# R4 Harvard Disclosure

# 1NC

## Off

### 1NC---T

T Prohibitions---

#### Prohibition requires completely ending a practice---that’s distinct from limitations on such practices

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### That excludes “rule of reason” exemptions

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".

#### Violation---the aff allows a rule of reason approach without an outright ban---that’s not increasing prohibitions

#### Vote neg---

#### [A]---Predictable limits---rule of reason affs double the topic---any given anticompetitive conduct can have multiple affs associated with it, which decks aff specific preparation

#### [B]---Ground---allows 2ACs to shift out of disad links, and they foreclose the rule of reason PIC, which is core neg ground

### 1NC---CP

#### Text: The United States federal government should:

#### mandate the interpretation of FRAND contracts according to first principles of U.S. contract law

#### recognize 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.

### 1NC---DA

FTC Tradeoff DA---

#### The FTC is fundamentally constrained---priority changes drag resources away from current merger investigations

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Current resource allocation allows effective regulation of hospital mergers---plan decimates FTC success

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Maintaining competitive hospital markets are critical to avoid terminal budget overstretch---the alternative is a global confidence collapse in the US economic system

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Growth is critical to maintaining US posturing across the globe---failure risks nuclear conflict

Henricksen 17

Thomas H. Henricksen, emeritus senior fellow at the Hoover Institution, Post-American World Order, 23 March 2017, https://www.hoover.org/research/post-american-world-order

It is obvious that that our world has pivoted from the immediate post-Cold War order. Gone is yesterday’s unipolar dispensation with the United States sitting unchallenged atop other powers. It still possesses immense conventional and unconventional strength, but it is hardly unrivaled in various geographic corners. The big questions remain: What kind of global order is unfolding and how does America respond? President Donald J. Trump’s frequent voicing of isolationist sentiments during and after the election campaign has been blamed by some critics for this international transformation. Yet he alone is not responsible for the shift. The international order has been undergoing a transformation for years, and the signs of that change began to materialize soon after Barack Obama assumed office. Trump’s move into the White House is more a consequence of this altered global scene than its cause. Obama initiated America’s international pullback with the military withdrawal from Iraq and severe cutbacks in Afghanistan, as well as blinking when Syria crossed his red line while “leading from behind.” China’s Not So Peaceful Rise A series of dramatic events took place in response to Obama’s growing disengagement policies, as world powers noted Washington’s burgeoning inwardness. China switched from its “peaceful rise” policy to aggressively asserting and expanding its international presence. Xi Jinping, the all-powerful Chinese leader, moved to advance Beijing’s political and military suzerainty over the South China Sea (SCS) by seizing and reconstructing the disputed shoals into artificial islands with dredged ocean sands in 2014. Next, China militarized three micro-isles of the Spratly Islands (also claimed by the Philippines, Malaysia, and Vietnam) with runways, radars, and surface-to-air missile sites—actions that broke Beijing’s earlier promise not to militarize the waterway. Since then, Chinese officials have made it clear that the SCS is now their exclusive lake. Other states are expected to recognize China’s claims to most of the energy-rich waters, through which $5 trillion of trade passes annually, roughly half the world’s merchant fleet tonnage. China backs its assertions by modernizing the arsenals of its advanced warships, aircraft, missiles, and ground forces. Xi and company seem bent on restoring the ancient tribute system in which South Korea and Vietnam would become modern-day vassals, while more distant Asian states become supplicants in a Sinocentric sphere. In short, China has become a revisionist juggernaut. Along with its fortifying of these artificial islands, the world’s second largest economy and military spender has emerged as an economic, political, and ideological competitor of the United States not only in Southeast Asian maritime zones but globally. China is maneuvering to set up bases or harbors in Pakistan, Sri Lanka, and Greece—and is even extending its reach to the long U.S.-allied Portuguese Azores in the mid-Atlantic. In reaction to Beijing’s SCS actions, the Trump administration has stepped up America’s own show of force by sending warships, fighter jets, and submarines to the waters. To underline its not-too-subtle counter-signal to China, the United States also test-fired four Trident II submarine-launched ballistic missiles over 4,000 miles into the Pacific Ocean from the California coast last month, the first four-missile salvo in the post-Soviet era. The western Pacific is becoming a tinderbox. Russia’s Resurgence At the other end of the Asian continent, Russia longs to restore its lost prestige and political influence, forfeited with the breakup of the Soviet Union in 1991. Under Vladimir Putin, Russian forces backed the seizure of Crimea from Ukraine before taking over its eastern borderlands. Earlier, Moscow perfected its “frozen war” tactics against two provinces in the Republic of Georgia, thereby yanking them from Georgian sovereignty. Russia’s bullying and intimidation of its Baltic and Eastern European neighbors have become commonplace. Meanwhile, the Russian foreign minister, Sergei Lavrov, called for “a post-West world” at the Munich Security Conference in mid-February. What China and Russia have in common is that both are engaged in advancing their spheres of influence in their neighborhoods and beyond. Both also seek to crack the Western liberal world order. The United States, meanwhile, has become blasé about its former leadership position in the Western hemisphere, where China’s companies have entered into business deals, some with strategic implications. Washington, without a hint of nostalgia, treats the Monroe Doctrine as a relic of yesteryear’s Yankee imperialism in Latin America. These newly assertive major powers are not alone in shattering the post-Cold War order, which witnessed the unrivaled predominance of the United States—the “indispensable nation,” in the words of the Clinton administration. Trouble-making regional powers, such as Iran, Syria, and North Korea either spread terrorism, provoke instability, or arm themselves with longer-range missiles and nuclear weapons. While they were independent actors a few years ago, each of these pariah regimes increasingly aligns with the two chief U.S. adversaries. Iran and Syria cozy up to Russia, and North Korea depends for fuel and food on a China that hypocritically protests that it lacks influence over a nuclear-armed Pyongyang. Western Europe, once a powerful but independently minded U.S. ally, has faltered. Its slippage is evident in the refugee crisis, its sagging economies, its 20 percent youth unemployment rate, and its reluctance to fund an adequate military defense in the face of Russia’s continuing provocations, including cyber-attacks, disinformation campaigns, and fake news stories. Europe’s paltry defense reflects the continent’s lost belief in its own purpose—and even, some might say, its own civilization. Sino-Russian Partnering Little of this threatening world existed when the United States enjoyed its unipolar moment after the eclipse of its Soviet nemesis, and even after the 9/11 terrorist attacks. The emergent world, divided between the United States, China, and Russia, points to the new global order. Particularly worrisome are the warming relations between Beijing and Moscow, despite Chinese designs on Siberian lands and resources. Overcoming a centuries-old rivalry, the recent Sino-Russian rapprochement compounds Washington’s difficulties. Separating Russia from China, as Kissinger and Nixon did, would be a sensible goal for President Trump. It has always been a wise recourse to divide one’s adversaries. Besides, the United States and Russia have worked together in the past. During the World War II, they collaborated against the Third Reich. And during the Cold War, they cooperated in nuclear arms treaties and wheat deals, while mutually trying to skirt a flashpoint that could end in a nuclear war. Washington can work to steer the Kremlin, as it has done before, toward acceptable conduct with its neighbors before Russia can be more than a tactical ally in the great game with China. In the immediate future, the United States can adopt international and domestic approaches to cope with Russian and Chinese territorial expansionism. The tensions stoked by the assertive regimes in the Kremlin or Tiananmen Square could spark a political or military incident that might set off a chain reaction leading to a large-scale war. Historically, powerful rivalries nearly always lead to at least skirmishes, if not a full-blown war. The anomalous Cold War era spared the United States and Soviet Russia a direct conflict, largely from concerns that one would trigger a nuclear exchange destroying both states and much of the world. Such a repetition might reoccur in the unfolding three-cornered geopolitical world. It seems safe to acknowledge that an ascendant China and a resurgent Russia will persist in their geo-strategic ambitions. What Is To Be Done? The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union. What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by staying militarily and economically strong, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a major conflict. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since all the countries boast nuclear arms and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously. There can be little room for error in fraught crises among nuclear-weaponized and hostile powers. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a waiting game in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union. Some Chinese and Russian experts predict grave domestic problems for each other. They also entertain similar thoughts about the United States, which they view as terminally decadent and catastrophically polarized over politics, ethnicity, and the future direction of the country. So, the brewing three-way struggle also involves a systemic contest, which will test the competitors’ economic and political institutions. At this juncture, the world is entering a standoff among the three great and several not-so-great powers. Averting war, while defending our interests, will prove a challenge, calling for deft policy, political endurance, and economic growth, as well as sufficient military force to keep at bay aggressive states or prevail over them if ever a war breaks out.

