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#### 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.

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FTC DA

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

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

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

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

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

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

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

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

#### Unchecked algorithmic bias risks massive inequality 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

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

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.

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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

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

#### No patent holdups---they require empirical evidence---Shapiro is a hack

Trevor Soames 16. Competition/regulatory lawyer + litigator (Avocat au Barreau de Bruxelles, Solicitor-Advocate & Barrister). "PATENT HOLD UP: “The fallacies of patent hold up theory” ". No Publication. 11-13-2016. https://www.linkedin.com/pulse/patent-hold-up-fallacies-theory-trevor-soames

The theory of Patent Holdup remains remarkably devoid of any empirical evidence. The paper delivered by Prof Carl Shapiro, one of the key proponents of that theory, at IEEE in late 2015 did nothing to fill that void, arguing that such evidence was unnecessary as it can be inferred just like, others have argued, like “dark matter”. As posted previously, a link to a copy of this still unpublished paper can be found embedded in the following commentary by Keith Mallinson:

http://www.wiseharbor.com/pdfs/Mallinson%20on%20Holdup%20and%20Holdout%20for%20IP%20Finance%2016%20Aug%202016.pdf

Before moving on to the newly published paper, I would like to point out, in all fairness, that the paper does indeed cite what it claims to be the "leading example" of hold up, namely the notorious General Motors/Fisher Body transaction. However, that so called example has been shown - in thoroughly researched papers - such as the one cited below by Professor Dan Spulber et al, but there are others, to have been wholly based upon a recitation of false facts. More detail on this flawed example can be found at: http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=231736 In other words, General Motors/Fisher Body is simply not a real and viable example of hold up, as claimed.

If you have an interest in this issue which has guided antitrust enforcement policies in many jurisdictions, including my own, then please read this just released paper by my friend Professor Stephen Haber of Stanford: http://hooverip2.org/working-paper/wp16009/ http://hooverip2.org/wp-content/uploads/ip2-wp16009-paper-1.pdf

In that paper both he and his co author, Alex Galetovic, examine each of the pillars that support the theory of Patent Holdup and find them (seriously) wanting. They find that the theory is based on three sequential fallacies: 1) patent holdup is a straightforward variant of holdup as it is understood in transaction cost economics; 2) royalty stacking is holdup repeated multiple times on the same product; 3) standard essential patents contribute little or no value to the markets they help create. These fallacies give rise to a theory that is logically inconsistent, incomplete, and ignores economic fundamentals. The flaws in logic of Patent Holdup Theory, and its lack of fit with the evidence, suggests that a new theory about the mechanics and dynamics of SEP-intensive IT industries is called for, both as a matter of science and as a guide to antitrust and patent policies.

#### The 1AC doesn’t have a card that any of the firms they let into the market have the resources to innovate---that was CX.

#### Plan causes patent holdouts---outweighs holdups.

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

“Patent holdup” allegations encourage SEP free-riders

Despite many years of speculation and recently adjusted claims, there is no empirical support for the theory of “patent holdup.” Various eminent experts refute allegations of systemic “patent holdup.” It is likely that “patent holdup” has not occurred in the context of standards and licensing of standards essential patents (SEPs) because of the fair, reasonable and non-discriminatory (FRAND) licensing contracts and available recourse to the courts have ensured that licensees cannot be forced to pay “excessive” licensing fees.

“Patent holdout,” which is also sometimes referred to as “reverse holdup,“ rather than “patent holdup” may instead be a prevalent problem; although calls for remedies have largely been in response to “patent holdup” allegations. Beguiled courts, antitrust authorities, government policy makers and even a standards development organisation (SDO) are tipping the scales in favour of “patent holdout” by infringing implementers of SEPs. This is destabilising the equilibrium between the interests of the licensors and licensees forged by consensus over decades in the IPR policies of SDOs such as ETSI with Fair, Reasonable and Non-Discriminatory licensing. As leading academics note, “FRAND Implies Balance” and “FRAND [is not] a one-way street.” Whereas alleged “patent holdup” supposedly results in excessive royalties, “patent holdout” is undermining licensors attempts even to achieve FRAND terms or to complete any licensing at all in many cases. Licensors are therefore losing their ability to make a fair return on their investments in SEP technologies. This discourages ongoing investments in standard-essential technologies, participation in SDOs and contribution to the standards.

#### 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.

#### 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.

#### 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.

#### No econ decline impact.

Stephen M. Walt 20. Robert and Renée Belfer professor of international relations at Harvard University. "Will a Global Depression Trigger Another World War?" Foreign Policy. 5-13-2020. https://foreignpolicy-com.proxy.library.emory.edu/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

#### 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 impact to democracy.

Sam Ghatak 17. \*Lecturer, Political Science, University of Tennessee Knoxville. \*Aaron Gold, PhD Student, Political Science, UT Knoxville. \*Brandon C. Prins, Professor and Director of Graduate Studies, UT Knoxville. “External threat and the limits of democratic pacifism.” Conflict Management and Peace Science 34(2): 141-59. Emory Libraries.

Conclusion

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

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

#### No impact to warming.

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

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

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

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

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

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

Plan for progress

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

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

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

### 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.

### Extra Card---1NC

#### Only antitrust can bust American 5G.

Osenga ’21 [Kristen; June 7; Austin E. Owen Research Scholar & Professor of Law at the University of Richmond School of Law; the Desert Sun, “Column: 5G isn't just about fast internet. It can help keep America safe,” https://www.desertsun.com/story/opinion/contributors/2021/06/07/5-g-china-national-security/7574073002/]

Most Americans associate 5G technology with self-driving cars, virtual reality headsets, or super-fast internet. While all of these applications are exciting, they aren’t as critical to America as the national security implications of 5G. Winning the race to 5G will help ensure that our military communications are secure and that bad actors can’t hack or manipulate these communications.

The Chinese Communist Party understands very well the importance of 5G and is working hard to develop 5G technology before us to gain control of the market. A recent report by the White House Office of Trade and Manufacturing Policy bluntly summarizes the threat the CCP poses.

“Given the size of China’s economy, the demonstrable extent of its market-distorting policies, and China’s stated intent to dominate the industries of the future, China’s acts, policies, and practices of economic aggression now targeting the technologies and IP of the world threaten not only the U.S. economy but also the global innovation system as a whole.”

America must swiftly act to ensure we win the race to 5G. One of the biggest barriers to American development of 5G is antitrust law and enforcement, both domestically and internationally. A combination of domestic rulings and efforts by foreign governments have left many of our most innovative companies dangerously exposed. We need to respond to these anti-competitive measures to ensure American companies are competing on a level playing field.

