# 1NC --- Wichita

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Sunbursting CP

#### The United States Supreme Court ought to, deploying the technique utilized in Great Northern Railway Company v. Sunburst Oil and Refining Company:

#### decline to rule that restrictive contracts governing post-sale use restrictions on products embodying patented components constitute an anticompetitive business practice on the basis that such a decision would undermine judicial deference to reliance interest

#### announce that existing precedent in this area is no longer reliable and that relevant parties should be on notice that the reliance interests that caused it to be upheld in this case will not apply to future challenges

#### not deny certiorari in challenges on the issue

#### CP solves and avoids - sunbursting avoids the downfalls of an unpredictable decision but causes legal change

Faure 14 – Michael Faure, Professor of International and Comparative Environmental Law at Maastricht University and Professor of Comparative Private Law and Economics at the Rotterdam Institute of Law and Economics (RILE), Erasmus School of Law, Morag Goodwin, Associate Professor in European and International Law, Tilburg Law School, and Franziska Weber, Junior Professor for Civil Law & Law and Economics at the Institute of Law and Economics, University of Hamburg, “THE REGULATOR'S DILEMMA: CAUGHT BETWEEN THE NEED FOR FLEXIBILITY & THE DEMANDS OF FORESEEABILITY. REASSESSING THE LEX CERTA PRINCIPLE”, Albany Law Journal of Science and Technology, 24 Alb. L.J. Sci. & Tech. 283, Lexis

Prospective overruling is a judicial technique in which a [\*349] previous precedent or authority is overruled without the new ruling having retrospective effect. n386 It thus represents a departure from the fundamental notion that judicial decisions that develop or change the law necessarily have retroactive effect. n387 It is, or has been, used by a court wishing to overturn or amend bad law, but is wary of the consequences of the retrospective application of their finding. Such consequences may include the inherent unfairness that would result to an individual who had relied on the existing law in good faith n388 or because of reasons of practicality, where the decision would have sweeping consequences for the operation of the judicial system. n389 Although appearing similar, prospective overruling differs from obiter dicta in two significant ways. Firstly, while judges can use obiter dicta to declare certain rules to be bad law or to comment on the likely direction of necessary legal reform, such comments do not entail that the decision in the case before them will be inconsistent with a future case. n390 Secondly, obiter dictum, while possibly highly influential, does not benefit from stare decisis and therefore is not binding. n391

There are a number of different ways in which a court can use prospective overruling. n392 Firstly, a court can announce a new rule or standards that will apply only to future cases, i.e., not to the case before it in the instant dispute. The old rule would also govern any cases that arose from action taken prior to the [\*350] announcement of the new rule but determined after it. n393 This has been called "pure" prospective overruling. n394 A second approach would be to announce a new rule that is only applicable to future cases that arise after the announcement but, as an exception, to apply it to the instant case. n395 A third alternative is to apply the new rule not only to the case at hand but to all other cases already pending at the time of announcement. This third approach excludes those cases in which the action that motivated them predates the announcement but where proceedings had not already been commenced at the moment of declaration of the new rule. n396 Finally, a fourth possibility would be for a court to announce a new rule not having retroactive effect but to suspend the entry into force of that new rule until a future date. n397 This technique is used to allow those actors likely to be affected by the change to adapt their behavior accordingly and to give the legislature the opportunity to enact a different rule should they so wish. n398 Traynor termed this form of prospective overruling "prospective-prospective overruling." n399 In this version of prospective overruling, the new rule does not apply to the case in which it is announced, or to any other cause of action that arises before the delayed entry into force of the new rule. n400 The Court of Justice of the European Union, for example, has accepted the need to place temporal limitations on its rulings in the interests of justice, although it has declared that it does so only in exceptional circumstances. n401 A variation on this form of [\*351] prospective overruling has been suggested by Advocate General Jacobs, whereby both the retrospective and prospective effect of a ruling of the Court of Justice of the European Union could be subject to a temporal limitation; in that case until the Member State concerned has had a reasonable opportunity to consider the introduction of amending legislation. n402

