# Open Source 1NC Round 4 ADA

## Off-Case

### T Scope

#### ‘Scope’ is the extent of the area dealt with or relevant to the core laws

Oxford Languages ND, “scope,” shorturl.at/wCDY3

scope

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

#### It’s bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The AFF just intensifies the application of antitrust to already covered activities---it does NOT curtail an exemption or immunity.

#### Vote NEG---eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### T Per Se

#### 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).

#### Prohibit means forbid by authority

Merriam-Webster No Date <https://www.merriam-webster.com/dictionary/prohibition> and <https://www.merriam-webster.com/dictionary/prohibiting>

Definition of prohibition 1: the act of prohibiting by authority

Definition of prohibit transitive verb 1: to forbid by authority : ENJOIN

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Prefer it---too many fringe standards with distinct lit and changing levels of enforcement or presumption shred link uniqueness AND they can pick a broader but more permissive standard, making the topic bidirectional.

### States CP

The fifty states and all relevant entities through the National Association of Attorneys General Antitrust Task Force should prohibit private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

### Non-Antitrust CP

The United States federal government should:

* maintain the scope of its antitrust laws and announce its intent to do so, and
* prohibit private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### Regulation solves and contains spillover.

Dr. Howard Shelanski 18, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust and Deregulation”, The Yale Law Journal, Volume 127, Issue 7, 127 Yale L.J., May 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss7/5/

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

### Contract Law CP

#### The United States federal government should increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards by expanding and clarifying the scope of contract and estoppel law regarding FRAND commitments, and establishing as necessary a private right of action with treble damages in the Federal Circuit for end-purchasers, and public enforcement via patent agencies.

#### Contact law solves the AFF.

Werden 19—(Senior Economic Counsel in the Antitrust Division, U.S. Department of Justice). Gregory J. Werden & Luke M. Froeb. 2019. Article: Why Patent Hold-Up Does Not Violate Antitrust Law, 27 Texas Intellectual Property Law Journal 1, Nexis Uni

V. Conclusions

Nothing is more alien to antitrust than enquiring into the reasonableness of prices. When the Sherman Act was young, the Supreme Court recoiled at the notion that the reasonableness of railroads' rates could determine antitrust liability. 205The Court did so again in first articulating the per se rule. It held that the Sherman Act judges the reasonableness of prices only examining the process through which they were determined:

Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether [a] restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for ... it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. 206

Conduct can be held to violate the Sherman Act only on the basis that it harms competition - not on the standalone basis that it produces the wrong prices.

The rubric of patent hold-up, as conventionally defined, does not involve the suppression of technology competition in the standard-setting process. The term describes the scenario in which inventors obtain higher royalties than they otherwise would because they bargain with implementers after they have sunk investments in the standard. Patent hold-up, so defined, does not harm competition and hence does not violate antitrust law.

[\*30] To whatever extent ex interim competition among technologies exists in a standard-setting process, antitrust law protects it, as Broadcom suggests. But the possibility of ex interim competition is insufficient to invoke antitrust law, as Rambus holds. The Sherman Act's policy of competition is not served by giving a cause of action under Section 2 of the Sherman Act to every standard implementer unhappy with a royalty offer from an SEP holder.

Advocates of antitrust intervention in patent hold-up do not propose to target conduct that harms competition. They contrive to move royalty rates closer to a theoretical ideal. Yet no sound theoretical or empirical basis has been offered for believing that this ideal sufficiently rewards inventors. Advocates of antitrust intervention in patent hold-up either ignore or cheer the opportunistic behavior of implementers in taking advantage of inventors' sunk investments.

Advocates of antitrust intervention in patent hold-up also skip over the fact that the delicate balancing of incentives to promote technical progress is the province of intellectual property law. If inventors were systematically over-compensated for technology incorporated into standards, adjustments in patent law or its interpretation by the Federal Circuit could afford the proper solutions.

If a FRAND commitment is part of a bargain that was hammered out by inventors and implementers in properly constituted and well-functioning SSO, it should be enforced under contract law. And that is happening. Implementers do invoke the powers of the courts to obtain royalties commensurate with those in the competitive benchmark of ex interim bargaining. With more experience on the outcome of FRAND breach-of-contract litigation, the mere option to bring suit typically will achieve much the same result.

#### Reforming contract law eliminates any solvency differentials.

Bagchi 15—(Professor, Fordham University Law School, J.D. Yale Law School, M.Sc. Oxford University, A.B. Harvard College.). Aditi Bagchi. 2015. “Other People's Contracts”. Yale Journal on Regulation, Volume 32. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1411&context=yjreg&httpsredir=1&referer=>. Accessed 10/22/21.

Contract law does not adequately account for the harms that we can inflict on third parties by joint agreement. Some terms are prohibited, and some third party interests are protected by independent causes of action. But a wide variety of material interests that are otherwise recognized in law may be burdened by other people's contracts. This Article proposes that ambiguous contract terms be construed to avoid harming third parties.

In some contexts, courts already protect third parties in this way. The doctrinal rule that courts should construe ambiguous terms "reasonably” accommodates this practice but does not invite it. Prevailing contract theory is affirmatively hostile to it. This Article locates the role of contract law in mitigating negative externalities within a broader institutional division of labor. Identifying the function of contract law helps justify an explicit interpretive principle that disfavors terms injurious to third parties.

Introduction

If you and I make a deal that is intended to benefit another person, she has a right to enforce her interests under our agreement as a third party beneficiary.' If you and I make a deal that harms another person, that deal may be unenforceable - but not usually. Many contracts adversely affect others; few are prohibited. On its face, contract law appears unresponsive to some of the harm contracting parties can do to others by mutual agreement.

Our ability to harm others through contract is defensible, at least in part. In complex societies, much of what we do harms others. If we were never permitted to burden others in the pursuit of our interests, our range of free action would be severely constricted. Our entitlements have to mutually adjust. But the process of mutual adjustment that private law contemplates is inadequate when joint action negatively affects third parties. We rely too much on the blunt instrument of outlawing terms without attending to the effects of enforceable agreements.

This Article proposes an interpretive rule that would better protect third party losers in contract: Textual ambiguity should be resolved to avoid compromising the legally-recognized interests of third parties. Courts already do this in some contexts, as in the interpretation of merger agreements, as a result of preferring the most reasonable meaning of ambiguous terms.2 This Article defends an interpretative rule that expressly considers third party interests, shows how the rule works, and argues for its more consistent application. It defends these theses by reference to the big picture, situating contract law within the broader set of legal rules designed to limit third party harm. The Article argues that, while public law regulates diffuse externalities, private law attends to concentrated externalities. The third party interests at issue in contract are among the concentrated externalities that contract law should mitigate. The proposed interpretive rule is an appropriate tool for that purpose.

One recent controversial case might have benefited from this rule: the suit by holdouts from Argentina's 2005 and 2010 debt restructuring, NML Capital, Ltd. v. Republic ofArgentina.3 Argentina defaulted on its debt in 2001, and most creditors eventually accepted new notes worth substantially less than their original notes.4 Holdout creditors refused to participate in either of the two debt exchanges. Argentina proceeded to make payments on the new notes but not on the old notes.6 The holdouts then sued under a "Pari Passu Clause" that requires their claims be treated equally to those of other unsecured noteholders.7 As the Second Circuit observed, citing voluminous scholarly commentary, Pari Passu Clauses are ambiguous. 8 The district court in NML Capital read the clause to prevent Argentina from making payments on the new debt without making payments on the original debt. The Second Circuit upheld the district court's decision to enjoin payment on the new notes, concluding that the contract "manifested an intention to protect bondholders from more than just formal subordination." 9 The court read terms of the bond as if each bond were an agreement between that individual bondholder and the government of Argentina, notwithstanding the fact that numerous other bondholders had held identical contracts and now held other notes based on their rights under the initial bonds. Nowhere did the appellate court expressly consider the interests of the vast majority of creditors who had accepted cents on the dollars and now stood to lose more, let alone the broader swath of the public that had an interest in avoiding another default by Argentina.' 0 Since Argentina could not and cannot pay all creditors in full, it indeed defaulted a second time and has been shut out of international debt markets ever since."

Third parties are implicated across the full range of contracts. I discuss the case of merger agreements at length below.' 2 In another common example, courts should (as some courts already do) read noncompete provisions in employment contracts as narrowly as possible since those provisions undermine not only diffuse consumer interests but also the more concentrated interests of rival firms. 13

Other examples together demonstrate the breadth of application. Courts already protect the interests of third parties in land transactions by preferring clear allocation of property rights and disfavoring uncertainty about ownership over time; that rule benefits future buyers as well as creditors.' 4 We should also expect courts reading construction contracts for residential developments to discourage practices and materials that produce latent defects-defects that will ultimately harm the people who live there. Courts should read supply agreements between manufacturers and retailers in ways that are compatible with the statutory employment rights of a supplier's employees (for example, in terms of chemical exposure and delivery times). They should read subleases as consistent with a sublessor's obligations to her landlord, and co-op purchase agreements as compatible with the co-op member's obligations to the cooperative, at least where the subtenant and buyer are on notice of those constraints. Courts should construe patent licenses to preserve the value of other licenses granted by the patent-holder, where each licensee is on notice of other licenses, in the way that bankruptcy courts are sensitive to the effects of secured credit agreements on other creditors.15 Courts should interpret agreements with auditors and insurance companies to favor reporting and coverage adequate to protect the interests of end-users or future claimants. Courts should narrowly construe confidentiality provisions in settlement agreements where the information is relevant to the claims of future plaintiffs.