Aggressive antitrust enforcement by both foreign and domestic forces threatens innovation by forcing American companies to engage in expensive litigation. The lawsuits often result in these companies being unable to exercise their legally granted intellectual property rights. Qualcomm — one of the most active companies in the 5G space — is embroiled in a years-long legal battle that jeopardizes its business model and could force it to sell its groundbreaking wireless chips at a steep discount. The problems American technology companies face overseas are even more extensive, as foreign governments like China prioritize technological supremacy over the rule of law.

## 2NC

### Regs CP---2NC

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

Carl W. Hittinger and Tyson Y. Herrold 19. Carl W. Hittinger (LAW ’79) is a senior partner and serves as BakerHostetler’s Antitrust and Competition Practice National Team Leader and the litigation group coordinator for the firm’s Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. Tyson Y. Herrold is an associate in the firm’s Philadelphia office in its litigation group. His practice focuses on complex commercial litigation, particularly antitrust and unfair competition matters, as well as civil rights litigation. "Antitrust Agency Turf War Over Big Tech Investigations". Temple 10-Q. https://www2.law.temple.edu/10q/antitrust-agency-turf-war-over-big-tech-investigations/

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

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

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

#### 3. Independently, applying antitrust to SSOs is bad---chills participation---turns advantage 1.

David J. Teece and Edward F. Sherry 3. Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California, Berkeley. Senior Managing Economist at LECG, LLC in Emeryville, CA, and a member of the California Bar. Standards Setting and Antitrust. Minnesota Law Review. 782. 2003. Pg. 1985-1986

F. PROBLEMS WITH "ONE SIZE FITS ALL" POLICIES It is common for commentators to suggest that the rules "should" or "must" be one way or another. For example, Mueller recently proposed that "[a]ny firm that participates in creating an industry standard and thereafter obtains patent rights in some aspect of the standard must, at a minimum, disclose the existence of any patents or pending patent applications that may be relevant to the standard."225 Such a proposal can be understood in one of two ways. The first is as a mandatory rule, specifying what the rules should be-whether as a general matter of public policy or as a consequence of application of antitrust principles-allowing for no deviation. The second is what is often termed a default rule, to be thought of as the general proposition to be applied in the absence of evidence to the contrary, but one that can be changed by the SSO if it chooses to do so. 226 These two interpretations have fundamentally different bases and policy implications. In our opinion, it is simply unnecessary to adopt mandatory rules in this area. SSOs are perfectly capable of adopting their own search, disclosure, and licensing rules, and of adapting those rules to the needs of the SSO participants. The results of Professor Lemley's survey indicate that SSOs have a variety of different rules. 227 There is no reason why a "one size fits all" mandatory-type approach is appropriate. 228 We find it is extremely telling that, at the recent FTC and Department of Justice (DOJ) hearings on the intersection between antitrust and intellectual property, both of the comments from SSOs expressed the belief that the current system worked reasonably well, and expressed concern that the antitrust authorities might adopt a "one size fits all" interventionist approach to standards issues.229 We believe that those comments, coupled with the results of Professor Lemley's survey showing the wide diversity of policies across SSOs, 230 strongly suggest that the antitrust authorities should proceed cautiously in this area. In particular, we are concerned that antitrust intervention may reduce the clarity of the rules, thereby making participation in SSOs more risky and reducing the willingness of firms with valuable IP (and which therefore presumably have much to contribute to selecting the appropriate standard) to participate. If the SSO's rules are unclear, the obvious public policy solution is to encourage SSOs to adopt clearer rules on a going-forward basis. Most significantly, we believe that intervention runs a significant risk of slowing down the standards-setting process, thus delaying the adoption of new standards and new products made in accordance with those standards, to the detriment of consumers and of society generally.

#### 4. Specifically true for patent law.

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

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

#### “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.

#### Ex ante regulations solve---mandating disclosure and licensing solve structural reforms.

OECD 10. OECD Competition Committee. Policy Roundtables Standard Setting. Competition Law & Policy OECD. 2010. Pg. 11-12. https://www.oecd.org/daf/competition/47381304.pdf

Antitrust law enforcement is primarily concerned with unilateral and concerted conduct that has anticompetitive effects on consumer welfare, such as limiting innovation, raising prices or otherwise limiting consumer choice. As noted above, standard setting is not immune to either of these harms. Interactions between competitors, while a necessary component of standard negotiations, present opportunities for collusion. As regards abuse of dominance, the discussion highlighted several examples, such as patent holders charging discriminatory royalty rates for essential patents in violation of a FRAND commitment as was alleged in a case reported by the Korean delegation. It can also occur when only one entity is charged with certification as discussed by the Bulgarian delegation. Certification of compliance with a standard is often limited to very few firms, or just one. Such limits raise the risk that providers of certificates of conformity will have market power. Increasing the number of potential providers for a given standard would likely reduce opportunities to exercise market power. Competition authorities should not hesitate to address clear cases of collusion or abuse of dominance. But it is important to note that intervention by a competition authority or court constitutes only an ex post remedy to an existing problem. There are also ex ante solutions that may prevent these harms from materializing in the first place. One of these relates to the rules that govern the operation of SSOs. First, an SSO should represent divergent economic interests including the public sector and consumers in order to avoid problems such as that presented by South Africa, where an SSO allowed a sub-committee comprised of only the three major incumbents in the market to set the standard for vehicle theft tracking devices. The resulting standard was based on prior performance and effectively blocked entry. If potential new competitors or consumers had been a part of the process, the standard would probably have been based on technological superiority rather than entrenchment. Another solution that fosters reaching the best possible standard and forecloses the possibility of patent ambush involves the imposition of disclosure requirements on participants in the SSO. At times, SSO members are required to disclose any existing patents or pending patent applications that are relevant to the standard under discussion. However, as discussed by Prof. Geradin, the large size of some companies' patent portfolios does not allow for a full search before a standard is chosen. Thus companies are in practice only required to disclose patents whose existence and relevance they are aware of. Further, SSOs may demand that its members disclose the maximum fees and most restrictive terms they would ask for if their technology became part of the standard. Such disclosures would enable SSOs to compare the financial and technical merits of the competing technologies prior to selecting a standard. Rather than being held up by IP owners after the standard has been chosen, participants could take advantage of ex ante competition to secure the most desirable terms. However, with such rules in place, SSOs must be aware that those with essential patents might deliberately stay out of the process, that discussing maximum rates could lead to illegal price fixing if it amounts to bid-rigging of competing technologies and that disclosed maximum future fees could risk being inflated when compared to actual fees, in particular if several rounds of declarations are foreseen or if private negotiations follow the announced maximum fee. A related proposal, mentioned by the US delegation, calls for ex ante negotiations between the potential licensor and licensees. This is meant not only to promote disclosure but also to create countervailing buying power in the hands of the combined licensees. However, economists disagree about the effects on consumer welfare when a monopsony faces a monopolist. In addition, the risk of collusion arises when potential competitors are negotiating payments to each other. In a 2007 report on intellectual property rights, U.S. DOJ and the U.S. FTC concluded that there were limited circumstances where such negotiations would harm competition: ―[S]such negotiations might be unreasonable if there were no viable alternatives to a particular patented technology that is incorporated into a standard, the IP holder's market power was not enhanced by the standard, and all potential licensees refuse to license that particular patented technology except on agreed-upon licensing terms. In such circumstances, the ex ante negotiation among potential licensees does not preserve competition among technologies that existed during the development of the standard but may instead simply eliminate competition among the potential licensees for the patented technology‖. However, the most common ex ante solution employed by SSOs to avoid excessive IP licensing fees, as mentioned above, is to require its members to commit to licensing their technology on FRAND terms. A FRAND guarantee reduces the incentive for patent ambush. However, while it is generally clear what constitutes ―non-discriminatory‖ terms, the meaning of ―fair‖ and ―reasonable‖ are much more amorphous. While one approach to treating patent ambushes is via abuse of dominance, the panelists also highlighted alternative legal routes, such as breach of contract or fraud, which could be pursued once a company violates the terms of its FRAND commitment. These alternative approaches also present complications, notably from the difficulty in identifying a FRAND price. Another approach is to argue that failure to disclose patents during the standard-setting process, when a disclosure is required by SSO rules, invalidates the ability of the patent-holder to sue for patent infrigement. Prof. Geradin also stressed the important role that IP regimes play in the standard setting process. Structural reforms that make obtaining a patent more difficult would reduce the large number of patents that currently exist for a single technology, such as about 2000 patents for Blu-Ray. This in turn would make royalty negotiations more manageable. More broadly, many benefits could be gained from international harmonization of standards. This would increase consumer welfare by providing a greater variety of products or decreasing the cost of production. For example, the Italian delegation suggested that a unified voltage system for locomotives in Europe would increase competition for the provision of trains thus lowering the ultimate price to consumers.