### 1NC---CP

CPL Counterplan---

#### The United States federal government should adopt a compulsory patent licensing scheme for private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

**Counterplan solves patent abuses without altering antitrust or hindering innovation**

**Nielsen and Samardzija 7** – shareholder in the Intellectual Property Section in the Houston Office of Winstead PC; Director of Intellectual Property at the Office of Technology Commercialization at the University of Texas M.D. Anderson Cancer Center

Carol M. Nielsen and Michael R. Samardzija, "Compulsory Patent Licensing: Is It a Viable Solution in the United States?,"  13 Mich. Telecomm. & Tech. L. Rev. 509, 2007, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1095&context=mttlr

8. What are the Appropriate Terms of the CPL?

Once a determination is made to issue a CPL, the terms of the CPL should follow those provided by TRIPS.' The CPL should be a nonexclusive, non-transferable license which may be revoked if circumstances change. The royalty should be a reasonable royalty that takes into account the fact that the patent at issue is merely one of many in a patent thicket. Factors that would decrease the royalty rate are the number of other required licenses and their royalty rates, the margin on the product sold, and the inventive contribution of the patent to the product.

Conclusion

While different abuses of the patent system challenge the efficacy of the system to promote innovation, different efforts are underway on many fronts to stifle such exploitation. The legislature has put forward four draft bills that would dramatically alter the patent system. The USPTO has proposed different ways in which it would tackle this issue. These efforts are too intrusive and not narrowly tailored enough to address the problem of hold-ups. These drastic and at times draconian changes would likely have an adverse effect on innovation. While patent pools and patent clearinghouses can work, these approaches require that all players voluntarily enter into such engagements. As such, these alone cannot prevent patent system abuses. Permitting compulsory patent licenses in extreme situations, where clearly required by the public interest, may offer a narrowly crafted solution specifically designed to address the problem of hold-ups, trolls and the like, with a minimal impact on innovation.

**1NC---DA**

Innovation DA---

**Frenzy of M&A now because Biden’s executive order won’t be implemented for years**

David **French and** Sierra **Jackson**, Reuters, July 12, 20**21**, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

Dealmakers expect **a new wave of transformative** U.S. mergers and acquisitions (**M&A**), as companies **rush to complete deals** **before President Joe Biden's antitrust push takes shape**, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an **unprecedented M&A frenzy**, as companies **borrow cheaply** and **spend mountains of cash** they have accumulated on **transformative deals** to reposition themselves for the post-pandemic world. **Almost $700 billion** worth of U.S. deals were announced in the second quarter, **the highest on record**.

The dealmaking **bonanza is set to continue**, as companies seek to **take advantage of the time window** during which regulators **frame precise rules** to implement Biden's order, advisers to the companies said. The M&A slowdown will come **only when regulators implement the rule changes**, **possibly in two years or more,** they added.

"The order itself will be **less likely to have a chilling effect** on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were **bracing for a tougher antitrust environment** under Biden **even before last week's executive order.** Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

**Immediately expanding scope of antitrust liability brings mergers 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**

**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---US leadership is 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 display** in 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 **a**rtificial **i**ntelligence (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**.

### 1NC---CP

States CP

#### 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

#### Coordinate unified, multistate efforts to prosecute violations of the above prohibitions through the National Association of Attorneys General

#### States solve---they can enact and interpret their own laws, and cannot be inherently 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.

#### State coordination through the NAAG solves certainty and resource disparities

ABA 10 – American Bar Association

“ABA Antitrust Health Care I-G,” Antitrust Health Care Handbook, American Bar Association, 2010, LexisNexis

Federal and state enforcement authorities frequently cooperate in health care antitrust investigations and enforcement actions, and the agencies have issued a protocol describing basic procedures for their coordinated enforcement. States also coordinate their antitrust enforcement through the Multistate Antitrust Task Force of the National Association of Attorneys General. These efforts serve important enforcement goals by permitting participants to share expertise and resources and affording greater certainty to health care providers and payors seeking to resolve antitrust concerns in a consistent and expeditious manner. Federal and state enforcement authorities have overlapping jurisdiction with respect to most conduct, and some states have aggressively enforced the antitrust laws in the health care sector.

### 1NC---K

Neolib K---

#### The 1AC’s neoliberal application of antitrust naturalizes corporate domination and confines the government’s role to course correcting markets

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

ii. antitrust law is not and cannot be “apolitical”

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a “spontaneous order” is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.24 This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different con- figurations of state action and different sets of beneficiaries.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions curtailed the reach of antitrust law, scaling back its objectives39 and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an “apolitical” antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is not anchored in congressional intent and reflects a narrow conception of monopoly and oligopoly

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges short- term consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.62

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.63

The consumer welfare model, moreover, affords little or no importance to corporations’ ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a product of big business’s reaction against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Neoliberalism causes cyclical economic collapses, widespread environmental destruction, and democracy collapse

**Kuttner 19** – Co-founder and co-editor of The American Prospect, and professor at Brandeis University’s Heller School

Robert Kuttner, “Neoliberalism: Political Success, Economic Failure,” The American Prospect, 6/25/19, https://prospect.org/economy/neoliberalism-political-success-economic-failure/

Since the late 1970s, we've had a grand experiment to test the claim that free markets really do work best. This resurrection occurred despite the practical failure of laissez-faire in the 1930s, the resulting humiliation of free-market theory, and the contrasting success of managed capitalism during the three-decade postwar boom.

Yet when growth faltered in the 1970s, libertarian economic theory got another turn at bat. This revival proved extremely convenient for the conservatives who came to power in the 1980s. The neoliberal counterrevolution, in theory and policy, has reversed or undermined nearly every aspect of managed capitalism—from progressive taxation, welfare transfers, and antitrust, to the empowerment of workers and the regulation of banks and other major industries.

Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

By the 1990s, even moderate liberals had been converted to the belief that social objectives can be achieved by harnessing the power of markets. Intermittent periods of governance by Democratic presidents slowed but did not reverse the slide to neoliberal policy and doctrine. The corporate wing of the Democratic Party approved.

Now, after nearly half a century, the verdict is in. Virtually every one of these policies has failed, even on their own terms. Enterprise has been richly rewarded, taxes have been cut, and regulation reduced or privatized. The economy is vastly more unequal, yet economic growth is slower and more chaotic than during the era of managed capitalism. Deregulation has produced not salutary competition, but market concentration. Economic power has resulted in feedback loops of political power, in which elites make rules that bolster further concentration.

The culprit isn't just “markets”—some impersonal force that somehow got loose again. This is a story of power using theory. The mixed economy was undone by economic elites, who revised rules for their own benefit. They invested heavily in friendly theorists to bless this shift as sound and necessary economics, and friendly politicians to put those theories into practice.

Recent years have seen two spectacular cases of market mispricing with devastating consequences: the near-depression of 2008 and irreversible climate change. The economic collapse of 2008 was the result of the deregulation of finance. It cost the real U.S. economy upwards of $15 trillion (and vastly more globally), depending on how you count, far more than any conceivable efficiency gain that might be credited to financial innovation. Free-market theory presumes that innovation is necessarily benign. But much of the financial engineering of the deregulatory era was self-serving, opaque, and corrupt—the opposite of an efficient and transparent market.

The existential threat of global climate change reflects the incompetence of markets to accurately price carbon and the escalating costs of pollution. The British economist Nicholas Stern has aptly termed the worsening climate catastrophe history's greatest case of market failure. Here again, this is not just the result of failed theory. The entrenched political power of extractive industries and their political allies influences the rules and the market price of carbon. This is less an invisible hand than a thumb on the scale. The premise of efficient markets provides useful cover.

The grand neoliberal experiment of the past 40 years has demonstrated that markets in fact do not regulate themselves. Managed markets turn out to be more equitable and more efficient. Yet the theory and practical influence of neoliberalism marches splendidly on, because it is so useful to society’s most powerful people—as a scholarly veneer to what would otherwise be a raw power grab. The British political economist Colin Crouch captured this anomaly in a book nicely titled The Strange Non-Death of Neoliberalism. Why did neoliberalism not die? As Crouch observed, neoliberalism failed both as theory and as policy, but succeeded superbly as power politics for economic elites.

The neoliberal ascendance has had another calamitous cost—to democratic legitimacy. As government ceased to buffer market forces, daily life has become more of a struggle for ordinary people. The elements of a decent middle-class life are elusive—reliable jobs and careers, adequate pensions, secure medical care, affordable housing, and college that doesn't require a lifetime of debt. Meanwhile, life has become ever sweeter for economic elites, whose income and wealth have pulled away and whose loyalty to place, neighbor, and nation has become more contingent and less reliable.

Large numbers of people, in turn, have given up on the promise of affirmative government, and on democracy itself. After the Berlin Wall came down in 1989, ours was widely billed as an era when triumphant liberal capitalism would march hand in hand with liberal democracy. But in a few brief decades, the ostensibly secure regime of liberal democracy has collapsed in nation after nation, with echoes of the 1930s.

As the great political historian Karl Polanyi warned, when markets overwhelm society, ordinary people often turn to tyrants. In regimes that border on neofascist, klepto-capitalists get along just fine with dictators, undermining the neoliberal premise of capitalism and democracy as complements. Several authoritarian thugs, playing on tribal nationalism as the antidote to capitalist cosmopolitanism, are surprisingly popular.

