# 1nc---harvard r2

## offcase

### t-structural---1nc

#### interpretation---“prohibitions” are structural---otherwise, it’s a remedy

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

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

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

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

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

#### violation---plan only expands behavioral remedies---topical affs must prohibit practices

#### vote neg:

#### 1---limits---there are infinite ways behavioral remedies to anticompetitive business practices---structural prohibitions are key to topic management and neg ground

#### 2---ground---our interpretation ensures the aff has to “break up” industries---key to link uniqueness and core controversy on a topic with no disads

### kritik---cap---1nc---commons

#### anti-trust is capitalist---competition inevitably replicates market collapse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### capitalism drives extinction and structural violence

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

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

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

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

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

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

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

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

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

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

### counterplan---n&c---1nc

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

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

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

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

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

### counterplan---regulations---1nc

#### counterplan: The United States federal government 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 counterplan pics out of anti-trust legislation and the ftc and doj as enforcers---other agencies’ regulations solve

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

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

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

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

#### statistics agree regs are better

Sumit Majumdar 21. Professor of Information Systems, University of Texas, Dallas. “Stick Versus Carrot: Comparing Structural Antitrust and Behavioral Regulation Outcomes.” *The Antitrust Bulletin*. June 2021. DOI: 10.1177/0003603X211023463.

The issue is which method works better, the antitrust (structural) or the regulatory (behavioral)? Using a standard test of differences in magnitude between two variables, as natural experiment 3 I evaluate if the antitrust (structural) approach or the regulatory (behavioral) remedy has had a greater impact in enhancing efficiency. Results are in Table 4. Column (A) relates to the performance outcome variable comparatively evaluated. Column (B) reports if the antitrust (structural) impact is less than that of the regulatory (behavioral) measures, on performance, and column (C) reports if the difference has been statistically significant.

[CHART EXCLUDED]

For the productive efficiency score, the regulatory (behavioral) remedy has statistically had a greater impact than the antitrust (structural) method in enhancing efficiency. (Recollect that Tables 2 and 3 reported results on how the structural vs. behavioral remedies impacted efficiency scores. The impacts were 2.23% for the structural remedy (column [A] in panel [B] of Table 2) and 4.33% (column [A] in panel [B] of Table 3) for the behavioral remedy.)

B. Robustness Check

An evaluation of why price caps, as endogenous phenomena,64 were implemented would depend on firm-level factors, such as past performance; these would have influenced the implementation of price cap regulatory schemes for specific firms. As a robustness check, controlling for inclusion of endogenous factors, past performance variables have been included as price caps determinants for each observation, in a selection equation with the price cap variable then determining performance in an outcome equation. The results show the price cap estimates to be of relatively the same magnitude (in fact, they are larger), sign, and significance as the estimate values already reported in this article.65

C. Summary

Overall, significantly larger positive outcomes have emerged from sector-specific regulatory (behavioral) remedy applications vis-à-vis the concurrent antitrust (structural) remedy application. The use of further performance variables to comparatively test the ideas has yielded very similar results. Such additional results are available on request.

### disad---ftc tradeoff---1nc

#### ftc’s increasing enforcement in privacy now---it’s focused on algorithmic bias---that solves

Timothy Butler et al. 10/14/21. Partner at Troutman Pepper, with Carlin McCrory, Elizabeth Waldbeser, Matthew White. “FTC Reports to Congress on Data Security and Privacy Priorities.” https://www.jdsupra.com/legalnews/ftc-reports-to-congress-on-data-5727533/

On September 13, the Federal Trade Commission (FTC) released a report to Congress that highlights the agency’s recent efforts to protect Americans’ privacy, announces the agency’s priorities for future data security and privacy protection efforts, and urges Congress to allocate more resources to the agency so it can expand its data security and privacy protection efforts.

As explained in the report, the FTC intends to focus its data security and privacy protection efforts via four key initiatives:

Integrating Competition Concerns. The FTC will focus its enforcement and rulemaking activities on the relationship of digital market dominance to consumer protection violations. The FTC’s report argues that “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over user data.” And it suggests that “violations of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental impact on competition.” Moreover, the FTC believes it has a “structural advantage” in comparison to other federal and state agencies because, unlike those agencies, it focuses on both competition and consumer protection issues. And, accordingly, the FTC intends to look “with both privacy and competition lenses at problems that arise in digital markets” and will, in some consumer protection cases, seek to impose “competition-based remedies.”

Advancing Remedies. The FTC will focus on crafting strong remedies that protect consumers and deter harmful data security and privacy practices. To protect consumers, it will require companies to disclose data breaches and data misuse. It will also negotiate redress funds for consumers harmed by data breaches and, where necessary, partner with other agencies in order to obtain redress for consumers. Additionally, the FTC will expand nonmonetary relief for affected consumers, for example, by requiring companies to provide identity verification services. As for deterrence, the FTC intends to penalize companies in violation by depriving them of the tools that caused the harm, such as requiring deletion of an algorithm. Per the report, the FTC will implement these remedies through orders issued in enforcement actions.

Focusing on Digital Platforms. The FTC will keep a close eye on the data practices of market-dominant digital platforms by focusing on order enforcement and conducting additional compliance reviews. Indeed, the FTC’s report notes that the agency “will shift resources to order compliance and enforcement especially against the largest respondents.”

Expanding Understanding of Algorithms. The FTC will develop greater understanding of algorithms and the consumer protection and competitive risks they may pose. The FTC will also provide more in-depth guidance for businesses on using algorithms and artificial intelligence fairly and equitably. In particular, the FTC would like to understand the ways that algorithms may create racial bias and prevent such uses of algorithms. It will also act to encourage companies to comply with its previously issued recommendation that they “test their algorithms, both at the outset and periodically thereafter, to make sure it doesn’t create a disparate impact on a protected class.”

#### antitrust enforcement saps up ftc resources and personnel, which are finite

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

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

#### that trades off with the necessary resources for privacy enforcement

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

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy

cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the

privacy unit, has called the FTC “woefully understaffed.”258

As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data

security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### unchecked algorithmic bias risks massive inequality, suffering, and extinction

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

Mike Thomas, THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

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.”

## innovation

### 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.

#### implementation and enforcement are nearly impossible---difficult for competition authorities to determine FRAND violations.

Damien Geradin 10. Professor of Competition Law and Economics at Tilburg University, a William W. Cook Global Law Professor at the University of Michigan Law School and a visiting Professor at the College of Europe, Bruges. Reverse Hold-ups: The (Often Ignored) Risks Faced by Innovators in Standardized Areas. Paper prepared for the Swedish Competition Authority on the Pros and Cons of Standard-Setting, Stockholm, 12 November 2010. Pg. 22-23

After a long and thorough investigation, the Commission eventually decided to close its formal proceedings against Qualcomm,71 hence following the very cautious approach it has usually taken in excessive pricing cases. This case, however, clearly illustrates the considerable difficulty for the Commission (but it is also true for any other competition authority) to determine whether the royalty rates sought by an essential patent holders are “fair and reasonable” or “excessive” under the standard set by the European Court of Justice in United Brands. 72 While determining whether the price of a physical product is excessive is already difficult, that task is even more complex with respect to non-physical constructs, such as IPRs. Although the complainants proposed a number of benchmarks to determine whether Qualcomm’s royalties were “fair and reasonable” (some of which were discussed above (see Section IV.B), we have seen that these benchmarks suffered from major weaknesses either because they were theoretically unsound or because they would have raised complex implementation issues. In the Qualcomm case, this exercise was particularly absurd considering that the royalty rates and other licensing terms contained in Qualcomm’s licenses had been negotiated at arm’s length – in some cases before the WCDMA standard was adopted – with large and sophisticated corporations

#### plan causes patent holdouts---that 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.

#### other countries solve their IOT offense---no reason u.s. is key

#### 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.

#### no internal link to democratic decline---not sufficient to overcome effects of trump and GOP lobbying

#### Democracy and internationalism are resilient.

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

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

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

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

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

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

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

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

Conclusion

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

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

Sam GHATAK ET AL. 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.