#### 4. Over-enforcement is worse for consumers than 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.

#### 5. Patent law solves---their solvency advocate. [EMORY PR=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.

#### They’re wrose for targetting---*expanding the scope of antitrust causes regulatory capture.*

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris. ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326

Private and Pseudo-State Interests. Antitrust authorities can be captured by various outside groups that lead antitrust employees to please them so as to maximize their own future interest. 59 Public choice theorists have pointed out that special interest groups may capture regulatory authorities. 60 This issue cannot be overlooked and [\*344] a precise risk map should be drawn in this area as antitrust authorities' employees may please these groups for personal benefit, to the detriment of consumers. 61 The importance of this issue is growing as the scope of antitrust authorities is expanding, which increases the risk of regulatory capture by interest groups. 62

See, e.g., Bundeskartellamt prohibits Facebook from combining user data from different sources (Bundeskartellamt, Feb. 7, 2019), archived at https://perma.cc/B9S2-9659. For more on this extension of antitrust authorities' power, see Directive (EU) 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019 O.J. L11 3 (Jan. 14, 2019). For risks this creates in terms of regulatory capture, see Michael E. DeBow, Social Costs of Populist Antitrust: A Public Choice Perspective, 14 Harv. J. L. & Pub. Pol. 205, 220 (1991) (explaining that as the government expands the scope and aims of antitrust enforcement, private parties invest more significant sums in manipulating this greater government intervention in the economy).

#### 3. Expertise solves targetting

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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.

#### CP encourages efficiency in any industry.

Kristelia A. García 14, Associate Professor, University of Colorado Law School, “Penalty Default Licenses: A Case for Uncertainty,” NYU Law Review, Vol. 89, No. 4, October 2014, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1071&context=articles

Companies, like individuals, are risk averse. The existence of a fallback option, even a poor one, allows them to take a chance on private negotiation. This is the case because the parties know they have an alternative should the deal not work out. Moreover, the fallback allows them the freedom of dabbling in individual deals with only one partner or a handful of them, affording valuable feedback on which terms work and which ones do not without committing the time and effort required to negotiate individually with all comers. If the private terms prove functional and an industry norm begins to take shape-as in the case of the Clear Channel-Big Machine deal-it can then be extended to the larger, more comprehensive partners and eventually reflected in the underlying legal regime.

CONCLUSION

When coupled with a penalty default, uncertainty can bring greater efficiency to the marketplace by encouraging private ordering, which allows for tailored terms and responsiveness to rapid technological change. This is great news in the music sampling context, where for years scholars, legislators, and industry players have been debating a statutory license. 271 This Article suggests that a penalty default license for samples, coupled with existing uncertainty about the future state of protections for derivative works, might alleviate efficiency concerns by encouraging more and better private negotiation. 272

This prescription is particularly timely given the imminent rewrite of "the next great copyright act," 273 and may find application outside the United States as well. In the European Union, for example, there has been a recent push for single-market licensing of intellectual property rights. 274 Copyright territoriality has largely thwarted this initiative, 275 whereas private ordering has resolved it. In November 2012, for example, Google accomplished something the European Union has thus far been unable to: The company struck a private, multiterritory agreement with thirty-five European countries. 276

Acknowledgment of the role uncertainty and penalty defaults play in increasing effectiveness in the market for statutory licensing and in copyright enforcement is only the beginning. A better understanding of uncertainty as a tool for efficiency has application in any industry facing change as a result of rapid technological growth, evolving consumer preferences, or ambiguity about the future state of the law.

#### 2. Mandating patent licensing solves deterrence. [EMORY PR=GREEN]

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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

#### 5. Solves deterrence.

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

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

### Innovation---2NC

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

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

Unmentionable claims

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

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

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

A big bluff

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

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

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

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

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

[CHART OMITTED]

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

[CHART OMITTED]

#### America wins the 5G race now. China gooses the stats.

Brake ’20 [Doug and Alexa Bruer; November 30; J.D. from the University of Colorado, a recognized broadband policy expert, Hatfield Scholar at the FCC; Policy Analyst at the Information Technology and Innovation Foundation, Public Policy Master’s from Harvard; Information Technology and Innovation Foundation, “The Great 5G Race: Is China Really Beating the United States?” https://itif.org/publications/2020/11/30/great-5g-race-china-really-beating-united-states]

