# Disclosure---Kentucky---Round 4

## 1NC

### OFF

#### Text: The United States federal government should adopt a policy –

#### – mandating the interpretation of FRAND contracts according to first principles of U.S. contract law, and

#### – recognizing that certain kinds of negotiating conduct might result in a breach of FRAND contracts.

#### Application of contract law solves holdup.

Sidak 18 – Chairman, Criterion Economics, Washington, D.C.

J. Gregory Sidak, “The FRAND Contract,” The Criterion Journal on Innovation, Vol. 3, 2018, HeinOnline

When an SEP holder's FRAND commitment is deemed to be an enforceable contract, and the implementer of an industry standard is consequently deemed to have the right, as an intended third-party beneficiary, to enforce the SEP holder's obligations to the SSO under that contract, no need exists to fashion new principles to enable the SEP holder and the implementer to resolve their disputes over FRAND terms promptly. Simply interpreting a FRAND contract according to first principles of U.S. contract law would encourage both the SEP holder and the implementer to engage in good-faith negotiations. Recognizing that certain kinds of negotiating conduct might result in a breach of contract, or the loss of a third-party beneficiary's right to enforce the FRAND contract, would encourage both the SEP holder and the implementer to avoid delaying tactics and instead to engage in conduct that facilitates the prompt execution of the license agreement. According to first principles of U.S. contract law, whether the SEP holder has discharged its obligations under its FRAND contract with the SSO with respect to a given implementer turns on whether the SEP holder has offered to license its SEPs to that implementer on legitimately FRAND terms. The recognition of comparable contractual principles in foreign jurisdictions-to the extent that such principles do not Conalready exist under the contract law of those jurisdictions-would stimulate the parties not only to avoid practices that needlessly delay negotiation and cause costly litigation, but also to work toward the prompt execution of a FRAND license agreement.

### OFF

#### Text: The United States federal government should adopt a policy encouraging innovation by offering prizes, research grants, and tax subsidies to innovators that engage in open licensing practices.

#### Attaching open licensing requirements to prizes and grants solves the single supplier problem.

Duan 20 – Director of Technology and Innovation Policy, R Street Institute, Washington, D.C.

Charles Duan, “Of Monopolies and Monocultures: The Intersection of Patents and National Security,” Santa Clara High Technology Law Journal, Vol. 36, Issue 4, Article 5, May 2020, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1655&context=chtlj

B. Prizes, Grants, and Other Incentives for Innovation

Patents are not the only incentive for innovation: Government policy may also encourage innovation through a variety of means, including prizes for inventions, research grants, and tax subsidies.195 Each has its advantages and drawbacks: Patents offer theoretically market-based rewards but create perverse incentives due to monopoly rights; prizes and grants avoid anticompetitive opportunities but present moral hazard and valuation difficulties.196

Despite the many tradeoffs among different forms of innovation incentives, much of the literature and most policymakers have tended to gravitate toward patents as the default tool of innovation policy.197

The national security dimension of innovation in view of technological races, however, may suggest a need to alter that calculus. As seen above, patents can force a nation into dependence on a single supplier of critical technology, whether it be torpedoes, airplanes, or anthrax treatments.198 Prizes or grants that allow for immediate free-market competition on any resulting inventions may have the benefit of protecting the government and the public from that single-supplier dependence. As a result, policymakers may seek to divert innovators in security-sensitive technology fields away from patents by offering alternative rewards.

One difficulty is that because patent law generally applies uniformly to all types of technologies,199 it may be difficult to leverage patent law itself to discourage patenting of those technologies that are of particular relevance to national security. Nevertheless, the government may leverage a variety of approaches, such as open licensing requirements in grant agreements or prize awards, or creation of patent pools with predefined licensing commitments, to limit the likelihood that exclusive rights arise in technology areas of concern to national security.

### OFF

#### Text: The fifty states and all relevant United States territories should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### OFF

**Regional bank consolidation is increasing now, but antitrust expansion chills activity**

**Nylen 21** – covers antitrust and investigations for Politico Pro

Leah Nylen, "Bank mergers come into Democrats’ antitrust crosshairs," Politico, 4-19-2021, https://www.politico.com/news/2021/04/19/progressives-biden-bank-merger-threat-483183

The last time the Justice Department challenged a bank merger was in 1985, around the time that compact discs and New Coke debuted.

In the 36 years since, the U.S. has shed roughly 10,000 banks — some from bank failures, but most through acquisitions that regulators and antitrust prosecutors at the Justice Department have blessed. Critics say that has led to higher fees for consumers, reduced access to banking services and increased concerns about risk to the financial system.

Now, as Democrats in Congress push for an antitrust overhaul to restrain corporate power in tech, health care and agriculture, progressive lawmakers and economists also want the Biden administration to crack down on mergers in the banking sector. It’s setting up a clash with the industry, which has been lobbying for even easier merger scrutiny.

The issue is taking on greater urgency as some of the country’s biggest regional banks — PNC of Pittsburgh, Huntington Bank of Columbus, Ohio and M&T Bank of Buffalo, New York — pursue major deals.

“Bank regulators are playing with matches while wrecking the fire department,” said Senate Banking Chair Sherrod Brown (D-Ohio). “The Wall Street megabanks are so large and powerful that banks across the country feel pressured to get bigger and riskier. These mergers are a symptom of a bigger problem — deregulation has left us with Wall Street banks that are too big and that take too many risks.”

The campaign is threatening to drag big banks into a high-stakes antitrust debate even as they warn they need help from Washington to compete with financial technology upstarts. It comes as progressives play an increasingly influential role in Biden’s economic policy.

“Regulators have served as a rubber stamp for bank mergers for too long,” said Rep. Chuy García (D-Ill.), who with Sen. Elizabeth Warren (D-Mass.) has proposed legislation to overhaul how bank deals are considered. “These mergers have negative consequences for our communities. They mean more Wells Fargos and fewer local bank branches.”

The regional bank mergers at issue accelerated after moderate Democrats joined forces with Republicans in 2018 to ease lending regulations that Congress enacted after the 2008 global financial crisis.

Wall Street analysts are now predicting a merger wave, particularly after SunTrust’s easy combination with BB&T in 2019 to form Truist, the nation’s sixth-largest commercial bank.

The deal boom was delayed by the pandemic. But an increasing number of regional lenders are now planning mergers to better position themselves against the biggest banks, like JPMorgan Chase and Bank of America, whose assets in the trillions of dollars will continue to dwarf the smaller competitors even after they consolidate.

The expected M&A rush may run into antitrust headwinds as top congressional Democrats turn their sights to industries like banking where many players are already considered “too big.”

**That’s key for regional banks to gain sufficient resources to invest in cyber-defenses**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

**Cyberattacks against small banks collapse the US financial system---they’re uniquely vulnerable**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

In the 21st century, first-order, single-point failures with profound second- and third-order effects are especially common in cyberattacks against complex systems. For one, the U.S. financial system is complex and highly interconnected, making it very vulnerable to a cyberattack.

The Federal Reserve Bank of New York (FRBNY) recently epitomized this interconnectivity in a report, arguing that a cyberattack could impair a bank’s ability to service creditors. More specifically, impairment of any of the five most active U.S. banks could result in significant spillovers to other banks, with 38% of the network affected on average.

Perhaps even more concerning, the FRBNY identified a subset of smaller banks that, if impaired, could threaten the solvency of a top-five institution. In particular, the FRBNY estimated it would take the financial distress of six small banks, each below $10 billion in assets, or just one institution with between $10 billion and $50 billion in assets.

More than 80 U.S. banks fall into the midsize bank category, with aggregate assets of approximately $1.8 trillion, while there are about 4,440 small banks, with cumulative assets of around $4.7 trillion. Combined, the midsize and small banks account for about 36% of all commercial banking assets. This indicates that the complexity of the U.S. banking system may not be driven solely by the “megabanks.”

A cyberattack on these banks, which appear benign in isolation and have simpler balance sheets, could ultimately cause a cascading failure of interbank funding, leading to a tipping point for a broader systemic liquidity crisis.

At a glance, when viewed with typical “first-order thinking,” this is deeply troubling, because larger banks tend to have more resources and invest more in building robust cybersecurity than smaller banks. Even if a large bank puts in place a proper cybersecurity policy with the right controls for its own protection, which it absolutely needs to do, it may not be enough.

The issue is not just building a bigger cybersecurity “moat and castle.” Instead, financial institutions need to understand the interconnectedness of their entire ecosystem, integrating cyber risk, vendors, liquidity sources, off-balance-sheet exposures, etc.

More thoughtful analysis, using second- and third-order thinking, indicates that cyberattacks by their very nature know no physical boundaries and can spread rapidly across the globe. We know this from the infamous NotPetya attack in 2017, when a worm planted in Ukrainian tax software managed to infect not just Ukrainian critical infrastructure, but also the largest global shipper, A.P. Moller-Maersk, and the big pharmaceutical company Merck as well as a chocolate factory in Australia.

In a system like banking that is already highly interconnected in its own right, one would expect the overall impact on the U.S. financial system to be even greater. The FRBNY’s paper is a very important illustration of how an operational risk can rapidly lead to grave financial risk.

#### That causes nuclear war

Tønnesson 15 - Stein Tønnesson 15, Research Professor, Peace Research Institute Oslo; Leader of East Asia Peace program, Uppsala University, 2015, “Deterrence, interdependence and Sino–US peace,” International Area Studies Review, Vol. 18, No. 3, p. 297-311

Several recent works on China and Sino–US relations have made substantial contributions to the current understanding of how and under what circumstances a combination of nuclear deterrence and economic interdependence may reduce the risk of war between major powers. At least four conclusions can be drawn from the review above: first, those who say that interdependence may **both inhibit and drive conflict** are right. Interdependence raises the cost of conflict for all sides but asymmetrical or unbalanced dependencies and **negative trade expectations** may generate tensions leading to trade wars among inter-dependent states that in turn increase the risk of military conflict (Copeland, 2015: 1, 14, 437; Roach, 2014). The risk may increase if one of the interdependent countries is governed by an inward-looking socio-economic coalition (Solingen, 2015); second, the risk of war between China and the US should not just be analysed bilaterally but include their allies and partners. Third party countries could drag China or the US into confrontation; third, in this context it is of some comfort that the three main economic powers in Northeast Asia (China, Japan and South Korea) are all deeply integrated economically through production networks within a global system of trade and finance (Ravenhill, 2014; Yoshimatsu, 2014: 576); and fourth, decisions for war and peace are taken by very few people, who act on the basis of their future expectations. International relations theory must be supplemented by foreign policy analysis in order to assess the value attributed by national decision-makers to economic development and their assessments of risks and opportunities. If leaders on either side of the Atlantic begin to seriously **fear or anticipate their own nation’s decline** then they may blame this on external dependence, appeal to anti-foreign sentiments, contemplate the use of force to gain respect or credibility, adopt protectionist policies, and ultimately **refuse to be deterred by** either **nuclear arms** or prospects of socioeconomic calamities. Such a dangerous shift could happen **abruptly**, i.e. under the instigation of actions by a third party – or against a third party. Yet as long as there is both nuclear deterrence and interdependence, the tensions in East Asia are unlikely to escalate to war. As Chan (2013) says, all states in the region are aware that they cannot count on support from either China or the US if they make provocative moves. The greatest risk is **not** that **a territorial dispute** leads to war under present circumstances but that **changes in the world economy** alter those circumstances in ways that render inter-state peace more precarious. If China and the US fail to rebalance their financial and trading relations (Roach, 2014) then a trade war could result, interrupting transnational production networks, provoking social distress, and exacerbating nationalist emotions. This could have unforeseen consequences in the field of security, with nuclear deterrence remaining the only factor to **protect the world from Armageddon**, and **unreliably so**. Deterrence could **lose its credibility**: one of the two great powers might gamble that the other yield in a cyber-war or conventional limited war, or third party countries might engage in conflict with each other, with a view to obliging Washington or Beijing to intervene.

### OFF

#### The court is moderating in response to public concerns over legitimacy – Roberts especially is concerned with maintaining the court’s institutional standing

Thomson-DeVeaux and Wiederkehr 20 – Amelia Thomson-DeVeaux is a senior writer for FiveThirtyEight. Anna Wiederkehr is a senior visual journalist for FiveThirtyEight. Citing political science professors from several universities.

Amelia Thomson-DeVeaux and Anna Wiederkehr, “The Supreme Court’s Big Rulings Were Surprisingly Mainstream This Year,” *FiveThirtyEight*, 13 July 2020, https://fivethirtyeight.com/features/the-supreme-courts-big-rulings-were-surprisingly-mainstream-this-year/.

The Supreme Court just wrapped up its first full term with two of Trump’s nominees on the bench. But the court’s much-anticipated conservative revolution didn’t really happen this year. To be sure, the last few weeks of the term were full of consequential decisions that hinged on just one vote. But even though there were some fierce disagreements among the justices, the court’s final rulings were actually not very controversial at all — at least from the perspective of most Americans.