## cybersecurity

### 1nc

#### 3GPP standards solve.

Esther Shein 20. Previous editor-in-chief of Datamation, an online enterprise technology magazine, freelance writer specializing in technology. Security Standards For 5G. Cyber Security Hub. 3-23-2020. https://www.cshub.com/mobile/articles/security-standards-for-5g

Enhancing Security For 5G

The 3GPP (3rd Generation Partnership Project) has developed 5G standards that include measures for encryption, mutual authentication, integrity protection, privacy and network availability to provide guidance for cybersecurity organizations. According to 5G Americas, a trade association for mobile operators, the standards provide:

A unified authentication framework that enables seamless mobility across different access technologies and support of concurrent connections

User privacy protection for vulnerable information often used to identify and track subscribers

Secure Service-Based Architecture (SBA) and slice isolation optimizing security that prevents threats from spreading to other network slices

Improving SS7 and diameter protocols for roaming

Adding native support for secure steering of roaming (SoR), allowing operators to steer customers to preferred partner networks – improving the customer experience, reducing roaming charges, and preventing roaming fraud

Improved rogue base station detection and mitigation techniques

 And even more proprietary operator and vendor analytics solutions that offer additional layers of security

#### 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**.**

#### They only require companies to license their patents---that doesn’t solve monocultured software---it still uses the same standards, so it’s still vulnerable to cyberattacks.

#### 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.

## solvency

### 1nc

#### can’t solve---agencies are dumb

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

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

#### Antitrust stifles 5G innovation---kills our edge.

Alden Abbott et al. 3-10. Hon. Paul R. Michel. Adam Mossoff. Kristen Osenga. Brian O’Shaughnessy. Senior Research Fellow at the Mercatus Center. Member of Judicial Conference’s seven-judge Executive Committee. Professor of Law at Antonin Scalia Law School, George Mason University. Professor at University of Richmond School of Law. Past President, Licensing Executives Society, USA & Canada. “Aligning Intellectual Property, Antitrust, and National Security Policy,” released by the Regulatory Transparency Project of the Federalist Society. 03-10-2021. https://regproject.org/paper/aligning-intellectual-property-antitrust-and-national-security-policy/

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.

#### The plan collapses the incentive for lead firms to innovate---low monopoly rents, legal costs, and disadvantaged negotiations.

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

A. What if the FTC Had Won in FTC v. Qualcomm?

To illustrate this argument, assume that the district court’s order in Federal Trade Commission v. Qualcomm had been upheld.  The court’s decision, and the regulatory consensus upon which it rests, implicitly assumes by fiat that firms such as Qualcomm would continue to invest in R&D under the same licensing-based business model but would simply enjoy lower monopoly rents, yielding a net efficiency gain by continuing to incentivize the same or greater amount of innovation while imposing a reduced deadweight-loss burden on intermediate and end-users.

This outcome seems implausible.  In a legal environment in which the wireless industry’s lead innovator must share its latest technological advances with direct competitors, it is unlikely to have any rational motivation to act as a public R&D utility for the remainder of the industry.  Moreover, given the success of the agencies in largely precluding SEP owners from seeking injunctive relief against infringers, the innovator firm would be disadvantaged in negotiating royalty rates with well-resourced intermediate users.  Absent the threat of an injunction, intermediate users would strategically shift the “negotiation” process to a federal district court, the Patent Trial & Appeals Board (in which patent validity can be separately contested), and multiple foreign courts and administrative venues.  The resulting burden of legal and other transactional costs might lead the innovator firm to reconsider whether a licensing-based business model is still the most efficient strategy for extracting value from its R&D portfolio.

#### Antitrust reduces entry to the largest firms---makes innovation impossible.

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

Consider the counterproductive consequence of this hypothetical antitrust intervention.

Under the market structure that existed prior to intervention, the absence of any significant antitrust constraints on patent licensing enables an industry-level division of labor in which certain firms specialize in innovating chip designs and then monetize that investment through licensing relationships with a broad population of device makers and other intermediate users.   (This roughly describes the organizational structure of the wireless communications market today during the 2G through 4G/LTE technology generations.)  Following antitrust intervention, the licensing “tax” has been eliminated but, precisely as a result, the market is largely reduced to a handful of firms that can sustain the exceptional costs required to maintain end-to-end production and distribution infrastructures.  In a legal environment in which patent licensing operates under the ongoing threat of antitrust scrutiny, informational assets cannot be transacted with sufficient security on the open market and firms must bring innovation and commercialization functions in-house.  In turn, this means that entry may effectively be limited to the largest firms that can meet the high capital and technological requirements that are necessary to construct and maintain largely self-contained innovation and commercialization pipelines.  Even if total industry R&D investment holds constant, the resulting market structure represents a step backwards from a competition policy perspective.

This possibility is not merely theoretical.

As I show in a forthcoming book22, the industrial organization of U.S. technology markets since the late 19th century through the present has, with some regularity, responded in precisely this manner to significant reductions in the force of patent protections, whether implemented directly through patent or indirectly through antitrust law (usually a combination of the two).  In environments in which patent protection is weak and antitrust-based licensing constraints are strict, R&D investment may remain robust but firms tend to monetize those investments through internal capital and information markets.  By contrast, in environments in which patent protection is robust and antitrust-based licensing constraints are relaxed, the feasible range of business models expands to include vertically disintegrated structures in which innovation is monetized externally through licensing-based relationships with specialized third parties.  This outcome has attractive effects from a competition policy perspective since IP licensors generally license to all interested users and, as historical and contemporary evidence from a variety of markets suggests, tend to do so at relatively modest rates in order to seed adoption, maintain usage, and, as a result, cultivate a large and stable user base from which to extract royalties over time.23

#### Tanks innovation---caps bargaining power, royalties, and increasing uncertainty.

Damien Geradin 10. Professor of Competition Law and Economics at Tilburg University, a William W. Cook Global Law Professor at the University of Michigan Law School and a visiting Professor at the College of Europe, Bruges. Reverse Hold-ups: The (Often Ignored) Risks Faced by Innovators in Standardized Areas. Paper prepared for the Swedish Competition Authority on the Pros and Cons of Standard-Setting, Stockholm, 12 November 2010. Pg. 8-9

Innovation requires that significant investment be made today to generate uncertain returns tomorrow. Obtaining the necessary capital to pursue R&D requires an innovator to convince investors that a number of conditions are met, including that: (i) its R&D will achieve results sooner than those of others engaging in similar, or at least comparable, R&D, and those results will be demonstrably superior to those of others for a substantial period of time; (ii) there will be an adequate supply o