In addition to the European Union, a number of jurisdictions have used or accepted the possibility, if only in principle, of prospective overruling in exceptional circumstances, including the United States, n403 India, n404 New Zealand, n405 Canada, n406 the United Kingdom n407 and Germany. n408 The European Court of Human Rights has been understood to issue prospective rulings, n409 although there is some doubt as to whether its "dynamic" approach to convention interpretation is properly classified as such; n410 however, it certainly accepts such rulings in domestic courts as compatible with the rule of law. n411 At its apogee in the United States, the United States Supreme Court ruled in the case of Linkletter v. Walker, that in both criminal and civil cases, "the accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective." n412 However, since the 1970s, the use of retrospective overruling in the United States has been in retreat. While it remains unclear as to whether the use of "pure" prospective overruling (where the new rule does not apply to the case at hand) has been abandoned in civil cases, n413 the Supreme Court [\*352] has overturned its earlier enthusiasm and now prohibits prospective overruling in criminal cases n414 and the use of selective prospective overruling (i.e., "non-pure") in civil cases. n415 Yet, despite the discrediting of prospective overruling as a technique in the US more than twenty years ago, it continues to attract the interest of senior common law judges. n416 In a 2005 case, In re Spectrum Plus, the House of Lords found that it was theoretically possible to overrule a judgment with prospective effect only; n417 and in 2007, two members of the New Zealand Supreme Court accepted the same possibility. n418

3. The Pros and Cons of Prospective Overruling

Given that the heyday of prospective overruling has, until recently, been behind us, what reasons are there for being suspicious of the technique? There are, it seems, two main reasons for rejecting prospective overruling in its entirety. The first has been articulated by the Australian High Court in its emphatic refusal to countenance the use of prospective overruling and concerns an understanding of the nature of judicial interpretation. In the case of Ha v. New South Wales, the Court ruled that, "it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law." n419 In this reading, where a court determines that the rule they are required to apply is bad law, i.e., that the "real law" is actually now a different standard, it is simply untenable to continue to apply the wrong standard, even where it results in a manifest injustice to one of the parties before it. n420 The notion that prospective overruling is "a perversion of judicial power" gains further credence from the commonly accepted understanding that the role of the judiciary is to interpret the law in light of the case before it, where the primary function of the courts is to [\*353] adjudicate between parties; going beyond the particular case by making a general statement about the law is seen by some as "blatantly legislative." n421 While the legislature looks forward, the proper direction of the courts' attention is backwards, applying the existing law to situations that have already happened. This view was echoed by the United States Supreme Court in Griffith v. Kentucky, in which it ruled, concurring with earlier minority opinions by Justice Harlan, that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." n422

The second reason for critics to reject prospective overruling concerns the impact upon individuals of arbitrariness to which prospective overruling gives rise. In Griffiths v. Kentucky, the United States Supreme Court stated quite simply that "selective application of new rules violates the principle of treating similarly situated defendants the same." n423 Once a rule or practice has been declared bad law or unconstitutional, it violates the central notion of equality before the law if the new rule is applied to benefit one individual but not another. n424 These concerns can be somewhat alleviated by applying the new rule to all cases stemming from action arising at or after the time of the cause of action of the case in which the new rule is announced, i.e., by limiting the normal retrospective effect of rulings only marginally, but to do so would be to reduce considerably the possible benefits of prospective overruling. n425 In effect, those parties who had relied in good faith on the previous standard in such actions would be held to a new, stricter standard and thus their legitimate expectation of and right to legal certainty would [\*354] be compromised. n426

What, then, are the benefits? In particular, would other, less dramatic, techniques do the same job without encountering the hostility that prospective overruling can inspire? Obiter dicta could be used, for example, to indicate a likely direction of legal reform without actually introducing a new rule. n427 However, it is in large part the binding nature of a prospective decision that makes it such a useful technique in balancing flexibility and foreseeability. n428 While obiter dicta could be used in a similar way, although such statements lack the ability to bind future courts, they reduce the foreseeability of parties the same way incentives for operators to adapt their behavior are reduced. Operators may instead play a waiting game in which they fail to carry out adaptations in the hope that a different court will continue to apply the existing standard. Prospective overruling, we suggest, cannot be replaced by the less controversial tool of obiter dictum. Moreover, obiter dictum would obviously only provide a solution in those legal systems where it exists, which is not the case for many civil law systems. n429

The first main benefit of prospective overruling follows from the assertion that it is a perversion of judicial power to uphold a law that is understood to be unsound. n430 Courts are rightly reluctant to overturn a precedent, even where they are convinced of the unsoundness of the rule in question, where the harm caused by retrospective change is greater than the supposed benefits. n431 Thus, Justice Traynor suggested, in his classic article on the topic, that the main benefit of the technique of prospective overruling is that it enables courts to "change[] bad law without upsetting the ... expectations of those who [have] relied upon it." n432 For Traynor, prospective overruling, in direct contrast to its critics, is a necessary tool for the proper administration of justice. n433 Allowing bad law to stand simply to overturn a [\*355] precedent would entail unacceptable and unreasonable hardship for one of the parties concerned is an equally perverse understanding of the judicial role. n434