It's also important to appreciate that neoliberalism is not laissez-faire. Classically, the premise of a “free market” is that government simply gets out of the way. This is nonsensical, since all markets are creatures of rules, most fundamentally rules defining property, but also rules defining credit, debt, and bankruptcy; rules defining patents, trademarks, and copyrights; rules defining terms of labor; and so on. Even deregulation requires rules. In Polanyi's words, “laissez-faire was planned.”

The political question is who gets to make the rules, and for whose benefit. The neoliberalism of Friedrich Hayek and Milton Friedman invoked free markets, but in practice the neoliberal regime has promoted rules created by and for private owners of capital, to keep democratic government from asserting rules of fair competition or countervailing social interests. The regime has rules protecting pharmaceutical giants from the right of consumers to import prescription drugs or to benefit from generics. The rules of competition and intellectual property generally have been tilted to protect incumbents. Rules of bankruptcy have been tilted in favor of creditors. Deceptive mortgages require elaborate rules, written by the financial sector and then enforced by government. Patent rules have allowed agribusiness and giant chemical companies like Monsanto to take over much of agriculture—the opposite of open markets. Industry has invented rules requiring employees and consumers to submit to binding arbitration and to relinquish a range of statutory and common-law rights.

#### Anti-domination counters neoclassical assumptions and judicial supremacy---that restores agency flexibility to democratically check existential threats

Jackson 21 – DeOlazarra Fellow at the Program in Political Philosophy, Policy & Law at the University of Virginia. She received her Ph.D. with distinction in political theory at Columbia University.

Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than four urgent crises: an ongoing pandemic1; racial injustice and its consequent civil unrest2; an economic depression approaching the pain inflicted in 1929; and the accumulating, existential threat of climate change.4 Citizens must rely on their state to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this multi-pronged anti-administravist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends (lawmaking) and the implementation (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that administration does indeed carry constitutional liberal democratic credentials – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal participants in the collective decision-making process.

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus not a question of ascertaining the existence of some non-existent popular “will” to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a question of developing transparent and accessible collective decision- making procedures that ensure that all citizens can understand themselves as equal participants in their collective ordering; that ordinary people are involved in public life and have a say in their collective destiny.89 They do not rule. Rather, they are equal players in the game of representative democracy.90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity, human equality and the public good.93 Because if the sovereign is a “we,” then governing involves more than the interests and preferences of single individuals. We will therefore demand that political institutions remain accountable and accessible to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also unlocks the closed doors of power and forces the inclusion of voices previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this place of power remain an empty one – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because all citizens contribute in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that administrative agencies can be made consistent with the requirements of constitutional popular sovereignty.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as co-equal participants in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

## Innovation

#### 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.

#### U.S. leadership is key to good 5G – the aff’s misapplication of antitrust makes that 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---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

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.

#### their internal link is science fiction

**Zeine 17** - Founder and CTO of Ossia. Wireless Power Pioneer. Physicist. Inventor.

Hatem, 6-19, The Problems With Smart Cities, Forbes, https://www.forbes.com/sites/forbestechcouncil/2017/06/19/the-problems-with-smart-cities/3/#268c6d041ffd

The "smart city" sounds like a digital utopia, a place where data eliminates first-world hassles, dangers and injustices. But there are some problems with smart cities, and no one, to my knowledge at least, has pointed them out. Press coverage from Forbes, The Wall Street Journal, The Guardian and dozens of other publications are gleefully optimistic about smart cities. No more traffic! Renewable energy for all! Fewer fires and disease outbreaks! Billions in savings! Automated vegetable gardens on roofs! These are all real possibilities. Before we get too excited, however, let’s examine the ingredients of a smart city and what they indicate about those problems. **Sensory Overload** Smart cities are based on data. If you want data, you need sensors. It’s not like roads, buildings and street lights will wake up magically and start chatting about the weather. We need sensors to see, hear, smell, taste and feel on their behalf. A platform can then aggregate all their data and use it to make (or propose) decisions at speeds exceeding human capacity. Sensors will measure temperature, traffic patterns, foot traffic, air quality and infrastructure integrity (e.g., is the bridge safe?), among many other things. Lux Research, an innovation research and advisory firm, has a report that suggests the world will deploy 1 trillion sensors by 2020. Let's put that in perspective: If you have 1 million people deploying sensors, each person needs to deploy a million of them within three years. The De-Energizer Bunny The U.S. alone buys over 3 billion batteries a year. **We have not built 1 trillion batteries in the history of humankind, yet we’re supposed to make enough batteries to power 1 trillion sensors within three years?** I doubt it. **Even if we could manufacture batteries at that scale, the resulting pollution and energy consumption would offset many of the benefits**. And tell me, who would monitor and replace the batteries in, say, 1 million public sensors scattered throughout New York City? Even the Energizer Bunny wouldn't get on board with that. Let’s say we ditch the batteries and connect sensors to wires instead. Installing 1 trillion wires is prohibitively expensive. Whether you power those sensors with solar, nuclear or fossil fuel energy, transmitting power from its source to a device is impractical. Problem No. 1 The first problem with a smart city is power. We want to install millions of sensors that can retrieve useful, potentially life-saving data. Yet with our current energy paradigms, we can’t power 1 trillion devices, let alone a million in a single city. Thus, **the smart city is a sci-fi fantasy without wireless power** (i.e., power at a distance). Is our utopia dead in the water, then? No. There are companies (including ours) developing wireless power that resembles the functionality of Wi-Fi but for power. We can solve the problem as quickly as societies unwire power distribution. Once sensors receive power wirelessly, we’ve cleared the main obstacle to a smart city. We can then ask practical questions: How do we mitigate rush-hour traffic based on the data? How do we reduce particulate matter in our indoor and outdoor air? Where are pollutants coming from and how might we stop them? How do we prevent meat contamination at a nearby food processing plant from becoming a city-wide health crisis? Initially, we’ll retrofit cities with sensors. Eventually, we’ll construct smart cities from scratch because our existing road systems, zoning patterns and power grids aren’t made for automated, data-driven lifestyles. Autonomous cars, for instance, have different needs than the manual gas guzzlers around which we have designed our infrastructure. Problem No. 2 As we design smart cities around the data we want instead of the wiring we have, the dialogue gets more complex. Mass data aggregation will establish some truths (the source of certain problems) about how our cities run. It will lead us to score cities on different quality-of-life metrics. And that brings us to the toughest question of all: What do we value in a human habitat? That raises the second problem with a smart city: **We could create a dystopia just as easily as we could create a utopia**. The dividing line is deceivingly thin. We assume that by tapping into the collective intelligence of both devices and people we can create better living environments. I believe we can. But data is not a magical cure to all our woes. To quote author and entrepreneur Derek Sivers, “If [more] information was the answer, then we’d all be billionaires with perfect abs.” Likewise, if urban data was the answer, then collecting it would eliminate traffic, poverty, crime, etc. That’s dangerously optimistic. **We’ll need leaders to interpret and use the data wisely**. Too often, our officials pass along data like hors d'oeuvres, expecting people to take only what nourishes their worldview. That’s not good enough. Smart cities will need leaders who have the courage to defend their data, say what it means and establish it as a truth upon which cities make decisions. If officials don't stand behind their data, neither will the public.

#### No econ impact

Dr. Christopher J. Fettweis 17, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. Haass, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 1990s

, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful

**[CUT HERE.]**

while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global police~~man~~. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

## Cyber

#### 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.

#### The aff dries up investment for startups

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.

#### SSOs fail to constrain license terms for SEPs

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

#### The core antitrust laws are sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act---the counterplan doesn’t affect that

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### C---Antitrust deterrence is incorrect in the FRAND context

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

#### D---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]

#### Antitrust is a bad remedy for patent holdups – ensures over-deterrence and chills incentives to innovate.

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.

#### FRAND commitments are binding contracts.

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

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.

#### E---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

## Innovation Adv

#### More ev

**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

#### No incentives

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

## Cyber Adv

#### The aff makes it impossible for start-ups to leverage patents for bargaining

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.