According to a recent survey by a group of researchers at Stanford, Harvard and the University of Texas, Austin, which asked Americans about central issues facing the court, the justices’ rulings were in line with public opinion in 8 out of 10 major cases.1

There were just two exceptions. One was in a case that questioned the constitutionality of the structure of the Consumer Financial Protection Bureau; the Supreme Court ruled, contrary to a majority of Americans’ views, that the director of the CFPB was too insulated from executive branch oversight. The second was in one of the two rulings involving subpoenas seeking President Trump’s financial records. A majority of Americans said that the president should not be able to stop his financial documents from being turned over to Congress, but the Supreme Court stopped short of fully siding with the public. They didn’t entirely rule out Congress’s ability to subpoena these documents, but they did suggest there are serious limits on what Congress can demand from the president — suggesting he could block people from turning them over in some instances — and punted it back to the lower courts.

Maya Sen, a political science professor at Harvard University who helped develop the survey, said she was a little surprised to see that Americans leaned to the left on so many of the cases. “It seemed to set the stage for some potential dissonance between public opinion and how the court’s conservative majority might rule,” she said. And it certainly wasn’t hard to imagine that this term’s Supreme Court decisions would cut against the prevailing public view on issues like abortion or gay rights.

But that’s not what happened. So what does it mean that so many of the court’s high-profile rulings were also pretty mainstream? The justices are notoriously tight-lipped about how their decisions are made (and they probably aren’t using this or any other poll to guide their decisions), but several of the experts I talked with saw this term as evidence that the Supreme Court isn’t immune to the winds of public opinion — particularly in an election year when the possibility of court-packing and term limits for judges came up more than once.

For one thing, there’s evidence that it’s pretty rare for the Supreme Court to lurch too far from the mainstream. Several studies have found that the court’s ideological tilt generally matches the public’s over time. Of course, that isn’t because the justices are trying to tailor their opinions to match Americans’ views. These findings could simply indicate that the court is influenced by the same forces that shape public opinion overall.2

But it’s also possible that the demands of public opinion — and concerns about institutional legitimacy — were weighing particularly heavily on Chief Justice John Roberts this year. After all, the partisan gap in approval of the Supreme Court has widened significantly in recent years. And research by Peter K. Enns, a political science professor at Cornell University, suggests that nonideological considerations — like public opinion — have more of an impact on the justice who casts the decisive vote in close cases, which was a position Roberts occupied several times this year.

One explanation that came up multiple times in interviews is that Roberts may have wanted to bolster the image of the court as nonpartisan this term so it would have more freedom to release unpopular opinions in the future. “I think Roberts in particular is probably concerned about tarnishing the court with the reputation of being a wildly political branch that makes decisions the public doesn’t like,” said Tom Clark, a political scientist at Emory University who studies the Supreme Court’s relationship with public opinion. “He perhaps wants to preserve the court’s legitimacy and build up a reservoir of goodwill so they can make unpopular decisions in the future without having it blow up in their face.”

#### Plan increases court legitimacy – current jurisprudence wholly lacks legitimacy because judges restrain antitrust statutes without any justification – expanding antitrust reverses Congressional acquiescence by returning to doctrines of Congressional intent instead of judicially-created law

Crane 21 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust Antitextualism,” *Notre Dame Law Review*, vol. 96, no. 3, 28 January 2021, pp. 1253-1255, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr.

The phenomenon of antitrust antitextualism is important for understanding the U.S. antitrust system, its history, and the possibilities for its reform, but it also has significance for more general understandings of how statutes are written and how their interpretation functions or should function. Scholars have argued that Congress sometimes means statutory language to be purely expressive, indeed that it means for the courts not to give that language legal effect.262 But the story of antitrust antitextualism goes far beyond judicial excision of stray words or phrases from the antitrust statutes. In important instances, particularly with respect to the FTC and Robinson-Patman Acts, the courts have entirely rewritten the textual meaning and legislative purpose of the statute.263 Through a chronic cycle of legislative enactment, judicial disregard, and implicit legislative acquiescence, Congress and the courts have constituted the common-law system that judges and scholars across the political spectrum now consider normalized and perhaps even inevitable.

This pattern of judicial/legislative engagement (with the executive playing an enabling role) raises both analytical and normative questions for the jurisprudence of statutory interpretation. Analytically and descriptively, is antitrust law sui generis, or do other statutory domains exhibit a similar, but perhaps unrecognized, dynamic? Do the antitrust laws idiosyncratically operate in a space of equipoise between Jeffersonian idealism and Hamiltonian pragmatism, with Congress implicitly assigning itself the role of idealist orator while acquiescing as the courts provide pragmatic counterbalance? Or is this yin and yang phenomenon, disguised in the interpretive rhetoric of broad delegations and common-law method, a more general one, in maybe unappreciated ways? Once a pattern is observed in one legal domain, it tends to be observed soon in others as well. Finding a recurrence of the antitrust pattern elsewhere could provide new insights on statutory interpretation, separation of powers, and the de facto institutional roles of the legislative and judicial branches.

Normatively, there is much to question about the democratic legitimacy of the implicit system of legislative declaration and judicial reformation described in this Article. There seems little in it that either a committed textualist or a committed purposivist could defend, since the system entails the courts honoring neither what Congress wrote nor what it meant. To rehabilitate the system’s democratic legitimacy, a subtle purposivist might say that what Congress actually meant—in a deep sense—must be gathered from the norms of the system itself rather than from conventional evidence such as floor statements by members of Congress, committee reports, or other contemporaneous sources of public meaning. Perhaps members of Congress legislate against a backdrop of expectation that the courts will continue to read down new statutes to accommodate pragmatic efficiency interests, and consenting to this implicit system, the members feel liberated to express more in the statute than they actually mean as prescriptive. But if that is wholesome democratic practice, that case is yet to be made.

Finally, if the system lacks democratic legitimacy, there is the question of how to begin unwinding it—and whether anyone has the incentive to try. Most committed textualists are also committed economic conservatives;264 it would take abundant motivation from pure principle for the average Federalist Society judge to restore the original meaning of the Robinson-Patman Act or the Clayton Act’s incipiency presumption, much less mount a cataclysmic return to section 1’s absolutist prohibition on agreements restraining trade. Progressive judges, perhaps looking for leverage to unwind the perceived laxity of Chicago School antitrust, might invoke statutory text or original meaning as a foil, but they too face Pandora’s Box. To insist on taking at face value Congress’s words and ostensible purposes—words and purposes to which Congress itself might not have been fully committed—would risk considerable backlash after the long reign of moderating common law and the system’s reliance on the courts to correct Congress’s textual overstatements. So maybe it should count in favor of the system’s normative legitimacy that it has worked for 130 years without anyone complaining too much.

#### Low court legitimacy prevents the Court from overturning Roe v. Wade now – it’ll only overturn major precedents if it gets a greenlight to move the court in a controversial direction

Stohr 20 – Supreme Court reporter for Bloomberg News. JD from Harvard.

Greg Stohr, “Roberts faces moment of truth on abortion issue at Supreme Court,” *Bloomberg News*, 28 February 2020, https://www.bloomberg.com/news/articles/2020-02-28/roberts-faces-moment-of-truth-on-abortion-issue-at-supreme-court.

For U.S. Chief Justice John Roberts, the moment of truth on abortion is coming.

The Supreme Court on Wednesday will hear its first abortion case since Roberts became the pivotal vote on the issue. Four years after invalidating a Texas law requiring clinic doctors to have hospital admitting privileges, the court will consider whether to switch directions and uphold a similar law in Louisiana.

The argument will test Roberts’s appetite for rolling back abortion-rights precedents and could foreshadow a fight over the landmark 1973 Roe v. Wade ruling. The justices will rule by the end of June, potentially making abortion and the court itself central issues in the November election. President Donald Trump’s administration is supporting the Louisiana law.

Opponents say the law would leave the state with only one clinic, in New Orleans, and just one abortion doctor to serve the 10,000 women who seek to end a pregnancy every year in the state.

“Roe becomes meaningless if there is no access to abortion,” said Kathaleen Pittman, director of the Hope Medical Group for Women, a Shreveport clinic that says it would have to close if the measure took effect. “These women that we work with now do not have the means to travel, to fly out of state, to go to other places for their care.”

Conservative states have been moving to sharply restrict abortion rights in recent years. States enacted 58 new abortion restrictions alone, including a total ban by Alabama, according to the Guttmacher Institute, a research organization that backs reproductive rights. Many of those laws are on hold.

Supporters of the Louisiana measure, which carries criminal penalties, say the state is trying to protect women from unscrupulous and incompetent abortion providers. Among other arguments, they are urging the court to say that Hope and two unidentified doctors lack the legal right to challenge the law on behalf of their patients.

“We need to be listening to women, not to abortion businesses,” said Catherine Glenn Foster, president of Americans United for Life.

Roberts — now back at the court full-time after presiding over Trump’s impeachment trial — dissented from the 2016 ruling that struck down the Texas rules and gave abortion-rights supporters reason to think the issue was resolved. The 5-3 decision said the state’s law “provides few, if any, health benefits for women” and “poses a substantial obstacle to women seeking abortions.”

That was before the court’s composition changed with the addition of Trump appointees Neil Gorsuch and Brett Kavanaugh. The latter succeeded Justice Anthony Kennedy, who had been the court’s swing vote on abortion and voted with the majority to throw out the Texas law.

Those changes have left Roberts, a 2005 appointee of Republican President George W. Bush, squarely in the middle. Last year he joined the four Democratic-appointed justices to put the Louisiana law on hold while the court considered whether to intervene. Kavanaugh and Gorsuch both voted to let the law take effect, hinting they were at least open to upholding it.

Roberts’ vote might suggest he has questions about the federal appeals court ruling that upheld the Louisiana law. The 2-1 decision said the impact wasn’t as great as in Texas, and the majority blamed Louisiana doctors for not making good-faith efforts to get the required privileges.

But Roberts gave no explanation for his vote, and he may view the Louisiana law differently now that the court is directly considering it.

If he votes to throw out the Louisiana law, “it will be an indication that he wants to move slowly on abortion and does not want to expose the court to a lot of criticism, at least at this point,” said David Strauss, a constitutional law professor at the University of Chicago Law School who signed a brief urging the court to strike down the law.

If Roberts votes to uphold the Louisiana statute, “that will suggest that he’s willing to be more aggressive, although a lot will depend on how the opinion is written,” Strauss said.

Roberts steered the court toward restricting abortion rights in a 2007 ruling he could use as a template. That decision, issued during Roberts’ second term as chief justice, upheld a federal ban on a rarely used late-term abortion procedure that opponents called “partial-birth abortion.”

The decision, written by Kennedy, didn’t overturn a 2000 ruling that struck down a similar Nebraska ban. Instead, Kennedy said the federal statute was clearer in describing what procedures were outlawed and how doctors could ensure they wouldn’t be prosecuted.

Roberts is far more reluctant to overturn precedents than his conservative colleagues. He said in his 2005 Senate confirmation hearing that overruling a precedent is a “jolt to the legal system.”

In that testimony, he called the 1992 Planned Parenthood v. Casey abortion-rights ruling a “precedent of the court entitled to respect under principles of stare decisis,” the policy that the court generally won’t disturb its settled rulings.

In the hospital-privileges case, abortion-rights advocates say the Texas and Louisiana rules are identical. Louisiana says there are enough differences that the court need not rule the same on both, but the state says the court should overturn the Texas ruling if necessary.

#### Reproductive rights key to solve overpopulation and systemic death – solves climate change and food shortages

Schlanger 14

Zoë Schlanger is a Newsweek reporter based in New York, Elijah Wolfson is Newsweek's Senior Editor, primarily responsible for the publication's science, health and technology coverage, Newsweek, December 18, 2014, “How to Defuse the Population Bomb”, http://www.newsweek.com/2014/12/26/fixing-crowded-earth-293024.html

It’s an ancient problem, with a very obvious solution: give women full reproductive rights, including easy access to contraception and other family-planning options. Family planning and reproductive health are some of the most crucial tools for reducing human suffering in a changing and increasingly crowded world.

No Food, No Water

Like many Kibera residents, Akinyi moved to the city only recently—she arrived a year ago from “the upcountry.” It’s not clear how many people live in Kibera, but the Kenyan census says that at least 200,000 are crammed into this makeshift, two-square-mile shantytown. The impact of this massing of humans is like a physical blow: The land and city infrastructure can’t keep up with the people. Step between the houses of Kibera and into a back alley and you are likely to come across gulches carved into the dirt by streams of wastewater, the ad hoc sewage system here, and garbage and waste piled high.

Kenya is in the midst of a population explosion. With a high fertility rate—the average Kenyan woman has 4.5 children, compared with 2.3 worldwide—Kenya’s population of 44 million is projected to more than double to 97 million by 2050. Meanwhile, more than a quarter of Kenyan women are still unable to access the contraceptives they want. Despite over a century of family-planning aid work, it remains one of the most misunderstood aspects of international development. This is in large part because of Western efforts to apply a coercive form of population control under the guise of “family planning.”