5G USERS VERSUS SUBSCRIBERS

Many reports likely overstate the extent of Chinese 5G deployment for several reasons. Part of this is likely due to intentional inflation of statistics reported by operators under pressure from Chinese authorities. This is a long-standing practice in China, going back at least as far as Mao and agricultural communes reporting fake crop yields so as not to displease leadership.4 And today they are not unique to the telecom sector, as organizations of all kinds inflate numbers in order to meet Beijing’s expectations. The Ministry of Industry and Information Technology (MIIT) put out a statement encouraging telecommunications providers to “accelerate user migration to 5G through measures such as package upgrade offer, and credit purchases, etc.”5 Providers then started encouraging or even forcing customers to upgrade to 5G subscriptions regardless of their actual need, use, or device.6 Some companies reduced 5G subscription prices so much they are even cheaper than staying on a 4G plan.7 As one reporter put it, “[W]ith all of China’s big telcos slashing 5G package prices in the past few months, it could well be that customers are being drawn in more by attractive tariffs than by a desire to get their hands on the latest hardware and its related capabilities.”8 The push for 5G subscribers was evident before 5G was even activated: Although 5G service was not turned on in China until November of 2019, Chinese telecom providers listed 9 million 5G users in October 2019, a month prior to its actual activation.9

By counting anyone on a 5G plan—even if they only have a 4G device connecting to 4G infrastructure—as a 5G subscriber, and measuring individual base stations instead of cell sites, China’s 5G stats paint a misleading picture.

Apparently, the numbers game went too far, as the MIIT later called upon providers to “clean up” reporting and end aggressive sales practices after news of subscriber inflation spread.10 But current numbers are still plagued with confusion. Consider that China Telecom and China Mobile (the two largest operators in China) reported 150 million “5G package customers” as of September 2020. But according to China’s Academy for Information and Communications Technology, only 94 million 5G devices had been shipped for all of China during the same time frame, indicating a sizable gap between the number of “subscribers” and actual 5G users.11

The discrepancy may be due largely to terminology: “5G package customers” is a blanket term often used by Chinese carriers to refer to anyone on a 5G subscription, regardless of whether they actually have a 5G device or access to a 5G network.12 China Mobile acknowledges that they count anyone “who has subscribed to 5G tariff plans” as a 5G customer.13 The number of 5G-capable devices alone is impressive, and the competitive threat from China justifies a thoughtful policy response, but no one should be worked into a panic by goosed stats.

NETWORK DEPLOYMENT: BASE STATIONS VERSUS CELL SITES

Subscriptions are not the only potentially misunderstood stat. Chinese operators tend to count mobile infrastructure differently from how Western operators generally do. The key difference is between cell sites (how U.S. telecommunications operators typically measure deployment) and base stations (how Chinese telecommunications operators typically measure deployment). A cell site usually refers to the entire area of a given tower, which includes potentially multiple base stations and antennas using different spectrum. The term “base station” generally refers to the equipment each carrier uses to send signals over multiple antennas at the cell site. Often one cell site will have multiple base stations, sometimes it will host only one. But generally, it is not a one-to-one conversion between base stations and cell sites or towers; It is important that these numbers are not conflated to mean the same thing.

Deployment figures are often further mischaracterized because of the way Chinese operators sometimes count each spectrum band as a separate “logical” base station instead of actual pieces of equipment.14 Just like how a Wi-Fi router can work on different spectrum (generally 2.4 GHz and 5 GHz), a mobile base station can operate on multiple spectrum bands. American carriers would generally count a multi-spectrum base station as at most one piece of equipment. But some Chinese reporting apparently treats each individual spectrum band a base station supports as a different “logical site.”15 A representative from Huawei explained that “a China Unicom base station supports GSM 900, GSM 1800, WCDMA 2100 and LTE. Most of the equipment is deployed in the same room at one physical site, but there are four bands, so there are four logical sites.”16

As a result, Chinese numbers could easily be misrepresented as three to four times higher compared with how Western operators tend to count equipment.17 Policymakers and the media should take care not to conflate estimates of base stations for logical sites with actual, physical cell sites—these are two totally different measurements. For a rough comparison, it seems fair to assume two or three base stations per cell site, but the number of logical sites—meaning each spectrum band used—could be many more.

ACTUAL PERFORMANCESS

The raw number of base stations is not always a good measure of a network’s performance. What we really care about is a network’s performance for the population it covers. Measuring performance becomes increasingly complicated with 5G’s diverse spectrum assets, some of which do not use the traditional cellular architecture.

The utilization of different spectrum resources or amounts of bandwidth results in varying levels of performance even with equal levels of infrastructure. This is relevant when comparing China, which so far uses exclusively mid-band spectrum for 5G, with the United States, which has made a large push to focus on high-band coverage. High-band 5G offers the highest performance leap over existing networks, at least where it is available.

But that being said, let’s try a rough comparison, assuming the similar spectrum assets and using China’s announcement that it anticipates 600,000 5G base stations by the end of 2020.18 Assume three base stations per Chinese cell site—one for each of the major operators—and we get about 200,000 sites. This could be several times lower if we’re talking logical sites, but it is hard to say—let’s keep the estimate conservative and set that issue aside.

The population served also plays a big role in the performance of a given network. China’s population is about 1.39 billion. This is about 4.5 times larger than that of the United States, indicating Chinese operators will need roughly 4.5 times as many base stations as their U.S. counterparts to get a similar level of performance for each user (all else being equal). So, those 200,000 sites work out to about 1 site per 7,000 people. In 2019 alone, U.S. operators invested in 5G-ready cell sites and added 46,000 new cell sites—roughly 1 site per 7,134 people.19 To the uninformed, 600,000 base stations might sound alarming, but understanding what those numbers mean, we’re about neck-and-neck. If we assume that the Chinese sites include logical sites, and the spectral efficiency of their base stations is less, then it appears the United States is clearly in the lead.

Slow and steady may win the race. Whereas the United States is pursuing a gradual, economical deployment of 5G, the problems with China’s rushed 5G deployments are already starting to show. One of Huawei’s own executives went so far as to call China’s 5G “fake, dumb and poor,” mostly due to poor integration with the 4G network.21 Another former official warned in a recent speech that China’s 5G push could become a failed investment.22 While China is no doubt investing substantially in the expansion of its 5G network, including by pressuring its state-owned carriers to invest faster than the market demands, Chinese figures must be properly scrutinized when using them to make U.S. policy decisions.