Further examples abound in the context of collective bargaining. The ban on secondary boycotts demonstrates a public policy protective of 'bystander firms' down the supply chain from firms involved in labor disputes.' 6 Collective bargaining agreements could be read to avoid accommodating labor action that involves the disputes of other employers. Given that current law allows for the permanent replacement of employees, collective bargaining settlements could be read to disfavor terms that disadvantage replacement employees, even where an alternative reading would not amount to an actionable unfair labor practice by the union.' 7 Civil rights statutes create legal interests in employees that may be constricted by arbitration terms in collective bargaining agreements. We already see that courts will avoid reading a collective bargaining agreement to forfeit judicial redress for discrimination except where the language waiving legal redress is express and unavoidable.' 8

Although courts sometimes engage in the angled interpretation proposed here, they do so inconsistently and rarely invoke an explicit rule. That is because third party losers now fall between various cracks in contract theory.' 9 An interpretative rule that protects their interests has not been adequately articulated or defended.

This might be surprising, since much of law is devoted to limiting the harms we impose on others. This is true of private and public law. This shared purpose has led some to question whether there is any meaningful distinction between public and private law, or whether the boundary instead reflects a foundational error by which we mistakenly inoculated some categories of conduct from public scrutiny.20 The general principle that most laws protect us from injury by others has obscured important differences in the kinds of harms that motivate public and private law.

The ultimate aim of this Article is to defend a role for contract interpretation in attenuating negative externalities, but I will make that claim by way of a more general one about the division of labor between public and private law and what it tells us about the role of the common law of contracts. Public law tends to use ex ante, untailored rules, especially blanket prohibitions and fixed prices, to regulate diffuse harms to people whose identities are not knowable in advance. Private law relies on more flexible standards that operate ex post and allow textured balancing of a limited set of interests-where limited does not mean only two.21

We generally think of contracts, torts and property (and related areas like corporations or bankruptcy) as private law subjects but the laws regulating private exchange, tort-like conduct, and property entitlements actually span both public and private law. For example, the laws of employment discrimination 22 and securities regulation23 include some general rules subject to public enforcement alongside private rights of action and related common law tort claims like breach of contract or fraud. Consumer2 4 and employment 25 regulation require certain terms and prohibit others in consumer and employment agreements while general contract law governs enforceable agreements. Environmental regulations prohibit certain conduct and require other conduct by manufacturing firms, but tort and property regimes still based largely on common law dictate civil liability to individuals distinctly harmed by their production methods. 26 We cannot delineate the boundaries between public and private law by reference to the kinds of rights or conduct the law regulates. Both public and private law are enlisted to regulate conduct that affects others. We can meaningfully distinguish only between the methods deployed by public and private law.

Matching method to purpose, common law contract-that is, the private law part of contract regulation-is appropriately used to attenuate harms to third parties' legally protected interests. Although the rules of property and tort are more obviously enlisted to manage such externalities, contract law is also well suited for limiting certain kinds of concentrated externalities, namely, those that arise from cooperative conduct between two parties. Scholars generally believe that only the boundaries of contract law reflect third party interests27\_ boundaries largely set by public law regulation of particular classes of contract, such as consumer or employment agreements. But the rules by which contractual obligations are determined within the domain of contract also can and do take third parties into account. Where third party interests are reflected in background legal norms, courts interpret ambiguous agreements in ways that minimize harm to those third parties. 28 This practice may be at odds with our formal theories of contract interpretation but it is consistent with the regulatory method of common law contract.29

Part I situates the argument here against existing contract theory. Part II considers existing perspectives on public and private law and offers an improved account of their division of labor. Part II locates contract law within the broader "strategy" by which private law manages concentrated externalities. I propose that contract law can fulfill this function most effectively if we recognize an interpretive principle that allows courts to construe ambiguous terms in ways that protect third party losers. Part III studies the case of merger agreements and shows how courts already interpret those agreements to minimize concentrated externalities. I recommend that they do so consistently across the full range of contracts.

I. Third Parties In Existing Literature

Who are the third parties to contracts? Third parties are implicated by other people's contracts in a variety of ways. Almost every commercial contract is situated in a market in which other participants are third parties; the prices those parties pay in their own transactions will be affected by the terms of any one contract by others through the price mechanism of supply and demand. Third parties affected by a contract may also include others in a contractual relationship with one of the parties, such as suppliers or downstream buyers. Other relevant third parties may be those with a material interest in how a physical resource at issue in a contract is used, such as neighbors to a property being bought and sold by others. Third parties who willingly or inadvertently insure one of the parties to a contract, as the case of taxpayers in some industries, are also affected by its terms.

### BBB DA

#### Climate legislation passes now

Sargent 3-3 [Greg Sargent and Paul Waldman, journalists, “Progressives Say They’re Open to Manchin’s New Framework. So What’s the Holdup?” WASHINGTON POST, 3—3—22, <https://www.washingtonpost.com/opinions/2022/03/03/jayapal-manchin-new-build-back-better-framework/>, accessed 3-3-22]

This week, Sen. Joe Manchin III indicated that he’s prepared to restart negotiations over a climate and social policy bill that could pass the Senate with only Democrats. So is there any hope of progress?

For that to happen, you need two things: First, the West Virginia Democrat must take a firm position. Second, other Democrats, including progressives in the House, have to agree to what he wants.

In a sign of movement, progressives are now signaling a new openness to Manchin’s overture, which suggests there’s a way forward.

In an interview, Rep. Pramila Jayapal (D-Wash.), chair of the Congressional Progressive Caucus, said progressives are ready to talk to Manchin about his framework, and signaled a deal is possible, with caveats.

“We’re open to that approach,” Jayapal told us.

Jayapal opened the door to a way this could work. A good starting place, she said, would be to agree to specifics on what revenue generators can get Manchin’s support — and can get 50 votes in the Senate — and then talk about what to fund with them.

“Let’s come up with the revenue-producing measures,” Jayapal said, and then “look at it from there.”

Manchin told reporters he’s open to a package that includes some corporate tax reforms and higher taxes on top earners that were in the Build Back Better package (which he killed). He’s also open to raising money by allowing the government some ability to negotiate drug prices.

But Manchin also said a chunk of those revenues must be plowed back into deficit reduction, and the remainder put toward something like BBB’s proposals for combating climate change — tax incentives and other measures to encourage manufacture and consumption of alternate energy sources. Manchin insists those programs must be permanent.

Jayapal said progressives would be open to this general framework.

“We’re open to putting some of it toward deficit reduction, and then climate,” Jayapal said, adding that this framework could also include whatever other provisions Manchin might be willing to support with whatever is left over to spend.

As tax and health-care experts told us Wednesday, such an approach could raise at least $1.5 trillion in revenue, and perhaps more depending on what other taxes Manchin is open to. If that were divided by putting some into deficit reduction and about $500 billion into climate, as BBB did, you might have a few hundred billion extra for other expenditures.

Importantly, Jayapal said this could work for progressives. Under such a framework, you might be able to put those extra revenues into expanding health-care subsidies, or into subsidies for child care.

Such an outcome would be scaled way down from the original BBB. But Jayapal suggested it would nonetheless be a major achievement that would be worthwhile for progressives to support.

“We’d have to see all the details, but progressives are absolutely committed to trying to deliver as much as we can,” Jayapal told us, saying that even the items on this more limited list “are all big progressive priorities.”

We want to try and get major things done," Jayapal continued.

Still, Jayapal cautioned that progressives would like to see legislative text that Manchin says he can support, and then “let’s have a conversation."

This shouldn’t actually come as that much of a surprise. Progressives are still eager to vote for any part of the original BBB they can get. They might grumble a bit, but if a bill embodying Manchin’s desires came up for a vote, and it included some combination like the ones outlined above, odds are approximately 100 percent that progressives would support it.

Indeed, there is no reason that a specific version of Manchin’s own framework — one that he himself writes, or at least blesses — should not form the basis of such talks. In a way, a silver lining here is that Manchin has offered up a framework that would leave far fewer things to negotiate.