Globally, birth rates are lower today than ever, and more women than ever before are masters of their own bodies. But global populations are still on the rise, and in many parts of the world—Africa most prominently—the problems created by a lack of reproductive rights are getting more dire. In 1650, there were about 500 million people on Earth. By 1804, the population had doubled to 1 billion. In just 123 years, it doubled again, to 2 billion, and it doubled yet again, to 4 billion, by 1974. The world’s population passed 7 billion in 2011. The latest U.N. projections suggest we’ll be up to 12.3 billion by 2100, with no stabilization in sight.

Meanwhile the rest of Earth’s flora and fauna are being pushed aside. We are in the midst of the biggest mass-extinction event since the dinosaurs were obliterated 65 million years ago. A recent paper in Science found that plant and animal species are now going extinct at least 1,000 times faster than they did before humanity’s arrival, due mostly to human-caused habitat destruction and climate change. Some scientists have taken to describing our current epoch as the Anthropocene, to highlight the fact that humans have irreversibly changed the ecological makeup of the planet.

In the 1970s, with the global population hovering around 4 billion, humanity began using more resources than the Earth could replenish each year, and was producing more waste than it could absorb, pushing us all deeper and deeper into “ecological overshoot,” according to California think tank Global Footprint Network. It estimates that in 2014 humans used the resources of 1.5 Earths.

Most of the population growth is occurring in African nations. The continent hosts 15 percent of the world’s people; by 2050, the U.N. projects, that number will be closer to 25 percent. This is particularly problematic, because much of the continent is also where people are less able to adapt to the effects of overpopulation, says John Wilmoth, director of the U.N. Population Division. If the world can’t meet Africa’s need for family planning, the result will be more and more poor, and poorly educated, people, he says. Kenya, Ethiopia and Malawi, for example, are three nations where large numbers of women can’t get the contraception they need and are at high risk for climate change effects like flooding and drought.

As climate change turns more coasts into flood zones and more farmland to desert, the damage will be inextricably linked to population growth—the more of us there are, the more water, food and energy we’ll need to survive. In the past three years, Australia, Canada, China, Russia and the U.S. have all suffered devastating floods and droughts that severely impaired food harvests. Earlier this year, the Food and Agriculture Organization said that to feed a population of 9 billion in 2050, the world must increase its food production by an average of 60 percent or else risk serious food shortages that could bring social unrest and civil wars. By comparison, wheat and rice production have grown at a rate of less than 1 percent for the past 20 years.

Mark Montgomery, a scholar at the Population Council, studies how the urban population boom will cause dramatic freshwater shortages. By 2050, the U.N. projects that 70 percent of the world’s population will live in cities. Already, 150 million people in cities around the world suffer from freshwater shortages. In a recent paper, Montgomery and his colleagues found the number of urbanites with inadequate water will rise by more than 1 billion by 2050, and cities in certain regions “will struggle to find enough water for the needs of their residents.”

The Big Taboo

Roger-Mark de Souza is fed up. The director of the population, environmental security and resilience arm of the Wilson Center, a government think tank in Washington, D.C., he says most of the discussion about adapting to climate change ignores the population explosion. “If you have all of these initiatives being put in place, and you have ongoing population growth, to what end?” he asks. “If we only invest in programs that do not take into account these broader social interventions, there is a missed opportunity.”

The Green Climate Fund, perhaps the most high-profile fund helping developing countries adapt to climate change, does not say anything about population on its website. The United Nations Framework Convention on Climate Change, which manages climate-focused “national adaptation programmes of action” for the least-developed countries, devotes a section of its website to the role gender plays in climate change. Women, it explains, are more vulnerable to its ravages and must be included in adaptation efforts. But family planning and contraception aren’t on the official list of adaptation projects.

This failure has been exacerbated by the long and ugly history of wealthy, predominantly white powers manipulating family planning on the continent for several centuries. Europeans came to Africa “looking for bodies,” says Nwando Achebe, a professor of history at Michigan State University. First was the slave trade. Then came the colonist era, when Europeans settled in Africa, establishing massive farms and plantations requiring local labor. Both groups of invaders “needed a population of able-bodied Africans,” says Achebe. “They were enacting laws to make sure the population grew.”

Columbia University history professor Matthew Connelly argues that the 20th century was filled with wrong-minded approaches to family planning that have ranged from using risky contraceptives on unwitting clients—in 1967 a Ford Foundation report praised a proposal for a new technology involving “an annual application of a contraceptive aerial mist” (from a single airplane over India)—to offering cash incentives to poor people who agreed to be sterilized. Policies like these “made family planning seem like an imposition, rather than something that served clients’ own ­interests,” writes Connelly, and the backlash was ferocious. Revolutionary leaders worldwide (including Daniel Ortega in Nicaragua and Zulfikar Ali Bhutto in Pakistan) attacked family planning as a symbol of American imperialism, and the Vatican jumped on board, helping organize a global campaign against family-planning efforts, which just happened to line up with the Catholic Church’s official stance on procreation, particularly in developing countries.

In 1984, President Ronald Reagan instituted what has become known as the “global gag rule” (officially the Mexico City Policy), which stopped U.S. dollars from flowing to any international family-planning groups that provided abortions. The rule also stipulated that any organization receiving U.S. funding could not educate patients on abortion or take a stand against unsafe abortion. President Bill Clinton repealed the policy in 1993, George W. Bush reinstated it in 2001, and Barack Obama repealed it again in 2009. If a Republican takes the presidency in 2016, the gag rule will likely come back.

When the gag rule was in effect, United States Agency for International Development (USAID) funding to family-planning organizations plummeted. Clinics providing everything from condom distribution to HIV/AIDS treatment to neonatal care cut back their staff and services, and in some cases shuttered their doors entirely. In some cases, the rule backfired: Kelly Jones, a senior researcher at the International Food Policy Research Institute, found that in Ghana during gag rule periods, rural pregnancies increased by 12 percent and the rural abortion rate increased right along with it, going up by 2.3 percent.

Meanwhile, U.S. funding for family planning abroad has flatlined for several years, at about $530 million, although it would take relatively little money to make an enormous difference. For every dollar spent on family planning, USAID’s website boasts, up to $6 is saved on health care, immunization, education and other services. Put another way, every dollar not spent on family planning will cost the U.S. up to $6 more in the long run. “It’s not difficult to understand that contraceptive devices are relatively cheap compared to the cost of building roads and schools and hospitals,” Wilmoth, the head of the U.N. Population Division, says. “So it’s not for lack of money that it isn’t accomplished.”

While the West waffles on providing aid for family planning, “Africans are asking for [it],” says Faustina Fynn-Nyame, Marie Stopes’s country director for Kenya, who is from Ghana. “Africans see the importance of this. It’s not the West telling us to do something.”

Leaving Half the Population Behind

In 2012, the estimated number of unintended pregnancies was 80 million (63 million in the developing world). World population growth? Also 80 million. In other words, if women all over the world had the ability to prevent the pregnancies they don’t want, the world’s population would stabilize.

That would immediately improve both maternal and infant health. In most parts of the global south, access to abortion is either extremely limited or prohibited. In Kenya, a nurse was sentenced to death for providing abortions this past September. Any pregnancy terminations in Nairobi have to be done on the backstreets, often using DIY drugs made by chemists more concerned with sales than efficacy, says Njagi, the Marie Stopes clinic manager. That’s how Florence Akinyi ended up nearly bleeding to death in a wheelbarrow.

Worldwide, it’s estimated that 20 million women have unsafe abortions every year because they lack better options. Over 5 million of them end up needing urgent medical attention, and 47,000 die in the process. In addition, in the developing world pregnancies are often dangerous. Every year, an estimated 358,000 women die during childbirth, and many more suffer debilitating pregnancy-related health problems. In sub-Saharan Africa, the lifetime risk of dying from pregnancy-related problems is 1 in 22. Lower pregnancy rates and you lower those risks—fewer pregnancies means resources don’t have to be spread dangerously thin.

Since 2011, the United Nations Population Fund (working to “ensure universal access to reproductive health, including family planning”) has been led by Dr. Babatunde Osotimehin, a Nigerian national. At the U.N. General Assembly meeting in September, Osotimehin urged the group to focus on gender equality. “We cannot advance by leaving half of the population—our women and girls—behind,” he said. At the same meeting, Bathabile Dlamini, a representative of South Africa, said her country had recently implemented policies allowing access to safe abortion services and had seen an increase in life expectancy from 54 in 2005 to 60 in 2011.

Of course, abortion is the last resort; it’s far better to help women before conception. According to research from the Guttmacher Institute, 39 percent of all pregnancies in sub-Saharan Africa—an estimated 19 million—were unintended in 2012. Of those 19 million, the institute estimates 10 million resulted in unplanned births, 3 million in miscarriages and 6 million in abortions, most performed in unsafe conditions. Providing access to contraception for every woman in sub-Saharan Africa who wanted it might prevent 5 million abortions and save the lives of 48,000 women. What’s more, 555,000 fewer newborns and infants would die, cutting infant mortality in the region by 22 percent.

Many Kenyan women would like to have power over how many children they have, and when. “We have a high unmet need,” says Fynn-Nyame, adding that “20.9 percent of married women say they want to control their fertility somehow but don’t have the access, money or awareness of where to go.”

In the developing world, 222 million women want contraceptives but can’t get them. (That is more than the population of Germany, France, Belgium, Spain and the Netherlands combined, notes a video by Population Action International.) Meeting their needs would have prevented 54 million unwanted pregnancies, 26 million abortions, 79,000 deaths of mothers in pregnancy or childbirth and 1.1 million infant deaths in 2012 alone.

Plus, contraceptives let women space out births, leading to far healthier children. If all families in the developing world put a three-year gap between pregnancies, almost 2 million fewer children under 5 would die each year, according to research from the USAID.

The problem is that too many of these important decisions are taken out of women’s hands. Over 10 percent of Kenyan women report being raped by their partners. “Women have very little power when they are having sex within their marriage,” says Fynn-Nyame. A woman might know that she’s at a fertile point in her menstrual cycle, but she won’t be able to negotiate with her husband. If he wants sex, she has to give in.

Fynn-Nyame says a lot of the work her team does is with men. It works, she says, particularly among young men. The problem is that misinformation about contraceptives is so endemic that even men who want to participate in family planning either don’t know how or don’t have the access. For example, recent research shows that young Kenyan men in universities will often have a glass of water and the morning-after pill ready for their date to take before sex. It’s effective—though not exactly healthy for the woman who takes it. But “what else are you going to do?” asks Fynn-Nyame. “You want to finish your education and have a different life—you have all these dreams and aspirations.”

‘God Will Provide’

Achebe’s first name, Nwando, is a shortened version of Nwabundo, an Igbo word that translates roughly to “a child is the shade.” She says, “It means as the youngest daughter, I’m expected to stay with my parents as they grow old and shade them as a tree. Let my lineage not end. Let my path not close. These are names that Africans give their kids.”

In much of the developing world, there remains a deep-seated imperative to have as many children as possible. In part, this is due to the pernicious influence of colonialists and missionaries, but it also stems from many decades ago, when child mortality was so high that if you wanted to have a few kids, you had no choice but to follow one pregnancy with the next. This is particularly the case among people who live off of subsistence farming in the rural areas, who feel that “the more hands we have, the more work we can do, and the more money we can take in,” says Fynn-Nyame. Children are also considered an investment for a parent’s old age. After all, if you have eight children, there’s a chance at least one will have the wherewithal to care of you when you grow too old to care for yourself. And it doesn’t matter if you can’t afford eight children right now. “If you ask people whether they can afford these children,” says Achebe, “the answer is always, ‘God will provide.’”

Meanwhile, too many children lack information about sex and procreation. Many of the women in the Marie Stopes Kibera clinic come alone, with no real knowledge of their options. Often they will have been told by their husband what contraceptive to ask for—usually they are told to avoid intrauterine devices (IUDs) because it “makes sex less fun,” says Njagi. “I try to teach them about their options so they can make a more informed decision.”

And that might just be IUDs, which are one of the best forms of birth control—they have a failure rate of less than 1 percent, while birth control pills have a failure rate of between 8 and 9 percent. Plus, in regions where the health care infrastructure is shoddy, relying on a daily supply only drives up failure rates. As Elaine Lissner, director of the Male Contraception Information Project, puts it, “If you’re somewhere on the pill and the pill truck doesn’t show up one month, you’re pregnant.”

The Great Girl Bounce

What would happen if contraception suddenly became a universal right?

It did, in Bangladesh, which is seasonally flooded from Himalayan ice melt and is regularly bombarded by cyclones. The rising sea level, driven by climate change, is projected to wipe out 17 percent of its landmass by 2050 and displace 18 million people.

In the 1970s, Bangladesh, freshly independent, concluded it was growing too quickly—it was on pace to nearly triple its size in four decades. Women on average gave birth to more than six children. So the government made contraception free and distributed it widely.