#### Wrong. China has more subscribers BUT won’t innovate the best applications.

Soon ’19 [Stella; November 26; reporter, citing Adam Segal, director of the digital and cyberspace policy program at CFR, and Paul Triolo, geo-technology practice head at Eurasia Group; CNBC, “Here’s how the US can beat China in the race for dominance in next generation networks,” https://www.cnbc.com/2019/11/26/5g-race-how-the-us-can-beat-china-in-the-competition-for-dominance.html]

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

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

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

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

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

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

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

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

#### Antitrust decks SSO clarity and predictability

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E. ANTITRUST INTERVENTION AND CLARITY

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

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

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

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

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

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

#### 2. Antitrust murders 5G AND open innovation. That’s Osenga, Abbott, AND…

Gupta ’19 [Kirti; September 23; Economics PhD from the University of California, San Diego; Antitrust Chronicle, “5G and Anticipated Intellectual Property and Antitrust Policy Issues,” Vol. 3, No. 2]

For antitrust economists, the courts, and policy makers to comprehend the full impact of their myopic theories, perhaps it is necessary to map out what might happen if rewards for investing in 5G mobile wireless technology are in fact set too low. The likely consequence is that: (1) R&D on mobile wireless is reduced and invention that relies on the licensing model slows. 5G updates occur less frequently, if at all. (2) Device makers and application developers suffer slowing, even declining, sales. There is little reason to buy new phones and other devices if the new ones don’t do much more than the old ones as technology obsolescence is what causes most customers to upgrade their devices. (3) To combat declining upstream innovation, device makers like Apple facing eroded sales may for the first time start to contemplate subsidizing upstream R&D. But this will be difficult because, in the shadow of FTC v. Qualcomm, the upstream wireless technology developers must provide FRAND licenses to all, subsidizer and free rider alike, at “nondiscriminatory” rates.15 Device makers subsidizing upstream technology developers is a strategy likely to fail, as individual device makers that consider subsidizing upstream R&D will have to compete with other free riding device makers. (4) Because such efforts to patch up open innovation are likely to fail, the large players (e.g. Apple, Google, Samsung, Huawei) are likely to begin to build their own proprietary technology stacks, causing the ETSI/3GPP open innovation model to collapse further. The integrated players will no longer wish to tender their technology to ETSI and be exposed to the FRAND commitment. The open innovation FRAND model will then no longer support sufficient technological development. This might not in the end trouble the big players like Samsung, Apple, and Huawei who can bring the technology in-house and not license it to the other usually smaller players. However, innovation will slow, and concentration in the downstream device markets would likely increase dramatically.

The irony would be that the same antitrust policy makers that might take pride from the breakup of the vertically integrated Bell System (“AT&T”), would have in fact stimulated the emergence of a vertically integrated model in mobile wireless, one that would likely suffocate a good deal of follow-on innovation and squeeze out downstream players. New entry into the device market would be much, much harder. The highly competitive model we have now, with scores if not hundreds of players, would collapse to a few players with proprietary software stacks. Perhaps these stacks would cooperate to achieve some amount of compatibility. Oligopoly would replace the vigorous competition we see today. Lower innovation is a likely corollary

There is not much in this scenario that is appealing from a competition policy perspective. Should this scenario play out, antitrust zealots in the US and the EU should then have on their tombstone the inscription that they “helped destroy the greatest model of technological cooperation and innovation in the history of human civilization” – all because they used too narrow an analytical lens. The poorest members of global society, who have benefited enormously from mobile technology, are likely to suffer disproportionately.

#### No impact to democracy.

Sam Ghatak 17. \*Lecturer, Political Science, University of Tennessee Knoxville. \*Aaron Gold, PhD Student, Political Science, UT Knoxville. \*Brandon C. Prins, Professor and Director of Graduate Studies, UT Knoxville. “External threat and the limits of democratic pacifism.” Conflict Management and Peace Science 34(2): 141-59. Emory Libraries.

Conclusion

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

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

### 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.

#### 3. Expanding reach of antitrust law = more court cases, clogs the courts

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The courts have responded by positing (mainly) standards—not rules—for determining the legality of challenged business practices.5 They have interpreted Section 1 of the Sherman Act to forbid agreements that unreasonably restrain trade and Section 2 to condemn unreasonably exclusionary unilateral conduct by firms possessing market power.6 In both cases, reasonableness is determined by assessing the actual or likely effect of the challenged behavior on quality-adjusted market output. For a few business behaviors (e.g., naked price-fixing among competitors), experience has shown that the conduct is always or almost always output-reducing, so such practices are deemed per se unreasonable. Such ex ante rules, though, are the exception in antitrust; for the most part, the law consists of ex post standards that require case-by-case assessment. Courts have posited different standards for different types of business behavior, calibrating them (by adjusting the elements of liability, burdens of proof, available defenses, etc.) to reflect judicial experience and economic learning. In so doing, the courts have been rightly concerned with the costs of the standards they set. One set of relevant costs consists of the welfare losses that result when a standard makes a mistake on liability. The behaviors antitrust polices—agreements that restrain trade, single-firm acts that make life hard for rivals, business combinations—can sometimes enhance market output and sometimes reduce it.7 If a legal standard mistakenly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/or reduced quality, and a deadweight loss will occur. But if the standard wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. Both false convictions (Type I errors) and false acquittals (Type II errors) generate losses. In addition to these so-called “error costs,” regulating competitive mixed bags entails significant costs of simply deciding whether contemplated or actual conduct is forbidden or permitted. Such “decision costs” must be borne by business planners (who are attempting to avoid liability), by litigating parties (who are trying to prove their case), and by **adjudicators (who must decide whether the law has been broken**). Type I error costs, Type II error costs, and decision costs are intertwined. If courts try to reduce the risk of false conviction (Type I error) by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will increase the risk of false acquittal (Type II error). If they ease a plaintiff’s burden or cut back on available defenses to reduce false acquittals, they will tend to enhance the social losses from false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack-a-mole, driving down costs in one area will cause them to rise elsewhere. In light of the inevitable and intertwined costs that will result from any effort to police market power-creating conduct, antitrust standards should be crafted so as to minimize the sum of error and decision costs. The institutions charged with crafting antitrust policies—under the status quo, the courts—should not strive to prevent every anticompetitive act, to allow every procompetitive one, or to keep the rules as simple as possible. In keeping with Voltaire’s prudent maxim, “the perfect is the enemy of the good,” they should eschew perfection along any single dimension in favor of overall optimization. Such an approach ensures that antitrust accomplishes as much good as possible. As I have elsewhere documented, this prudent approach has largely been embraced by the U.S. Supreme Court in recent years.8 Time and again, the Court has examined the economic learning on different business practices and crafted “structured” rules of reason aimed at separating the procompetitive wheat from the anticompetitive chaff, while keeping decision costs in check. For some practices (e.g., tying) the legal rules have not caught up with economic understanding, but the system as a whole is sound, and one would certainly expect the doctrine to evolve in a salutary direction. With respect to mergers and other business combinations, the judicial precedents are less sound, largely because few merger decisions are appealed to allow for an updating of controlling precedents in light of current economic understanding. In the merger context, though, the federal enforcement agencies (the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice) have taken the lead in updating the standards so as to minimize the sum of error and decision costs; the agencies’ enforcement guidelines, crafted with an eye toward optimizing antitrust interventions and regularly updated to reflect new economic learning, have been extremely influential among the lower courts and have largely remedied the deficiencies in controlling precedents. To summarize this section, **any effort to regulate potentially market power-creating conduct** (collusion, exclusionary conduct, business combinations) **is sure to create some** losses in terms of errors (wrongful acquittals of harmful behavior and wrongful convictions of beneficial conduct) and **administrative costs**. The approach currently prevailing under the federal antitrust laws—an output-focused, standards-based, common law approach under which courts craft policies in light of evolving understandings of economics and with an eye toward minimizing the sum of error and decision costs—is generally working well.