[MARKED]

f necessary, complementary products, services, and technologies (e.g., wireless handsets, infrastructure equipment, attractive content, etc.); (iii) there will be one or more “platforms” or real commercial “laboratories” to test the technical, commercial and financial feasibility of the invention; (iv) it will be able to defeat opposition to change, customer inertia, and the resistance of powerful incumbents whose businesses may be “disrupted” by its invention; and, if it adopts a licensing business model, (v) it will be able to obtain the patents necessary to protect its inventions and, if necessary, that it will have the resources to enforce them in multiple fora in cases involving multiple parties. But even if an innovator manages to obtain the necessary capital to pursue a given R&D project, this gives it no guarantee that its investments will bear fruition. Its research may not lead to any concrete results or may lead to results that may not be subject to commercial exploitation. While there is obviously no precise data with respect to the success (or failure) rate of R&D projects, the conventional wisdom is that the vast majority of such projects fail. An additional problem is that, although frequent, failure is very hard to predict and prevent as its causes can be numerous (e.g., insufficient resources, unrealistic completion timeframe, loss of key personnel, failure to obtain authorizations from regulators, etc.) and complex (e.g., technological shifts, unpredictable changes in the commercial landscape, etc.). Although innovator can learn from experience, there is nothing like a failure-proof research project. The above considerations are important as they illustrate why investors will only accept to fund R&D projects provided that, if successful, they generate significant returns.18 It is a basic law of finance that the return expected by investors are directly proportionate to the risks involved in the proposed investment. Given that profits are uncertain when an R&D project is funded, an investor will only be willing to invest if the expected return on its investment exceeds the cost of capital by a significant measure.19 The need to motivate investors to dedicate their resources to risky R&D projects is also the rationale of the patent system. As correctly observed by the Commission its Guidelines on Technology Transfer Agreements: “In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should normally be free to seek compensation for successful projects that is sufficient to maintain incentives, taking failing projects into account.”20 Thus, attempts by implementers to affect the ability of innovators to generate the type of returns that will motivate R&D investments in the first place (see Sections B & C below), by for instance trying to weaken their bargaining power or to cap the royalties they can draw from licensing their technologies, will inevitably harm innovation. In addition, even changes that merely increase uncertainty as to what return an innovator will be able to recover can be expected to have a depressing effect on investment and innovation as they will make capital available for R&D scarcer and more costly.

# 2nc---harvard r2

## t-structure

#### 2---and causes bidirectionality---or circumvention

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

We can now look at the causal relations between the variables of primary interest: the relationship between antitrust actions and merger frequencies: Prohibitions has a statistically-significant negative impact on future merger behavior in five out of the six regression equations (excluding only the OLS estimation in regression #1). The consistent significance and strong impact of this variable suggests that spikes in the use of Prohibitions seem to send a very clear signal of toughness by antitrust authorities—a signal that significantly reduces future merger proclivities.

Remedies, on the other hand, seem to positively influence future Mergers; though, the coefficient estimate is only significant in three regression equations—regressions’ #1, #2, & #4. Accordingly, we can interpret these results as suggesting that the effect of remedies coming at the expense of prohibitions (a lowering of antitrust toughness) is stronger than the effect of remedies coming at the expense of clearances (an increase in antitrust toughness). In other words, we have some evidence that firms seem to interpret spikes in remedies as indicating softer behavior on the part of antitrust authorities. Such an interpretation should be cautioned by the fact that the remedies coefficient estimate is not significant in the fixed- effects estimation (regression #3); thus, suggesting that the remedies effect may only be capturing cross-jurisdictional variation. Nevertheless, the important point here is that the application of Remedies does not seemingly involve a significant deterrence effect.

#### [2ac/1ar] 2---their 1AC ev lays out the violation for us---the aff makes SSO’s jump through behavioral hoops, but doesn’t outright prohibit anything

Emory = blue

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 prevent 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.

#### 3---a---intent to define and exclude---that’s 1nc **seldeslachts and…**

PEDIAA 15. “Difference Between Prohibited and Restricted”. https://pediaa.com/difference-between-prohibited-and-restricted/

Main Difference – Prohibited vs. Restricted

Prohibited and Restricted are used in reference to limitations and prevention. However, they cannot be used interchangeably as there is a distinct difference between them. Prohibited is used when we are talking about an impossibility. Restricted is used when we are talking about something that has specific conditions. The main difference between prohibited and restricted is that prohibited means something is formally forbidden by law or authority whereas restricted means something is put under control or limits.

What Does Prohibited Mean

Prohibited is a variant of the verb prohibit. Prohibited can be taken as the past tense and past participle of prohibiting as well as an adjective. Prohibited means that something is formally forbidden by law or authority. When we say ‘smoking is prohibited’, it means that smoking is not allowed at all, there are no exceptions. Prohibit indicates an impossibility. This gives out the idea that it is not at all possible under any condition or circumstance. The term Prohibited goods is used to refer to items that are not allowed to enter or exit certain countries. For example, the government of South America lists Narcotic and habit-forming drugs in any form, Poison and other toxic substances, Fully automatic, military and unnumbered weapons, explosives and fireworks as prohibited goods. The following sentences will further explain the use of prohibited.

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

No one was allowed to enter the grounds; entry was prohibited.

Prohibited imports are the items that are not allowed to enter a country.Difference Between Prohibited and Restricted

What Does Restricted Mean

Restrict means to put under limits or control. Restricted can be either used as the past tense of restrict or as an adjective meaning limited. When we say something is restricted, it means that limits or conditions have been added to it. It does not mean that it is completely impossible. For example, Restricted goods are allowed to enter or exit a country under certain circumstances. A written permission can help you to import or export that item. Likewise, a restricted area does not mean that people are not allowed to enter; it means that a special permission is required to enter the place. Restricted information refers to information that are not disclosed to the general public for security purposes.

The new regulations restricted the free movement of people.

The club was restricted to its members and their family members.

Only the highest military personnel had access to the restricted area.

American scientists had only restricted access to the area.Main difference - Prohibited vs Restricted

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

Restricted means limited in extent, number, scope, or action

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

#### 4---b---authors…state scotus agrees

Hiram E. Hadley 1909. Judge, McPherson v. State, 174 Ind. 60, Supreme Court of Indiana, December 1909, LexisNexis

In the majority opinion it is conceded "that there is a marked difference" between unqualified prohibition of the sale of intoxicating liquors and the regulation of such sale. It is said in the opinion that "to regulate, restrict and control the sale implies that the sale shall go on within the bounds of certain prescribed rules, restrictions or limitations." Citing Sweet v. City of Wabash (1872), 41 Ind. 7; Duckwall v. City of New Albany (1865), 25 Ind. 283; Loeb v. City of Attica (1882), 82 Ind. 175, 42 Am. Rep. 494.

"Prohibition," states the majority opinion, "as applied to the liquor traffic, implies putting a stop to its sale as a beverage; to end it fully, completely and indefinitely. So, if the purpose of the act in question is to authorize the exercise of unqualified prohibitory power, as usually understood by the term, the act is void because its subject is not expressed in the title." The court might properly have further said [\*\*\*45] that if the act under its provisions is not one to regulate the sale of intoxicating liquors it is void, for the reason that it does not meet or respond to the subject as expressed in its title.

#### 5---AND common meaning

Dictionary.com “Inhibit vs. Prohibit”. https://www.dictionary.com/e/inhibit-vs-prohibit/

Prohibit is a transitive verb that means to forbid or prevent. Unlike inhibit, the word prohibit means that an action is being completely prevented. For example: “Angie’s coat was so tight, it prohibited any arm movement.” In this case, Angie isn’t able to move her arms at all. Prohibit is often used to describe the actions of authority figures. It can explain a rule or law. For example, “School rules prohibit cellphone use during class.” A street sign may say “Parking prohibited,” while a sign in a building lobby might say “Smoking prohibited by law.” All of these cases mean that cell phone use, parking in a certain area, or smoking are completely forbidden by their given authority figures, and can’t be done at all.

## regs

#### 2---“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.

#### 2---“expanding the scope” of “anti-trust laws” must be the doj or 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.