#### C---No retaliation

Farnsworth 2013 – editor and a contributor for Arms Control Now (Timothy, "Is there a place for nuclear deterrence in cyberspace?" 5/30/13, Arms Control Now, armscontrolnow.org/2013/05/30/is-there-a-place-for-nuclear-deterrence-in-cyberspace/

However, the threat of using nuclear weapons to respond to cyber attacks by other states against U.S. critical infrastructure is not a realistic nor an effective response to cyber attack because: Cyber attacks lack the destructive and existential threat of nuclear weapons; A nuclear response to a cyber attack is not proportional; Threatening to respond with a nuclear weapons lacks credibility in adversaries’ eyes; Cyber deterrence in general is difficult to achieve; and The policy would provide a new rationale for nuclear proliferators. First, cyber attacks do not pose the same catastrophic threat nuclear weapons present. While it has been reported that the United States critical infrastructure is vulnerable to cyber intrusions and potential attacks, the likelihood of such attacks and their potential effects have been exaggerated by policy makers who lack the technical knowledge to predict accurately what effects a cyber attack might have on much of the critical networks. With the exception of a cyber attack against a nuclear power plant that causes a nuclear meltdown—which is theoretically possible but very unlikely—there is no cyber attack with the destructive force of a “limited” nuclear attack involving less than 100 nuclear weapons, which could kill tens of millions of Americans immediately. Even if an adversary were able to take down the power grid of the entire East Coast with a highly sophisticated cyber attack, leaving at-risk people populations and transportation systems vulnerable, such an attack would not have the nearly the same impact as the use of a few nuclear bombs on American cities. This does not mean that there are not real vulnerabilities that need to be addressed before cyber weapons become even more capable and destructive. But for now, they are not. The United States should therefore focus on hardening these networks and working with the international community to establish rules of the road to decrease risk. In March 2013 National Intelligence Director James Clapper presented the “Worldwide Threat Assessment” before Congress and said, there is a “remote chance” that over the next two years the United States will see a major cyber attack against its critical infrastructure, producing “long-term, wide-scale disruption of services, such as regional power outage.” However, it also said China and Russia “are unlikely to launch such a devastating attack” outside a “military conflict or crisis.” Second, the law of armed conflict requires that states respond to aggressive acts of force proportionally. If cyber attacks lack the destructive force of nuclear weapons then responding to one with a nuclear weapon is not a proportional response. If China launched a cruise missile and took down a power plant, it would be disproportional to respond with launching a nuclear warhead at China. Now imagine that instead of a cruise missile, a cyber attack is launched against the industrial control mechanism for the power plant and takes it offline. Does that somehow now warrant a nuclear response? No. Third, U.S. adversaries are not likely to consider the threat of a nuclear response to a highly sophisticated or catastrophic cyber attack as credible. If, as a policy, nuclear weapons are included to deter any level of attack or behavior, it tends to lower its effectiveness. For the United States, a conventional military response is more appropriate and can more easily be calibrated to respond to highly sophisticated cyber attack and would therefore be seen as a more credible response by any potential adversary. Fourth, a policy where nuclear weapons are used as deterrent against potential cyber attacks would have a negative effect on preventing nuclear proliferation. If responding to cyber attacks with nuclear weapons becomes an acceptable form of deterrence, it could legitimize other states’ nuclear weapons ambitions.

# 1NR

## Innovation DA

**Turns Chinese tech leadership and standard setting---Big Tech is the only route to victory**

**Bruyère and Picarsic 20** – co-founders of Horizon Advisory and a Senior Fellows at the Foundation for Defense of Democracies

Emily de La Bruyère and Nathan Picarsic, "There’s a Bigger Threat Than Big Tech. It’s Big China," Defense One, 7-26-2020, https://www.defenseone.com/ideas/2020/07/theres-bigger-threat-big-tech-its-big-china/167187/

Such questions are valid. Regulations have not kept pace with evolving digital marketplaces. But the July 27 hearing – and the Judiciary Committee’s investigation writ large – risk overlooking the real threat to competition: The Chinese Communist Party.

American tech giants do not exist in a vacuum. Whether Congress acknowledges it or not, American companies are competing with the Chinese state and its state-backed corporate champions. And these Chinese players are competing to control a new global architecture. As we consider the state of American big tech, we should also ask what curtailing it means for the world: Do we want Facebook, Google, Apple, Amazon or do we want Beijing’s?

“Chinese standards will inevitably reach the world,” declared the Chinese Communist Party’s Global Times in April, “and that will not be stopped by geopolitical games.” Today, these Chinese standards – and networks and platforms – facilitate theft of American innovations, promotion of Beijing’s narrative and economic systems, and genocide of the Uighur minority in Xinjiang.

Information technology is creating a new global architecture. As Beijing sees it, a foundational information system – what the Chinese Academy of Sciences calls a ubiquitous network backbone – is taking shape. It connects the real and the virtual worlds. Smart trains, cars, TVs, and refrigerators link to this backbone. So do shopping and entertainment platforms, global logistics, payments, imagery, social media. This information architecture was emerging before COVID. It is developing more quickly now, as remote work, commerce, and communication define daily existence.

China’s global strategy hinges on establishing control of the ubiquitous information network, with it the “Internet of Everything.” And Beijing intends to use this control to acquire global dominance; both to collect full data on what is said, moved, and purchased, and to shape as much. Beijing propels its strategy by deploying select state champions, propped up by subsidies and intellectual property siphoned from foreign rivals.

The House Judiciary Committee worries that Amazon, motivated by profit, can adjust information on its platform to shape what is purchased at the expense of smaller competitors. But Beijing wants to build a global network with which it will shape what is said, moved, and purchased.

One way or another, the Internet of Things will be built, and on a global scale. If you take America’s tech giants out of the equation, Beijing will be the one to build it.

Imagine what happens when a nation-state claims Amazon’s power – but internationally, across domains, and with hegemonic ambitions. That country could shape international supply chains. It could shape international narratives so that the media tells a positive story about China – and targets it to receptive audiences. That country could control global data on land, air, and sea movement, of people and of things, military and commercial. It could feed that data to its industrial champions as they compete for global markets. It could influence insurance rates and credit ratings. It can obfuscate illicit activities to gain a competitive edge. As the former Director of China’s State Council’s Research Office put it in 2019, “The strategic contest among great powers is no longer about competitions for market scale and technological superiority. It is about competition for system design and rule-making.”

This, not just espionage, is the threat posed by Huawei and China’s 5G ambitions. It is also the threat posed by ByteDance and Beidou and AliPay, by China’s growing dominance in fintech, commercial drones, social media, sensor systems, next-generation transportation systems, and modern logistics platforms. China’s long-standing, national strategies are candid about its intentions: This calendar year, Beijing is expected to release its China Standards 2035 strategy, a program to extend the footholds claimed through the Made in China 2025 industrial plan into control over the networks, platforms, and standards that will govern the emerging world.

The U.S. is ill-prepared to respond. The contest for global networks plays to China’s strengths. It favors size, centralization, and efficiency of scale. In 2002, a scholar at Hunan University wrote that “where there are network effects, when a country has a larger user base, even though its technology is no better, even worse, than other countries, it can win the international competition for standards.” That framing recurs consistently in Chinese discourse.

The network contest also allows Beijing to subvert America’s traditional strengths: The U.S. has the strongest innovative capacity and the most influential private sector in the world. But China copies that innovation – Baidu’s resemblance to Google is no accident – and applies it, at scale, through government-guided companies, for strategic ends. U.S. fragmentation and openness give Beijing an angle in. They also stymy the communication and coordination necessary for an effective response.

What would such a response look like? It would recognize that a new global architecture is being formed. If that architecture is not defined by the U.S. private sector, it will be captured by an authoritarian adversary. An effective response would therefore marshal the enduring strengths of the U.S. private sector: innovative capacity, incumbency, and nimbleness that the centralized Chinese Communist Party cannot hope to rival. Through a system of patriotic shaping and in concert with trusted allies and partners, an effective U.S. response would encourage American companies to build a positive global architecture.

#### Antitrust scrutiny deters investment in finance---wards away big tech

Pedersen 20 – Brendan Pedersen covers federal bank regulation and fintech policy for American Banker

Brendan Pedersen, "Congress's scrutiny of tech giants could be blessing and curse for banks," American Banker, 10-13-2020, https://www.americanbanker.com/news/congresss-scrutiny-of-amazon-google-could-be-blessing-curse-for-banks

WASHINGTON — A Democratic proposal to reform antitrust law to limit the reach of the largest technology firms may hearten banks, but analysts say the financial services sector is not immune from a revived focus on breaking up megacompanies.

In the sweeping 400-page report by the House Judiciary Committee’s antitrust law subcommittee, lawmakers laid out a sweeping case for reforming laws that allow the colossal growth of just a handful of tech giants: Amazon, Apple, Facebook and Google.

“To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” the report said, adding later that “the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform.”

The U.S. banking industry has long worried about the financial ambitions of leading tech firms and even the possibility that one of the four Big Tech giants could charter or acquire a bank with significant competitive advantages at the expense of traditional financial services firms. While none of the four companies have applied for banking powers, past reports have circulated of Google and Amazon being among those having engaged with bank regulators.

The report authored by subcommittee staff did not specifically focus on the tech giants' financial services aims, but rather on how their global reach and impact on sectors like the news media could threaten democratic norms.

But observers said tighter restrictions on acquisitions by tech leaders could put them on more equal footing with banks and even discourage their potential interest in acquiring financial technology startups. The report also appears to validate the regulatory regime for bank parents as a potential model for reining in growth of the tech sector.

“A more aggressive antitrust stance would reduce the likelihood that those companies get even deeper into financial services, so it protects some turf for banks that don't have to compete with a Bank of Amazon or an Apple Bank,” said Jeremy Kress, an associate professor of business law at the University of Michigan.