#### No cyber impact---every scenario is empirically denied. That’s Lewis AND…

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

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

#### The grid is resilient to cyber-attacks and states have no motive.

Jesse Dunietz and 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. <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.

## 1NR

### FTC Tradeoff DA---1NR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Algorithmic bias turns the economy---drains business profitability.

Kalinda Ukanwa 21. Assistant professor of marketing at the University of Southern California’s Marshall School of Business, 5/23/21. “Algorithmic bias isn’t just unfair — it’s bad for business.” https://www.bostonglobe.com/2021/05/23/opinion/algorithmic-bias-isnt-just-unfair-its-bad-business/

These moves respond to growing concerns that algorithms have been reproducing discrimination in situations such as home lending, the allocation of health care, and decisions about who deserves parole. While many people hoped machines could help us make fairer decisions, as the use of AI has exploded it’s become clear that all too often they simply replicate and even amplify our existing prejudices.

An important part of the story has been missing, however. It’s one that might make businesses more amenable to regulation or even preclude the need for it by motivating them to act on their own. Algorithmic bias is not only a pressing ethical and societal concern — it’s also bad for business.

My research shows that over time, word of mouth about algorithmic bias among customers will hurt demand and sales and cut into profits. This damage won’t just hit a few unlucky companies that find themselves embroiled in public controversy around algorithmic discrimination. It can occur even if the inner workings and biases of an algorithm remain invisible to the public.

To understand how this can happen, consider one tech giant’s failed attempts at algorithmic design. In 2014, Amazon launched an internal tool to evaluate resumes. Although the algorithm was not programmed to look at the gender of the job applicants, it was trained using data from the company’s previous decade of hiring decisions, and the applications in that period mainly came from men. Based on past patterns, the algorithm learned to downgrade resumes that mentioned certain women-only colleges or women’s sports or clubs.

Amazon dropped that tool once these biases were discovered, but companies still widely use algorithms for recruiting and hiring. Not only are employers potentially missing out on valuable candidates, but over time these losses will compound through word of mouth. People learn about opportunities from members of their social circles, who often have race, age, gender, and other demographic characteristics in common. When women hear that their female friends and colleagues have been passed over for jobs at a particular company, they are less likely to apply, even if they know nothing about why these other candidates were rejected.

Using group characteristics to make decisions about whether and how to provide services to individual consumers may seem logical in some cases and may even be profitable in the short term. For example, a property manager might believe there are legitimate business reasons to choose tenants based on their age or education level. But my research, which uses computational methods to simulate consumer behavior, shows that these types of “group-aware” algorithms will tend to become less profitable over time.

In a study I conducted with Roland Rust, we simulated how customers would respond to two banks. One bank is “group-aware” and has various loan-approval thresholds for members of different groups. For example, women might have to meet a higher standard than men to get a loan. The other bank in the model is “group-blind”: It has the same approval threshold for every applicant.

Our model indicates that most members of the favored group meet the loan threshold at both banks, so they are likely to apply to either. But members of the group being discriminated against learn from one another to avoid the group-aware bank in favor of the group-blind one. Furthermore, members of the group experiencing discrimination also influence some members of the favored group to avoid the group-aware bank. As time passes, there is a net movement of customers toward the group-blind bank, hurting the profitability of the group-aware bank.

In short, when consumers learn from one another that a company is less likely to serve them, even if the discrimination is unintentional, they’ll avoid that company and it’ll lose revenue.

Algorithms often become group-aware when they aren’t intended to be. AI teases out correlations in the data that serve as stand-ins for group membership. For example, in our geographically segregated society, ZIP codes and other location data are a common proxy for race. Ride-sharing companies discovered the problem when a study revealed that their location-based pricing algorithms charge customers more for rides to or from neighborhoods primarily occupied by people of color. In other words, programming an AI system to ignore people’s gender or race or leaving this information out of the data set entirely isn’t enough to ensure an algorithm is group-blind.

What can companies do to make algorithms treat people fairly? Here are three key steps they can take:

1. Rather than removing group identifiers, businesses should include demographic characteristics in their data so they can continually audit their algorithms to determine whether they inadvertently discriminate against certain groups. There are a number of tools to evaluate whether bias is creeping in. IBM’s AI Fairness 360 is an open-source tool kit that helps detect bias in machine learning models. Microsoft’s FATE research group produces reports and tools aimed at reducing bias and increasing transparency and accountability in AI.

2. Companies can model how their systems’ decisions will affect demand over the long run among consumers who learn that some groups are treated differently. For example, if a bank used a model similar to the one in my study, it could easily see the long-term impact of a group-aware algorithm for making loans.

3. Whenever possible, algorithms should be designed to make decisions using context-specific data about individuals — looking at someone’s bill payment frequency in loan decisions, for example, or a patient’s cholesterol levels in health care, or a student’s grades in education — rather than trying to infer such information from other data points like their education level or where they live. The data used to train the algorithm is important too. Increasing the variation among and representation of different kinds of consumers allows algorithms to better evaluate individuals on their own merits.

Algorithms can lead to fairer outcomes, but only if they are designed and managed carefully. As computers increasingly make influential decisions about our lives, from the health care and financial services we receive to our educational and career prospects, we must remain alert to the potential for bias. There are strong ethical and moral reasons to do so, but there is also a business case to be made. We need to make sure companies understand how algorithmic bias can hurt their bottom lines.

#### The US is key to global AI.

AFP 21. Agence France Presse, 1/25. “US leads world on artificial intelligence but China is catching up: study.” https://www.scmp.com/news/china/science/article/3119115/us-leads-world-artificial-intelligence-china-catching-study

The United States is leading rivals in development and use of artificial intelligence while China is rising quickly and the European Union is lagging, a research report showed on Monday.