#### 3---functional severance is bad---moots lit base and allows teams to shift goalposts through plan writing---both fry ground---here’s…

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

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

#### 4---alternatives not subsets

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

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

#### 5---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---Courts and regulators disagree

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

A. Contract Law, Not Antitrust Law

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

#### 4---AT: LS) Mandating patent licensing solves deterrence. [EMORY =GREEN]

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

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

#### 5---deterrence fails

Keith Violante 17. Associate Attorney, then-Associate Attorney at Nelson, Bryan and Cross. “Making a Deal with the Devil: Are Current Antitrust Sanctions Deterring Cartel Behaviour.” *International Trade and Business Law Review* (20): 227-229.

There is no indication that the drastic increase in criminal and civil penalties under the ACPERA has caused a significant decline in antitrust violations.92 Civil fines are unlikely to effectively deter antitrust violations committed by an individual when the corporation is able to completely internalise the entire fine imposed against the business.93

According to a recent study, average antitrust conspiracies last six years.94 This study suggests that these conspiracies persist for so long because price-fixing is more profitable than was previously thought,95 which in turn suggests the need for greater sanctions. Put simply, this study argues that the decision to commit antitrust violations is driven by a rational cost/benefit analysis. Under this theory, a business will continue to commit antitrust violations so long as it remains profitable.

Critics of this argument suggest that sanctions exist that can prevent antitrust violations.96 Judge Richard Posner proposed that price-fixing is ultimately punished exclusively through corporate fines, and 'only when a company is unable to pay an optimal fine should imprisonment be imposed as a last resort and only if the individuals are unable to pay the fine'.97 Other practitioners argue that criminalisation of price-fixing offences would be a better deterrence. One argument suggests the 'publicity about severe sentences for price fixing may help educate other corporate executives about the true individual and corporate legal risks of being caught while also contributing to the effectiveness and cost of corporate antitrust compliance programs' .98

However, civil fines, or at least the implementation of them, do not seem to adequately deter antitrust violations. The fluctuation of a corporation's stock price after a firm is indicted for committing an antitrust violation also suggests civil fines provide an inadequate deterrence.99 A well documented empirical regularity is that share values in indicted firms initially fall significantly but the stock price of an overwhelming majority of indicted firms returns to pre-indictment levels within one year. l00 These results are consistent with firms indicted between 1962 and 2000.101 Given the substantially greater corporate fines that were imposed during the latter half of that period, the consistency of the stock price recovery across that time suggests increased sanctions do not significantly deter antitrust violations.102

Regardless of the amount of the fine, it seems civil sanctions do not have more than a transitory impact upon the profitability of a business. Another recent study also suggests that civil sanctions have little to no deterrent value. The study identified several companies that average one or more antitrust civil judgements annually between 1990-2015.103

#### 6---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.

#### 7---Changes in contract and patent law faults the entire SSO by targetting FRAND.

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

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

Contract and patent law, on the other hand, provide a different perspective and more flexibility for implementers during negotiations and in court. When negotiating FRAND terms, the parties should review relevant case law interpreting similar SSO polici

es, 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.

#### 8---Patent law solves via enforcing rights---avoids stifling innovation.

Steve Brachmann 8-25. Professional freelance journalist for over a decade covering antitrust. FTC’s Antitrust Complaint Against Facebook Highlights Another Missed Opportunity to Address Big Tech’s Anticompetitive Activities Through Patent Reform. IPWatchdog. 8-25-2021. https://www.ipwatchdog.com/2021/08/25/ftcs-antitrust-complaint-against-facebook-highlights-another-missed-opportunity-to-address-big-techs-anticompetitive-activities-through-patent-reform/id=137070/

Big Tech Antitrust Enforcement Wouldn’t Be Necessary with Strong Patent Rights

The blind eye that antitrust regulators have been turning toward Big Tech’s patent killing activities would be laughable if it wasn’t so frustrating. The recent legislation introduced in Congress to reduce Apple’s anticompetitive app store practices? That probably would never have been needed if Smartflash, the inventor of data storage and access systems that Apple’s App Store was found to willfully infringe and whose patent rights were obliterated by Apple through questionable machinations at the PTAB, had its patent rights respected. Last December, 10 state attorneys general filed an antitrust suit against Google targeting its anticompetitive practices in online search advertising. Google didn’t invent search advertising, but the Internet giant did leverage PTAB trials to knock out seminal online search advertising patent claims owned by B.E. Tech, preserving many billions in Google’s corporate value while destroying the business interests of an innovative competitor. Earlier this month, B.E. Tech and inventor M. David Hoyle filed a Bivens action lawsuit naming several former USPTO officials, including Google’s former Head of Patents and former USPTO Director Michelle K. Lee, for rigging proceedings at the PTAB on behalf of Google, one of the agency’s largest stakeholders.

Antitrust suits may eventually be successful at splitting Big Tech giants into smaller firms, but none of these efforts does anything to actually ensure that the resulting markets will allow smaller competitors to protect their innovations against market incumbents that, while smaller, will still have market caps dwarfing small innovators and independent inventors. The sad truth of the matter is that Apple wouldn’t dominate app stores, Google wouldn’t dominate online search advertising, and Facebook wouldn’t dominate social media if the entire U.S. federal government hadn’t completely turned the patent system on its head over the past two decades.

#### 2---cfius solves and avoids ftc

Richard M. Steuer 17. Member of the New York Bar. "The Horizons of Antitrust." St. John's Law Review, vol. 91, no. 1, Spring 2017, p. 177-210. HeinOnline.

As described earlier, some countries assign their competition agencies responsibility for assessing and weighing not only consumer welfare, but other goals as well. This can be daunting, but every town council and zoning board routinely faces the challenge of weighing competing goals, usually with far less analytical support.8 ' Nevertheless, the arguments against assigning competition agencies authority for applying other goals are that these agencies are ill equipped to perform non-economic analysis, and that such an approach would concentrate too much discretion within the competition authorities. If, for instance, the Federal Trade Commission were tasked with conducting a "net benefit" analysis, considering all the goals discussed earlier, it would require greater resources. It also would need the political strength to withstand the criticism it would inevitably attract year in and year out from disappointed parties and their supporters. Some countries, such as Canada and Australia, have established authorities separate from competition authorities to oversee foreign investment, applying a wide variety of goals either apart from consumer welfare or, as in Australia, including consumer welfare. 82 A model like that adopted in Australia would contemplate the creation of a foreign investment review board to advise a cabinet member or the president, who in turn would have authority to disapprove foreign investments, applying a "national interest" or "net benefit" test. If such an arm of government were assigned responsibility in the United States for balancing all these goals in the context of foreign investment, who has the breadth of experience, depth of wisdom, and political respect to make such judgments? The National Economic Council, as has been suggested by the Center for American Progress?" Would its determination be subject to judicial review, and under what standard? What about expanding the responsibilities of CFIUS, as proposed under the Foreign Investment and Economic Security bill,' to apply a "net benefit" test to foreign acquisitions of control regardless of whether those acquisitions pose a threat to national security? Under that proposal, the Committee's determination would be subject to review by the President, but otherwise would be nonreviewable. What about creating a new body, modeled on Australia's Foreign Investment Review Board? How would it be composed and who would appoint its members? Would it be modeled on the Federal Trade Commission, with members from more than one political party serving fixed terms or would it be reconstituted by each administration, like the Council of Economic Advisors? Who would have the ultimate responsibility-the Treasury Secretary? The Commerce Secretary? The President? What would be the threshold for review? Would judicial review be possible and, if so, under what standard? The simplest approach might be to expand the mission of CFIUS by defining "national security" to include economic security, or "national interest," and to create a new advisory board, with adequate staffing, to provide the support that CFIUS would need to fulfill a broader mission with respect to acquisitions of foreign control that do not raise issues of national defense or homeland security. Depending upon the scope of this new authority, there might be calls to add provisions to allow judicial review in those instances where neither national defense nor homeland security is involved." It would be easiest to leave well enough alone, of course, but if the American economy truly is being threatened by the current approach, a new assignment of responsibility should be considered. There are several viable alternatives, as just described, each of which has pros and cons. What is clear is that if the present structure in the United States no longer is working satisfactorily, a new structure needs to be considered.