#### Antitrust reform requires PC and trades off

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Solves climate targets

Joselow 3—1 [Maxine Joselow, journalist, “In State of the Union, Biden Plans to Tout His Climate Agenda Despite Challenges in Congress and the Courts,” WASHINGON POST, 3—1—22, <https://www.washingtonpost.com/politics/2022/03/01/state-union-biden-plans-tout-his-climate-agenda-despite-challenges-congress-courts/>, accessed 3-2-22]

However, talks over Build Back Better have evaporated since Sen. Joe Manchin III (D-W.Va.) came out against the measure in late December. And Biden aides briefing reporters on the speech yesterday would not say whether Biden would mention his onetime signature legislation by name. “It’s not about the name of the bill. It’s about the ideas,” said one top Biden aide.

Regardless of the name, a study released Monday found that the spending bill would reduce U.S. greenhouse gas emissions by 5.2 billion tons, putting the United States within easy reach of Biden's 2030 climate goals. By contrast, the infrastructure law alone would leave the nation's emissions 1.3 billion tons short of Biden's 2030 target, according to the modeling by the REPEAT Project at Princeton University.

#### Extinction

Fuchs 18—(Senior Fellow @ The Center For American Progress, A Former Deputy Assistant Secretary Of State For East Asian and Pacific Affairs And A Guardian Us Contributing Opinion Writer). Michael H Fuchs. 11/29/2018. The Guardian. "The ticking bomb of climate change is America's biggest threat". https://www.theguardian.com/commentisfree/2018/nov/29/ticking-bomb-climate-change-america-threat.

Imagine that US leaders were told that hundreds of nuclear weapons were set on a timer to detonate across the planet, progressively and in increasing numbers, over the coming years and decades. The lives of millions would be upended, if not made nearly impossible to survive, by transformed weather patterns and resource scarcity. Tens of millions would become migrants as regions became uninhabitable. Millions would die, more and more as time went on. If this science fiction were reality, US leaders would lead an international effort to immediately disarm and dismantle the weapons.

But this isn’t science fiction. Climate change is a ticking time bomb, literally threatening to end human life on earth over the coming centuries. As climate journalist Peter Brannen describes it, Earth faced a similar crisis hundreds of millions of years ago during the “Great Dying” when volcanoes spewed so much carbon dioxide into the air – including magma that blanketed an area as large as the lower 48 US states, 1km deep – that it almost killed all life. Today, Brannen says, “we’re shooting carbon dioxide up into the atmosphere 10 times faster than the ancient volcanoes”.

Even in the shorter term, climate change will make the world far more dangerous. A World Bank Group report estimates that climate change could drive 140 million people to move within their countries’ borders by 2050. A report by the Trump administration finds climate change could reduce the size of the US economy by 10% – more than twice as bad as the worst part of the Great Recession – by 2100. Growing resource scarcity could cause more wars. Deadly and destructive extreme weather events such as Hurricanes Harvey and Maria and California’s Camp fire are mild symptoms of the plague to come.

There is no greater national security threat than climate change. Even the specter of nuclear war between great powers – the only thing that could remotely mimic the effects of climate change over time – is a much lower risk than climate change, which is already happening.

Every year we fail to act the problem grows, and the solution becomes more difficult. As America dithers, climate change is sparking a slow-motion nuclear-scale holocaust. If the world fails to urgently mitigate climate change, no other challenge – not the rise of China, Russian aggression, terrorism, nor some other future geopolitical peril – will matter because humans won’t survive to be the cause of these threats or suffer from them.

America’s failure is not for lack of capacity to safeguard against future threats – the US invests hundreds of billions of dollars every year in defense to deter adversaries such as Russia and China, and tens of billions more in intelligence capabilities to monitor threats. Instead, America is paralyzed by a lack of political will. Donald Trump and his allies in Congress – many of whom deny the existence of climate change – are making the problem worse. The president announced his intent to withdraw the US from the Paris climate agreement and is rolling back regulations that would have cut emissions.

Despite this dark reality, there is reason for hope. In 2015, the world came together to negotiate the Paris agreement, which set the goal of limiting global temperature increases to well below 2C. Despite a hostile Trump administration, many US governors, mayors, businesses and private citizens are already leading the way. So are other countries as they seize the economic and public health opportunity that comes with a clean energy future.

The path ahead, to say the least, is daunting. Even if the US were not to leave the Paris climate agreement, the action required to realize its potential is enormous. US policymakers will need to use every policy tool in their toolbox to drive unprecedented deployment of clean energy and build out zero-carbon transportation infrastructure. When the US leads by example, domestic emissions will fall, and new diplomatic doors to more ambitious climate action will open.

### FTC DA

#### Courts have gutted FTC anti-fraud measures---Congress will pass a legislative fix now, BUT it’ll be a referendum on FTC overreach.

Christopher Olsen & Stephen Schultze 21, Olsen is a partner in the privacy and cybersecurity practice at Wilson Sonsini and Vice Chair of the Privacy and Information Security Committee of the ABA Antitrust Law Section, and former Deputy Director of the FTC’s Bureau of Consumer Protection; Schultze is an Associate in the privacy and cybersecurity practice at Wilson Sonsini, “FTC Authority Under Siege: Monetary and Injunctive Relief at Risk in Courts as Congress Contemplates a Response,” The Antitrust Source, April 2021, ABA

It is hard to imagine a favorable outcome for the FTC after this oral argument. The Court will prob- ably limit 13(b) relief to injunctions, requiring the Commission to resort to cumbersome administrative proceedings to get any monetary relief. That would dramatically undermine the Commission’s work over several decades to build a robust fraud program.40 It would leave Section 5 and 19 as the only avenues for monetary relief under the FTC’s general consumer protection authority. Under Section 5, the Commission may impose monetary civil penalties under some limited circumstances.41 Under Section 19, the Commission may obtain monetary consumer redress or disgorgement but only after obtaining a final cease-and-desist order through administrative litigation and only after demonstrating that “a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent.”42 Moreover, Section 19 includes a statute of limitations whereas Section 13(b) does not.43 Thus, the FTC has strongly favored Section 13(b) actions. At oral argument, the FTC conceded that going directly to court is “more attractive in certain instances” and that the Commission brings “far more [consumer protection] cases” in court than through its own administrative proceedings.

An Unlikely Out for the FTC. It is worth noting that the Court could also rule against the FTC in a more limited way, although there was little indication at oral argument that it would. Last term, the Court held 8-1 in Liu v. SEC that even where a statute permitted “any equitable relief that may be appropriate,” the government’s equitable monetary relief could not exceed the wrongdoer’s net profits.44 Justice Sotomayor wrote for the court that the government cannot impose a “penalty” under equity; therefore actual net profits is all that restitution or disgorgement allows.45

If the FTC could still obtain “net profits,” AMG would not be a total loss for the agency. AMG argued in the briefs that the Ninth Circuit “did not limit the Commission’s recovery to anything close to net profits” when it awarded the FTC $1.27 billion, which was more than triple the amount that petitioners had allegedly received.46 But the textual difference between 13(b)’s “permanent injunction” and the SEC statute’s “any equitable relief that may be appropriate” makes it unlikely that the FTC will win even this less-than-half a loaf. Instead, the FTC will likely lose any ability to obtain monetary relief under 13(b). And limits to its ability to obtain even injunctive relief may also soon bubble up to the Supreme Court.

Even for Injunctive Relief, Lower Courts Are Reconsidering Whether Past Misconduct Is Actionable Under 13(b)

As noted above, Section 13(b) gives the FTC the authority to obtain injunctions in federal court only where a defendant “is violating, or is about to violate” the law. It is hornbook law that injunctive relief cannot be based solely on past conduct.47 Instead, there must be a present violation or some prospect of future violation. But the circuits differ on how likely the future violation must be.

The majority view has been that 13(b) requires the typical injunction predicate—“some cogniza- ble danger of recurrent violation, something more than the mere possibility.”48 The Ninth Circuit is a good example, having long embraced this standard in Section 13(b) cases.49 Most of the lower courts continue to rely on the “cognizable danger” standard, with the Ninth Circuit showing no signs of altering its view.50 This is a “likelihood of recurrence” standard, based on a factual analy- sis of the totality of the circumstances. On this reading, 13(b)’s “about to violate” language adds nothing to the inherent injunctive relief requirements.