#### Big tech in finance is key to widespread blockchain adoption

Pejic 17 – author of "Blockchain Babel," a strategy guide to blockchain based on management theory and scientific research. He was voted by McKinsey and the Financial Times as one of three finalists in the Bracken Bower Prize for his work on blockchain in 2016

Igor Pejic, "Tech giants will not be silent about blockchain for long," American Banker, 5-18-2017, https://www.americanbanker.com/opinion/tech-giants-will-not-be-silent-about-blockchain-for-long

The hunt for the killer blockchain application is in full swing. The emergence of the technology saw something akin to a Cambrian explosion for blockchain startups. Now, more than 300 of them are vying to be the global economy’s “next best thing,” posing an obvious competitive threat to traditional financial institutions.

Banks, payment processors and credit card companies worry that brainy entrepreneurs, who transform high IQs into billions of dollars, could cast a pall over their core business. But **it is not fintechs** they should be worried about. It’s the **tech titans** in Silicon Valley that should keep them up at night.

Management theory makes the distinction between de novo market entrants and diversifying market entrants. The former are complete newcomers; they include fintech companies. But diversifying market entrants are firms that have been successful in other arenas. In most technological shifts, it is diversifying entrants that grab market share because they are experts in capabilities that suddenly become relevant to the new product or service generation. And unlike startups, they come with legions of experts, a global network and stuffed pockets. When the camera maker Polaroid failed, it was not de novo entrants that took over. Rather, it was Canon and Nikon that brought to the table their experience with optoelectronics. But how do you spot diversifying entrants in advance? A good start is to identify which competencies will become central once the blockchain hits the market.

For example, a technology like blockchain, challenging one of the world’s largest industries, needs more than just programmers and algorithms. The storage, archiving, communication and file serving needed to run distributed ledgers **gobble up** hard-drive space at **unprecedented speeds**. Moreover, blockchains have an end of life. When they go out of business, they still need to be accessible.

These requirements call out for the capabilities of the cloud-computing giants, such as Amazon, Microsoft and IBM. Banks must not underestimate what these companies can contribute to the blockchain; they offer more than just raw server resources.

At the same time, pure cloud companies will never be able to cut into banks’ core business; they are too far away from the end customer. The really dangerous diversifying entrants will come from somewhere else: **internet giants** such as Google, Apple and Facebook, which already collect massive amounts of data.

Globally dominating data-collecting companies — search platforms, social networks, e-commerce giants — are neglected in the discussion about blockchain. Internet firms haven’t shown a lot of interest in lowering the blockchain gauntlet onto the banking world. **But they will**.

Data behemoths are pointedly silent about the new technological development. Yet their core competencies will be crucial in a blockchain-based banking world. According to a Finextra Research report, companies such as Google and Facebook are **perfectly suited** to outdo banks in driving blockchain mass adoption (particularly in payments) due to their large global customer base. Already, large data collectors are entering payments with Android or Apple Pay and the companies are positioning themselves where they are the strongest: at the front end.

The likes of Google know what we search, what we write in emails, with whom we interact, and which places we frequent. And they know how to turn that data into dollars. Blockchain technology **trims transaction costs to the bone**, and financial services can be offered for free. This model p**lays into the hands of data behemoths**, whose business models are already geared to making money out of free services. Selling highly accurate personalized advertising in two-sided platforms is in their DNA.

Secondly, globally recognizable and trusted brands are another major asset of the tech titans. Google, Apple, and Amazon have been at the pinnacle of global brand valuation lists for years. The gap between these top three and other brands is stunning. Their brands are worth, respectively, $109 billion, $108 billion and $106 billion. People spend hours staring at their logos while checking emails, searching the web, chatting with friends or shopping online. AT&T comes in fourth with “only” $87 billion.

Silicon Valley’s behemoths are also competing to place their brands on payment interfaces.

To be sure, banks are likely to stay on top of global finance for some time to come. But, as it is the painful case with most technological leaps, the **barriers to entry** for nonbank competitors **will eventually disappear**. By how much will depend on identifying the right challengers on time and fending them off. Banks are well advised to keep a close eye on the blockchain activities of data behemoths.

**Financial blockchain is key to preventing terrorism**

**Readling and Schardin 16** – Justin Schardin is the Former Director of the Financial Regulatory Reform Initiative

Kristofer Readling and Justin Schardin, "Why Blockchain Could Bolster Anti-Money Laundering Efforts | Bipartisan Policy Center," Bipartisanpolicy, 6-2-2016, https://bipartisanpolicy.org/blog/blockchain-anti-money-laundering/

Blockchain could dramatically improve the speed and effectiveness of AML/CTF efforts by creating a system-wide ledger accessible in real time. This ledger would maintain all transactional data throughout a network of institutions rather than at a single institution. Thus, a network that included all financial institutions could avoid the information asymmetry problem above by giving law enforcement the ability to see the entire system’s ledger rather than just the suspicious activity reports currently submitted by individual institutions.

Wikipedia uses an analogous structure to maintain its articles by crowdsourcing knowledge from anyone willing to author or edit them. If someone adds erroneous information, the community’s editors will generally correct it. Since all of the articles and the history of edits to those articles are simultaneously visible to everyone who views the site, it is difficult for con-artists to make lasting changes.

Blockchain goes further than Wikipedia by storing an entire database of transactions (in the case of a financial blockchain) with each party on the network rather than on a single third-party server. This provides enormous security benefits because in order for a hacker to fraudulently edit the blockchain and thus steal money or assets, they would have to hack more than half the network rather than a single server. The more institutions that are part of the blockchain, the more difficult that becomes.

The security benefits of blockchain mean that transactions can be cleared faster because there is no need for third party verification of transactions. It also means that records of those transactions are much more trustworthy. This combination of speed and trust is an essential improvement over the current framework because of the need to prevent rather than prosecute terrorism.

A significant problem with blockchain that would need to be overcome is how to store the entire database at each institution while still protecting people’s privacy. There are good reasons for people to hide information from their bank or insurance company that have nothing to do with illegal activity. Therefore, many elements of any future financial system blockchain would likely need to be encrypted to protect personal information and corporate secrets.

With an encrypted blockchain, procedures could be put in place to grant financial regulators and law enforcement access when they needed it. This is similar to the current system except that instead of waiting for each bank to review its own transactions for suspicious activity and report them, law enforcement would be able to review the entire network at once without waiting for a bank to check its books. This could provide essential time savings in a world where terrorism is a chief concern.

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

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

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

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

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

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

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

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

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions

(CUT HERE

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

#### Precedent fundamentally favors defendants

Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust Institute, Scalia Law School at George Mason University, and Mungan is a Professor of Law, Scalia Law School at George Mason University, ‘21

(Joshua D., and Murat C., “The Easterbrook Theorem: An Application to Digital Markets,” The Yale Law Journal Forum, Vol. 130, pp. 622-646)

Thirty-six years afer Judge Easterbrook’s seminal article, the Supreme Court has effectively written Easterbrook’s principal conclusion about error costs into antitrust jurisprudence. Less ideological campaign, more convergent evolution, this process has spanned decades, over a series of opinions, and includes the votes of at least fourteen different Justices. Time and again, when confronted with deep questions in antitrust law, those Justices, have reached the same conclusion: false positives are more harmful than false negatives in antitrust.13

This proposition has appeared in a variety of antitrust contexts, both substantive and procedural. A couple of years after Easterbrook’s article was published, the Court invoked systemic-error costs to justify its intervention in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., which raised the burden for plaintiffs alleging predatory pricing.14 Noting how rarely the Supreme Court reviewed the sufficiency of the evidence, Justice Kennedy, writing for six Justices, found the effort justified by “the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings.”15 The Court placed paramount importance on the “realities of the market”16—like the likelihood of a breakdown in oligopoly discipline—which animated the Court’s skepticism about the odds of recovery from predatory pricing schemes.17 The Court’s answer, with the odds of a “real” case of predatory pricing so slim, was to tighten the legal standards to better filter false positives, in accordance with the economic balancing of error costs. The Court concluded the better course was not to assign liability to companies cutting prices because “[t]he antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition.”18

#### Companies will continue making big 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.

#### Courts limit Biden enforcement – any squo antitrust actions won’t take effect until 2023

Christopher et. Al. 7/26 – Paul Christopher is the Head of Global Market Strategy for Wells Fargo Investment Institute (WFII), a subsidiary of Wells Fargo Bank, N.A., which is focused on delivering the highest quality investment expertise and advice to help investors manage risk and succeed financially.

