not pushing him too far. "A lot of the same kinds of arguments about precedent and backlash that progressives have aimed toward Roberts will also be aimed at Kavanaugh," said Ziegler, author of "Abortion and the Law in America" and other books on the issue. "He shares Roberts’ concerns but also seems to think he can write more conservative opinions and finesse those concerns." Barrett's first full term Associate Justice Amy Coney Barrett has made her personal views on abortion clear. Years before she was confirmed to the Chicago-based U.S. Court of Appeals for the 7th Circuit, while still a Notre Dame law professor, Barrett signed a two-page advertisement in the South Bend Tribune describing Roe's legacy as "barbaric." During her Supreme Court confirmation hearing last year, Barrett said she didn't "have any agenda" to overturn Roe and said she would follow the "rules of stare decisis," the Latin term for the notion of precedent. Pressed about the ad during her hearing, Barrett said she hadn't remembered it until it surfaced in a newspaper story. "Thirty years worth of material is a lot to try to find and remember," she said. None of that means Barrett would vote to overturn Roe. Some court observers have questioned whether she would make that decision so early. Barrett, who was confirmed in late October, will embark on her first full term on the court this fall. "I would be stunned if she would want to go all the way to overrule Roe so early in her tenure on the court and let it define her,” said Devins at William & Mary. Barrett's best-known abortion case on the 7th Circuit came in 2018 in the form of a challenge to an Indiana law requiring fetal remains to be buried or cremated. After a three-judge panel invalidated the law, the full appeals court rejected the state’s request for reconsideration. Barrett dissented from that decision. When Indiana appealed to the Supreme Court, a 7-2 majority upheld the state's law. Gorsuch's textualism Though he spent more than a decade as an appeals court judge in Colorado, Associate Justice Neil Gorsuch didn't directly confront constitutional questions about abortion. He did rule in cases touching on the issue, including over "Choose Life" license plates. Gorsuch sided with abortion rights advocates in 2007 on a threshold question: whether a lower federal court had jurisdiction to decide if Oklahoma could deny funding collected from the specialty plates to an organization involved in "abortion related" activities, such as counseling. Gorsuch ruled the lower court could hear the case on the merits. Months later, the district court did just that – and ruled against the group. Gorsuch was more on point in a bristling dissent in June Medical, asserting that the court's usual process had been "brushed aside" to strike down the Louisiana law and that the decision was "a sign we have lost our way." Part of Gorsuch's argument was that the court ignored the state's ostensible reason for requiring abortion providers to have admitting privileges: to ensure the procedures were conducted safely. Steven Aden, chief legal officer at Americans United for Life, declined to predict how Gorsuch might approach Dobbs. Aden, whose group has fought for abortion restrictions for nearly five decades, noted Gorsuch has embraced his reputation as a textualist, the notion that jurists decide cases based primarily on the text of the law. That, Aden argued, ought to augur well for the anti-abortion cause. "Any judge who is a fan of an original, textual reading of the constitutional text – who's loyal to the intention of those who wrote it – is a friend of the right to life," Aden said. "He's also been one of the strongest federal judges on religious liberty, going back to the 10th Circuit." Conservative stalwarts Associate Justices Clarence Thomas and Samuel Alito, the court’s most reliable conservative votes, are the most likely to take on Roe directly. Thomas, the most senior associate justice, wrote last year of the court’s "ill-founded abortion jurisprudence" in his dissent in June Medical. He described those decisions as "grievously wrong" and said they "should be overruled." Before Alito's confirmation in 2006, a memo he wrote for the Justice Department in the 1980s surfaced in which he called for overturning Roe. Though Alito has been a consistent vote to support abortion restrictions, he has been more circumspect in discussing his broader views on the court’s precedents. Alito dissented in October when the Supreme Court said women seeking to end their pregnancies with medication didn't need to visit a doctor because of COVID-19 in the short term, a move he said used the "pandemic as a ground for expanding the abortion right recognized in Roe v. Wade." When the case made it back to the court in January, it ruled women were required to visit a doctor's office after all. Alito dissented in June Medical, asserting the dispute should have been returned to the trial court for additional fact-finding. Middle ground for liberals? Based strictly on the size of their group, the court’s three liberals – Associate Justices Breyer, Sonia Sotomayor and Elena Kagan – are likely to be in damage control mode when the Mississippi case is decided, experts said. But as the term that wrapped up this month demonstrated, that doesn’t mean they are without influence. The court’s liberals joined with Roberts in one of the most closely watched cases this year involving a conflict between LGBTQ rights and religious freedom. A unanimous court concluded a Catholic foster care agency could decline on religious grounds to screen same-sex couples as prospective parents. The opinion stopped short of what some conservatives wanted: The overturning of a decision in 1990 that makes it more difficult for religious entities to challenge generally applicable laws. A similar lineup is possible in Dobbs: Liberals could join at least two conservatives in an opinion that does something less than overturn the court’s precedents. On the other hand, such compromise may be harder to reach on the divisive issue of abortion. "What would a compromise look like in this case?" asked Ziegler, the Florida State University law professor. "If the court upholds this law and gets rid of viability or does something else that’s a pretty huge deal but stops short of overturning Roe, I don’t know how happy about that you’re really going to be if you’re Justice Breyer or Justice Kagan."