Shire Leads the Way. The Third Circuit recently adopted a more demanding threshold. In Shire Viropharma, the court held that the “about to violate” provision plainly limited injunctive relief to “impending conduct.”51 The court reasoned that 13(b) “was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur”; that it is not enough for the FTC to allege a “vague and generalized likelihood of recurrent conduct.”52 Moreover, the court held that the 13(b) requirement applies “right out of the gate” at the pleading stage, rather than at a later stage when the court is considering appropriate remedies.53 The Third Circuit thus upheld the trial court’s conclusion that the FTC failed to meet the 13(b) threshold when it merely alleged that the defendant had the “incentive and opportunity” to commit violations like it had in the past.54 The FTC did not petition for certiorari, presumably out of concern that the Supreme Court might adopt the Shire view.55

No other circuit has squarely addressed the Third Circuit’s view. Some lower courts in other cir- cuits have at least acknowledged Shire’s holding without explicitly rejecting it.56 Procedurally, we should expect more of these challenges to occur at the pleading stage, creating early opportunities for appellate review and Supreme Court cert petitions.57 Indeed, even some district courts in the Shire-hostile Ninth Circuit have nevertheless entertained 13(b) challenges “right out of the gate” at the motion to dismiss stage.58 Moreover, regardless of whether courts go so far as to adopt the Shire test, violators may sometimes be able to avoid any action under 13(b) by ceasing their violations before the FTC files suit. For example, a district court in the Ninth Circuit granted summary judgment where Amazon had ceased the alleged practice after the FTC began an administrative investigation but before the suit was filed, and the court could find no “cognizable danger of a recurring violation.”59

A Shire-style defense is not just permitted at the pleading stage, it likely must be raised early oth- erwise it will be forfeited. The Shire court held flatly that “13(b)’s ‘is’ or ‘is about to violate’ requirement is non-jurisdictional.”60 This is no academic distinction. It means that a Shire argument might have to be raised on a motion to dismiss. The sometimes obtuse and varied rules of waiver and forfeiture may control whether a Shire defense has fallen out of the case.61 While circuits do not have uniform rules, they all agree that “waiver and forfeiture rules . . . ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression.”62

Failure to timely raise a Shire argument has already tripped up one prominent defendant. In FTC v. Vyera, the Southern District of New York recently rejected a 13(b) challenge framed as an affirmative defense because “Defendants had a full opportunity to challenge the sufficiency of the pleading at the motion to dismiss stage.”63

The potential impact of Shire has not gone unnoticed by consumer protection advocates. In a recent congressional hearing, one advocate argued that, under Shire, “wrongdoers that line their pockets with money they have illegally obtained can sail off into the sunset just as long as they retire their scams before the FTC catches up with them.”64 Jessica Rich, former Director of the FTC’s Bureau of Consumer Protection, similarly noted that Shire limited the FTC’s authority to remedy past conduct and called for Congressional action.65

Whether under Shire in the Third Circuit or under less-restrictive standards in the Ninth Circuit and elsewhere, courts’ limitations on injunctive relief under Section 13(b) increasingly curtail the availability of the FTC’s go-directly-to-court approach of the past few decades. Nobody would dispute that— as the Chief Justice observed at AMG oral arguments—an agency only has the authority delegated to it by Congress.66 Of course, Congress may yet delegate more authority than the FTC already has.

Congressional Activity in the New Administration

In light of the incursions into the FTC’s Section 13(b) authority, Congress may well expressly legislate to broaden or clarify the Commission’s authority. In the last Congress, Senator Roger Wicker (R-MS) introduced a bill that would have both allowed the FTC to bring a 13(b) suit even where the offender merely “has violated” the law, and expressly allowed for “restitution for consumer loss,” “rescission or reformation of contracts,” and “the refund of money or return of property.”67 Such an approach would, in one fell swoop, end any uncertainty about the FTC’s authority to go directly to court even for past violations and obtain monetary relief. The prospects of any such legislation are unclear, but there can be no doubt that if the Supreme Court rules in favor of AMG, some in Congress will seek to give the FTC more express authority. The trend in Shire—and even in courts with less stringent standards for injunctive relief—only adds fuel to that fire.

Back in October 2020, all five then-Commissioners urged Congress to pass legislation to “swiftly []clarify the statutory text and allow us to continue to protect consumers.”68 They warned that “13(b) is a critical tool in our enforcement mission” but that AMG and Shire were “grave” “judicial threats” to “the FTC’s ability to protect consumers.”69 With a Democratic-majority FTC and the Biden administration expected to take a forward-leaning approach on consumer protection, Congressional “clarification” would likely garner broad executive branch support.70

In February, the Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce held a hearing ostensibly focused on “Fighting Fraud and Scams During the Pandemic.”71 Discussion of AMG, Shire, and 13(b) dominated the hearing. Subcommittee Chair Jan- ice D. Schakowsky stated that “[u]nder 13(b), the FTC can require defrauders to provide restitution (money) to individuals who have been defrauded. Unfortunately, this authority is under assault at the Supreme Court, and the FTC may find itself deprived of a critical tool.”72 She argued that “reaffirming the FTC 13(b) authority is a bipartisan issue at the Commission as it should be everywhere.”73

While Congressional activity and interest may be easy to predict if the Court rules in AMG as anticipated, the outcome of that activity is entirely uncertain. Opening the FTC Act to amendment is likely to lead to a broader Congressional referendum on the Act as a whole, with various members of Congress seeking to amend the Act in ways unrelated to the 13(b) issues currently in dispute. For example, some members are likely to seek broader FTC rulemaking authority while others may use the opportunity to press for the transfer of powers from the agency to a new agency empow- ered to address privacy concerns or even digital markets as a whole. This will undoubtedly complicate the ability of Congress to address the relatively narrow issue teed up in AMG and leaves the future of FTC monetary—and potentially injunctive—relief in jeopardy. ●

ADDENDUM

On April 22, 2021, a day after this article was published, the United States Supreme Court unanimously decided AMG Capital Management v. FTC. That decision marks the end of the FTC’s broad exercise of Section 13(b) authority to get money back from those who violate the FTC Act—for now.

In a unanimous decision written by Justice Breyer, the Supreme Court held that the statute does not authorize the FTC to seek “equitable monetary relief such as restitution or disgorgement.” In essence, the Court decided that Section 13(b)’s reference to a “permanent injunction” means just that and no more. So, for monetary relief, the FTC is now left with its existing authority under Section 19 of the FTC Act.

While the Supreme Court settled an important issue in AMG, the law around FTC enforcement authority is in flux. Indeed, on the day before the decision, the FTC testified before Congress that “Section 13(b) is a critical tool in support of our enforcement missions, but its effectiveness is cur- rently imperiled [by AMG and further curtailments by circuit courts], and this uncertainty is hurting our ongoing enforcement efforts.” The Commission called for legislation, and a bill that would reverse the effect of AMG was introduced that same day in the House.

#### The plan derails it

Alison Jones & William E. Kovacic 20, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 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.

#### Fraud crackdowns stop major terror attacks

Michael Tierney 18, George & Mary Hylton Professor of International Relations; Director Global Research Institute (GRI), “#TerroristFinancing: An Examination of Terrorism Financing via the Internet,” International Journal of Cyber Warfare and Terrorism, vol. 8, no. 1, 01/2018, pp. 1–11

2. TERRORIST FINANCING AND THE INTERNET

As mentioned, terrorists’ use of the internet has become a major concern for security officials across the world in recent years. Like many other users, terrorists have found that the internet is an invaluable tool to share information quickly, in order to disseminate ideas and link up with likeminded individuals (Jacobson, 2010; Okolie-Osemene & Okoh, 2015). In this manner, terrorists use the internet for a variety of purposes, including recruitment, propaganda, and financing. As scholars have also noted, the internet is an attractive option for extremists due to the security and anonymity it provides (Jacobson, 2010). Yet while there have been a growing number of studies completed on the ways in which terrorist organizations use the internet to recruit and indoctrinate others, there has been relatively little focus on the methods by which terrorists finance themselves through online activities. Some researchers have attempted to fill gaps in this area by broadly studying internet aspects of terrorism financing. However, research on this particular aspect of terrorism financing still appears to be lacking, with little focus on new methods of terrorist financing via the internet or a marrying of strategies to combat online financing trends available to practitioners in the field.

For instance, Sean Paul Ashley (2012) assessed the mobile banking phenomenon, which is prevalent in regions such as the Middle East and Africa, and provides extremists with the ability to easily connect to the internet and remit funds around the world. The decentralization of this kind of banking, due to the fact that brick-and-mortar facilities are not needed to conduct transactions, has allowed terrorist financiersto more efficiently move funds while avoiding detection from authorities. Other researchers,such as MichaelJacobson (2010), have studied the waysin which terrorists engage in cyber-crime to raise and move funds. For example, Jacobson (2010) found that online credit card fraud was a fairly major source of terrorist financing. By stealing a victim’s private credit information, terrorists are able to co-opt needed funds and provide support to themselves or their counterparts. Yet as James Okolie-Osemene and Rosemary Ifeanyi Okoh (2015) note, the internet is mostly used to augment and assist activities which occur in the physical world. In this way, it would appear that the internet is far more useful as a means to move funds globally in support of terrorism, rather than simply as a method to raise funds.

#### Nuclear war---cash is key

Dr. Peter J. Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University, “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

### Spillover DA

#### The plan’s antitrust expansion cascades, chilling even beneficial mergers.

Eakin ’21 [Dr. Douglas; 2021; Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University; American Action Forum – The Daily Dish, “Losing Focus on Antitrust,” https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/]

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

#### It sets precedent that guts defense innovation.

Goure ’21 [Dan; October 29; Vice President of the Lexington Institute, served in the Pentagon during the George H.W. Administration, Ph.D. and taught at Johns Hopkins and Georgetown Universities and the National War College; National Interest, “Could Antitrust Legislation Threaten National Security?,” https://nationalinterest.org/blog/reboot/could-antitrust-legislation-threaten-national-security-195407]

There is a real danger in allowing the FTC to set the kinds of limits on vertical mergers that it is seeking in the case of Illumina and Grail. Not only could this impair the ability of the medical system to detect cancers more easily, but it could also set a dangerous precedent for vertical mergers in the defense, aerospace, and other sectors.