In 1975, 8 percent of Bangladeshi women used contraception. By 2010, the number was over 60 percent. At the same time, educational opportunities increased: More than 90 percent of girls enrolled in primary school in 2005. Just five years earlier, female enrollment was half that number, according to The Economist. Women’s literacy hit 78 percent in 2010, compared with just 27 percent in 1981. Women who had an average of six children in the 1970s have roughly 2.2 children today. That fertility rate is well below India’s and far lower than Pakistan’s. Bangladesh is now the only developing country on track to meet the Millennium Development Goals for child and maternal health.

“This is not just a medical issue; it is a social issue as well,” the U.N.’s Wilmoth says. “The Bangladesh program did that community by community, with these women who would talk to people. It’s amazing that [the fertility rate] has fallen that low in a country so poor. It’s an example of what’s possible.”

The “Iranian miracle” is another example. It was the steepest population drop ever recorded—faster even than China’s one-child policy. And it came without coercion.

In the late 1980s, Iran’s Ayatollah Ruhollah Khomeini reversed a pro-natal policy meant to produce soldiers for the war against Iraq. Persuaded that the Iranian economy could not handle the bloated population, he issued fatwas making contraception available for free at government clinics. State-run TV broadcast information about birth control, and health workers educated patients on family planning as a means to leave more time between births. The fertility rate fell from seven births per woman in 1966 to fewer than two today. The plunging birth rate, coupled with increasing public education for girls, shifted the role of women in Iran. More women postponed childbirth to attend college, and now the country’s universities are 60 percent female.

But in 2006 the-President Mahmoud Ahmadinejad attempted to halt the decline, calling the family-planning programs a “prescription for extinction,” according to the Los Angeles Times. He urged Iranian girls to marry young, offered cash incentives per child, and thegovernment recently outlawed permanent surgical contraception. But it hasn’t worked. “Iranian women are not going back,” Sussan Tahmasebi, an Iranian women’s rights leader, told the Times.

When women can have fewer children further apart, the effect on their lives is dramatic and immediate. They have more time to pursue education and get jobs, earning money that they are more likely to invest back into their family and community than their male counterparts do. They lead healthier lives and have healthier children. The power dynamic between men and women can change too: Women with more access to resources are less frequently victims of domestic violence, according to USAID.

The Aspen Institute estimates that if all women globally had access to the contraceptives they want, the reduction in unwanted pregnancies would translate into an 8 to 15 percent reduction in global carbon emissions. Fewer people would be in harm’s way as sea levels rise and farmland dries out, and less pressure on resources already stretched thin would mean less violent conflict over those resources.

#### Extinction – increasing reproductive rights is key

Ehrlich 13

Paul R. Ehrlich is the Bing Professor of Population Studies, and President, Center for Conservation Biology at Stanford University, Millennium Alliance for Humanity and Biosphere, November 5, 2013, “Overpopulation and the Collapse of Civilization”, http://mahb.stanford.edu/blog/overpopulation-and-the-collapse-of-civilization/

A major shared goal of the Millennium Alliance for Humanity and the Biosphere (MAHB) and Sustainability Central is reducing the odds that the “perfect storm” of environmental problems that threaten humanity will lead to a collapse of civilization. Those threats include climate disruption, loss of biodiversity (and thus ecosystem services), land-use change and resulting degradation, global toxification, ocean acidification, decay of the epidemiological environment, increasing depletion of important resources, and resource wars (which could go nuclear). This is not just a list of problems, it is an interconnected complex resulting from interactions within and between what can be thought of as two gigantic complex adaptive systems: the biosphere system and the human socio-economic system. The manifestations of this interaction are often referred to as “the human predicament.” That predicament is getting continually and rapidly worse, driven by overpopulation, overconsumption among the rich, and the use of environmentally malign technologies and socio-economic-political arrangements to service the consumption.

All of the interconnected problems are caused in part by overpopulation, in part by overconsumption by the already rich. One would think that most educated people now understand that the larger the size of a human population, ceteris paribus, the more destructive its impact on the environment. The degree of overpopulation is best indicated (conservatively) by ecological footprint analysis, which shows that to support today’s population sustainably at current patterns of consumption would require roughly another half a planet, and to do so at the U.S. level would take four to five more Earths.

The seriousness of the situation can be seen in the prospects of Homo sapiens’ most important activity: producing and procuring food. Today, at least two billion people are hungry or badly in need of better diets, and most analysts think doubling food production would be required to feed a 35% bigger and still growing human population adequately by 2050. For any chance of success, humanity will need to stop expanding land area for agriculture (to preserve ecosystem services); raise yields where possible; increase efficiency in use of fertilizers, water, and energy; become more vegetarian; reduce food wastage; stop wrecking the oceans; significantly increase investment in sustainable agricultural research; and move feeding everyone to the very top of the policy agenda. All of these tasks will require changes in human behavior long recommended but thus far elusive. Perhaps more critical, there may be insurmountable biophysical barriers to increasing yields – indeed, to avoiding reductions in yields – in the face of climate disruption.

Most people fail to realize the urgency of the food situation because they don’t understand the agricultural system and its complex, non-linear connections to the drivers of environmental deterioration. The system itself, for example, is a major emitter of greenhouse gases and thus is an important driver of the climate disruption that seriously threatens food production. More than a millennium of change in temperature and precipitation patterns is now entrained, with the prospect of more crop-threatening severe storms, droughts, heat waves, and floods— all of which are already evident. Thus maintaining – let alone expanding – food production will be ever more difficult in decades ahead.

Furthermore, agriculture is a leading cause of losses of biodiversity and the critical ecosystem services supplied to agriculture itself and other human enterprises, as well as a major source of global toxification, both of which pose additional risks to food production. The threat to food production of climate disruption alone means that humanity’s entire system for mobilizing energy needs to be rapidly transformed in an effort to hold atmospheric warming well below a lethal 5o C rise in global average temperature. It also means we must alter much of our water-handling infrastructure to provide the necessary flexibility to bring water to crops in an environment of constantly changing precipitation patterns.

Food is just the most obvious area where overpopulation tends to darken the human future – virtually every other human problem from air pollution and brute overcrowding to resource shortages and declining democracy is exacerbated by further population growth. And, of course, one of our most serious problems is the failure of leadership on the population issue, in both the United States and Australia. The situation is worst in the U.S. where the government never mentions population because of fear of the Catholic hierarchy specifically and the religious right in general, and the media keep publishing ignorant pro-natalist articles, and in Australia even advertise on prime-time TV to have more kids.

A prime example was a ludicrous 2010 New York Times screed by David Brooks, calling on Americans to cheer up because “Over the next 40 years, the U.S. population will surge by an additional 100 million people, to 400 million.” Equal total ignorance of the population-resource-environment situation was shown in 2012 by an article also in the New York Times by one Ross Douthat “More Babies, Please” and one by a Rick Newman in the USNews “Why a falling birth rate is a big problem,” both additional signs of the utter failure of the US educational system.

A popular movement is needed to correct that failure and direct cultural evolution toward providing the “foresight intelligence” and the agricultural, environmental, and demographic planning that markets cannot supply. Then analysts (and society) might stop treating population growth as a “given” and consider the nutritional and health benefits of humanely ending growth well below 9 billion and starting a slow decline. In my view, the best way to accelerate the move toward such population shrinkage is to give full rights, education, and job opportunities to women everywhere, and provide all sexually active human beings with modern contraception and backup abortion. The degree to which that would reduce fertility rates is controversial, but it would be a win-win for society. Yet the critical importance of increasing the inadequate current action on the demographic driver can be seen in the decades required to change the size of the population humanely and sensibly. In contrast we know from such things as the World War II mobilizations that consumption patterns can be altered dramatically in less than a year, given appropriate incentives.

### OFF

#### Interpretation---prohibit means to forbid a given practice---that’s distinct from restriction.

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### Violation---exemptions based on the rule of reason means practices are not prohibited.

Skoczny 01 – Professor of law, Holder of the Jean Monnet Chair on European Economic Law at the Warsaw University Faculty of Management

Tadeusz Skoczny, “Polish Competition Law in the 1990s - on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules,” European Business Organization Law Review, Vol. 2, Issue 3-4, September 2001, LexisNexis

Most importantly, the new Act departed from the relativity of the prohibition of dominant position abuses; as in Article 82 EC Treaty, it is now a general prohibition which does not allow for exemptions on the basis of a rule of reason. Also new is the prohibition of the abuse of dominant position by groups of undertakings, which will allow to effectively control the state and the development of competition on oligopolistic markets. The Act also eliminated the distinction between monopolistic and dominant position; in theory and in practice, it was difficult to justify the maintenance of this distinction. Therefore, the Act relates only to a dominant position, the definition of which however has been changed. According to the new Article 4 point 9, dominant position means a position "which allows [the undertaking] to prevent effective competition on the relevant market thus enabling [the undertaking] to act to a significant degree independently from its competitors, contracting parties and consumers". It is easy to notice that this definition is based on the United Brands and Hoffmann La-Roche standards. It must nevertheless be emphasised that such understanding of dominance was introduced by the AMC already in 1993; it considered dominance as the capacity to act "to a large extent independently of the competitors and clients, thus also the consumers". Thanks to the AMC's judgements also the relevant product and geographical markets are defined on the basis of the criteria of "close commodity substitutability" and "homogenous competition conditions".

#### That’s a voter for limits and ground---allowing exemptions on the rule of reason lets the aff straight turn core topic DAs and get advantages based off clarifying vague statutes.

### OFF

#### The United States Federal Trade Commission should:

#### determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

#### issue cease and desist letters to companies engaging in private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards, stating that their conduct constitutes a violation of Section 5 of the FTC Act.

#### Broad FTC authority means the counterplan solves

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

#### Maintains incentives for innovation

Dagen 10 – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

d. Efficiency Considerations Weigh in Favor of Use of Section 5 Enforcement, but Not Sherman Act

Critics might argue that Section 5 enforcement has resulted in at least one firm leaving a standard-setting organization. Rambus’s counsel advised Rambus of the risks of equitable estoppel well before the Dell decision, yet Rambus continued to participate in JEDEC.260 It was very soon after Dell that Rambus withdrew from JEDEC.261 Thus, if the FTC enforces equitable estoppel principles, a firm with an intent to engage in “bad” conduct may leave.262 But this is not an undesirable thing – particularly in the case of Rambus, which gained valuable information during SSO deliberations but provided none.

Section 5 enforcement might increase the likelihood that potential hold-up victims participate in standard setting. Enforcement would encourage “innocent” firms to participate because they would be less likely to suffer from opportunistic behavior. The net would be an increase in standard setting.

Conversely, finding the negligent IP holder liable for treble damages under Section 2 could significantly deter firms from participating in standard setting or cause overinvestment in patent tracking. Treble damages for negligence (over and above an injunction) will generally exceed any patent law remedy.

If treble damages were available, unintentional conduct could be penalized significantly more than under laches. Rather than risking treble damages in addition to the loss of IP, firms might choose not to participate in standard setting.

In summary, monopoly gained through conduct that is within the control of the monopolist and not on the merits resembles monopolization, as the term is used by courts and in common parlance, rather than historic accident or luck. Such conduct is proscribed by patent law defenses and other external norms. Where external norms already exist, the incentive to engage in that conduct is already affected. The existence of a patent law defense, in conjunction with relief that is similar in nature to the patent law defense, mitigates any risk of harm to incentives. Using these defenses as one potential limiting principle ensures that no skill, foresight, or business acumen is involved. The deadweight social welfare loss associated with monopoly can be eliminated with minimal concern for false positives. The use of Section 5 in this way is consistent with Supreme Court precedent.263

### Innovation Adv.

#### Antitrust law fails – judges provide undue deference to patents.

Lemley 07 – William H. Neukom Professor of Law, Stanford Law School

Mark A. Lemley, “Ten Things to do About Patent Holdup of Standards (and One Not to),” Boston College Law Review, Vol. 48, 2007, https://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/48\_1/06\_lemley.pdf

C. Antitrust Law Can’t Solve the Holdup Problem

Note what is not on this list: antitrust law. I have made ten more or less radical proposals for doing something about patent holdup, and not one of them mentions antitrust, except to say antitrust law should get out of the way of SSOs. That’s not an accident. I think antitrust law serves a valuable purpose, but where the holdup problem is concerned, it is a backstop. In this particular circumstance, it’s a backstop that’s going to apply only if private efforts in SSOs and IP law have already failed us.

Even then, it is not clear that antitrust law is up to the task of policing patent holdup.88 Courts may be reluctant to second-guess what they see as the judgment of patent law to give certain rights to patent owners.89 Certainly, some courts have shown undue deference to patents even in circumstances that more clearly violate the antitrust laws.90 Further, proving an antitrust violation requires detailed evidence of both causation and intent, something that may be difficult even when, as a policy matter, a patentee should not be permitted to extend its rights.91 We have yet to see a successful contested prosecution of standard-setting abuse.92 Antitrust law can play a role here in extreme cases, such as in In re Rambus, Inc.93 But if we design the patent law and the SSO rules correctly, those cases should not arise.