The study by the Information Technology and Innovation Foundation assessed AI using 30 separate metrics including human talent, research activity, commercial development and investment in hardware and software.

The US leads, with an overall score of 44.6 points on a 100-point scale, followed by China with 32 and the European Union with 23.3, the report based on 2020 data found.

The researchers found the US leading in key areas such as investment in start-ups and research and development funding.

But China has made strides in several areas and last year had more of the world’s 500 most powerful supercomputers than any other nation – 214, compared with 113 for the US and 91 for the EU.

“The Chinese government has made AI a top priority and the results are showing,” said Daniel Castro, director of the think tank’s data innovation centre and lead author of the report.

“The United States and European Union need to pay attention to what China is doing and respond, because nations that lead in the development and use of AI will shape its future and significantly improve their economic competitiveness, while those that fall behind risk losing competitiveness in key industries.”

The EU lagged notably in venture capital and private equity funding, while faring better in terms of research papers published.

The report found China published 24,929 AI research papers in 2018, the latest year for which data was available, to 20,418 for the European Union and 16,233 for the US.

But it said that “average US research quality is still higher than that of China and the European Union”.

The survey also concluded that the US “is still the world leader in designing chips for AI systems”.

#### Turns their authoritarianism arg.

William Cohen et al. 20 – former U.S. Secretary of Defense, with Leon E. Panetta, Chuck Hagel, and Ash Carter, 2/27. “America Must Shape the World’s AI Norms — or Dictators Will.” https://www.defenseone.com/ideas/2020/02/america-must-shape-worlds-ai-norms-or-dictators-will/163392/

Now, based on our collective experience, we believe the development and application of artificial intelligence and machine learning will dramatically affect every part of the Department of Defense, and will play as prominent a role in our country’s future as the many strategic shifts we witnessed while in office.

The digital revolution is changing our society at an unprecedented rate. Nearly 60 years passed between the construction of the first railroads in the United States and the completion of the First Transcontinental Railroad. Smartphones were introduced just 20 years ago and have already changed how we manage our finances, connect with family members, and conduct our daily lives.

AI will have just as significant an impact on our national defense, and likely in even less time. Its effects, however, will extend beyond the military to the rest of American society. AI has already changed health care, business practices, and law enforcement, and its impact will only increase.

As this AI-driven transformation occurs, we must keep our democratic values firmly in mind and at the center of any dialogue about AI. Developers embed their values into their products whether they mean to or not. Social media platforms make tradeoffs between free speech and protection from harassment. Smartphone companies choose whether or not to develop operating systems that block the activation of cameras and microphones without users’ permission. Just as surely, AI developed by authoritarian governments and the companies they finance will reflect authoritarian values.

However, if designed with American values, AI can empower individuals by freeing them from mundane tasks, by increasing access to information, and by helping optimize decisions, all while respecting individual liberties and fundamental human rights. We’ve seen examples of how other AI designs will empower governments, particularly authoritarian governments. Their AI designs value those in power more than their citizens, by amplifying sensors that monitor populations, valuing state access to data more than privacy, and creating automation that empowers central decision makers. Just as a highway system that centralizes major cities naturally increase the cities’ importance, societies using a network architecture and series of AI models with embedded authoritarian values will begin to reflect those same values.

Americans must ensure we deliberately and carefully embed our values into the technology that is already shaping our world. To do so, we need to lead the world in AI research and development, provide commercial and public systems to the world that reflect democratic values, and lead the global conversation on AI standards in concert with our allies, especially regarding AI’s use in war.

#### Algorithmic bias is part of the FTC’s healthcare enforcement push.

ALEXANDRA S. LEVINE 8/25/21. Reporter covering the intersection of technology, government and public policy, and she is the author of POLITICO’s popular daily newsletter, Morning Tech. “How Biden's tech trustbuster could change health care.” https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333

The way health care companies and consumer health apps handle sensitive data “is an area that I'm sure [Khan’s] very, very interested in,” said Jessica Rich, former director of the FTC’s consumer protection bureau, adding that the Biden administration's FTC will also be closely scrutinizing hospital mergers.

“I expect her and the commission to take a very bold approach to what constitutes harm for both,” Rich said. “I expect her to pay close attention to algorithms and potential discrimination in health care, both denials and pricing issues which the FTC's laws can address.”

#### Current enforcement is all talk

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Thumpers are priced in.

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

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

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

Made in USA Claims

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

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

Expediting Rulemaking

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

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

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

Rescinding the Competition Policy Statement

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

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

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

Targeting Sectors and Suspects

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

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

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

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

The Future of FTC Enforcement

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

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

#### Plan tips the balance.

Tara Lachapelle 8/25/21. Bloomberg Opinion columnist covering the business of entertainment and telecommunications, as well as broader deals. She previously wrote an M&A column for Bloomberg News. “Wall Street Is Ready to Put Lina Khan’s FTC to the Test.” https://www.bloomberg.com/opinion/articles/2021-08-25/wall-street-is-ready-to-put-lina-khan-s-ftc-to-the-test

As President Joe Biden pushes for more aggressive antitrust enforcement — an effort spearheaded by legal scholar Lina Khan, his controversial pick to lead the FTC — the agency is running up against practical limitations. It’s working with very limited resources for a very large number of deals. How large? So far this year, nearly 10,000 U.S. companies agreed to be acquired for a combined deal value of $1.25 trillion, data compiled by Bloomberg show. That’s already surpassed last year’s sum and may even be on track for a record. Not all of those tie-ups will require regulatory approval but in July alone, 343 transactions filed premerger notifications and are awaiting review, compared with 112 in July 2020, according to the FTC.

These filings start a 30-day clock for regulators to decide whether to further investigate a deal. If that waiting period expires without any action, a company would typically take that to mean that it’s free to complete the transaction. But now the FTC says it can’t get to its backlog fast enough and that inaction on its part doesn’t signal permission to proceed. In warning letters sent to filers this month, the agency said companies that go ahead anyway do so at their own risk because the FTC might later decide a deal violates antitrust laws and sue to undo it — and what a mess that would create for buyers and sellers. And yet, if the agency thought such an aggressive move might discourage mergers, it was wrong.

“To my mind, it is a completely hollow threat and makes the agency look weak,” Joel Mitnick, a partner in the antitrust and global litigation groups at law firm Cadwalader, Wickersham & Taft LLP, said in a phone interview. “They’re saying they’re going to ignore the statutory time limits on them whenever they feel like it and continue to investigate transactions until they’re satisfied. But it’s very difficult for the agency to sue to unwind the transaction once the eggs are scrambled.”

Merger reviews traditionally involve some give and take. Companies will often give regulators more time if they think it will increase the odds of winning approval. If that cooperative attitude is being tossed out the window, though, dealmakers are ready to reassess and embrace a more adversarial process.