The defense and aerospace sector is in the midst of overlapping structural and technological revolutions. The Department of Defense (DoD), with strong Congressional support, is pushing defense companies to be more innovative. The military services have also taken up the mantra of calling for faster change and greater innovation. Emblematic of this drive was the first strategic message to his service by the Air Force Chief of Staff General C.Q. Brown titled [“Accelerate Change or Lose.”](https://www.af.mil/Portals/1/documents/csaf/CSAF_22/CSAF_22_Strategic_Approach_Accelerate_Change_or_Lose_31_Aug_2020.pdf)

The change to which he is referring will be comprehensive: organizational, operational, and technological. The DoD is supporting this effort to move faster and be more innovative by adopting new ways of contracting with the private sector, and by creating special funds to help small, innovative companies enter the defense market.

An important tool that contributes to the private sector being more innovative and accelerating change is mergers and acquisitions. In response to the trend of reduced defense spending, as well as reductions in the number of major programs, the defense and aerospace sector has been in a continuous state of consolidation since the end of the Cold War.

In addition, until the recent drive toward shortening acquisition timelines, major programs often took fifteen years or more to go from initial design to full-rate production. Scale and financial resources were also important for the ability of defense companies to survive changes in national security priorities or decisions to cancel major acquisition programs. Therefore, small and mid-sized firms often found it extremely difficult to thrive in the defense and aerospace sector. As a result of these factors, the number of major prime contractors has shrunk to, at best, [two or three companies](https://www.pogo.org/analysis/2019/08/the-incredibly-shrinking-defense-industry/) in each defense subsector.

Mergers and acquisitions will continue to be an important tool for defense and aerospace companies in accelerating change, improving their performance, reducing costs, and providing the rapid innovation demanded by the Pentagon. Recent examples include the merger of L3 and Harris; the merger between Raytheon and United Technologies; the acquisition of Sanders Electronics from Lockheed Martin by BAE Systems; the acquisition of OrbitalATK by Northrop Grumman; and finally, the proposed acquisition of Aerojet Rocketdyne by Lockheed Martin.

But where mergers and acquisitions may be particularly significant is in bringing unique products to bear on critical defense problems. The acquisition of small and mid-sized companies (particularly those without a foothold in the defense sector) by larger firms is an important way of providing them with the access to customers, financial and human resources, and management support required to enter and survive in the defense market.

Over the past several years, the Federal Trade Commission (FTC) has pursued several misguided antitrust investigations and suits. One of these was against [Qualcomm](https://www.realcleardefense.com/articles/2019/11/22/the_ftcs_suit_against_qualcomm_is_a_serious_threat_to_national_security_114864.html), despite senior DoD officials warning that this would harm national security. The recurring theme in these actions is the need to reign in corporations based on size or market presence. This reflects a growing sentiment at the FTC that corporate success as reflected in size or dominant performance is suspect. As a recent [Wall Street Journal editorial](https://www.wsj.com/articles/unfortunately-big-is-bad-is-back-11622995107) observed, the premise of the new approach is that “big is bad.”

#### Nuclear war.

Greenwalt ’19 [William; April 2019; Senior Fellow at the Atlantic Council within the Snowcroft Center for Strategy and Security, former Deputy Undersecretary of Defense for Industrial Policy in the U.S. Pentagon; Atlantic Council, “Leveraging the National Technology Industrial Base to Address Great-power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies,” p. 6-7]

The Compelling Case for a Robust Implementation of the NTIB

Three large trends argue for the need to use greater NTIB integration as a means of addressing US national security needs. The first is a return of great-power competition in a form vastly different from the Cold War competition with the Soviet Union. The second is the US military allowing its technological dominance, gained during the so-called “second offset” of technology developed in the 1970s and visibly displayed in the first Gulf War, to atrophy.5 The United States and its allies appear to be at risk of suffering a reverse “offset”—for example, through Chinese and Russian development of hypersonic missiles. The final trend is that the current export-control system, also established in the 1970s and designed to protect that technological dominance, is now a threat to US national security, as it severely constrains US technological advancement while doing little to hold back great-power adversaries.

The Rise of Great-Power Competition

The United States faces a new threat environment that has not been seen since the height of the Cold War. In fact, this threat is more dangerous and complicated, with a resurgent military and nuclear power in Russia, an emerging superpower in China, and medium-sized powers such as Iran and North Korea growing their military and nuclear capabilities. The 2018 National Security Strategy and National Defense Strategy documents are unlike those of the recent past, which were severely budget-constrained and primarily focused on antiterrorism operations. US strategy now significantly recognizes the current threat, and outlines the new challenges facing the United States in an emerging era of great-power competition.

Strategy documents are one thing; doing what is necessary to implement a strategy is something else. A significant effort will be required to mobilize and sufficiently prepare for any major great-power conflict.

Still, the primary purpose of US and allied military and foreign policy over the past seventy years has been to prevent any such conflict. During the recent decades of US and allied hegemony, it could be argued that a significant lesson from the Cold War has been forgotten: that military capability is required not just to fight a war, but to prevent it. If US and allied military capability cannot respond to current challenges quickly enough, a potential great-power adversary may no longer feel sufficiently deterred from taking steps that could bring about conflict. So, technological and doctrinal innovation is as critical for deterrence as it is for warfighting.

## Adv 1

### No SEP---1NC

#### Statistics prove royalties are optimal now and patent hold-up isn’t happening.

Barnett 20—(Law Professor at the University of Southern California). Jonathan Barnett. April 2020. Center for the Protection of Intellectual Property. “Are There Really Patent Thickets?”. <https://cip2.gmu.edu/wp-content/uploads/sites/31/2020/04/Barnett-The-End-of-Patent-Groupthink.pdf>.

A. Replacing Conjecture with Data

It is important to appreciate that the shift in SEP antitrust policy is firmly grounded in a recent but already well-developed body of empirical research. This point deserves some emphasis, because litigators, regulators, and, more surprisingly, scholarly commentators who continue to rely on patent holdup theories often do not seem to take this evidence into account. That research has done what academic, regulatory and industry proponents of patent holdup and royalty stacking theories have never done, namely, subject these theoretical assertions to empirical inquiry to verify that they provide an accurate picture of real-world innovation markets, rather than relying on stylized models in which a theory can never be more than “plausible” under “reasonable assumptions.”

In this case, it turns out that the old joke about the economist’s magical can opener is brutally true.11

Scholars who had advanced these theories had argued that profit-maximizing SEP owners would generate an aggregate royalty burden that would dramatically inflate device prices in the end-user market.12 In some cases, these arguments referred to anecdotal reports, or simply added up publicly announced royalty rates, that SEP owners were collectively charging smartphone producers aggregate royalty burdens representing double-digit percentages of the sales price.13 Empirical researchers that have made systematic efforts to collect and analyze royalty data have failed to find support for these claims. Using various methodologies, researchers have found that estimated total royalty burdens are in the single to mid-digits as a percentage of the device price.14

[Begin Footnote 14]

14 Alexander Galetovic, Stephen Haber and Lew Zaretzki, An Estimate of the Average Cumulative Royalty Yield in the World Mobile Phone Industry: Theory, Measurement and Results, 42 TELECOMMUNICATIONS POLICY 263, 266 (2018); Alexander Galetovic, Stephen Haber and Lew Zaretzki, Is There an Anti-Commons Tragedy in the World Smartphone Industry?, 32 BERKELEY TECHNOLOGY LAW JOURNAL 1527, 1532-33 (2017); J. Gregory Sidak, What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents?, 1 CRITERION JOURNAL ON INNOVATION 701, 701-02 (2016); Keith Mallinson, Cumulative Mobile SEP Royalty Payments No More Than Around 5% of Mobile Handset Revenues, WISE HARBOR (2015), available at http://www.wiseharbor.com/pdfs/Mallinson%20on%20cumulative%20mobile%20SEP%20royalties%20for%20 IP%20Finance%202015Aug19.pdf.

[End Footnote 14]

Additionally, researchers have found that the royalty-stacking hypothesis is incompatible with the performance of the 3G and 4G wireless markets over an almost two-decade period during which device sales grew dramatically while, adjusted for increased functionality, device prices fell.15 In light of this discrepancy between theories of market failure and evidence of market success, the U.S. taxpayer might reasonably ask why the antitrust agencies elected to dedicate scarce investigation and enforcement resources to a well-functioning market in the first place.