#### The aff’s misapplication of antitrust makes U.S. standards leadership impossible.

Isztwan 19 – Vice President, Litigation at InterDigital Communications

Andrew G. Isztwan, Brief of Amicus Curiae of Interdigital, Inc. in Support of Neither Party, FTC v. Qualcomm Inc., United States Court of Appeals for the Ninth Circuit, August 2019, LexisNexis

C. Importance of US Leadership in 5G

As an American company that has actively participated in the development of 5G standards since the beginning, InterDigital has a firsthand view of the current landscape of 5G implementation. As many commentators have noted, there are acute risks to US interests raised by 5G technology deployment. See, e.g., ER325 (United States Statement of Interest); ER312-24 (supporting declarations from Department of Defense and Department of Energy). While US consumers will be greatly affected by how 5G is ultimately implemented, 5G remains an international standard that is simultaneously being disseminated in the United States and throughout the world. Accordingly, if US companies do not maintain leadership in establishing the direction of both the underlying technological standards and the physical infrastructure, these will be dictated by foreign companies, often supported by their governments, whose interests may not be aligned with those of the United States.

As compared to some other countries, the United States has traditionally provided strong protection for intellectual property rights, with the goal of encouraging innovation. Further, "[t]he patent and antitrust laws are complementary in purpose in that they each promote innovation and competition . . . ." Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1352 (Fed. Cir. 1999). Promotion of innovation and consequent enhancement of consumer welfare requires striking an appropriate balance between intellectual property and antitrust in order to serve their common goals. Permitting antitrust theories with inadequate foundations to undermine intellectual property rights would not only decrease innovation, but has the potential to disable innovative US companies from effectively competing on a global scale. Particularly against the backdrop of the incipient rollout of 5G cellular technology, which promises to transform industries and significantly affect consumers, as well as the investments currently occurring in anticipation of the next generation of cellular standards, the Court should be mindful of whether and to what extent the antitrust theories asserted in this action can or should be used to prevent or limit the enforcement of intellectual property rights.

#### Their specific mechanism is uniquely likely to destroy standard setting.

Werden & Froeb 19 – Senior Economic Counsel in the Antitrust Division, U.S. Department of Justice; William C. Oehmig Chair of Free Enterprise and Entrepreneurship at Owen Graduate School of Management, Vanderbilt University

Gregory J. Werden, Luke M. Froeb, “Why Patent Hold-Up Does Not Violate Antitrust Law,” Texas Intellectual Property Law Journal, Vol. 27, No. 1, 2019, HeinOnline

D. A. Douglas Melamed and Carl Shapiro

Melamed and Shapiro argued that antitrust law provides an essential supplement to contract and patent law in dealing with "anticompetitive conduct" by SEP holders.187 They contended that "an SSO that does not take effective measures to prevent or minimize ... ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act."188 Melamed and Shapiro did not indicate what SSO rules would avoid liability, so they propose to create a risk of liability from which there is no safe harbor, a situation decried by the Supreme Court in Pacific Bell Telephone Co.189 More importantly, they ignored the possibility that the inventor did nothing to undermine ex interim competition and simply equated "harm to competition" with "obtaining royalties in excess of the competitive, ex ante level."190

Melamed and Shapiro further observed that: "Implementers that paid supracompetitive royalties … would be entitled to damages and, in some cases, to treble damages."191 But inventors would be unlikely to participate in an SSO with that threat hanging over them. And if that threat did not destroy standard setting, it would distort it. Melamed and Shapiro placed the onus on inventors to protect implementers, but having everyone look out for their own interests is the mechanism of competition and the plan of antitrust law.

#### Patent holdup is not a problem for competition – every empiric goes neg.

Ginsburg et al. 15 – Judge on the U.S. Court of Appeals for the District of Columbia, Professor of Law at George Mason University School of Law, and Chairman of the International Advisory Committee of the Global Antitrust Institute

Douglas H. Ginsburg, Koren W. Wong-Ervin, Joshua D. Wright, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” CPI Antitrust Chronicle, October 2015, https://www.law.gmu.edu/assets/files/publications/working\_papers/LS1537.pdf

It is important to distinguish the hypotheses generated in the theoretical literature on patent holdup from such empirical evidence as would substantiate those hypotheses. The existing empirical evidence is not consistent with the view that holdup is a prevalent or systemic problem and is causing harm to consumers.6 [FOOTNOTE 6 STARTS] See, e.g., J. Gregory Sidak, The Antitrust Division’s Devaluation of Standard-Essential Patents, 104 GEO. L.J. ONLINE 48, 61 (2015) (collecting studies at n.49) (“By early 2015, more than two dozen economists and lawyers had disapproved or disputed the numerous assumptions and predictions of the patent-holdup and royalty-stacking conjectures.”), available at https://www.criterioneconomics.com/docs/antitrust-divisions-devaluation-of-standardessential-patents.pdf; ANNE LAYNE-FARRAR, PATENT HOLDUP AND ROYALTY STACKING THEORY AND EVIDENCE: WHERE DO WE STAND AFTER 15 YEARS OF HISTORY? (Dec. 2014), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282014%2984&docla nguage=en (surveying the economic literature and concluding that the empirical studies conducted thus far have not shown holdup is a common problem). [FOOTNOTE 6 ENDS] The evidence required to support the new antitrust rules requires that there be a probability, not a mere possibility, of higher prices, reduced output, and lower rates of innovation.

In fact, as mentioned above, evidence from the smartphone market is to the contrary: Output has grown exponentially, while market concentration has fallen, and wireless service prices have dropped relative to the overall consumer price index (“CPI”).7 More generally, prices in SEP-reliant industries in the United States have declined faster than prices in non-SEP intensive industries.8 A recent study by the Boston Consulting Group found that globally the cost per megabyte of data declined 99 percent from 2005 to 2013 (reflecting both innovation making data transmission cheaper as well as the healthy state of competition); the cost per megabyte fell 95 percent in the transition from 2G to 3G, and 67 percent in the transition from 3G to 4G; and the global average selling price for smartphones decreased 23% from 2007 through 2014, while prices for the lowest-end phones fell 63 percent over the same period.9 All of this indicates a thriving mobile market as opposed to a market in need of fixing.

Economic analysis provides the basis upon which to understand the apparent disconnect between holdup theory and the available evidence. As economic theory would predict, patent holders and those seeking to license and implement patented technologies write their contracts so as to minimize the probability of holdup.

#### No royalty stacking – empirics are neg and firms have several strategies for mitigating burdens imposed

NRC 13 – National Research Council, operating arm of the United States National Academies of Sciences, Engineering, and Medicine, overseen by a governing board that consists councilors from each of the three Academies

“Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communications Technology,” National Research Council, National Academies Press, 2013, https://www.nap.edu/read/18510/chapter/1

Despite this concern, the committee has found no empirical evidence showing that royalty stacking currently suppresses the adoption or use of standard-compliant products. Firms can mitigate the burden from aggregate royalties in several ways.9 Some rights holders enter into cross-licensing arrangements with zero royalties or with royalties equal to the difference between the fees charged by each party. Patent pools exist for some standards, which reduce transaction costs and mitigate royalty stacking by setting a single fee for a portfolio license. Firms that own patents and sell products covered by those patents have incentives to charge low or zero royalties to promote the commercialization of their products. In addition, firms have strategic incentives to refrain from charging high royalties. Indeed, product prices have been dropping for devices such as mobile phones and laptop computers that support multiple standards for which there are thousands of declared SEPs owned by hundreds of entities. Furthermore, not all standards, even in the ICT area, invoke large numbers of patents with widely distributed ownership.

#### No democracy impact---new tech, non-state actors, military autonomy, and eroding institutional constrains undermine DPT

Potter, 16 - Assistant Professor in the Department of Politics at the University of Virginia (Philip B.K. Potter, "Four Trends That Could Put the Democratic Peace at Risk," *Political Violence at a Glance*, 10-14-2016,

The point is that it’s not democracy alone that matters. Rather it is the limits that these regimes can put on their leaders to force them to be careful and selective when doing things like making threats and starting fights. This also means it’s not a baked-in advantage that a democracy can take lightly – even well-meaning leaders in democracies have every incentive to figure out how to slip these constraints. Limits yield long-term advantages, but in the immediate term they tie leaders’ hands, preventing them from engaging with the international problems or opportunities that they feel they should.

There are four trends that indicate this process is well under way and is putting the “democratic advantage” at risk.

Militaries are less closely tied to voters

Democratic advantages in conflict are commonly traced to the nature of democratic militaries and their relationship with political power. Going all the way back to Kant, there has been the notion that societies with citizen soldiers and the vote are not going to support unnecessary wars when they are going to bear the costs. The problem is that Kant’s vision isn’t what modern armies look like, and they’re intentionally moving away from the target rather than toward it.

In the US, military service is all-volunteer, and the recruits are increasingly drawn from concentrated segments of society. This divorces the consequences of fighting from the day-to-day experience of most voters. Increasingly, this is a limited force supplemented by private sector contractors, placing even more distance between the individual with the gun and the democratic process.

The emphases on covert operations, Special Forces, and technological superiority further water down the link between society and soldiers. This was, in fact, part of the point of moving to an all-volunteer force and one of the rationales for investments in stealth, information technology, and precision guided munitions, e.g. the precision strike complex. By replacing bodies with dollars, planners have consistently sought to increase the flexibility that the US has in its use of force. In the immediate term, that goal makes sense – it allows policy makers to do what they believe needs to be done without having to worry about a fickle public. But over the long term, it has the potential to lead to less caution and selectivity when engaging in conflicts.

Adversaries are proliferating and changing

The emergence of non-state actors as a primary threat has further loosened constraints on leaders. The shift from the possibility of total war with the Soviet Union to myriad smaller-scale challenges accelerated the transition from a mass military to an elite, highly specialized force more isolated from society. Compounding the challenge, this type of adversary and conflict leads to more significant informational advantages for leaders, which make democratic constraints less binding. Citizens and political opposition are always playing catch-up with the executive when it comes to foreign policy information, but the challenge is harder when the adversaries are less familiar, the engagements shorter, and the issues more complex.

Technology is reducing constraint

New technologies are driving citizens and political opposition ever further out of the loop. The extraordinary rise of unmanned vehicles in combat reduces the risk of casualties and extends the range for projecting force. This has undeniable strategic advantages, but there is less visibility and, accordingly, less accountability associated with the use of this technology. This means leaders worry less about the ex-post constraints and costs that typically come with casualties.

Institutions and practices increasingly favor the president

The recent nuclear agreement with Iran was an executive agreement rather than a treaty. This is the norm – most international agreements are now unilateral actions of the president. A polarized Congress is ever more cautious in its exercise of what little foreign policy power it has; two years into the campaign against Islamic State and Congress still hasn’t weighed in one way or the other. In the US this is an expansion of the widely accepted argument that there are two presidencies – a constrained one in domestic politics and a relatively autonomous one abroad. What’s unappreciated is that this growing presidential autonomy (which may well be needed to run a Superpower) also decreases constraint and with it the foreign policy “advantages” we associate with democracy.

While these advantages are real, they are also fragile. Key institutional constraints – such as a robust political opposition and a knowledgeable citizenry – are susceptible to seemingly minor changes in institutions and/or practices that loosen the limits of leaders’ foreign policy decisions. As technologies advance, threats shift, and institutional constraints wax and wane, the foreign policy advantages embedded within democratic systems may begin to erode. The potential for such a shift is a possibility that should not be taken lightly.

### Cyber Adv.

#### Antitrust is a bad remedy for patent holdups – ensures over-deterrence and chills incentives to innovate – turns their cyber internal link

Kobayashi & Wright 09 – Professor of Law, George Mason University School of Law; Visiting Professor, University of Texas School of Law, Assistant Professor

Bruce H. Kobayashi, Joshua D. Wright, “Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup,” Journal of Competition Law & Economics, Volume 5, Issue 3, September 2009, https://academic.oup.com/jcle/article/5/3/469/764852?login=true

Second, because modification of breach of FRAND commitments might increase social welfare in some circumstances, efficient conduct might be over-deterred as a result of antitrust liability. Whereas the conventional argument in favor of treble damages is that super-compensatory damages are necessary to compensate for a low probability of detection of the violation, that argument does not make sense in the case of holdup. “Holdup,” as the definition suggests, requires the patent holder to announce to the SSO that it is violating the prior terms and “holding up” its members. The likelihood that this conduct would go unnoticed by the SSO members, whether the holdup is successful or otherwise, approximates zero. The case of treble damages for this sort of “open and notorious” conduct is weak. The concerns with over-deterrence are even greater when one considers follow-on private litigation and state remedies. To the contrary, the payment of expectation damages under contract law is not likely to generate these overdeterrence concerns.

Third, to the extent that one accepts the arguments, based on the analysis in NYNEX and Rambus, that breach of a FRAND commitment made in good faith involves an attempt by a lawful monopolist to raise prices, the Supreme Court has consistently made clear that the Sherman Act does not condemn high prices alone. Rather, as the Supreme Court notes in Trinko, the returns to the lawful monopolist are related to the pro-competitive incentive to innovate:

The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

In sum, antitrust enforcement creates the potential for significant error costs, increased transactions costs, and reduced social welfare.