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T TPS

#### Topical affs must increase prohibitions on the entire economy:

#### 1---By identifies an agent

Lexico, ND (“BY English Definition and Meaning” https://www.lexico.com/en/definition/by)

PREPOSITION

1 Identifying the agent performing an action.

#### 2---“The” before a noun means whole

Webster’s 5 (Merriam Webster’s Online Dictionary, [http://www.m-w.com/cgi-bin/dictionary](about:blank))

The

4 -- used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole <the elite>

#### 3---“Private Sector” means all

Senate Manual 11 (Senate Document No. 112-1)//babcii

The term ``private sector'' means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.112 S. Doc. 1

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Collusion CP

#### The United States Federal Government should

#### - remove antitrust scrutiny on companies colluding against patent holders that participate in restrictive contracts governing post-sale use restrictions

#### - announce that the Bowman v Monsanto decision only creates an exception for the exhaustion doctrine for sui generis category of self-replicating technology and shall not apply to other types of technology

#### Plank 1 solves --- Allowing collusion against seed monopolies redresses abusive use of patents by leveling market and negotiating power --- It also harmonizes antitrust and patent law

1AC Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

While courts and agencies have found that **antitrust is ill-equipped to identify anticompetitive patent practices**, the clearer antitrust offense may thus occur when licensees combine to negotiate against rightsholders. As a result, patent owners may enforce the antitrust laws to solidify their limited monopoly even though antitrust is meant to condemn monopolies. In light of this, the next Part explores the costs imposed by strategic patenting. It concludes with a simple, yet effective, proposal promising to foster innovation and harmonize the antitrust and patent laws.

III. THE NON-ANTITRUST SOLUTION

**The best remedy against abuses of patent rights is less antitrust**. This Part suggests that some firms have used the patent system to exclude competition rather than to protect original innovation. But we caution against enhancing antitrust enforcement as many policymakers and scholars have sought to do.187 **Using historical and economic analyses, we assert that firms should be able to collude against a monopolist or rightsholder, effectively balancing another’s market power.** **This would harmonize the patent and antitrust laws**, resolve the judicial split about bilateral monopolies, reduce litigation, and promote efficiency.

A. The Puzzle

The issue of whether antitrust should discipline rightsholders raises questions about the patent system’s efficacy. Federal **agencies, courts, and scholars have cautioned against involving antitrust within patent disputes** on the belief that **it would stymy innovation**.188 The theory is that the patent system must grant the right to exclude competition unfettered by antitrust review.189 This position, however, presumes that the exploitation of patent rights promotes R&D. But if patent abuses achieve the opposite result in predictable instances, then the deadweight loss may not warrant the per se insulation of patent rights sought by the DOJ and others. We ask, first, should the patent system go unaltered, or is enough competition and innovation impaired to demand a remedy? If the latter is true, then the issue is whether antitrust enforcement offers the best solution. We advocate for less antitrust. Based on economic theory, as well as support from the labor market and the Sherman Act’s legislative history, **allowing firms to combine against rightsholders and monopolists would help to discipline abusive practices and provide clear rules without costly litigation**. Helping to support our claim, we investigated whether patent owners do seek to impede competition and R&D without contributing innovation. It seems that as firms build large arsenals of low-value **patents**, rivals tend to reduce R&D and exit the market. That said, we also assert that **antitrust is the wrong remedy**. Further, we insist that **permitting firms to collude against a monopolist would redress ironic uses of antitrust law.** As discussed earlier, a patent owner may currently enforce the antitrust laws to charge monopoly prices as well as suppress competition and innovation.190 While patentees must be able to exercise exclusive rights, we think that they should rely on patent and contract remedies rather than antitrust enforcement. By taking antitrust out of patent law, it would provide holders with the proper scope of exclusive rights to foster innovation (**as well as preserve the incentives to innovate conferred in patent**, which Part IV explains in greater detail).