[Begin Footnote 15]

15 Alexander Galetovic and Kirti Gupta, The Case of the Missing Royalty Stack in the World Mobile Wireless Industry, INDUSTRIAL & CORPORATE CHANGE (forthcoming 2020).

[End Footnote 15]

### Turn---1NC

#### Applying antitrust to FRAND lowers royalties, which decks innovation.

Renaud 18—(BS in mechanical engineering from Duke, JD from UConn). Michael Renaud. 11/22/18. "DOJ sensibly returns to antitrust fundamentals on patent licensing." The Hill. <https://thehill.com/opinion/finance/417833-doj-sensibly-returns-to-antitrust-fundamentals?rl=1>.

Our tech-focused world depends on our innovation economy bringing standards like Wi-Fi and LTE to market. Some c[ommentators have suggested that recent Department of Justice statements on intellectual property rights, coined the “New Madison Approach,” threaten to upend this ecosystem](https://thehill.com/opinion/finance/410958-doj-giving-cover-to-monopolizing-firms-breaching-antitrust-rules).

To the contrary, the New Madison Approach marks a return to the core principles on which the patent laws are predicated.

A viable standard has three primary characteristics: compelling technology, industry consensus and straightforward implementation. These characteristics compel firms with different business goals to collaborate on a standard.

One firm may wish to commercialize a new technology; another may wish to monetize an established technology; and yet another may wish to gain access to a range of technologies for implementation. A smart standardization process attracts all interested firms, including those seeking royalties and those likely to pay most of those royalties.

For over 50 years, standard-setting organizations (SSOs) have maintained this balance by requiring participants to contractually agree to offer to license contributed technology on terms that are “fair, reasonable, and non-discriminatory” (“FRAND”).

SSOs, however, do not articulate what FRAND means. In fact, the meaning can’t be spelled out, given the divergent interests involved. Historically, FRAND is a term of art understood by SSO participants to impose mechanical, not financial, requirements.

The FRAND obligation does not dictate how to calculate royalty rates, it merely requires an SSO participant to bargain in good faith with an implementer (even a competitor) toward a fair license to essential technology.

It has become fashionable to interpret FRAND as including obligations beyond those that the term has traditionally encompassed, in the process upending time-tested licensing practices.

Last year, a California court, concerned that firms would leverage their technology’s inclusion in the standard to extract higher royalties (sometimes referred to as “hold-up”), engaged in rate-setting for a license from Ericsson to manufacturer TCL for LTE technology.

The court’s methodology required thousands of hours of expert review, raising enforcement costs beyond most patent owners’ means.

It also ignored the approach that Ericsson, a foundational contributor to global wireless telecommunications standards, had used for years to determine royalty rates for the LTE technology it licensed to most of the world. To the court, concerns over hold-up justified scrapping and replacing the established market process.

Critics of New Madison overlook how the new interpretations that courts and commenters have ascribed to FRAND threaten the balance that has worked for generations.

The goal of any SSO is to balance the interests of advancing a technology with easing that technology’s implementation, but ease of implementation does not mean making the technology artificially cheap by devaluing standard-essential patents (SEPs).

When the IEEE (a SSO) added contractual obligations to its FRAND encumbrance, Qualcomm — among the most innovative American firms — ended its years-long participation in IEEE. Efforts to devalue essential technology will likewise drive innovators away from standardization.

Assistant Attorney General Makan Delrahim, in speeches setting forth the New Madison Approach, wisely minimizes the role of hold-up in FRAND analysis. As the Department of Justice now recognizes, there is no evidence that hold-up is an actual problem requiring a regulatory solution.

Rather, fears about hold-up are just another iteration of the age-old attempt to use the antitrust laws to protect individual competitors — who benefit from artificially low royalty rates — at the expense of competition, which maximizes consumer welfare when market participants are motivated to innovate in order to maximize royalties.

The realization that courts have fallen for this topsy-turvy application of antitrust principles has resulted in historical levels of free-riding, with implementers emboldened to force SEP holders to incur the delay, cost and risk of enforcement.

New Madison simply argues that we shouldn’t impose obligations on licensors beyond those to which they agreed when joining an SSO. FRAND has worked for decades on basic contract law principles.

The en vogue FRAND theory that the antitrust laws should now be deployed as a patent royalty rate-setting regime perverts the process of invention innovation that forms the very basis of our patent laws.

It encourages free-riding, discourages innovation and increases enforcement costs. The New Madison approach merely recognizes that these outcomes are antithetical to the goals of the antitrust laws.

### Tech High---1NC

#### US is structurally ahead in the tech race now.

Greene 21—(former petty officer in the US navy, technology reporter). Tristan Greene. June 2, 2021. “Here’s why the US continues to beat China in the AI race”. TNW. <https://thenextweb.com/news/heres-why-the-us-continues-to-beat-china-in-the-ai-race>. Accessed 9/9/21.

As it turns out, the global AI race is more of a marathon. And the US has a huge lead that’ll be difficult to overcome for any country, but especially China.

The setup

It was easy to believe China would pull ahead a few years ago. US big tech companies such as Microsoft and Apple had always co-existed with eastern outfits. But, once deep learning exploded in 2014, many experts believed China would use its government influence to direct the flow of research in ways the EU and US’ respective leaders simply couldn’t.

And, for a while, it looked like that was going to be enough to propel the PRC to the top of the global AI leaderboards.

In the west, a lion’s share of AI research ends up patented by businesses who keep their algorithms in a walled-garden. But in the east things are different.

Per an article in the Harvard Business Review:

Unlike in Western developed economies where companies are the primary holders of AI patents, in China, the majority of AI patents are filed by universities and research institutes, most of which are government owned or sponsored.

China’s big problem

The biggest problem China has when it comes to AI is a lack of innovation. Consumer demand is at an all-time high for deep learning technologies in China, but this social trend isn’t translating into breakthroughs.

In essence, China is still playing catch up. The Chinese government may be pouring more money into research and producing more of it, but US tech companies are raising and spending more on research outside of academia.

The US government still spends more on defense AI than China, and US businesses spend more money on cutting-edge research than Chinese companies do.

Simply put, the biggest technology companies in the US can afford to invest in breakthrough research even when such research leads nowhere. The profit margins are much leaner at most Chinese firms so the incentive is typically on producing a profit.

Unfortunately for China, much of its AI position is rooted in developing Chinese-language versions of language recognition software and creating surveillance technology – neither of those are very marketable outside of places where Chinese is spoken or where privacy laws exist.

What it all means

Deep learning might not be the best path forward for artificial intelligence technologies. This is great news for big tech companies in the US. But it’s bad news for China.

In the US, where most of the AI breakthroughs tend to come from big tech companies with large enough coffers to afford supercomputers and high enough salaries to lure away academia’s brightest, scientists won’t miss a beat if we transition away from deep learning.

But China’s heavily-saturated market likely won’t extend beyond its own bubble, much less the deep learning bubble that could pop and leave AI-only companies behind. There’s a reason why there’s only one Chinese firm among the top five richest technology companies in the world.

### 5G---1NC

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

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

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9 Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13 The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### The 5G race is irrelevant to leadership.

Patel 19 (J.D. from the University of Wisconsin Law School, Editor-in-Chief of The Verge, Former Acting Managing Editor for Vox, AB in Political Science from the University of Chicago). Nilay Patel. 5/23/2019. “Wait, Why The Hell Is The ‘Race To 5G’ Even A Race?”. The Verge. <https://www.theverge.com/2019/5/23/18637213/5g-race-us-leadership-china-fcc-lte>.

I have a dumb question that no one seems capable of answering directly: *Why is 5G a race?*

Everyone — the wireless industry, Democrats, Republicans, the major media, you name it — frames the building of next-generation 5G networks as a “race” in which the United States needs to demonstrate “leadership.”

Here is The Washington Post declaring America has the lead in the race to 5G. Here’s CNN asking “Who’s winning the race to 5G?” Here’s AT&T CEO Randall Stephenson declaring that China isn’t beating the US to 5G “yet,” as some sort of ominous warning. Here’s T-Mobile CEO John Legere telling the House Subcommittee on Communications and Technology that merging with Sprint will let his company “win the race to 5G.” Here is an entire microsite from industry lobbying group CTIA titled “The Race to 5G.”

Let us never forget AT&T being so desperate to lead this “race” that it rolled out fake 5Ge logos on its phones.

But the stakes of this supposed race are wholly unclear. What happens if we win, besides telecom execs getting slightly richer? More importantly, what are the drawbacks to coming in second, or even third? Where is the list of specific negative outcomes of China building a 5G network a month, a year, or even five years before the United States? I’ve never seen it, and I keep asking about it.

NO ONE CAN SAY WHAT BAD THINGS WILL HAPPEN IF WE DON’T WIN THE RACE TO 5G

For example, here’s FCC Commissioner Geoffrey Starks on The Vergecast this week, when I asked why 5G is a race.

“I think it is important for us to continue to lead the race ... we obviously led to 4G and I think we get to set some of the standards that are ultimately going to be implemented worldwide, which is why there is a little bit of a race.”