#### Aff bad for increasing vendor numbers

Taylor 19 – Member of the USIJ Advisory Board, former Chair of the Antitrust Section of the American Bar Association, Fellow of the American College of Trial Lawyers, Lifetime Member of the American Law Institute, served as a Member on the 1992 Commission on Patent Law Reform appointed by the U.S. Secretary of Commerce

Robert P. Taylor, Brief of Amicus Curiae Alliance for U.S. Startups and Inventors for Jobs (USIJ) in Support of Appellant Qualcomm Incorporated, FTC v. Qualcomm Inc., United States Court of Appeals for the Ninth Circuit, August 2019, LexisNexis

IV. Reviving Antitrust Defenses to the Enforcement of Patents Will Further Erode the Incentives That Patents Are Intended to Provide.

Quite apart from its potential impact on Appellant and the cellular communications industry, another danger in the ruling of the court below is its potential impact on patent owners seeking to license their patents in the future. The decision below is a bad outcome generally for the development of new technologies, for entrepreneurs that give up comfortable and secure jobs to pursue new ideas, for the investors that have great but not unlimited tolerance for risk, and for the United States as a whole. A significant portion of the mechanism by which patents provide incentives for investment and entrepreneurial activities is one of perception - if inventors do not believe that their patents allow the capture of the market value of their inventions, many will simply focus their attentions elsewhere. The decision below, which would have the effect of destroying billions of dollars' worth of R&D investment - after the fact - can only discourage future investment by Appellant and others.

#### The aff fails – SSOs can’t constrain license terms for SEPs at will.

Wright 14 – Former Commissioner, Federal Trade Commission

Joshua D. Wright, “SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts,” George Mason Law Review, Vol. 21, No. 4, 2014, HeinOnline

Much of the call for SSO contract reform-whether under the guise of possible antitrust enforcement or friendly advice on contract drafting-is based upon the notion that SSOs bear a special responsibility for constraining the market power of SEP holders. Indeed, the possibility of SSOs constraining the exercise of SEP holders' market power is purported to be the primary benefit of filling gaps in SSO contracts. However, it is unlikely SSO contract reform can bear the burden its proponents place upon it. SSO members are a heterogeneous group including contributing members as well as non-contributing, adopting members, with widely varying incentives. It is important to recognize that SSOs are not necessarily in a position to constrain license terms for SEPs at will. SSOs compete to attract key players to join and contribute their technology to the standard and can be at the mercy of certain members with essential technologies. However, even assuming arguendo SSO contract terms can constrain market power newly created by adoption of the standard, that situation is clearly not always the case. For some SEPs, the relevant market power will be inherent in the underlying technology and the patents themselves, rather than conferred upon the SEP holder by the SSO as the result of the standard-setting process.5 Imposing more restrictive terms can undermine key players' incentives to join SSOs and/or contribute technology, which could have welfare-reducing consequences.

## 2NC

### Contract Law CP

#### Here’s evidence---the contract is between the SEP holder and the implementer.

Sidak 18 – Chairman, Criterion Economics, Washington, D.C.

J. Gregory Sidak, “The FRAND Contract,” The Criterion Journal on Innovation, Vol. 3, 2018, HeinOnline

When a tribunal deems a particular FRAND commitment to be an enforceable contract between the SEP holder and the SSO, first principles of contract law identify the permissible conduct of both the SEP holder and the implementer in their subsequent bilateral negotiation for a license. Under U.S. law, contract principles identify the SEP holder's precise obligations and, correspondingly, the implementer's precise rights as a third-party beneficiary of the FRAND contract between the SEP holder and the SSO; contract principles also determine whether the implementer, in negotiating FRAND terms, loses its rights as a third-party beneficiary.23 When U.S. contract law governs the obligations arising from the SEP holder's FRAND commitment to the SSO, the tribunal's explicit recognition of the controlling authority of those contractual principles will induce the parties not only to avoid practices that prolong the negotiation, but also to work toward the prompt execution of a license agreement, which will hasten the standard's implementation and thus advance the public interest.

#### Here’s evidence---empirics go neg---contract law has always been best and antitrust is an ill-fitting remedy.

Taylor 19 – Member of the USIJ Advisory Board, former Chair of the Antitrust Section of the American Bar Association, Fellow of the American College of Trial Lawyers, Lifetime Member of the American Law Institute, served as a Member on the 1992 Commission on Patent Law Reform appointed by the U.S. Secretary of Commerce

Robert P. Taylor, Brief of Amicus Curiae Alliance for U.S. Startups and Inventors for Jobs (USIJ) in Support of Appellant Qualcomm Incorporated, FTC v. Qualcomm Inc., United States Court of Appeals for the Ninth Circuit, August 2019, LexisNexis

I. The District Judge's Effort To Convert A Contract Dispute Into An Antitrust Case Should Be Overturned.

The primary flaw in the findings of the court below is that this should not be an antitrust case at all. It is in essence a contract dispute over the royalties demanded by Appellant from OEMs that sell smartphones and cellular telephones covered by Appellant's patents. It seems apparent from the Opinion that the FTC and the district judge are attempting to restructure the entire industry through the mechanism of antitrust "findings" having no support in the law. The Opinion does not establish that Appellant has engaged in the types of behavior addressable under the antitrust laws, which are for the protection of the process of competition for the benefit of consumers, not the protection of competitors.7

This distinction is particularly compelling in light of two incontrovertible facts. First, consumers all over the world have enjoyed intense and dynamic competition that is readily apparent to everyone. It is difficult to imagine a more competitive industry than this one over the last decade. If Appellant's licensing practices had actually reduced competition, as the district court concluded, consumers would not have the available choices, the rapidly falling prices for legacy products, and the constant and accelerating improvements in the quality of new products and services that are available.

Second is the identity of the companies on whose testimony the district judge relied to support her findings - Apple, Samsung, Intel, Huawei and others that stand to benefit most from the district court's ill-conceived effort. As already noted, this group includes some of the largest and most powerful companies in the world. Of course, they would like to pay lower royalties, because it would add to their already generous profitability. 8 The antitrust laws, however, are indifferent to the profits of these large companies. If any of them believes that Appellant's royalty structure is not consistent with its FRAND commitments, that company is free to pursue a contract claim in a state or federal court, as both Apple and Samsung have done in the past.

There is nothing unusual in the need to resolve disputes over licensing terms and royalties in this context. Developing a new standard or defining improvements to an existing standard often requires the invention of new technologies, and the participants in SDOs commonly acquire intellectual property rights in some of these new technologies. 9 To deal with potential conflicts between an innovative company that creates new technologies and those companies wishing to implement the new technologies in products or services, most SDOs require the participants to agree that they will offer licenses on FRAND terms with respect to any patents that would be infringed in implementing the standard. When disagreements arise between the inventor companies and the user companies over how these concepts should be applied, such disputes typically are resolved by negotiation or, failing to arrive at a mutually satisfactory agreement, by arbitration or litigation. Courts have resolved at least two recent and significant contract disputes between patent owners and user companies as to what constitutes a FRAND royalty, one of which was affirmed by this Court in Microsoft v. Motorola, Inc., 795 F.3d 1034 (9th Cir. 2015). In that case, Judge Robart in the Western District of Washington addressed a large number of contested issues in a dispute between Microsoft and Motorola, including a determination of the proper amount of a FRAND royalty, the obtaining of an injunction in Europe by Motorola, and a jury's determination of contract damages apart from the royalty due. 10

#### Existing remedies solve—In Microsoft v. Motorola, the court used other mechanisms to remedy breach in FRAND licensing, and concluded that treble damages aren’t key to deterrence.

Kallay et al. 15 – Director, Intellectual Property and Competition at Ericsson

Dina Kallay, James F. Rill, James G. Kress, Hugh M. Hollman, “Antitrust and FRAND Bargaining: Rejecting the Invitation for Antitrust Overreach Into Royalty Disputes,” Antitrust, Vol. 30, No. 1, Fall 2015, HeinOnline

Rejecting Antitrust’s Overreach into FRAND Bargaining

An Unprecedented and Unnecessary Expansion. While the scope of antitrust standards may be elastic, in our view it would require a huge and unwarranted stretch to bring patent royalty demands, rates, or royalty base within the ambit of exclusionary conduct. No U.S. case of which we are aware has found that seeking supra-FRAND royalties alone constitutes an antitrust violation. The D.C. Circuit’s Rambus decision explained the doctrinal complications with conflating ex post opportunism with conduct injurious of competition that is properly reached by Section 2.40 If alternative technologies were passed over for use in the standard, in the absence of ex ante deception, that outcome was the result of competition on the merits. And, if the essential patent owner overreaches in its royalty demands in violation of its FRAND commitment, neither exploitation (“hold-up”) or exclusion are pervasive concerns. It is well established that licensees willing to pay a FRAND rate for a license to those patents may seek a judicial resolution of the royalty dispute without fear of exclusion. Some courts have even found that the absence of a credible threat of exclusion by an injunction order has shifted the bargaining power to the technology user, who by “holding out” can do no worse than an adjudicated FRAND rate.41

FTC Chairwoman Edith Ramirez, who is generally supportive of antitrust involvement in essential patent-related matters, also emphasized these concerns when she remarked that “royalty rates should not be negotiated under the threat of antitrust liability,” and that “it is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns.”42 To reach a contrary result, the doctrinal building blocks of Sherman Act Section 2 that focus on exclusionary conduct would need to be disregarded to reach mere exploitation of market power in the “patent hold-up” context. As such, the DOJ is “skeptical when manufacturers complain to us about high royalty rates in the absence of bad conduct. We don’t use antitrust enforcement to regulate royalties.”43

Commentators who support expanding the role of anti-trust to police FRAND bargaining have also, in our view, failed to show that other solutions to deter and remedy actual FRAND violations are unavailable or insufficient. Courts have held that a commitment to an SDO to assure access on FRAND terms constitutes a binding contract between the essential patents holder and the SDO and its members, and operates for the intended benefit of and is enforceable by the standard’s implementers.44 As with any negotiation, it is anticipated that the parties will bilaterally negotiate over FRAND terms, and that “a patent holder does not violate its RAND obligations by seeking a royalty greater than its potential licensee believes is reasonable . . . both sides’ initial offers should be viewed as the starting point in negotiations.”45 As Bruce Kobayashi and Joshua Wright have argued, a FRAND commitment is best considered an incomplete contract (or pre-contract) and “the debate in the antitrust community has largely ignored the superiority of substantive contract doctrine.”46 Ignoring contract law is a mistake, as it is specifically geared towards identifying and enforcing the parties’ intent where certain terms governing the relationship are missing or ambiguous.

The effectiveness of contract law as a remedy for FRAND violations was recently demonstrated by the Ninth Circuit in Microsoft v. Motorola. There, the court upheld the district court’s FRAND rate determination of the jury’s $14.5 million damages award for Motorola’s breach of its duty of good faith and fair dealing in seeking non-FRAND licensing terms.47 Other legal doctrines, including quasi-contract theories, promissory estoppel, and patent damages, may also be available to deter and remedy alleged instances of FRAND breaches in licensing contexts.48 In the years since the Rambus decision, there is no record of essential patent holders behaving more opportunistically in seeking to evade their FRAND commitments when freed of concerns over treble-damages liability for hard-bargaining.49

#### Antitrust is a worse tool—contract law is better at deterring misbehavior in standard setting.

Wright 14 – Former Commissioner, Federal Trade Commission

Joshua D. Wright, “SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts,” George Mason Law Review, Vol. 21, No. 4, 2014, HeinOnline

V. DOES ANTITRUST HAVE A ROLE IN REGULATING SSO CONTRACTING PROCESSES?

In my view, the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law. The same concerns extend to attempts by antitrust agencies to influence SSOs' IPR policies. Caution should be exercised in both situations. Indeed, economists have long viewed the holdup problem, and ex post opportunism more generally, as a problem sounding in contract law, with its default substantive rules and remedies, rather than in antitrust law.56 [FOOTNOTE 56 STARTS] See, e.g., OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 26-30 (1975) (stating that to prevent opportunism, "an effort must be made to anticipate contingencies and spell out terms much more fully than would otherwise be necessary.... [In addition,] the agreement needs to be monitored"); Benjamin Klein, Market Power in Antitrust: Economic Analysis After Kodak, 3 S. CT. ECON. REV. 43, 62-63 (1993) ("Antitrust law should not be used to prevent transactors from voluntarily making specific investments and writing contracts by which they knowingly put themselves in a position where they may face a 'hold-up' in the future .... [C]ontract law inherently recognizes the pervasiveness of transactor-specific investments and generally deals with 'hold-up' problems in a subtle way, not by attempting to eliminate every perceived 'hold-up' that may arise."); see also Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521, 521 (1981). [FOOTNOTE 56 ENDS] The risk of imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation. These would be unfortunate consequences of policy reforms and enforcement efforts designed to improve the competitive process. They are also avoidable consequences. The sanctions available to address patent holdup and related concerns under other legal regimes are more than adequate to provide optimal deterrence against patent holdup.57 [FOOTNOTE 57 STARTS] Bruce H. Kobayashi & Joshua D. Wright, The Limits of Antitrust and Patent Holdup: A Reply to Cary et al., 78 ANTITRUST L.J. 505, 510-11 (2012) ("Because multiple damages are not required to generate optimal deterrence, remedies for breach of contract, or preventing the enforcement of the patent through estoppel, waiver, or other equitable doctrines, can serve to optimally deter undesirable patent holdup if they impose approximately single damages."). [FOOTNOTE 57 ENDS] Antitrust enforcement remains available in cases of true anticompetitive price fixing or deceptive manipulation of standards. In the absence of robust empirical evidence to suggest that SSOs' adaptation of their IPR policies over time have been inadequate in minimizing the probability of holdup, there is little reason to bring to bear the blunt weaponry of antitrust rules and remedies to micromanage the competitive process in the name of improving SSO contracts.