#### Plank 2 solves Bowman --- It refuses to apply it to further sectors --- This is also a takeout to A2 --- The Court already explicitly held that Bowman is limited and shouldn’t apply to other sectors

**Kagan, 13** (Kagan, Supreme court associate justice Kagan, May-13-2013, accessed on 10-28-2021, SUPREME COURT OF THE UNITED STATES , "BOWMAN v. MONSANTO CO. ET AL. ", https://www.supremecourt.gov/opinions/12pdf/11-796\_c07d.pdf)//Babcii

Our **holding today is limited**—addressing the situation before us, **rather than every one involving a self replicating product.** We recognize that such inventions are becoming ever more **prevalent, complex, and diverse. In another case**, the article’s **self-replication might occur outside the purchaser’s control**. Or it **might be a necessary but incidental step** in using the item for another purpose. Cf. 17 U. S. C. §117(a)(1) (“[I]t is not [a copyright] infringement for the owner of a copy of a computer program to make . . . another copy or adaptation of that computer program provide[d] that such a new copy or adaptation is created as an essential step in the utilization of the computer program”). **We need not address here whether or how the doctrine of patent exhaustion would apply in such circumstances**. In the case at hand, Bowman planted Monsanto’s patented soybeans solely to make and market replicas of them, thus depriving the company of the reward patent law provides for the sale of each article. Patent exhaustion provides no haven for that conduct. We accordingly affirm the judgment of the Court of Appeals for the Federal Circuit.

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T Courts

#### Courts cannot create “antitrust law” and cannot “increase prohibitions”

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the **prohibitions** of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

### OFF

DPA CP

#### The United States Federal Government should expand the scope of its core antitrust laws to include antitrust review of restrictive contracts governing post-sale use restrictions on products embodying patented components only if the president determines it does not pose a direct threat to national defense or preparedness programs

#### The counterplan maintains DPA authority --- the plan eliminates it.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Authorities Under Title VII of the DPA

Title VII of the DPA contains various provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Some significant provisions of Title VII are summarized below.

Special Preference for Small Businesses

Two provisions in the DPA direct the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 reiterates89 and expands upon a requirement in Section 108 of Title I directing the President to "accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor."90

Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.91 Though national defense is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.92 Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, most recently in 2009, when Congress added a definition for homeland security93 to place it within the context of national defense.94

Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and therefore need to obtain extensive information from private industries. Under Section 705 of the DPA, the President may "by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA]."95 This authority is delegated to the Secretary of Commerce in E.O. 13603.96 Though this authority has many potential implications and uses, it is most commonly associated with what the DOC's Bureau of Industry and Security calls "industrial base assessments."97 These assessments are often conducted in coordination with other federal agencies and the private sector to "monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities."98 The statute requires the President to issue regulations to insure that the authority is used only after "the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."99 This regulation has been issued by DOC.100

Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA authorizes the President to "consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."101 The President must determine that a "condition exists which may pose a direct threat to the national defense or its preparedness programs"102 prior to engaging in the consultation process. Following the consultation process, the President or presidential delegate may approve and implement the agreement or plan of action.103 Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.104 Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to "enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes," among other examples.105 It could also be used, for example, to develop a plan of action with private industry for the repair and reconstruction of major critical infrastructure systems following a domestic disaster.

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect.

The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110

Nucleus Executive Reserve

Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112

The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114

Authorization of Appropriations, as amended by P.L. 113-72

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116

Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations).

Committee on Foreign Investment in the United States118

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.

CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute.

On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls.

Termination of the Act

Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are

* 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
* 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
* 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and
* 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4.

Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA.

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129

The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

Impact of Offsets Report

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

Congress may consider whether to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. These reporting or notification requirements could be added to the existing law, or could be included in conference or committee reports accompanying germane legislation, such as appropriations bills or the National Defense Authorization Act. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities under specific circumstances. For example, Congress may consider whether to require the President to notify Congress (or the oversight committees) when the priorities and allocations authority is used on a contract valued above a threshold dollar amount.132 Congress might also consider expanding the existing reporting requirements of the DPAC, to include semi-annual updates on the recent use of authorities or explanations about controversial determinations made by the President. Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees.

Enforce and Revise Rulemaking Requirements

Congress may consider reviewing the agencies' compliance with existing rulemaking requirements. A rulemaking requirement exists for the voluntary agreement authority in Title VII that has been completed by DHS, but it has not been updated since 1981 and may be in need of an update given changes to the authority and government reorganizations since that date.133 One of the agencies responsible for issuing a rulemaking on the use of Title I authorities has yet to do so. Congress may also consider potentially expanding regulatory requirements for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities. In addition to formalizing the executive branch's policies and procedures for using DPA authorities, these regulations could also serve an important function by offering an opportunity for private citizens and industry to comment on and understand the impact of DPA authorities on their personal interests.