# 1nr---harvard r2

## ftc disad

#### 1---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.

#### 2---Algorithmic bias destroys democracy.

Karl Manheim\* and Lyric Kaplan\*\*, 19 – \*Professor of Law, Loyola Law School, and \*\*Associate in Privacy & Data Security Group, Frankfurt Kurnit Klein & Selz. “Artificial Intelligence: Risks to Privacy and Democracy.” 21 Yale J.L. & Tech. 106. https://yjolt.org/sites/default/files/21\_yale\_j.l.\_tech.\_106\_0.pdf

This article explores present and predicted dangers that AI poses to core democratic principles of privacy, autonomy, equality, the po- litical process, and the rule of law. Some of these dangers predate the advent of AI, such as covert manipulation of consumer and voter preferences, but are made all the more effective with the vast pro- cessing power that AI provides. More concerning, however, are AI’s sui generis risks. These include, for instance, AI’s ability to generate comprehensive behavioral profiles from diverse datasets and to re- identify anonymized data. These expose our most intimate personal details to advertisers, governments, and strangers. The biggest dan- gers here are from social media, which rely on AI to fuel their growth and revenue models. Other novel features that have gener- ated controversy include “algorithmic bias” and “unexplained AI.” The former describes AI’s tendency to amplify social biases, but covertly and with the pretense of objectivity. The latter describes AI’s lack of transparency. AI results are often based on reasoning and processing that are unknown and unknowable to humans. The opacity of AI “black box” decision-making14 is the antithesis of democratic self-governance and due process in that they preclude AI outputs from being tested against constitutional norms.

We do not underestimate the productive benefits of AI, and its inev- itable trajectory, but feel it necessary to highlight its risks as well. This is not a vision of a dystopian future, as found in many dire warnings about artificial intelligence. Humans may not be at risk as a species, but we are surely at risk in terms of our democratic institutions and values.

#### 5----The link turns case---it undermines enforcement.

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

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

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

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

#### outweighs everything

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.

#### 2---Their ev says FTC WANTS TO not is doing so

1nc Morris 9/17/21, \*Angela Morris, Deputy editor at IAM Media; (September 17th, 2021, “The FTC creates a potential new US headache for SEP owners”, https://www.iam-media.com/frandseps/the-ftc-creates-potential-new-us-headache-sep-owners)

SEP owners that may already be wary of potential Biden Administration regulatory changes now have a new threat to keep them up at night. Over the summer the Federal Trade Commission [announced an expanded view](https://www.jdsupra.com/legalnews/the-ftc-expands-section-5-enforcement-7020931/) of its standalone enforcement authority to curb anti-competitive misconduct; and [now the agency has made it clear](https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas) that priority targets include “abuse of intellectual property” and “monopolistic practices”. The agency’s description of the “anticompetitive and deceptive conduct” it seeks to curtail in the technology sector most likely will encompass alleged misconduct by standards essential patent (SEP) owners and their commitments to licensing on FRAND terms, according to IP and antitrust attorney Tim Syrett. “The FTC has previously conducted two investigations where it found that SEP holders seeking injunctions against licensees was anti-competitive and presented a threat to innovation,” Syrett, who is a partner in Wilmer Hale in Washington DC, explains via email. “That may be an area where the FTC wants to continue to devote resources and is certainly an area where there can be harm to competition because of the hold-up power of SEPs.” He adds that investment-backed patent assertion entities and patent aggregation organisations may also have reason to fear ITC investigations. “Investment-backed patent assertion entities can obscure information about who actually owns or has an interest in patents that can harm both licensing and litigation,” says Syrett. “Further, we have seen a concerning rise of patent assertions where the incentives of investors to obtain outsized returns from patents trump any reasonable valuation of the patents’ worth, which can harm competition in the licensing of patents.” IP owners in the pharmaceutical, technology and gasoline refining industries should also take note of the development, since the commission indicated that it would investigate potential abuses of IP rights that create anti-competitive and deceptive conduct in those spaces. Big Tech companies and other large businesses would be advised to pay attention as well, given that another stated FTC aim is to target alleged abuses of their market power that stop entrepreneurs from competing. The two resolutions were among a group of eight that a divided commission passed this month on a 3-2 vote, as the agency seeks to handle increased workload from high merger filings. Both resolutions, effective for 10 years, direct the agency to use its compulsory processes to obtain documents and testimony through either demands or subpoenas to investigate allegations that would be a violation of Section 5 of the FTC Act.

#### 5---current enforcement is all talk

JED GRAHAM 9/16/21. Writes about economic policy for Investor's Business Daily. “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court.” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>

Investors don't seem to see a major threat. Google parent [Alphabet](https://www.investors.com/news/technology/google-stock-buy-now/) ([GOOGL](https://research.investors.com/quote.aspx?symbol=GOOGL)), Apple and Facebook stock have hit all-time highs this month. After Khan's ascension as FTC chair, Amazon stock ran to a record, before its second-quarter revenue miss briefly halted its momentum.

Recent antitrust rulings help explain the apparent lack of concern.

The Supreme Court's June opinion rejecting NCAA limits on educational benefits for student-athletes reads like a celebration of noninterventionist antitrust law, William Kovacic, who chaired the FTC under President George W. Bush, told IBD.

"Markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare," Justice Neil Gorsuch wrote. Courts examining business dealings should take care not to "set sail on a sea of doubt," he added, elevating William Howard Taft's warning of the danger of a "shifting, vague and indeterminate" antitrust standard.

The words seemed to carry a not-too-subtle message for the Biden team, Kovacic says. "Until the Congress changes the law, we will continue to endorse the approach we have taken for the last 40 years," he said.

Can Parties Unite On Antitrust Law?

The House Judiciary Committee narrowly passed a package of antitrust measures in June called the Ending Platform Monopolies Act. Amazon has warned of massive disruption from restrictions preventing the biggest online platforms from favoring their own goods and services. "These bills would jeopardize Amazon's ability to operate a marketplace for sellers, potentially resulting in hundreds of thousands of small and medium-sized businesses losing access to Amazon's customers and services."

Another measure would shift the burden of proof for Big Tech acquisitions under antitrust law. Companies with a market cap of $600 billion or more — including Apple, Amazon, Facebook and Google — would have to prove that a proposed merger wasn't anticompetitive.

GOP Sen. Josh Hawley's antitrust bill goes much further, essentially banning acquisitions by companies with a market cap over $100 billion.

Skepticism about Big Tech and excessive corporate power is clearly bipartisan. That helps explain why Khan's nomination as commissioner sailed through the Senate with 21 Republican votes. Yet Biden didn't reveal until after the vote that he intended to name Khan FTC chair, which might have given some senators pause.

Fundamental changes to antitrust law are unlikely to pass the closely divided Congress this year, Goldman Sachs analysts say. Some Democratic lawmakers have voiced opposition to the House antitrust package. Meanwhile, Hawley's Trust-Busting for the 21st Century Act has zero co-sponsors.