#### The counterplan’s single damages are sufficient—Ease of detection means antitrust liability is only counterproductive

Kobayashi & Wright 12 – Professor of Law, George Mason University School of Law; Professor, George Mason University School of Law and Department of Economics

Bruce H. Kobayashi, Joshua D. Wright, “The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.,” Antitrust Law Journal, Vol. 78, 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2704591

Second, unlike price-fixing cartels, patent holdup is not difficult to detect. The various activities challenged in patent holdup cases all share one common characteristic: the patentee “holds up” licensees. This is not furtive activity. To the contrary, a holdup attempt that is kept secret from potential licensees is as much a holdup as engaging in a routine bank withdrawal while secretly thinking to one’s self about demanding that the teller open the vault. For the patentee’s holdup to be profitable he must at some point reveal to the SSO exactly what he is doing; that is, the patentee must actually tell the SSO that he is no longer willing to abide by his previous commitments.17 [FOOTNOTE 17 STARTS] We make this point repeatedly, noting “[t]he likelihood that this conduct would go unnoticed by the SSO members . . . approximates zero,” “the case for treble damages for this sort of ‘open and notorious’ conduct is weak,” and the case for multiplied damages is even further undermined “when one considers follow-on private litigation and state remedies.” Kobayashi & Wright, supra note 2, at 509. Others have also made this point in the context of patent holdup. See, e.g., Cotter, supra note 3, at 1157–58. [FOOTNOTE 17 ENDS]

The implications of the optimal deterrence literature for the antitrust treatment of patent holdup are clear. The case for imposition of antitrust sanctions that exceed damages is weak so long as the probability of detection is sufficiently high. Because multiple damages are not required to generate optimal deterrence, remedies for breach of contract, or preventing the enforcement of the patent through estoppel, waiver, or other equitable doctrines, can serve to optimally deter undesirable patent holdup if they impose approximately single damages. This analysis does not imply that patent holdup is desirable, or that firms that engage in the type of patent holdup with which Cary et al. are concerned should be able to avoid the obligation to pay optimal penalties. It is rather a question of efficiency—a question which Cary et al. never address.18 [FOOTNOTE 18 STARTS] Indeed, a premise of our analysis is that patent holdup is capable of generating social harms, and much of our analysis is devoted to making the case that the combination of contract and patent law is more likely to generate optimal deterrence and avoid error costs than is antitrust law. [FOOTNOTE 18 ENDS]

### Innovation Adv.

#### It fails to deter future anticompetitive conduct

**Contreras 11** – Jorge L. Contreras is a Visiting Associate Professor at American University–Washington College of Law

Jorge Contreras, “Equity, Antitrust, and the Reemergence of the Patent Unenforceability Remedy,” October 2011, The Antitrust Source, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1187&context=facsch_lawrev>

Agency Enforcement and the Failure of Antitrust Remedies to Address Standards Hold-Up

Public actions to enforce the antitrust laws may be brought by the Department of Justice, the FTC, and state attorneys general. Recently, the FTC has been the most active in seeking to curb deceptive conduct and standards hold-up by means of antitrust enforcement. In Dell Computer, the FTC alleged that Dell’s deception of the Video Electronics Standards Association (VESA) constituted unfair competition affecting commerce and thus violated Section 5 of the FTC Act. In the resulting Consent Agreement, Dell was prohibited from enforcing the asserted patents against any implementer of VESA’s VL-bus standard. The breadth of this remedy flows from the FTC’s broad authority to redress market harm under Section 5. 18

The Dell decision shaped the debate regarding standards hold-up for more than a decade and may have emboldened the agency to exercise its Section 5 authority to police the standard-setting world more broadly. It did so most notably to redress the now-notorious conduct of Rambus both during and after its participation in the Joint Electron Device Engineering Council (JEDEC). As has been discussed at length in numerous books and articles, Rambus allegedly deceived JEDEC participants regarding the patenting of standards on semiconductor DRAM technology. When Rambus began to seek patent royalties from implementers of these standards, the FTC brought an action charging Rambus with violation of Section 5(b) of the FTC Act and Section 2 of the Sherman Act. In 2006 the Commission ruled against Rambus under both theories of liability and ordered, among other things, that Rambus license its patents to all implementers of the standards at specified royalty rates. 19 In 2008, however, the D.C. Circuit reversed the Commission’s ruling, holding that it failed to establish that Rambus’s deceptive conduct harmed competition for purposes of the Sherman Act (i.e., that the relevant standards would not have been adopted but for Rambus’s conduct). The court also cast doubt on the Commission’s Section 5 theory, questioning its generous reading of the vague JEDEC intellectual property policy and its conclusions regarding common practices and expectations within the standard-setting community.

Though the validity of the D.C. Circuit’s reasoning in Rambus has been widely debated, 20 a number of commentators argue that antitrust law has proven to be a suboptimal theory for addressing issues of standards hold-up. 21 The weaknesses of antitrust law arise both when it is used as a theory of liability and also when it is used to fashion remedies (two distinct but inextricably related sides of the antitrust coin). Antitrust suffers as a theory of liability because, as the D.C. Circuit reasoned, a showing of antitrust harm is necessarily tied to market-wide effects on competition, rather than effects on individual competitors. Absent proof of market harm, antitrust injury cannot exist. Indeed, the dissent in Dell made this point in 1995, taking the view that the allegations of the Commission’s complaint failed to demonstrate that Dell obtained market power as a result of its alleged misstatements to the SDO.

Antitrust law also falls short in enabling appropriate remedies for standards hold-up. Thus, while the FTC in Dell fashioned a sweeping order under Section 5 that prohibited Dell from enforcing its patents against any implementer of the VL-bus standard, 22 the Commission’s order eleven years later in Rambus exhibits a significant retreat from this early expansive posture. Perhaps influenced by public commentary and the briefs of the parties or a more refined understanding and appreciation of the market harm arising from such conduct, the FTC in Rambus required that Rambus license its patents to any implementer of the JEDEC standard but also permitted Rambus to collect a specified royalty with respect to this license (a royalty that was lower, of course, than Rambus requested, but significant nonetheless). The rationale for this seeming generosity toward a company that the Commission found to have engaged in a “deliberate course of deceptive conduct”23 can be explained by the Commission’s need to fashion a remedy calculated to address perceived market harm. Indeed, the Commission noted that imposing a requirement of royalty-free licensing on Rambus would be justified only to the extent “necessary to restore the competitive conditions that would have prevailed absent Rambus’s misconduct.”24 Instead, the Commission proceeded to construct an elaborate “reasonable royalty” analysis based on a series of assumptions about how the potential DRAM market would have looked “but for” Rambus’s deceptive conduct, and to set royalty rates for Rambus patents accordingly. While the FTC’s remedy opinion was rendered moot by the D.C. Circuit’s reversal of its liability holding, the fact that the FTC’s analysis would have resulted in the award of ongoing royalties to Rambus despite its deceptive conduct suggests that antitrust remedies may not address all of the harms that are likely to arise in the context of standards hold-up and that perhaps other remedial regimes are more likely both to penalize those engaging in standards hold-up and to deter future instances of hold-up behavior. 25

#### Antitrust liability discourages participation in standard-setting.

Ginsburg et al. 15 – Judge on the U.S. Court of Appeals for the District of Columbia, Professor of Law at George Mason University School of Law, and Chairman of the International Advisory Committee of the Global Antitrust Institute

Douglas H. Ginsburg, Koren W. Wong-Ervin, Joshua D. Wright, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” CPI Antitrust Chronicle, October 2015, https://www.law.gmu.edu/assets/files/publications/working\_papers/LS1537.pdf

Third, antitrust liability is likely to deter patent holders from contributing their technology to an SSO under FRAND terms if doing so will require them to forfeit their right to protect their intellectual property by seeking an injunction against infringing users. These possibilities, far from protecting the public interest in competition and innovation, actually threaten to reduce the gains from innovation and standardization.

### Cyber Advantage

#### Market mechanisms solve.

Ginsburg et al. 15 – Judge on the U.S. Court of Appeals for the District of Columbia, Professor of Law at George Mason University School of Law, and Chairman of the International Advisory Committee of the Global Antitrust Institute

Douglas H. Ginsburg, Koren W. Wong-Ervin, Joshua D. Wright, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” CPI Antitrust Chronicle, October 2015, https://www.law.gmu.edu/assets/files/publications/working\_papers/LS1537.pdf

In addition, several market mechanisms are available to transactors to mitigate the incidence and likelihood of patent holdup. For example, reputational and business costs may deter repeat players from engaging in holdup and “patent holders that have broad cross-licensing agreements with the SEP-owner may be protected from hold-up.”10 Also, patent holders often enjoy a first-mover advantage if their technology is adopted as the standard. “As a result, patent holders who manufacture products using the standardized technology ‘may find it more profitable to offer attractive licensing terms in order to promote the adoption of the product using the standard, increasing demand for its product rather than extracting high royalties’” per unit.11 This is not surprising. The original economic literature upon which the patent holdup theories are based was focused upon the various ways that market actors use reputation, contracts, and other institutions to mitigate the inefficiencies associated with opportunism in transactions involving tangible property.12

#### Leverage in bargaining – licensing allows start-ups to get a leg up in negotiations that are k2 innovation

Taylor 19 – Member of the USIJ Advisory Board, former Chair of the Antitrust Section of the American Bar Association, Fellow of the American College of Trial Lawyers, Lifetime Member of the American Law Institute, served as a Member on the 1992 Commission on Patent Law Reform appointed by the U.S. Secretary of Commerce

Robert P. Taylor, Brief of Amicus Curiae Alliance for U.S. Startups and Inventors for Jobs (USIJ) in Support of Appellant Qualcomm Incorporated, FTC v. Qualcomm Inc., United States Court of Appeals for the Ninth Circuit, August 2019, LexisNexis

The decision below misinterprets both antitrust law and patent law in ways that, if allowed to stand, will diminish significantly the incentives of entrepreneurs, startups, inventors and their investors to pursue risky new ventures and unproven technologies. Many new technologies invented by entrepreneurs and small companies have value only if they can be licensed to sellers of larger products or systems. The district judge's vehement and repetitious use of the term "anticompetitive" to describe the normal give and take that occurs in contract negotiations vilifies a patent owner's insistence that infringers take licenses to the patents they want to use. This will inhibit the ability of many patent owners to negotiate patent licenses, particularly the smaller companies that do not have a great deal of bargaining power other than the potential enforcement of their patents. By vilifying patent owners that take a firm stand against infringement of their property rights, the decision lends credibility to the false but often used argument that patents are just a nuisance and interfere with real innovation. In fact, patents allow truly inventive companies to overcome the obstacles - economic and otherwise - that large incumbent companies are able to employ to protect their markets. Smaller companies already have a difficult time trying to benefit from their inventive efforts; the instant decision will add to the difficulty.

## 1NR

### Courts DA

#### Companies will continue making big and controversial deals because they know they can win in court---that deters unnecessary enforcement.

Jennifer Saba and Gina Chon, Reuters, Breakdown: U.S. antitrust frenzy stops with judges, 7/21/21, <https://www.nasdaq.com/articles/breakdown%3A-u.s.-antitrust-frenzy-stops-with-judges-2021-07-21>

COMPANIES WIN CAT-AND-MOUSE GAME IN COURTS

If a firm wants to fight, it can turn to federal courts, where judges have often taken a narrow view of rules in a way that favors companies. For example, the burden of proof is on the government to show an acquisition target is a significant rival or that a deal will substantially reduce competition. This has tripped up many high-profile cases, including some recently. In 2019, the Justice Department lost an appeal to block the $85 billion tie-up between AT&T and Time Warner. A judge recently dismissed the FTC’s suit against Facebook saying the agency failed to prove its case.

To avoid wasted time and resources, and potential embarrassment, the two federal agencies take on a small sliver of transactions. For the year ending Sept. 30, 2019, the FTC and DOJ challenged just 38 mergers of the more than 2,000 transactions that were reported. And a more aggressive approach by watchdogs hasn’t changed judges’ minds.

There is precedent, too, of companies winning when states get in the way. That was the case with Sprint’s deal with T-Mobile US, which received court approval after years of slogging through both federal regulators and state pushback.

Deals do have a shelf life, and some firms, like LSC Communications and Quad/Graphics, throw in the towel. But for those that are patient, the court system allows a path to beat an aggressive antitrust environment.