#### Court will uphold Roe now – three swing justices who are concerned with the court’s political legitimacy – especially Roberts.

Jon Ward, 7-9-2021, [Chief National Correspondent at Yahoo News. "The real measure of Justice Amy Coney Barrett will come in the next year", Yahoo News https://www.yahoo.com/news/the-real-measure-of-justice-amy-coney-barrett-will-come-in-the-next-year-192158587.html //]

The knee-jerk reaction to Supreme Court Justice Amy Coney Barrett’s first term was that she was less conservative than some had hoped and others had feared. But those judgments are likely to be premature, because the real tests for Barrett will come over the next year, in her second term as a justice. The 49-year-old Barrett, for example, was lampooned by Democrats as a threat to health care during her confirmation hearings last year, but then ruled against a challenge to the Affordable Care Act in this year’s term. Barrett is likely to be a crucial and possibly a deciding vote on two huge cases on hot-button culture war issues: abortion and guns. How she rules on those cases will illustrate the kind of justice she is and will be, and could end up becoming an enormous part of her legacy and the court’s. The abortion case is Dobbs v. Jackson Women’s Health Organization. At issue is a law passed by the Mississippi Legislature in 2018 that banned most abortions after 15 weeks of pregnancy. A federal court found the law unconstitutional, because Supreme Court jurisprudence prohibits bans on abortion before a fetus is viable outside the womb, which is considered to be at around 24 weeks of pregnancy. The Supreme Court could uphold the lower court’s ruling, but most observers think that’s unlikely. Some also believe it is unlikely to throw out Roe v. Wade, the 1973 ruling that legalized abortion, and Planned Parenthood v. Casey, the 1992 ruling that upheld a constitutional right to abortion. The middle ground would be for the court to get rid of the viability threshold, allowing states to enact bans on most abortions prior to 24 weeks of pregnancy, but to replace it with a different standard. This is where politics comes into play. The three most conservative justices — Samuel Alito, Clarence Thomas and Neil Gorsuch — are all considered likely to throw out Roe v. Wade if the opportunity were presented to them. The three liberal justices — Stephen Breyer, Elena Kagan and Sonia Sotomayor — would keep it in place. But the three others — Barrett, Chief Justice John Roberts and Brett Kavanaugh — constitute a swing bloc of sorts that controls who gets a majority of votes. This swing bloc is ideologically conservative, but for now it is considered to be more temperamentally moderate — and more politically calculating — than the three most conservative justices. And so the swing justices might choose to weaken Roe but not obliterate it, believing that getting rid of it in one fell swoop in Barrett’s first major abortion case would create a political backlash against the court, and against Barrett in particular. “It would do more to fuel arguments against her than if the court takes its time and a couple of decisions to decide itself,” Mary Ziegler, a legal historian and law professor at Florida State University, and the author of "Beyond Abortion: Roe v. Wade and the Fight for Privacy," told Yahoo News. “There's no shortage of other cases in the pipeline [that] they could take,” Ziegler said. “I still think within five years, the court is likely to have overturned Roe.” Ziegler added that “the tension for [Barrett] in her own mind is she probably thinks Roe was wrongly decided. She could be telling herself that the right thing for a jurist to do would be to overturn Roe, [but] doing that would define her legacy and paint her as an ideologue.” Mark Joseph Stern, a writer for Slate who covers the courts, said in a recent podcast analysis of the Supreme Court’s last term that some think “Barrett wants to be perceived as a serious intellectual, that Amy Coney Barrett doesn’t want to be perceived as a sort of instrumental, transactional vote … that she is a really brilliant person who wants to be perceived as an independent, neutral, thoughtful institutionalist.” But conservatives have begun this week to increase pressure on the court to throw Roe out entirely. If it does not completely uproot Roe and Casey, the conservative legal scholar Robbie George argued a week ago, the current court would have to “double down” on the right to abortion at some point, “making it harder for them to fully reverse Roe later on.” “Dobbs presents the best opportunity in 47 years — and likely the best for another generation or more — to overturn Roe and Casey,” George wrote. If Barrett and Kavanaugh join with the three hardline conservative justices to completely reverse Roe when the court decides the Dobbs case in the spring or summer of 2022, it will indicate that Barrett is less concerned about her reputation and legacy, and about political backlash against the court, than some observers had thought. That outcome would also indicate a loss of influence on the court for Roberts, who has shown himself to be highly concerned with the political fallout from court rulings, and eager to insulate the court from culture war issues and the appearance of political motivation.

1. See e.g. *Rambus*, cited at footnote 182 below. [↑](#footnote-ref-1)
2. See Carl Shapiro, “Injunctions, Hold-Up, and Patent Royalties,” Working Paper, Draft 17 April 2006, http://faculty.berkeley.edu/shapiro/royalties. [↑](#footnote-ref-2)
3. 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-3)
4. 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-4)
5. Id. at 10. [↑](#footnote-ref-5)
6. 9*. See* Lemley, *supra* note 4, at 1954. [↑](#footnote-ref-6)
7. *. See* Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 29 (1991). [↑](#footnote-ref-7)
8. . 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-8)
9. . 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-9)
10. . This example assumes an open SSO. For the dangers of closed SSOs excluding competitors, see *supra* notes 76-77 and accompanying text. [↑](#footnote-ref-10)