[Paul Christopher, CFA](https://www.wellsfargoadvisors.com/research-analysis/strategists/paul-christopher.htm), [Ken Johnson, CFA](https://www.wellsfargoadvisors.com/research-analysis/strategists/ken-johnson.htm), [Gary Schlossberg](https://www.wellsfargoadvisors.com/research-analysis/strategists/gary-schlossberg.htm), [Michael Taylor, CFA](https://www.wellsfargoadvisors.com/research-analysis/strategists/michael-taylor.htm), and [Michelle Wan, CFA](https://www.wellsfargoadvisors.com/research-analysis/strategists/michelle-wan.htm), “Policy, Politics & Portfolios,” Wells Fargo, https://www.wellsfargoadvisors.com/research-analysis/reports/policy/domestic-foreign-policies.htm

Antitrust laws are intended to help protect consumers from predatory corporate activity and promote fair competition in the open market. The intention of these laws and associated regulations is to help curb a range of business practices, including price fixing and monopolies. Without regulatory oversight, lawmakers' concern is that consumers would likely pay higher prices and have access to fewer choices of products and services.

Antitrust laws are comprised of three pieces of legislation enacted by Congress (see Sidebar 1). U.S. antitrust regulations are enforced by two federal agencies: the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Yet, there are limits and potential delays to antitrust policy under current laws. At times, U.S. courts have struggled to interpret vague language and make rulings.

Biden acts

Earlier this month, President Biden signed an executive order (EO) initiating a broad-based approach to spur competition across sectors including Information Technology, Health Care, and agriculture. The EO includes 72 actions and recommendations across 12 federal agencies (see Sidebar 2).1 President Barack Obama issued a similar EO late in his second term, but few agencies responded to it. Recently appointed FTC Chair Lina Kahn appears poised to broaden oversight and enforcement of anti-competition laws. Yet, there are questions about the president’s authority over the FTC and the agency’s reach; certain measures will likely be blocked by courts.

In Congress, regulating Big Tech has garnered bipartisan support, but for different reasons. Democrats are focused on alleged anticompetitive practices while Republicans are concerned about the limitations on commentary and content on social media websites. Last September, Congress held hearings to investigate these allegations. In June, the House Judiciary Committee approved five of six proposed bills, mainly aimed at Big Tech platforms favoring proprietary products and services. Yet, even with bipartisan support, we believe the odds of passing meaningful antitrust legislation in the near term are slim as proposals for physical infrastructure and social spending take precedence. That said, we expect antitrust legislation to remain a priority for lawmakers ahead of midterms.

Investment implications

With the signing of the EO, we believe changes in regulatory oversight are likely. Successful antitrust litigation from lawmakers is a growing possibility, yet likely slow in coming. The DOJ suit filed last year is still scheduled for September 2023, demonstrating the snail-like pace of litigating antitrust cases.

We currently have a neutral tactical position on the Information Technology sector. This outlook aligns with our view that the path of regulation is unclear and will likely be delayed by court challenges. This trajectory may not affect the earnings of large firms with component businesses that could be flexible enough to maintain earnings growth as individual or spun-off companies. Thus, the cross-currents of regulation add uncertainty that balances against our view that the sector’s earnings will grow over the next 6 to 18 months.

#### SCOTUS has overwhelmingly hindered anti-trust litigation---the plan’s precedent would be a massive upheaval

Edward Wasmuth, Jr., Partner, Smith, Gambrell & Russell, 2007, Supreme Court Antitrust Rulings, <https://www.sgrlaw.com/ttl-articles/1068/>

Trends Reflected in These Decisions

These decisions reflect a faith in markets. Leegin and Ross-Simmons show that **the** Supreme **Court believes** that market participants ought to enjoy **greater flexibility** in choosing how to do business, unencumbered by the threat of antitrust lawsuits.

**All of the decisions** reflect **a perspective highly suspect** of the benefits of antitrust litigation. Leegin reflects a view that the threat of litigation under a per se rule keeps businesses from engaging in pro-competitive behavior. In Ross-Simmons, the Court declared claims of predatory bidding to be inherently suspect. In Credit Suisse, the Court was concerned that antitrust lawsuits would have a chilling impact on the IPO market. In Twombly, the Court expressed concern that businesses would need to endure the burden of expensive litigation while a court or jury attempted to distinguish between illegal conspiracies and innocent, legal parallel conduct. **In each case, the Court raised standards for liability to lessen the chilling effect that antitrust litigation might have on markets.** If conduct could be construed as either innocent or illegal, the Court was willing to presume the conduct innocent.

#### Biden acts are vague and guaranteed to be challenged by the courts

Alvarado 8/31 – Investment Strategy Analyst Wells Fargo.

Luis Alvarado, August 31 2021, “Prospective policy changes don’t dent a strong economy,” Wells Fargo, https://www.wellsfargo.com/investment-institute/ppp-prospective-policy-changes-dont-dent-strong-economy/

Last month, President Biden signed an executive order (EO) that aims to broaden the administration’s focus on anticompetitive practices and industry consolidation.2 The order proposes 72 actions and recommendations across more than a dozen federal agencies that target increased competition in sectors including agriculture, health care, pharmaceuticals, technology, and transportation. The EO does not decree specific policies; rather it encourages regulators to craft strategies for executing the list of proposed actions. In fact, critics contend the EO is a vague outline of recommendations that will likely face legal roadblocks.

A sweeping order

Promoting market competition has been a key priority for the White House. The administration maintains that industry consolidation has reduced competition, hurting consumers, workers, and small businesses. The EO provisions aim to spur competition in consolidated industries and reinvigorate innovation. Yet, certain obstacles will likely delay such broad edicts. The president’s authority over federal agencies is limited, and implementing antitrust policy is a laborious process stymied by court injunctions and industry blockades.

The order seeks to promote competition and growth across a number of sectors. Its highlights include:3

Labor markets — Limits or bans noncompete clauses, occupational licensing requirements, and companies from sharing wage information. These actions complement the proposed Protecting the Right to Organize Act (PRO) that would grant workers unionization and collective-bargaining rights.

Health care — Encourages collaboration among states to promote drug importation and ban pay-for-delay agreements (see sidebar 1). It supports generic drugs and reducing prescription-drug prices.

Transportation — Advocates refunding of baggage and travel fees for unoffered services and requires fee disclosure. It also requires railroad track owners to provide rights of way to passenger trains and limits transport fees for maritime shipping.

Agriculture — Encourages new rules to reduce poultry processers’ pricing leverage over smaller producers. It also advocates new requirements for “Product of USA” meat labeling.

Information technology (IT) — Restores net neutrality rules, requires disclosure of broadband prices and speeds, and limits early termination fees. It also calls for greater scrutiny of IT mergers and data collection.

Banking and finance — Supports updating guidelines for financial mergers and requires banks to permit data portability for customers.

Investment implications

We believe the EO will usher in changes in regulatory oversight. Antitrust legislation from Congress is another growing possibility, yet likely slow in coming.4 That said, we expect antitrust legislation to remain a priority for lawmakers ahead of midterm elections.

In reviewing the highlights above, we conclude that the equity sector impacts appear narrow as the provisions should have their main impact at the subindustry level. The Health Care sector is the notable exception because prescription-drug price controls are a significant negative for that industry. Nevertheless, we look for a gradual return of a broad range of health care spending as a potential counterbalancing positive for the sector. We maintain our neutral rating on Health Care and favor holding exposure at a market weight.

For other sectors, we expect little effect from the president’s order on our current tactical guidance over the coming six to 18 months. Congress has other legislative priorities, and the courts will likely block many regulatory agency directives. Consequently, our outlook for strong economic growth is a more important factor in guiding our sector preferences. Specifically, we hold a favorable view of the Communication Services sector along with cyclical sectors oriented to economic expansion, including Energy, Financials, Industrials, and Materials.

#### 1---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.

#### 2---Substantive legal focus—new substantive changes signal a trend throughout the economy

Crowell & Moring 20 – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

“The antitrust world hasn’t seen an issue this large in decades. Unlike every major antitrust development of the past, a look into Big Tech involves companies that may not charge customers anything and whose assets involve private consumer data that may not be able to be transferred as part of a remedy,” says Shawn Johnson, a partner at Crowell & Moring and co-chair of its Antitrust Group in Washington, D.C. “And this is not just about Big Tech. In the end, all companies are becoming digital. From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a wide range of businesses for years to come.”

While an imminent breakup of any Big Tech firm is unlikely, the increased attention to antitrust issues has implications far beyond the handful of companies that dominate the news. These new developments could affect mergers, acquisitions, and business practices in virtually every sector. That’s because competitive advantage today is often reliant upon access to key data, to online platforms, and to cutting-edge technologies—and antitrust legal and regulatory action sets the rules for such access.

“This is a megatrend,” says Wm. Randolph Smith, a partner at Crowell & Moring in Washington, D.C., former chair of the firm’s Antitrust Group, and a former executive assistant to the chairman of the FTC. “A confluence of events, including political philosophy, economic impact, and missteps on issues like privacy, is creating a shift in antitrust focus and thinking that could reverberate into other sectors.”

So Big. So What?

Big Tech platforms stand accused of a multitude of sins: invasion of privacy; lax data security; unfair treatment of labor, content, or merchandise suppliers; bias against competitors; failing to vet dangerous products or content; and the acquisition of incipient competitors in an effort to squelch future competition, a phenomenon some have labeled killer acquisitions.