For M&A lawyers, it’s a disturbance to an equilibrium that existed under other administrations, and they fear a reversion to the merger-hostile environment of the 1960s. Of course, folks in Khan’s camp would say it wasn’t an equilibrium at all, but rather an often overly cozy relationship between regulators and companies that were given too much leeway in recent years.

In any case, businesses are understandably frustrated by what would seem to be an unreasonable ask. Waiting indefinitely to close a deal is costly and full of risks. At least one acquirer isn’t having it. Last week, Illumina Inc. finalized an $8 billion purchase of cancer-testing startup Grail even though U.S. and European authorities haven’t completed their probes. Even as the FTC began this week its attempt to unwind the deal, other dealmakers may decide they like their chances, too.

The FTC “better be ready to litigate,” said David Wales, a partner in the antitrust and competition group at law firm Skadden, Arps, Slate, Meagher & Flom LLP and former acting director of the agency’s Bureau of Competition. “I’ve seen first-hand the resource constraints at the FTC,” he said. “They can’t sue everybody. They can’t block every deal. They will have to be strategic about it.”

Already, regulators have two major cases sucking up resources. The FTC last week refiled its monopoly lawsuit against Facebook Inc., alleging its takeovers of Instagram and WhatsApp violated antitrust laws. (Its deal last year for Giphy also employed a sneaky maneuver to avoid showing up on regulators’ radars, and now they’re looking to close that loophole.) The Justice Department is pursuing its own case against Google. And what was initially seen as a narrow effort to reel in dominant technology companies has since expanded to other industries in light of a sweeping executive order from President Biden. Even more obscure areas such as ocean shipping are facing new scrutiny.

#### Focus on privacy enforcement now---strategic resource deployment is key.

Arianna Evers et al., 21 – Counsel at Wilmer Hale, with Kirk J. Nahra and Reade Jacob, 4/2. “FTC Set to Flex Its Rulemaking Authority.” https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20210402-ftc-set-to-flex-its-rulemaking-authority

Last Friday—on March 25, 2021—Acting FTC Chairwoman Rebecca Kelly Slaughter announced the creation of a new rulemaking group within the FTC’s Office of the General Counsel. With this group, the FTC is poised to create new rules as well as strengthen existing ones across its vast consumer protection and competition portfolio. This is significant because it signals that the FTC is ready to strengthen its enforcement reach and may start the rulemaking process for a comprehensive privacy rule that is not sector specific, and that could stretch beyond what we typically think of as “privacy” in order to reach related competitive harms caused by companies’ data practices.

For the past several years, FTC commissioners have vocally supported federal privacy legislation and, in its absence, have been asking Congress for civil penalty authority, something they generally do not have for first time violations of Section 5 of the FTC Act. Congressional inaction in both of these areas has resulted in the FTC actively looking for ways to maximize its enforcement reach through the strategic deployment of existing remedies and tools. To that end, the FTC has recently gotten creative with its remedies, requiring companies to delete allegedly ill-gotten data (Everalbum) and provide notice to consumers (Flo Health). It has also used its Section 6(b) authority to examine the data practices of social media and video streaming services and the privacy practices of broadband provides, and two of the commissioners have suggested stretching existing trade regulation rules—specifically the Health Breach Notification Rule—to activities where their application is not immediately obvious.

Given the continued uncertainty around whether and when we might see congressional agreement on a federal privacy bill, the creation of this new group is likely the FTC’s first step towards moving forward with privacy rulemaking under the FTC’s Section 18 authority. This authority, which is also referred to as Magnuson-Moss rulemaking, establishes the process for FTC rulemaking undertaken without direct congressional authorization. However, it is rarely used because it is more burdensome than Administrative Procedure Act notice and comment rulemaking.

This new rulemaking group is also a reaction to AMG Capital Mgmt., LLC v. FTC, a case before the Supreme Court in which the court is deciding whether or not the FTC can properly seek monetary relief under Section 13(b) of the FTC Act. Section 13(b) allows the FTC to seek an injunction to prevent unfair or deceptive acts affecting commerce, and the FTC has long relied on this authority to provide monetary redress to consumers in consumer protection cases.

The creation of this new rulemaking group should not be a surprise to anyone who has been paying attention to the commissioners’ recent focus on improving the effectiveness of the FTC’s existing remedies and using all the tools at its disposal to pursue perceived instances of consumer harm. The FTC also likely sees little downside to beginning the rulemaking process for a comprehensive privacy rule at this time. Congress does not appear close to federal privacy legislation and many states are have moved ahead with their own laws or are posed to do so. Either this is a move that, in combination with activity in the states, could galvanize Congress to finally act, or it will move the FTC closer to obtaining the clear enforcement authority that it has been seeking in the privacy space.

#### 3. Key priority is privacy and data scrutiny.

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

The FTC recently voted to authorize the use of compulsory processes—the FTC’s primary investigatory tools—on what it calls “key law enforcement priorities.” The resolutions allow investigators to take actions like issuing subpoenas and civil investigations demands (commonly referred to as “CIDs”) in a variety of areas. Of note is the inclusion of both healthcare markets and technology platforms, signaling a potential FTC interest in those sectors. These resolutions compliment the agency’s existing authority to investigate deceptive or unfair acts, and comes on the heels of the blow the FTC suffered as a result of the Supreme Court’s AMG decision. For those in the healthcare and technology platform space, this may signal an increase in privacy and data security scrutiny by the FTC. Putting it Into Practice: The authorization of the use of compulsory processes suggests that the FTC will not be backing off from bringing actions to enforce against unfair and deceptive practices. We will continue to monitor to see the impact this may have on privacy and data security cases brought by the agency in the healthcare and technology platform industries.

#### 4. Increase in scrutiny.

Charles Glover et al. 8/16/21. Privacy and cybersecurity attorney at Sheppard Mullin, with Kari Rollins and Liisa Thomas. “FTC Signals Focus on Healthcare and Technology Platforms, Among Others.” https://www.jdsupra.com/legalnews/ftc-signals-focus-on-healthcare-and-2513825/

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#### It’s the FTC, not the DOJ.

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

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

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

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

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

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

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

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

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

#### It directly undermines privacy enforcement.

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

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

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

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

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

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

#### Biden’s XO was just a bunch of complaints---proves it can’t thump the DA. Emory = Green

2AC Posner 21, professor at the University of Chicago Law School (Eric, 7-21-2021, "The Antitrust War’s Opening Salvo", Project Syndicate, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>. Accessed 7-22-21)

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

#### The XO didn’t meet the link threshold, but the plan does.

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

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

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