Starks went on to say that China wants to be a global leader in supplying 5G equipment and that’s why Huawei has been so aggressively building and pricing its gear. But Huawei depends on American chip technology to make its products, and the US government has just put Huawei on a blacklist anyway. So... the race is so we can set some wireless standards? I suspect Apple, Google, Qualcomm, Verizon, and AT&T can fend for themselves when it comes to that process.

The other main argument for winning the “race” to 5G is that having the world’s best and fastest networks will create new economic opportunities for businesses of all kinds — we’ll enable self-driving cars and telemedicine and all the other stuff you hear about during interminable 5G slideshows at trade conferences. At a hearing before the Senate Committee on Commerce, Science, and Transportation earlier this year, Mississippi Sen. Roger Wicker confidently declared that “failing to win the race to 5G would not only materially delay the benefits of 5G for the American people, it would forever reduce the economic and societal gains that come from leading the world in technology.”

WE WON THE RACE TO LTE AND OUR LTE NETWORKS ARE AMONG THE SLOWEST AND MOST EXPENSIVE IN THE WORLD

Maybe. It is indeed true that better networks lead to better opportunities, and that widespread high-speed broadband is something everyone wants. But I sincerely doubt that all of these companies will pick up and move to China or Europe if the United States builds 5G networks slightly slower. After all, we already have some of the slowest and most expensive networks in the world, and Apple and Facebook have not yet relocated to South Korea.

The more I hear about the race, the more I don’t buy it. I think the “race” framing is there to make some big decisions seem urgent and important — to make it appear as though some serious trade-offs are worth it in order to “win.” And those trade-offs are indeed serious: 5G networks will require a serious rethinking of how we use wireless spectrum. There are incredible privacy implications around putting millions of IoT devices in a “smart city” on 5G. Investment dollars will naturally flow toward building 5G networks in cities instead of expanding our networks to rural areas, exacerbating the digital divide.

THE “RACE” IS TO THERE TO MAKE SERIOUS TRADE-OFFS SEEM WORTH IT SO WE CAN “WIN”

And once the “race” to build out 5G in big cities is “won,” the pressure to expand access to other places in the country will vanish, making that divide even worse. It is worth carefully considering all of these things before giving in to haste.

Oh, and it appears that some of the required 5G spectrum might interfere with important weather sensors, a concern raised by NASA, the Navy, and the NOAA in hearings before Congress last week. How did the wireless industry respond to these concerns? By writing a blog post accusing meteorologists from across three government agencies of “risking our 5G leadership.” The implication, of course, is that worrying about detecting major weather events could make us lose the race.

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

### Demo---1NC

Alt causes:

Internationally---repression in Turkey, Russia, and Hungary.

Domestically---gerrymandering, domestic surveillance, and police brutality.

#### It’s inevitable because of Europe even in spite of U.S. democratization.

Stelzenmueller ’20 [Constanze; December 2; Kissinger Chair on Foreign Policy and International Relations at the Library of Congress, Senior Fellow in the Center on the United States and Europe at the Brookings Institution; Financial Times, “The west must live up to its own principles on democracy,” <https://www.ft.com/content/19d44ecb-152e-4db7-b2c6-de5928712cca>]

One of President-elect Joe Biden’s promises is that the US will recommit itself to defending democracy in the world, together with other democratic allies. The EU, it appears, plans to firmly embrace this proposal, with a particular focus on presenting a united front to China.

Yet criticising Beijing’s mass internment of Muslim Uighurs — or the Kremlin’s attempts to manipulate elections — draws accusations of hypocrisy at a time when many western governments struggle to convince their citizens that representative democracy remains the most trustworthy way to deliver good governance. If the transatlantic alliance is to hold its own in competition with illiberal authoritarian rivals, its members had better fix their democratic problems at home. But how?

Granted, in the context of a decade of global democratic recession, the US and Europe still look quite respectable on the surface. The US presidential election last month was in many ways a triumph of democracy: Americans saw historic voter turnout, a process that broadly worked and officials and judges who refused to be intimidated. In Europe, populists hoping to exploit the Covid-19 pandemic to stoke fear and polarisation have instead seen voters support centrist governments and fact-based policies.

Yet it is also true that the widespread commitment to liberal democracy — a foundational value of the west — is under fire. The fact that, in some cases, the attacks come from opposition parties within the political system is no cause for complacency.

In Germany, for example, the hard-right Alternative for Germany has been plateauing in the polls at around 10 per cent, and its leadership is mired in shambolic infighting. But it continues to wage a quiet and disciplined campaign to undermine and delegitimise democratic institutions. In France, Marine Le Pen, the leader of the far-right National Rally, remains a serious contender in the 2022 presidential election.

Elsewhere, in Hungary, Poland and Turkey, the authoritarians are in government and have used their positions to change the rules of governance in order to expand or perpetuate their hold on power. And in the US, the alliance’s anchor democracy, an outgoing president is claiming against all evidence and with the support of his party’s leadership that a massive fraud has denied him an election victory.

This democratic backsliding undercuts the cohesion of NATO at a time when conflicts around the world are heating up. It undermines trust between allies, limits intelligence sharing and reduces the effectiveness of diplomacy, deterrence and operations.

As for the EU, which the incoming US administration (unlike its predecessor) sees as a key provider of diplomatic and economic leverage, its budget is being blocked by Budapest and Warsaw in a fight over the rule of law. All this allows adversaries to exploit the west’s divisions — and gives them a welcome pretext to dismiss critiques of their own failings.

The transatlantic alliance, born out of the crucible of the second world war and the Holocaust, always had liberal democracy at its heart. For decades, the American security umbrella enabled the conditions for stable representative governance to take root in Europe: functioning states, open market economies, inclusive social contracts. Yet when some NATO member states took authoritarian turns — as happened in Greece, Portugal and Turkey — others turned a blind eye. Our allies’ domestic affairs, it was held, were none of our business.

This has to change. The alliance is based on the principle that the security of one member is the security of all. The 2008 financial crisis and its long aftermath taught us a hard lesson: in an interdependent world, the vulnerability of one is the vulnerability of all. And security today begins with resilient domestic governance.

## Adv 2

### Circ---1NC

#### Plan is circumvented by activist courts.

Crane 21 (Professor of Law, University of Michigan). Daniel A. Crane. 2021. “Antitrust Antitextualism”. 96 Notre Dame Law Rev. 1205. <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>. Accessed 9/12/21.

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that.

Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus for potential reform legislation.7 As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.8 We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

To begin informing an answer to that question, this Article undertakes to diagnose and analyze the longitudinal phenomenon of antitrust antitextualism. Part I sets the stage by contextualizing antitrust law within broader jurisprudential conceptions of statutory regimes, statutory interpretation, and legislative-judicial dynamics. More specifically, it presents the conventional understanding of the Sherman Act as a “super-statute” delegating broad common-law powers to the courts, thus removing antitrust law from usual controversies over statutory interpretation methodologies.9 It then establishes that, if the conventional wisdom is wrong and the antitrust statutes have determinate meanings that the courts are consistently ignoring in favor of big capital, the most obvious inference is that the courts have an ideological bias at odds with congressional purpose. Part I concludes by establishing a framework for assessing whether antitrust antitexualism generally represents a conservative judicial bias against the will of a more progressive Congress.

Part II subjects the historical record of antitrust antitextualism to the analytical framework described in Part I. It presents the consistent pattern of judicial disregard of the antitrust statutes’ text and purpose across all five of the principal substantive antitrust statutes—the Sherman Act of 1890, the FTC and Clayton Acts of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Act of 1950, and shows that the pattern of judicial disregard has a unilateral direction—toward softening the blow of the antitrust laws on big business. However, Part II also shows that the progressive Congress/conservative courts hypothesis fails to capture the burden of the historical record. In particular, the judges responsible for reading down the antitrust statutes were not generally conservative by conventional measures, Congress has not shown much interest in overriding the judicial recasting of the statutes, and the courts have not undertaken to constitutionalize their holdings in order to prevent congressional overrides, even though they had many occasions to do so. Something other than ideological conflict between the legislative and judicial branches must be behind the phenomenon.

Part III offers a counterhypothesis—that the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche: the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve economic efficiency. Congress expresses populist idealism through legislative pronouncements reining in big business, but then implicitly acquiesces as the courts (often in conjunction with the executive branch) read down the statutes to strike a balance between the aspirational and pragmatic impulses. For better or for worse, this is the way things have worked for 130 years. Part III concludes by considering the implications of the idealistic Congress/pragmatic courts thesis for future legislative reforms, the dynamism of the antitrust system, and jurisprudential understanding of legislative/judicial dynamics more generally.