Many of these platforms have prospered because they provide a superior service at a lower cost, or for free. But they also have benefited from the “network effects” that tend to favor technology incumbents. Along the way they’ve collected vast quantities of data about customers or users that critics contend entrench their dominance. “Antitrust enforcers are struggling to figure out how to define and police the amount of market power these platforms have amassed, particularly with respect to the collection and use of personal data,” says Jeane Thomas, a Washington, D.C.-based partner in Crowell & Moring’s Antitrust and Privacy & Cybersecurity groups.

Within antitrust circles, a debate has emerged about whether current law and legal precedent suffice to address the alleged challenges presented by Big Tech platforms. For nearly 40 years, antitrust law has been dominated by the idea that consumer welfare is the ultimate goal of antitrust enforcement. Some critics have vigorously challenged that standard, especially when it comes to mergers and dominant-firm conduct, and blame what they view as weak antitrust enforcement for increased market concentration and market power. Others have sought to defend the standard, while still others are actively seeking to define a new middle ground that is at once economically grounded yet acknowledges that increased antitrust enforcement is warranted, notes Crowell & Moring senior counsel Andrew Gavil, a former director of the FTC’s Office of Policy Planning and a member of the firm’s Antitrust Group in Washington, D.C.

Yet the source of Big Tech’s alleged dominance may lie less in legal doctrine than in missed opportunities for more aggressive antitrust enforcement. Many important acquisitions by Big Tech companies in recent years have flown under the radar from an antitrust perspective, notes Johnson. Antitrust enforcers haven’t challenged these deals, likely because the acquired company was viewed as operating in an adjacent or differentiated space. But with the benefit of hindsight, it is likely that some of these companies would have developed into potential competitors, such that a killer acquisition had occurred. “The platforms are thinking 10 years ahead,” Johnson says.

“The current wave of concern about Big Tech mirrors previous eras when antitrust was in the spotlight, such as when supermarkets and shopping malls were hurting Main Streets across America,” says Smith. Beyond acquisitions, big company behavior can raise competitive concerns when the companies take measures to hold onto the power they already have. Or as Smith puts it, “It’s often not what you do to become king of the hill, it’s what you do to stay there” that attracts antitrust attention.

It’s far from clear, however, whether antitrust enforcement is the answer to the problems ascribed to Big Tech. A prime example is concern about the protection of privacy. “Traditionally, privacy concerns have played virtually no role in antitrust enforcement,” says Thomas. “But the platforms have grown so large that some users want, and to some extent need, to be on these platforms so much so that they feel forced to give up significant privacy in exchange.” Some markets might benefit from competitors that would do a better job protecting privacy.

“Privacy protection and competition protection are on a collision course,” Thomas says. If platforms are leveraging customer data to foreclose competition, a typical antitrust solution would be to require them to make that data available to competitors. But this might mean the sharing of personal data, which would be unacceptable to most people. One prominent platform has already withheld information from advertisers about how viewers are interacting with their ads— creating anticompetitive concerns—by saying it must conform with European and California privacy laws. “Regulators are going to have to make some policy choices to say whether or not we’re willing to trade off harm to competition to protect personal data,” Thomas says. “In any case, privacy protection may be better addressed through consumer protection laws, for example by forbidding platforms from collecting certain information or from using it in certain ways.”

Guidelines Ahead

With so many investigations underway, it might seem to some that the era of Big Tech is coming to an end. In reality, experts say, the course of change in 2020 is likely to be slow and incremental—though a change in the political balance of power in Washington could open the door to new legislation that would upend existing judicial precedent.

In January, the DOJ and the FTC jointly released new draft guidelines governing vertical mergers. The FTC has also said that it is developing additional digital platform enforcement guidelines as well as an addendum to 2006 horizontal merger guidelines that would address nascent competition and how the agency analyzes non-price effects of mergers. “Agency guidelines are significant for many reasons,” says Alexis Gilman, an antitrust partner at Crowell & Moring in Washington, D.C., and former head of the Mergers IV Division at the FTC. “They’re a useful road map of the agencies’ own analyses, which make them an important cue for companies that want to understand how the agencies might react to proposed deals. But they also influence how courts analyze issues, especially given the relative paucity of case law.”

The draft vertical merger guidelines, however, were less aggressive than many observers had expected. “I don’t see them having a significant impact on vertical merger enforcement,” says Johnson. “They don’t reflect a fundamental shift in law and enforcement policy.” The two Democrats on the FTC abstained on the guidelines, arguing they were too soft. The guidelines identify effects that agencies will evaluate in determining whether to challenge a transaction, such as raising rivals’ costs. They also identify a market-share threshold below which agencies are unlikely to challenge a merger.

The efficiencies arising from vertical mergers will continue to make agencies reluctant to formally challenge transactions unless they raise serious competitive concerns, Johnson says. Yet the mere fact that the guidelines were revised reflects closer scrutiny of deals by both state and federal regulators in many areas besides tech. That includes health care, where the quest for “integrated care” has inspired a significant number of vertical acquisitions. Last June, for example, the FTC announced a settlement between two major health care companies that required the acquirer to divest certain regional operations. The deal also led to a settlement with the Colorado attorney general. Importantly, the changes to the vertical merger guidelines will affect every industry in which companies seek to create efficiencies through vertical integration—not just health care or Big Tech.

Rise of the Enforcers

In remarks to a group of state attorneys general last December, the U.S. attorney general noted the rare bipartisan support for closer scrutiny of digital markets. The FTC and the DOJ have each launched new efforts focused on technology. In March 2019, the FTC announced the formation of its Technology Task Force, which has since become the fullfledged Technology Enforcement Division. TED will review conduct and mergers in any market “where digital technology is an important dimension of competition,” according to the agency. Areas of focus may include killer acquisitions, “self-preferencing” by platforms, and exclusionary data practices. “The division is well staffed and its ambit is broad, so its investigations are likely to be thorough, wide-ranging, and lengthy,” says Gilman. The DOJ announced its own review into leading online platforms in July 2019.

It’s highly likely that these agencies will initiate enforcement actions this year, says Gavil. However, “they will be more targeted than people think, given the public debate,” he says. Rather than pursuing full breakups, agencies will focus on mergers or particular conduct alleged to be anticompetitive. In many cases, the actions will result in consent decrees in which companies agree to measures including targeted divestitures, elimination of anticompetitive contractual provisions, or less severe design changes.

“The investigations will likely create a flood of follow-on litigation by private companies and individuals who claim to be harmed by anticompetitive practices,” says Jason Murray, a Los Angeles-based litigator and co-chair of Crowell & Moring’s Antitrust Group. “Competitors, suppliers, vendors, and customers could attempt to recover damages in private lawsuits based on theories established or prosecuted by the government.” State attorneys general could sue on behalf of excluded competitors; individual customers, or “indirect pur-chasers,” could join massive, multidistrict class action suits. “These suits will multiply and drag on for a decade,” Murray predicts.

But any litigants that choose to pursue an antitrust remedy in the courts—whether agencies, states, or private entities—will run into legal doctrines that have set a very high bar for plaintiffs, particularly standards relating to exclusion and the duty to deal with rivals, says Lisa Kimmel, a senior counsel in Crowell & Moring’s Antitrust Group in Washington, D.C., who formerly served as FTC attorney advisor on antitrust and competition policy matters for then-chairwoman Edith Ramirez. “The case law has been very defense-friendly for many years, especially for monopolization cases. Novel theories are unlikely to prevail under the existing state of antitrust law, which means there may be a disconnect between what U.S. enforcers want to do and what they can actually get done absent legislation that alters the status quo in the courts.”

With the courts and long-standing precedent acting as a backstop, a sea change in antitrust will likely require new laws from Congress. And substantive new laws are unlikely unless a bipartisan consensus coalesces around specific reforms or this year’s election results in single-party control of Congress and the White House, Gavil believes.

Ripple Effects

Regardless of whether this new wave of antitrust investigations results in a major change in law or legal doctrine, it could still have a significant effect on business well beyond Big Tech. That’s because it could impact the robust markets for data and disruptive technology that drive the economy in this era of digital transformation.

“The mere fact of the investigations is already affecting the market,” Gavil says. “It influences investors, venture capitalists, and innovators.” Potential competitors to the Big Tech platforms have been emboldened, the big platforms are more cautious, and some innovators who were looking forward to having their companies bought “could be disappointed.” The likely sources and shape of innovation may well change as a result.

#### 3---There’s no way to limit the plan’s scope AND firms and lawyers are risk-averse and think this is true---the result is fear of liability that scales back investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### 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.