Antitrust Enforcement Losing Streak

As the Biden administration aims to ramp up antitrust enforcement, it inherits something of a losing streak. Even cases that seemed winnable have been lost, Skadden antitrust attorneys Steve Sunshine and Julia York wrote.

The Justice Department failed to block the AT&T (T) takeover of Time Warner in 2018. New York lost its bid to stop T-Mobile (TMUS), the No. 3 wireless carrier, from buying No. 4 Sprint. The upshot: "Merely establishing a presumption of likely anticompetitive effects does not guarantee a government plaintiff a litigation victory."

Khan wrote after a 2018 Supreme Court ruling for American Express (AXP) that it had "dealt a huge blow" to antitrust enforcement. The ruling would make it "easier for dominant firms — especially those in the tech sector — to abuse their market power with impunity."

AmEx's contracts prohibited merchants from steering customers to a payment type with a lower transaction fee. To compensate, merchants charged higher prices. Yet a 5-4 majority found that wasn't sufficient to prove consumer harm. AmEx's rewards to cardholders and indirect benefits to merchants complicated the analysis.

Kahn Rejects Antitrust Enforcement 'Rule Of Reason'

Khan's strategy to achieve a better win-loss record — despite the courts — is taking shape.

Prior antitrust regulators, when they emerged from the dugout, strictly played defense. Khan has served notice that she'll be a hurler.

At her first meeting as chair on July 1, the commission voted 3-2 to rescind a 2015 Obama-era policy statement on Section 5 of the FTC Act. Kahn said that policy "doubled down on the Commission's long-standing failure to investigate and pursue 'unfair methods of competition.' "

Section 5 of the FTC Act, passed in 1914, empowered the agency to police corporate conduct that hadn't yet violated the Sherman and Clayton Acts, but could if left unchecked, according to Khan. Yet the Obama-era FTC essentially decided to put its Section 5 power in a drawer and lock it away.

That ill-defined, rarely used authority made Obama-era antitrust enforcers uneasy. Why? Because, as Kovacic has written, it comes with an "absence of limiting principles."

Courts have an entrenched, if murky, "rule of reason" standard for judging alleged antitrust violations. They assess all pro-competitive and anti-competitive factors to gauge whether the behavior is contrary to consumer welfare.

With antitrust cases proving hard to win, Khan and her Democratic colleagues are rejecting a "rule of reason" framework. In other words, they're trying to expand the strike zone for antitrust enforcement.

Because cases brought under Section 5 shield defendants from liability for treble damages in private litigation, courts might be more open to finding fault.

But what should be the limiting standard in antitrust law? As it is, the consumer welfare standard is hard to interpret. But courts might view Khan and Biden's "fair competition" standard as too fuzzy, like "setting sail on a sea of doubt."

EU Google Antitrust Fines

Section 5 cases could look like the European Union's more proactive enforcement regime for "dominant" firms.

The European Union fined Google $2.8 billion in 2017, charging that its search results favored its own comparison-shopping site. The FTC ended its probe covering similar ground in 2013 without taking action.

Berin Szoka, president of think tank TechFreedom, criticized the fine, saying it showed that European rules were "about protecting some companies against more successful ones, not about protecting consumers," who liked Google's service. While Google is still appealing, it complied with an order to halt the practice. Rivals argue its modified behavior isn't much better.

In all, the EU has hit Google with $10 billion in antitrust fines. That includes a $5 billion penalty for using its Android mobile operating system to preserve its search dominance. Google is appealing that one too, but gave up its default search position in Europe in the meantime.

In 2020, the Justice Department filed a Google antitrust suit for maintaining search and internet advertising monopolies through anticompetitive means. The U.S. v. Google antitrust case won't go to trial until late 2023. Extended appeals could follow.

FTC Competition Rules

U.S. antitrust law is a slowly evolving patchwork made up of case-by-case decisions. But Khan argues that drawn-out cases and ambiguous rule-of-reason opinions invite dominant firms to abuse their market power.

So to keep companies on the straight and narrow, she plans to erect a series of U.S. competition rules. The Biden executive order calls for FTC rules covering a broad spectrum of practices said to contribute to lower wages or higher prices.

The FTC might restrict employers from requiring workers to sign noncompete agreements. Right-to-repair rules could break the lock companies place on repairing their goods, from Apple iPhones to John Deere tractors. Biden wants rules covering internet marketplaces and online data collection and surveillance. Agreements between drugmakers to delay market entry of a competing product are another focus. FTC competition rules also could limit occupational licensing restrictions and exclusionary real estate practices.

There's bipartisan concern about a number of these areas. Yet writing competition rules would be a huge departure from the agency's usual quasi-judicial process focused on specific facts in individual cases.

Courts Reining In Regulators

FTC commissioner Noah Phillips, a Trump appointee, sees a historical parallel in the New Deal-era National Industrial Recovery Act, which the Supreme Court struck down in 1935. The ruling held that Congress couldn't delegate broad legislative authority allowing regulators to draw up "codes of fair competition."

Khan's rule-making agenda "may present the most stark and real nondelegation controversy of our time," Phillips told a recent forum.

In an April case involving payday lender AMG Capital, all nine justices agreed that the FTC had wrongly assumed authority to impose financial penalties that wasn't explicitly provided by Congress. That could be a precursor to a harsh judicial reception for Kahn's FTC rule-making, Kovacic wrote.

In striking down the Centers For Disease Control's eviction moratorium on Aug. 26, the conservative majority issued a loud call for regulators to narrowly interpret their mandates. "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.' "

Industry Consolidation Impact Mixed

Apart from the legal underpinnings of Biden's antitrust push, how strong is the economic case for combating corporate consolidation?

Consolidation has increased in 70% of industries since the late 1990s, Goldman Sachs economists find. Nearly 20% of industries now qualify as "highly concentrated," based on DOJ and FTC criteria.

"Highly concentrated" industries include interactive media and services, led by Facebook and Google. Telecom services, airfreight and the beverage industry also qualify. Tech hardware, pharma and airlines fall a bit short of that threshold.

Lax antitrust enforcement only partly explains consolidation trends, Goldman says. High-productivity firms also have won market share from less-productive rivals.

Further, as big players like Walmart (WMT) entered more markets from 1990 to 2014, local industry concentration actually fell, Richmond Fed economists have shown.

Because "the local market is most relevant for most consumer purchases," Goldman's Joseph Briggs and Alec Phillips reach a much different conclusion than Biden and Khan. "The increase in national concentration likely increased consumer choice and welfare," the Goldman economists write.

Even so, they add, the growing scale and clout of national players "might have been harmful to small sellers and input producers."

Where consolidation has significantly reduced local competition, consumers appear to have suffered. The small-government-oriented American Action Forum finds a strong case that hospital mergers raise costs without raising quality. The group highlighted studies showing that prices tend to rise 20%-40% when hospitals within the same market merge.

Merger Activity Ramps Up

Wall Street's early reaction to the Biden administration's attempt to stiff-arm M&A activity has been to step on the gas. The FTC said in August that it's struggling to stay abreast of a "tidal wave" of mergers. The 2,436 deal filings through August have already blown past the elevated annual totals from 2017-2019.

Despite a skeptical, if not hostile, attitude among antitrust enforcers, the vast majority of these deals are likely to go through.

While Congress may increase funding for merger enforcement, the FTC and DOJ are already devoting significant resources to the Facebook and Google antitrust cases. "They can only fight so many battles," Kovacic said.

Khan Uses Bully Pulpit, Bulls Like Big Tech

That's not to say the Biden team won't create major headaches for merging parties. More mergers will face reviews and the probes will last several months longer. And where concerns arise, the agencies will be less likely to negotiate a fix.