### Cyber Turn---1NC

#### Antitrust can’t solve and worsens vulnerabilities.

McLaughlin ’19 [Michael and Daniel Castro; April 10; research analyst at the Information Technology and Innovation Foundation; vice president at ITIF and director of ITIF's Center for Data Innovation; ITIF, “Breaking Up Big Tech Would Not Make Consumer Data More Secure,” https://itif.org/publications/2019/04/10/breaking-big-tech-would-not-make-consumer-data-more-secure; KP]

A growing number of advocates are arguing that many U.S. technology firms are too big and that antitrust regulators should break them up. For example, Senator Elizabeth Warren (D-MA) recently detailed how the government should break up Amazon, Google, and Facebook. Some advocates have wrongly justified similar positions by stating that smaller firms would have less data, and so consumers would be better protected from data breaches.

Data breaches refer to incidents of hacking that allow individuals to exfiltrate data from another party’s computer system, such as when hackers copied the data of nearly 150 million Americans from Equifax’s servers. Frequently, hackers use phishing attacks or ransomware to illicitly access data, but they can also exploit vulnerabilities in code, which is how hackers gained access to 30 million Facebook users’ accounts.

Many of the calls for antitrust action have to do with Facebook data. For example, two co-founders of the anti-Facebook campaign “Freedom From Facebook” published an op-ed in USA Today arguing that because of the recent data breach at Facebook, the Federal Trade Commission should go beyond a “historic fine” and “break up Facebook’s social media monopoly.” Some members of Congress have echoed these sentiments. For example, Senator Mark Warner (D-VA) stated that the data breach was “a reminder about the dangers posed when a small number of companies like Facebook or the credit bureau Equifax are able to accumulate so much personal data about individual Americans without adequate security measures.” Later, when asked about breaking up Facebook, he did not take the option off the table, instead saying “I see breakup as more of a last resort.” And Senator Richard Blumenthal (D-CT) noted that “Facebook has become a honeypot for malevolent lawbreakers who seek to undermine our society and democracy.” He too has stopped short of explicitly calling to breakup Facebook but has argued there is a link between competition and data protection, stating in January, “This is yet another astonishing example of Facebook’s complete disregard for data privacy and eagerness to engage in anti-competitive behavior.” The remedy, according to organizations like Open Market Institute and Color of Change, is for regulators to force Facebook to divest its ownership of Instagram and WhatsApp.

But if the problem is data breaches, antitrust is the wrong tool. There is no reason to believe that consumer data is more protected if five firms each hold data on 20 million Americans versus if one firm holds data on 100 million Americans. Plenty of companies with less data than Facebook—from Under Armour to Caribou Coffee—have had data breaches. And even if the government were to break up some of the largest tech firms, the resulting organizations would still represent enormous “honeypots” to malicious actors—for example, Instagram alone has 1 billion monthly users.

But more importantly, breaking up large tech firms would not make those smaller companies more secure. Indeed, larger firms have several advantages over smaller ones when it comes to security. Many security upgrades involve fixed, rather than variable costs. Larger firms can better afford to invest more in security since they can amortize the cost over a larger user base and benefit from economies of scale. They can also hire larger and more experienced security teams to prevent, detect, and respond to new threats. For example, Facebook has steadily increased the size of its staff dedicated to addressing security threats on its platform. In addition, breaking up large tech firms will not make U.S. elections less vulnerable to Russian interference, which Senator Warren has suggested. The data on large platforms is a rich source of intelligence on cyber threats. Alex Stamos, the former chief security officer at Facebook, has noted that Google “has the most useful data set available to any private company for tracking state adversaries and intelligence services.”

#### Competition is a cybersecurity risks – giants are more secure.

Peters ’19 [Chistopher; March 26; Chief Executive Officer, The Lucrum Group; Senate Hearing 116-260, “The Cybersecurity Responsibilities of the Defense Industrial Base,” https://www.govinfo.gov/content/pkg/CHRG-116shrg41313/html/CHRG-116shrg41313.htm; \*SMM = small to medium-sized manufacturers; KP]

The research shows that SMMs have a poor understanding of cybersecurity in general. They often do not understand the threats much less what to do about them.

This overall lack of awareness and preparedness should be alarming. Large manufacturers typically have very robust security measures for both their business and operating systems. That makes the less knowledgeable and poorly defended SMMs in the supply chain a greater target for cyber attacks particularly since they often handle much of the technical data sent from those larger contractors. Whether the attack is to steal intellectual property, introduce defects into weapon systems, or to shut down entire operations

### Grids D---1NC

#### No grid impact---it’s overhyped.

Freedberg 14 (Sydney J, “Cyberwar: What People Keep Missing About The Threat,” Jan 6, <http://breakingdefense.com/2014/01/cyberwar-what-people-keep-missing-about-the-threat/>, CMR)

**Cites:**

--Peter W. Singer – former director of the Center for 21st Century Security and Intelligence and a senior fellow in the Foreign Policy program

--Allan A. Friedman – Research Scientist at the Cyber Security Policy Research Institute at George Washington University's School of Engineering

**Singer and Friedman** also **do a valuable service** in **beating back the hype** **about “Cyber Pearl Harbors”** **and “Cyber 9/11s” or the US suffering countless millions of “attacks.”** **Those alarmist statistics lump together everything from a virus easily stopped by** someone’s **firewall** to credit card theft **to the loss of secret schematics for the F-35** stealth fighter. **Those “attacks” vary from trivial, to significant losses** for one particular business, to actual matters of national security, **but none of them does as much damage as a good old-fashioned bomb**, they argue. **Even if hackers shut down the** national **electrical grid for weeks** on end, bad as that would be, **it wouldn’t be as bad as a single nuclear explosion**. “**It’s** a lot **like ‘Shark Week**,’” Singer said about the overhyped dangers. “**Squirrels have taken down the power grid more times than the zero times hackers have**.” There’s lots of talk about how the attacker always has the advantage in cyberspace, he told an audience at Brookings this afternoon, but “**a true cyber offense, an effective one**, a Stuxnet style [attack] **is** something **quite difficult**.”

### A2: Cyber---1NC

#### No cyber impact – attribution, restraint, and capabilities.

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

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.

#### Resilience solves.

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

One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.

### Antitrust Fails---1NC

#### The aff gets delayed and watered down---that melts solvency

Jeffers and McCareins 19 [Mark McCareins is a Clinical Professor of Business Law at Northwestern and Co-Director of the JDMBA Program there. Glenn Jeffers is a freelance writer based in Los Angeles, “Why Antitrust Regulators Don’t Scare Big Tech”, 8-19-2019, https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech] IanM

The Feds Don’t Have Time on Their Side

**Even** where there may be **cause for concern**, federal regulatory **agencies** are notoriously slow to investigate **anticompetitive practices** by tech companies. The **investigations of any** of these four firms will take years to unfold, and even longer to prosecute.

Take, for example, Microsoft. The FTC launched an investigation into the software firm’s bundling practices in **1990**, with the DOJ following suit eight years later. At the time, the company’s Windows operating system accounted for 90 percent of the PC market. The DOJ eventually charged Microsoft, claiming that its Internet Explorer browser, which was built into Windows, had an unfair advantage over other web browsers like Netscape.

In 2000, a federal judge ordered the company to be split into separate entities, but an appeals court reversed the ruling. The DOJ and Microsoft finally settled the case in 2002—a full twelve years after a regulatory **agency** **first launched** an **investigation.** Microsoft was ultimately required to give computer manufacturers identical licensing contracts for Windows, which gave other companies more equal access to the browser market, as well as undergo nine years of court supervision into its business practices.

The **punishment** was, to say the least, **much reduced** from its **original form**. “The U.S. **D**epartment **o**f **J**ustice was not overly successful in that attack,” says McCareins, who was a partner in the firm that represented Microsoft, Winston & Strawn.

### No Nucs---1NC

#### The government won’t adopt new IT innovations.

Kennedy 16—(bachelor's degree in international relations from Stanford University, master's degree in international human rights law from The American University in Cairo). Merrit Kennedy. May 26, 2016. “Report: U.S. Nuclear System Relies On Outdated Technology Such As Floppy Disks”. NPR. <https://www.npr.org/sections/thetwo-way/2016/05/26/479588478/report-u-s-nuclear-system-relies-on-outdated-technology-such-as-floppy-disks>. Accessed 10/25/21.

The U.S. nuclear weapons system still runs on a 1970s-era computing system that uses 8-inch floppy disks, according to a newly released report from the Government Accountability Office.

That's right. It relies on memory storage that hasn't been commonly used since the 1980s and a computing system that looks like this:

Beyond the nuclear program, much of the technology used by the federal government is woefully outmoded, the report says. About 75 percent of the government's information technology budget goes toward operations and maintenance, rather than development, modernization and enhancement.

"Clearly, there are billions wasted," GAO information technology expert David Powner said at a congressional hearing Wednesday, The Associated Press reports.

The GAO report found that the Pentagon's Strategic Automated Command and Control System — which "coordinates the operational functions of the United States' nuclear forces, such as intercontinental ballistic missiles, nuclear bombers, and tanker support aircrafts" — runs on an IBM Series/1 Computer, first introduced in 1976.