#### That liability destroys incentives to participate in the standard setting process and kills innovation.

Ginsburg et al. 21 – Antonin Scalia Law School, George Mason University

Douglas H. Ginsburg, Joshua D. Wright, Camila Ringeling, “Growing Convergence: The Limited Role of Antitrust in Standard Essential Patent Disputes,” George Mason University Law & Economics Research Paper Series, 21-19, CPI Antitrust Chronicle, Vol. 1, No. 2, Summer 2021, https://www.law.gmu.edu/pubs/papers/2119

VII. POLICY IMPLICATIONS AND CONCLUSIONS

A strong patent law is crucial not only for market incumbents but even more for would-be entrants as it “tends to enable smaller, less integrated, more disruptive innovators.”97 The possibility of obtaining injunctive relief against infringement of an SEP is crucial to encourage innovation and entry.

At the same time, policies that encourage innovators to participate in the standard development process result in more competition to shape the standard, making it more likely that the best technologies will be adopted. Less participation could result in suboptimal standards and less implementation in the marketplace, which would tend significantly to diminish interconnectivity and interoperability. Therefore, as a general principle, policies that protect IPRs and promote participation in the standard development process have the potential to promote innovation and consumer welfare.

There is no benefit to be had from imposing antitrust liability upon a patentee merely for seeking to enforce its property right. Indeed, to hold that seeking an injunction may be anticompetitive negatively affects an important right that promotes dynamic competition by ensuring there are strong incentives to invest in innovative technologies.98 More important still, imposing antitrust liability for enforcing an SEP frustrates the constitutional purpose of conferring patent rights, turning a property rule into a liability rule and creating a de facto compulsory licensing scheme.99

Competition and consumers both benefit when inventors have complete incentives to exploit their patent rights. This requires an assurance to inventors that they need not subsidize their competitors’ business models.100

#### The prospect of antitrust liability for SEP holders over-deters.

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

Moreover, an antitrust sanction is not only unnecessary to protect consumer welfare given that the law of contracts is sufficient to provide optimal deterrence,18 but is likely to be harmful.19 First, significant monetary sanctions are likely to over-deter procompetitive participation in SSOs; FRAND-encumbered SEP holders need the credible threat of an injunction if they are to recoup the value added by their patents and have no other adequate remedy against an infringing user. Indeed, excessive deterrence is particularly likely because, with liability turning upon whether the infringing user was truly a “willing licensee”20—a factual determination that may be far from clear in many cases—the outcome of an antitrust case will necessarily be uncertain. The prospect of penalizing a FRAND-encumbered SEP holder for seeking injunctive relief diminishes the value of its patents and hence reduces its incentive to innovate.

Second, the prospect of antitrust liability for a patentee seeking injunctive relief would enable an infringing user to negotiate in bad faith, knowing its exposure is capped at the FRAND royalty rate; in this way, an unscrupulous or a judgment-proof infringing user can force the SEP holder to take a below-FRAND rate. Indeed, when the worst penalty an SEP infringer faces is not an injunction but merely paying, after a neutral adjudication, the FRAND royalty that it should have agreed to pay when first asked, then reverse holdup and holdout give implementers a profitable way to defer payment—or if they are judgment proof, to avoid payment altogether— and puts SEP holders at a disadvantage that reduces the rewards from, and can only discourage innovation and participation in, standard setting.21

#### Treble damages make the aff uniquely harmful.

Ginsburg 14 – Senior Circuit Judge, U.S. Court of Appeals for the D.C. Circuit, Professor of Law at George Mason University

Douglas H. Ginsburg, Taylor M. Owings, Joshua D. Wright, “Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions,” The Antitrust Source, George Mason University Law and Economics Research Paper Series, October 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2515949

An Antitrust Sanction for Seeking an Injunction Would Be Harmful

An antitrust remedy is not only unnecessary to protect consumer welfare when the law of contracts and injunctions is sufficient, it would be harmful. First, a familiar point: antitrust liability comes with treble damages and so is most appropriate when anticompetitive conduct is difficult to detect or otherwise unlikely to be litigated. Because initiating litigation by filing for an injunction entails neither of these problems, treble damages will overdeter SEP holders that need an injunction to recoup the value added by their patents and have no other adequate remedy against an infringing user.24 Indeed, excessive deterrence is particularly likely because the outcome of an antitrust case would be uncertain. Liability would attach based in significant part upon whether the SEP holder refused a FRAND offer, but what constitutes a FRAND price is far from clear. A SEP holder with a meritorious position reasonably may fear a contrary finding and abandon its right to an injunction in order to avoid the risk of being held liable for treble damages.

For instance, a SEP holder may require injunctive relief against a SEP user that is or appears or claims to be judgment proof or consistently and in bad faith rejected FRAND terms to gain leverage in negotiations by putting the SEP holder to the need for costly litigation. Bo Vesterdorf, the former president of the General Court of the European Union, makes the point with unmistakable clarity:

If such SEP owners, when they believe that the only way to get [a SEP user] to accept to take a license is to seek an injunction against the unauthorized and thus illegal use of the SEP, run the risk of being found to abuse a dominant position with the ensuing risk of potentially large fines, it puts them in a position of unwarranted legal uncertainty.25

This uncertainty is not only bad for private parties, it is contrary to the public interest in dynamic competition. Overdeterring SEP holders from seeking an injunction effectively diminishes the value of their patents and hence their incentive to innovate.26 [FOOTNOTE 26 STARTS] 6 See id. (a prohibition on seeking an injunction “may discourage [SEP holders] from contributing their technology to standards and from accepting to commit to license on FRAND terms, or even discourage them from investing in R&D as much as they would otherwise have done”); Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation, 60 J. INDUS. ECON. 249 (2012). [FOOTNOTEE 26 ENDS] It enables a SEP user to negotiate in bad faith, knowing its exposure is capped at the FRAND licensing rate, and requires a SEP holder to take a below-FRAND price from an unscrupulous or judgment-proof SEP user.27

#### Applying antitrust law to post-standardization opportunistic conduct chills innovation and standards participation.

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

The Potential for Chilling Innovation and Standards Participation. Lost in the debate about whether Section 2 does or should reach allegations of post-standardization opportunistic conduct are the risks to consumer welfare that such a standard would bring about. The benefits to consumer welfare from dynamic competition and innovation are manifest, especially in high technology industries. Likewise, the enormous technological and competitive benefits of open standards are by now well-recognized and will not be repeated here.60 Indeed, FTC cases premised on allegations of essential patent abuse unfailingly cite the harm to consumer welfare. For example, in Google/MMI, the FTC commented that “[w]hen participants breach their FRAND commitments by engaging in patent hold-up and threatening to keep products out of the market, consumers and the competitive process will likely be harmed.”61

It comes as no surprise that to diminish the profit incentive is to diminish the incentives for innovation itself. In the words of Trinko:

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.62

For that reason, the protection of those incentives to innovate are rightful concerns of antitrust laws and enforcers, including protection from misplaced intrusion of the antitrust laws into FRAND licensing negotiations. As Assistant Attorney General Baer explained last year:

Pricing freedom in bilateral licensing negotiations is critical for intellectual property owners. . . . Using antitrust enforcement to reduce the price firms pay to license technology owned and developed by others is short-sighted. Any short-term gains derived from imposing what are effectively price controls will diminish incentives of existing and potential licensors to compete and innovate over the long term, depriving jurisdictions of the benefits of an innovation-based economy.63

# 2NR

## Innovation DA

#### This was a district court ruling that will get appealed, while the AFF uses the Supreme Court, whose decisions are final and binding. AND, this was a WIN for Apple anyways!

Kif **Leswing** **21**, “Apple can no longer force developers to use in-app purchasing, judge rules in Epic Games case,” CNBC, https://www.cnbc.com/2021/09/10/epic-games-v-apple-judge-reaches-decision-.html

However, Rogers said Apple was not a monopolist and “success is not illegal.”

“Given the trial record, the Court cannot ultimately conclude that Apple is a monopolist under either federal or state antitrust laws,” Rogers wrote.

The trial took place in Oakland, California, in May, and included both company CEOs testifying in open court. People familiar with the trial previously told CNBC that both sides expected the decision to be appealed regardless of what it was.

“We are very pleased with the court’s ruling and we consider this a huge win for Apple,” Apple general counsel Kate Adams said.

#### The ruling is entirely irrelevant---it WASN’T on antitrust, but instead an irrelevant Californian law.

**Christopher M. 21**, 10-30-2021, "Court Issues Mixed Ruling in Epic v. Apple Antitrust Trial," National Law Review, https://www.natlawreview.com/article/court-issues-mixed-ruling-epic-v-apple-antitrust-trial

While the court declined to find antitrust violations, it did hold that Apple’s anti-steering provisions violated the California Unfair Competition Law. As discussed above, Apple’s anti-steering provisions restrict developers’ ability to tell customers about payment methods outside of Apple’s in-app payment system. The court concluded that the provisions were unfair because they prevented users from making an informed choice. Thus, the court issued a nationwide (but not global) injunction enjoining Apple from: (i) prohibiting apps and their metadata from containing “buttons, external links, or other calls to actions that direct customers to purchasing mechanisms, in addition to [in-app payment]”; and (ii) prohibiting developers from “[c]ommunicating with customers through points of contact obtained voluntarily from customers through account registration within the app.”