To make deals approvable, regulators have long consented to divestitures. Sometimes regulators settle for behavioral remedies. To seal the T-Mobile-Sprint merger, the Justice Department relied on Dish Network's commitment to build out a national wireless network. But Khan says the track record of both types of fixes isn't great.

"The antitrust agencies should more frequently consider opposing problematic deals outright," Khan wrote Aug. 6. She was responding to a letter from Sen. Elizabeth Warren, who had raised concerns about defense mergers. The news added to doubts that the FTC will clear the pending Lockheed Martin (LMT) acquisition of rocket engine manufacturer Aerojet Rocketdyne (AJRD).

When regulators do decide to negotiate, "expansive divestiture demands could result in a remedy that frustrates the purpose of the deal," warned antitrust attorneys at tech-focused law firm Wilson Sosini.

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.

#### b---privacy is the focus now

Bryan Koenig 10/4/21. “FTC Split Over 'Integrating' Data Privacy And Competition.” https://www.law360.com/articles/1427875/ftc-split-over-integrating-data-privacy-and-competition

According to the report, the FTC has been trying to target "the most egregious and substantial privacy and security abuses," with an eye toward mandating that consumers implicated in privacy violations and data breaches be notified and getting financial compensation for injured consumers, including through partnering with other agencies with the power to impose monetary penalties. The FTC further said it plans to increase its focus on dominant digital platform data practices and expand its understanding of how algorithms implicate both competition and consumer protection.

All four of the FTC's current commissioners expressed at least some support Friday for going after privacy and data security violations. A particularly common theme was the call for more funding from Congress.

#### c---resources---our ev’s comparative

Jessica Rich et al. 10/3/21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection, OF Counsel at Kelley Drye, with Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod. “FTC Chair Khan’s Vision for Privacy – and Some Dissents.” https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/

Last week, we wrote about FTC Chair Khan’s memo describing her plans to transform the FTC’s approach to its work. This week, she followed up with a no-less-ambitious statement laying out her vision for data privacy and security, which she appended to an agency Report to Congress on Privacy and Security (“report”). Together, these documents outline a remarkably far-reaching plan to tackle today’s data privacy and security challenges. As noted in the dissents, however, some of the stated goals may exceed the bounds of the FTC’s current legal authority.

Privacy/Competition Focus on Tech

First, Khan’s statement reiterates her commitment to address privacy through a “cross-disciplinary” approach that uses the tools of competition law, not just consumer protection law, to address privacy harms. She states that “concentrated control over data has enabled dominant firms to capture markets and erect entry barriers while commercial surveillance has allowed firms to identify and thwart emerging competitive threats,” resulting in reduced privacy.

To address these concerns, as outlined further in the report, the agency intends to focus “most” of its limited resources against the “data practices of dominant digital platforms,” including through additional compliance reviews and order modifications and enforcement, “as necessary,” against, for example, Facebook, Google, Microsoft, Twitter, and Uber.

#### competition overwhelms

Erika M. Douglas 21. Assistant Professor at Temple University Beasley School of Law. “The New Antitrust/Data Privacy Law Interface.” 1/18/21. https://www.yalelawjournal.org/forum/the-new-antitrustdata-privacy-law-interface

The necessary implication of tension at the new antitrust/data privacy interface is that choices will have to be made between competition and privacy interests. This Section suggests that competition is likely to be preferred over privacy and observes very early indications this may already be occurring—whether or not that preference is justified, or even acknowledged.

Existing theories and institutional context create a “competition first” perspective at the intersection of antitrust and data privacy. The leading theory—the integrationist view—treats data privacy as a factor to be subsumed into existing antitrust understanding. 142 This makes sense, given that the origin of the theory is, of course, antitrust law. However, this also builds into the analysis a perspective of competition primacy. The institutions involved reinforce this primacy. It is predominantly agencies of antitrust,143 not of data privacy, that are considering the implications of this intersection of law. The mandate of antitrust agencies is to advance competition, not privacy. In fact, antitrust agencies have expressed skepticism as to whether they have jurisdiction over interests of data privacy.144 In this theory and agency context, the tendency will thus be to prefer competition when faced with a data privacy tradeoff.

#### b---causes backlash

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

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

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

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

#### this link turn is the wrost----conceeds private sector reports BUT the ftc investigates

2ac Speegle 12, \*Adam Speegle, J.D., (May 2012, “Antitrust Rulemaking as a Solution to Abuse on the Standard-Setting Process Setting Process”, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1128&context=mlr>)

This too is not fatal to the approach. The proposed rule uses a light touch in that it only buttresses rules established by SSOs. Because the rule would support actions by the private sector to manage their own activities rather than introducing additional agency oversight, Congress would be unlikely to react the way it did when the FTC's activism in the consumer protection arena evoked fears of excessive government intervention. One final concern with the approach is that it will demand more of the FTC in a regulatory capacity than the FTC is capable of handling. For example, under any rule where the FTC would be called upon to enforce RAND terms, the FTC might fall into the role of license-rate regulator, determining which licensing fees are reasonable and which are unreasonable. But the FTC is a relatively small institution with limited resources.1 62 Some are concerned that under such a scenario the Commission would have to bring on new staff with expertise in the technology sector to monitor the reasonableness of licensing terms arising from SSO commitments.163 This concern is unlikely to be serious under the proposed formulation. As to the problem of determining "reasonableness," the FTC has already developed expertise in this area and, in fact, recently authored a report putting forth workable solutions to the problem of calculating "reasonableness" in the context of RAND commitments. 64 Further, the FTC would not need to establish itself as a monitoring body and would not incur the related costs of increases in staff and resources. Rather, enforcement of the proposed rule would operate similarly to the FTC's enforcement of its consumer protection rules. Under that regime, companies and individuals report fraudulent activity that violates one of the FTC's rules, which the Commission then investigates and, at its discretion, prosecutes. 16 Because the burden would be on the private sector to report in such a regime, the FTC would not need to monitor SSO activity. And as with consumer protection enforcement, a small number of decisive enforcement actions against abusive firms should act as a deterrent sufficient to decrease the FTC's litigation workload. 166 Thus, despite some legitimate concerns with the approach of enforcement by rule, those concerns are not fatal to the strategy. Moreover, the next Section demonstrates that there are also general benefits to enforcement by rule that weigh in favor of the approach.

#### c---controversy link---saps implementation

Alison Jones and William E. Kovacic 20. Professor at King’s College London, U.K.. Global Competition Professor of Law and Policy, George Washington University Law School. “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” *The Antitrust Bulletin* 65(2): 227–255.

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

#### e---FTC filed the suit against Qualcomm in the first place---they ensure compliance.

Erik R. Puknys and Michelle (Yongyuan) Rice 20. Parnter at Finnegan and former patent examiner at the US Patent & Trademark Office. Associate at Finnegan, with experience in section 337 investigations before the U.S. International Trade Commission (ITC). Strategic Considerations for the Escalating SEP Battles. Finnegan. 06-29-2020. https://www.finnegan.com/en/insights/articles/strategic-considerations-for-the-escalating-sep-battles.html  
The 2019 statement was issued shortly before the appellate argument in FTC v. Qualcomm in February 2020, and after the U.S. Court of Appeals for the Ninth Circuit received over two dozen amicus briefs including briefs from Nokia, InterDigital, various industry associations, and the DOJ. The FTC sued Qualcomm for using anti=competitive tactics to maintain its monopoly in the CDMA and LTE chip markets, imposing licensing terms, and refusing to license competitors.  
  