### Innovation DA

**Acquisitions are critical to secure cyber-defenses**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

#### Immediately expanding scope of antitrust liability brings that to a halt---undermines dynamism and global competitiveness.

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership vis-à-vis China---key to competitiveness and AI.

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Tech innovation prevents nuclear conflict---U.S. leadership key.

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

#### Perception---companies do not expect immediate statutory/legal changes---enforcement only affects a small slice of deals.

Zero 21 – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**

#### No lasting change from xo even if administrative stuff implemented.

Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, former FTC Commissioner, ‘21

(Joshua D., “Lina Khan Is Icarus at the FTC,” July 13, WSJ)

All that has been overshadowed by an executive order aimed at competition and loaded with goodies, good intentions, new regulatory regimes and a blissful ignorance of unintended consequences (“Joe Biden, 20th Century Trustbuster,” Review & Outlook, July 10). Some of its pronouncements, like occupational-licensing reform, are to the good. But the FTC’s competition authority is about to become a free-for-all for the Biden administration to reshape the economy. One wonders how the Republicans going along with all this to “get Big Tech” are feeling right now; I’m guessing “played.” If not, they’ll catch up soon enough.

Imagining the FTC as Icarus flying without the constraints of history, economics or law is a fun thought experiment, but we’ve been here before. Ms. Khan’s initial steps are indicative of a regulatory overreach that will end with the FTC’s wings melting in the courts. This path does not lead to incremental, much less radical, change. I predict early headlines that appease a rabid base, frustration for FTC staff and a new, volatile partisanship at the agency, but actual results that leave unsatisfied the progressives aching for radical change.

#### Status quo victories do not touch large firms

Nicole Goodkind, Fortune, Lina Khan is the face of the populist antitrust moment. But how much power does the FTC chair wield? June 30, ‘21, https://fortune.com/2021/06/30/ftc-chair-lina-khan-populist-antitrust-movement-what-can-she-do-federal-trade-commission/

But the question of whether Khan will be able to rouse an agency that’s been in a state of semiconsciousness for nearly half a century remains.

Detractors argue that Khan is little more than a figurehead, meant to placate progressives and antitrust populists while the FTC remains largely ineffective. This week, a federal judge struck down an FTC complaint against Facebook, brought by Khan’s predecessor, that would have forced the company to divest from Instagram and WhatsApp. Khan and the FTC now have until July 29 to file a new complaint.

Amazon also tried to make the case on Wednesday that Khan should recuse herself from any FTC enforcement decisions involving the company—including the FTC review of its $8.45 billion acquisition of movie studio MGM—because of her previous statements that the company should be broken up.

There’s a dichotomy between popular groupthink around monopolies and what’s actually going on in the courts, said Aurelien Portuese, director of antitrust and innovation policy at the Information Technology and Innovation Foundation, a D.C. think tank that is partially funded by Big Tech. “There are a lot of proposals to depart from these principles of how you define the market and market demand. I think these attempts may very well be crushed many times in courts,” he said. Khan might be effective in precautionary rulemaking, he said, but that would largely impact smaller tech upstarts, not the Big Four.

Those interruptions, he argued, would stifle innovation and American entrepreneurship, giving China an upper hand (a similar argument was made when Microsoft faced antitrust charges in 1998).

Populist antitrust sentiment, said Portuese, is a trend that will soon fade: “I don’t see radical changes in the long run, because of the inevitable judicial review that entrepreneurs are subject to.”

#### Plan is one of the first major pro-plaintiff decisions in decades---that is magnified and affects every future case.

Pale 04– R. Hewitt Pale, Former Assistant Attorney General, Antitrust Division @ US DOJ

(R. Hewitt Pale, “ANTITRUST LAW IN THE U.S. SUPREME COURT, Presented at British Institute of International and Comparative Law Conference, May 11, 2004, <https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court>)

In considering my topic for a forum on comparative law, it occurred to me that it might be useful to focus on the special role of the United States Supreme Court in making American antitrust law. The topic is especially timely because our Supreme Court granted review in four antitrust cases this term, each of which is the object of intense study by U.S. antitrust practitioners. The Supreme Court, unlike the intermediate appellate courts of the federal system, has discretion to choose the cases it will hear, and its choices have a profound effect on the development of antitrust law.

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this "common law" approach may lack the certainty provided by a more detailed statute, but it "permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law." (1) Our Supreme Court has described the antitrust laws as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions."(2)

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate.(3) Observing that the standards of the antitrust law must be developed by the courts deciding each case "by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,"(4) the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only "unreasonable" restraints of trade. In another decision that year, United States v. American Tobacco Co.,(5) involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason's fundamental grounding in competition concerns. This standard proscribed "contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."(6)

In 1918, Chicago Board of Trade v. United States(7) made clear that the Rule of Reason encompasses all the relevant circumstances. To determine whether a restraint is illegal, a court must "ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" and the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained."(8)

Around the same time, the Court was also developing the doctrine of per se illegality, which provides bright-line guidance as to certain clearly anticompetitive practices. In United States v. Trenton Potteries Co., (9) the Court held that a price fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."(10) In 1940, in another landmark case brought by the United States in the oil industry, United States v. Socony-Vacuum Oil Co.,(11) the Supreme Court repeated that price-fixing agreements are illegal per se and that "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."(12) The per se rule underpins the Antitrust Division's criminal prosecution of collusion among competitors.

The Supreme Court's pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the fundamental principle — consistent with the modern approach worldwide — that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In Brown Shoe, Pabst, and Von's Grocery, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration.(13) In Schwinn,(14) it abandoned its formerly cautious approach to vertical practices,(15) holding exclusive dealer territories unlawful per se. Similarly, in Albrecht,(16) it held vertical maximum price fixing illegal per se.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In GTE Sylvania,(17) the Court overruled Schwinn, and in State Oil v. Khan,(18) it overruled Albrecht. The Court adopted a significantly different approach to mergers in General Dynamics,(19) refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in Matsushita,(20) the Court poured cold water on theories of liability that make little economic sense, and it expressed skepticism of liability theories based on price cutting, which is often "the very essence of competition."(21)

Of particular note is the Court's decision in Brunswick,(22) in which it rejected the theory that a private plaintiff could obtain treble damages as compensation for continued competition resulting from a merger that prevented a firm from leaving the market. This may be one of the Supreme Court's lesser-known decisions outside the United States, but it is of fundamental significance. Private treble damage litigation is an important tool in the U.S. antitrust enforcement scheme, and the Brunswick decision mandated that it, like government enforcement, be firmly anchored to pro-competition, pro-consumer principles. The Court emphasized that private damages must be based on conduct causing injury of the type that the antitrust laws were intended to prevent. Plaintiffs may not prevail unless they are harmed by anticompetitive consequences of a defendant's conduct, for the antitrust laws were enacted to protect competition, not competitors.

In the last quarter of the twentieth century, the Supreme Court began hearing fewer antitrust cases. In part this reflects a general trend in the Court's practices. In its 2002 term, it issued only 81 written opinions, having issued only 71 the year before.(23) In contrast, thirty years earlier, the Court issued 164 written opinions in its 1972 term and 151 in 1971, including full opinions in ten antitrust cases during those two terms.(24) A litigant's chance of obtaining review today is quite low. In the last complete term, 2002, the Supreme Court considered 8,340 petitions for review by writ of certiorari, but granted full review to only 91 cases, or 1.1%.(25) Even if the unpaid, in forma pauperis, petitions are left out of the calculation, the odds improve only to 4.5%.(26)

A change in the statute governing appeals in civil antitrust cases brought by the government has also had the effect of limiting the number of Supreme Court opinions in antitrust cases in recent years. Until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."(27) Even then, the Court retains discretion to remand the case to the court of appeals. District courts have certified only three such cases for direct appeal.(28) One of these was Microsoft, but the Supreme Court declined to hear the case and remanded it to the court of appeals.

Because there are so few Supreme Court antitrust decisions each year — and because each one sets precedent that will govern the application of the antitrust laws in the lower courts for decades to come — each decision is an event of major significance for antitrust enforcers and the antitrust bar. Every phrase is studied with care, and every future case is evaluated in terms of the Court's reasoning process.

#### AND, even if the substantive change is small---it signals that courts everywhere should favor plaintiffs.

Tracy 21– Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

#### Antitrust liability is distinct from other forms of liability---the ability to obtain final judgements increases the potential cost of all conduct and undermines industry deal-making.

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### That has a direct chilling effect on firms in negotiation.

Werden & Froeb 19 – Senior Economic Counsel in the Antitrust Division, U.S. Department of Justice; William C. Oehmig Chair of Free Enterprise and Entrepreneurship at Owen Graduate School of Management, Vanderbilt University

Gregory J. Werden, Luke M. Froeb, “Why Patent Hold-Up Does Not Violate Antitrust Law,” Texas Intellectual Property Law Journal, Vol. 27, No. 1, 2019, HeinOnline

Bargaining theory predicts that bilateral negotiations divide the total gain to both parties reaching agreement.17 The original theory of John Nash posited an even division,18 but economic analyses of patent hold-up posit a division determined by relative bargaining skill.19 In ex interim bargaining, inventors and implementers would have divided the incremental gain from using the best technical solution instead of the next-best alternative. This incremental gain would be huge for a breakthrough invention but very small if alternative technical solutions to a particular problem were almost equally good.

Licensing SEPs before adoption of a standard likely is infeasible because some SEPs have not been issued and their claims are unsettled.20 Before taking all the necessary licenses, implementers are apt to make sunk investments in product development and manufacturing. Once they have, replacing a particular technology in a standard with the next-best alternative ex interim might be impossible, in which case all of an implementer's sunk investments in standard-compliant products would be lost if bargaining over the royalty failed to produce an agreement. This puts SEP holders in a position to engage in what is called patent hold-up, meaning that the SEP holder exploits the bargaining advantage afforded by the implementer's sunk investment.

A concrete example clarifies the insight that ex interim and ex post bargaining produce different royalties because they involve different metaphoric pies: Suppose that an implementer expects to manufacture a standard-compliant component with a marginal cost of $2 and a price of $8. The difference of $6 is not expected profit because the implementer incurred sunk costs. But once those costs are sunk, the per-unit gain from reaching agreement with holders of SEPs is the full $6, so ex post bargaining splits $6. If sunk development costs amortized to $4 per unit, ex interim bargaining would have split just $2. If bargaining splits gains evenly a la Nash, conducting the bargaining after product development costs are sunk increases the per-unit royalty (divided among all SEP holders) from $1 to $3.21

The foregoing ignores external influences on the bargaining outcome, and there are several. An inventor can seek an injunction, and threat of an injunction could affect the bargaining outcome.22 An implementer can seek a declaratory judgment that the patent is invalid or not infringed,23 and the threat to do so could also affect the bargaining outcome. And, of course, an implementer can bring an action to enforce the FRAND commitment,24 and the threat to do that could also affect the bargaining outcome. Courts have observed that a FRAND commitment is meant to achieve the outcome that ex interim bargaining would have produced,25 and they have acted accordingly in determining SEP royalties.26

Antitrust intervention in patent royalty disputes also would alter the bargaining outcome. Section 4 of the Clayton Act allows any person injured "by reason of anything forbidden by the antitrust laws" to sue for treble damages.27 If patent holdup was deemed an antitrust violation, damages presumably would be computed as the difference between the royalties paid and the royalties later determined to have been FRAND. With uncertainty about what royalty a court would choose, the threat of antitrust damages would cause the bargaining to settle on a royalty less than the expected court-determined FRAND royalty.28 Reducing SEP royalties would cause inventors to reduce their investment and would result in less innovation, thereby harming consumers.29

#### The aff tilts bargaining outcomes too far in favor of implementers – the threat of antitrust action makes collecting royalties at all impossible.

Isztwan 19 – Vice President, Litigation at InterDigital Communications

Andrew G. Isztwan, Brief of Amicus Curiae of Interdigital, Inc. in Support of Neither Party, FTC v. Qualcomm Inc., United States Court of Appeals for the Ninth Circuit, August 2019, LexisNexis

Increasingly, the most intractable FRAND disputes are not based on genuine disagreements raised by a potential licensee about the appropriate and fair value to be paid as royalties in return for use of patented technologies. Instead, implementers may opportunistically threaten (and even assert) antitrust claims seeking injunctions and treble damages as part of a hold-out strategy to gain unwarranted leverage in license negotiations. Implementers thereby seek to coerce patent owners into accepting minimal, sub-FRAND royalties that are not nearly sufficient to provide an adequate and fair reward for use of the intellectual property. Under a threat of treble damages, the patent owner is faced with a tremendously outsized risk, which inappropriately tilts the balance of negotiating power far in favor of the implementer asserting the claim. Often the intellectual property in question has been developed over many years as a result of the investment of enormous sums in research and development. Yet the prospects of obtaining an adequate and fair return on this investment are significantly reduced to the extent unwilling licensees are able to use strategic antitrust claims to force royalty terms far below FRAND levels-or even to avoid payment of royalties completely.