In 2019, U.S. District Judge Lucy Koh of the U.S. District Court for the Northern District of California enjoined Qualcomm, holding that it had a duty to provide competitors with exhaustive SEP licenses and avoid exclusive chip supply agreements.11 The court also ordered Qualcomm to report to the FTC annually to ensure compliance.12

#### f---FTC leads in antitrust hold-up concerns.

Chong Park et. al. 20. Scott A. McKeown. Matthew J. Rizzolo. Ropes & Gray LLP. Trial lawyer with over 25 years experience serving as lead counsel in complex litigation and government investigations for companies and individuals, practing antitrust. Chair of the firm’s Patent Trial and Appeal Board (PTAB) group. Leads the firm’s practice in Section 337 actions before the United States International Trade Commission and has significant experience litigating patent cases. Podcast: IP(DC): 5G for the C-Suite: Patent Hold-Up or Hold-Out?. Lexology. 2-18-2020. https://www.lexology.com/library/detail.aspx?g=797b7ebb-823d-46c5-9652-083a72245d8d

Chong Park: Well, that's an interesting question, Scott. What we have learned is that until recently, both of the federal antitrust agencies, the Federal Trade Commission (FTC) and the DOJ were primarily worried about just that, the accumulation of power in the hands of patent holders with Standard Essential Patents. And so they were worried about the concept of “hold-up,” that is that once a standard is adopted that companies are locked into that particular standard. And so a patent holder who had not disclosed their patent during a process might benefit from a hold-up, which is essentially sort of a hold-up in terms of the common cops and robbers sense when they point the gun, in this case, the figurative patent at a company and said, "Well, we have a patent. It's standard essential. You comply with a standard. Please pay up." Recently, however, there's been a shift at least with respect to the DOJ to a concept of the “hold-out,” which is a concern that really a party that might be disadvantaged would be the patent holder when individuals and companies fail to pay a reasonable license for their innovative technology. And so the DOJ recently has actually fallen more on the side of vindicating and championing the rights of patent holders versus the, what they call, “the implementers.”

#### g---It’s the FTC.

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.

#### H---It is the ftc

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

FTC’s Approach to FRAND Violations

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

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

#### 3---private enforcement fails---barriers to enforcement and class label

AAI 21. American Antitrust Institute. “The Critical Role of Private Antitrust Enforcement in the United States.” *American Antitrust Institute*. August 4th, 2021. 7.

Finally, the falloff in private dollar settlements since about 2017-2018, even despite the few large settlements within that period, is potentially troubling. As discussed, private enforcement serves an important function in stepping into the void left by inadequate federal enforcement. But rising standards for showing collusion in private price fixing cases are problematic. For example, federal courts have been steadily increasing the burden on plaintiffs pleading antitrust conspiracies to establish that the defendants’ conduct results from collusion and not from un-coordinated, but consciously parallel, conduct among competitors. This has, ironically, meant that it is more difficult for plaintiffs to successfully allege collusion where industries are highly concentrated, because where there are only a few competitors, competitors do not need to actually collude in order to achieve supracompetitive prices.

Other factors also increase the burden on private plaintiffs in bringing and litigating Section 1 cases, as explained in AAI’s May 7, 2020 commentary, “When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains.”22 These include: obtaining class certification, which has become increasingly difficult over the last several decades and presents a considerable barrier to private antitrust litigation, and identifying which consumers were harmed and by what amount. Additional barriers include the primacy of the government’s “interest” in overlapping private suits, which can ultimately aid private plaintiffs, but can significantly impair the ability of private plaintiffs to effectively litigate their claims.

#### 4---no private enforcement---too uncertain

Joshua Davis and Robert Lande 13. Associate Dean for Academic Affairs and Professor of Law, University of San Francisco School of Law. Member of the Advisory Board of the American Antitrust Institute; and Venable Professor of Law, University of Baltimore School of Law, and Director, American Antitrust Institute. “Article: Defying Conventional Wisdom: the Case for Private Antitrust Enforcement.” Georgia Law Review 48: 31-33.

iii. Risk Aversion: Private v. DOJ. Another interesting conclusion is suggested by private plaintiffs pursuing litigation independently of public litigation and prosecuting claims under [\*32] the rule of reason rather than just under a per se standard. Private plaintiffs may not be as averse to risk as government litigators. 130 Again, a comparison to the DOJ is illustrative.

In our original comparison of private enforcement and DOJ enforcement, we noted that the DOJ appears to succeed in a very high proportion of its cases. 131 From 2000 to 2009, it won anywhere from thirty-one to sixty-seven antitrust cases and lost four in one year and from zero to two cases in all other years. 132 In its worst year, it prevailed over 90% of the time. 133

We do not know the rate at which private plaintiffs are successful. 134 But almost certainly they prevail at a much lower rate. This conclusion is suggested by the willingness of private plaintiffs to pursue cases other than following a government filing. It is even more powerfully suggested by their pursuit of rule of reason cases. The rule of reason entails a high degree of uncertainty that can readily result in a successful defense. 135 This proposition is confirmed by Michael Carrier's work, which identifies 221 rule of reason cases between 1999 and 2009 in which a court entered final judgments against plaintiffs (and only one in which a court entered final judgment in favor of a plaintiff). 136 Moreover, any plausible model based on expected value would indicate that plaintiffs would pursue claims with a lower chance of success than the DOJ appears to require. This evidence and analysis suggests that private plaintiffs bring riskier claims than government actors, helping to ensure some deterrence effects when behavior is anticompetitive but will not necessarily result in successful prosecution of a claim.

[\*33] 6. Overall Deterrence Effects: A Study. The evidence discussed above is suggestive, but it does not provide a systematic analysis of the deterrence effects of private enforcement. We know of only one such systematic effort, co-authored by one of us. It analyzes seventy-five cartels, assessing the total sanctions that were imposed on the wrongdoers and the total profits they appeared to reap from their illegal conduct. 137 The article also gathers evidence and theory on the rate at which illegal antitrust conspiracies are discovered and successfully prosecuted. 138 The ultimate conclusion of this analysis is that the total sanctions-- public and private--from antitrust enforcement are insufficient for optimal deterrence. 139 In terms of expected value, illegal antitrust conspiracies remain a profitable endeavor--which explains their persistence. 140 Indeed, based on the seventy-five cases, the overall level of sanctions would have to increase at least threefold--and perhaps by as much as ten times--to achieve optimal deterrence. 141 Of course, this analysis applies only to cartel cases and not to other forms of anticompetitive conduct. 142 But as the only effort of its kind, it provides valuable evidence that private enforcement does not result in excessive deterrence effects.

#### 1---ftc must still police whether that deterrence is working-

Maureen K. Ohlhausen 15. Commissioner, U.S. Federal Trade Commission, 9/12/15. “Antitrust Oversight of Standard-Essential Patents: The Role of Injunctions.” https://www.ftc.gov/system/files/documents/public\_statements/800951/150912antitrustoversight-1.pdf

Lessons drawn from the U.S. experience and from case law governing per se or by-object prohibition counsel a flexible standard rather than a firm rule. It is not easy to craft a rule that will appropriately resolve future cases, least of all in a setting as complex and dynamic as the standard-setting space. With those principles in mind, I worry that antitrust analysis governing SEP owners is being reduced to a simplistic principle. I say this with full respect for antitrust authorities’ efforts to address perceived hold-up. And while I recognize that much intervention to date has challenged efforts to enjoin those deemed to be “willing licensees,” that label has at times been applied too broadly to include parties that did not seem to be willing to pay a RAND rate.21 In any event, policymakers should not presume that seeking an injunction is always problematic, even against firms that agree to respect a third party’s determined royalty. Competition agencies should examine the facts of each case before reaching a conclusion.