Broaden Committee Oversight Jurisdiction

Since its enactment, the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and their predecessors have exercised legislative oversight of the Defense Production Act. The statutory authorities granted in the various titles have been vested in the President, who has delegated some of these authorities to various agency officials through E.O. 13603. As an example of the scope of delegations, the membership of the Defense Production Act Committee (DPAC), created in 2009 and amended in 2014, includes the Secretaries of Agriculture, Commerce, Defense, Energy, Labor, Health and Human Services, Homeland Security, the Interior, Transportation, the Treasury, and State; the Attorney General; the Administrators of the National Aeronautics and Space Administration and of General Services, the Chair of the Council of Economic Advisers; and the Directors of the Central Intelligence Agency and National Intelligence.

In order to complement existing oversight, given the number of agencies that currently use or could potentially use the array of DPA authorities to support national defense missions, Congress may consider reestablishing a select committee with a purpose similar to the former Joint Committee on Defense Production.134 As an alternative to the creation of a new committee, Congress may consider formally broadening DPA oversight responsibilities to include all relevant standing committees when developing its committee oversight plan.

Should DPA oversight be broadened, Congress might consider ways to enhance inter-committee communication and coordination of its related activities. This coordination could include periodic meetings to prepare for oversight hearings or ensuring that DPA-related communications from agencies are shared appropriately. Finally, because the DPA was enacted at a time when the organization and rules of both chambers were markedly different to current practice, Congress may consider the joint referral of proposed DPA-related legislation to the appropriate oversight committees.

Amending the Defense Production Act of 1950

While the act in its current form may remain in force until September 30, 2025, the legislature could amend the DPA at any time to extend, expand, restrict, or otherwise clarify the powers it grants to the President. For example, Congress could eliminate certain authorities altogether. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.

#### Key to pandemic response.

J. Mark Gidley et al. 20. J. Mark Gidley chairs the White & Case Global Antitrust/Competition practice. Martin M. Toto and Sean Sigillito. “A Novel Antitrust Defense for COVID-19 Agreements: Section 708 of the Defense Production Act” <https://www.whitecase.com/sites/default/files/2020-04/novel-antitrust-defense-covid-19-agreements-section-708-defense-production-act.pdf>

There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States’ response to the COVID-19 health emergency. The Government’s recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President’s delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act’s antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

#### Disease causes extinction and turns every impact --- it’s an *IMPACT MAGNFIER!!*

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93. https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the **risk of a civilisation collapse** would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

### OFF

Sua sponte DA

#### The aff is sua sponte – it makes a decision in absence of arguments presented before the court – that crushes court legitimacy

Milani & Smith 02 (Adam and Michael, both are Assistant Professors, Mercer University School of Law, “Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts,” 69 Tenn. L. Rev. 245, Winter, lexis)

The heart of the American legal system is the adversary process in which trained advocates present the parties’ facts and arguments to neutral decision makers. The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system.3 The adversary process is also said to “promote[] litigant and societal acceptance of decisions rendered by the courts”4 because a party who “is intimately involved in the adjudicatory process and feels that he has [they have] been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not.”5 Indeed, the Joint Conference on Responsibility of the American Bar Association and the Association of American Law Schools stated that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate.”6 Accordingly, most lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties. But we all know it happens. We even have a name for such a decision: [is] sua sponte. Translated from its original Latin, “sua sponte” means “on his or its own motion.”7 In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion8 as opposed to an action or decision done in response to a party’s request or argument. As such, the concept of “sua sponte” is an important exception to two basic [the] principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive.9 One of the clearest manifestations of these principles is that the parties themselves, not the decision maker, determine what issues will be adjudicated. In the context of judicial decision making, a court deviates from its traditional “passive” role in the adjudicatory process when it raises an issue not identified by the parties but which it deems relevant to the legal controversy before it. Nonetheless, raising issues sua sponte is not an uncommon practice.10 In fact, legal scholars have identified several kinds of issues that are commonly raised by courts on their own. First, both trial and appellate courts often raise jurisdictional issues such as standing, subject matter jurisdiction, and mootness sua sponte.1

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson ’17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard.

A. Failure to Provide Due Process

Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it:

When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court.

The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking:

[I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6

The situation is even harder to defend when there is no hearing at all. 9

B. Undermining Respect for the Legal System

The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o

This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2

Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next:

The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved.

This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication

We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).a

## Case

### Advantage 1

#### 1. Farming is rapidly becoming sustainable---all environmental metrics are improving

Michael Shellenberger 20, Founder and President of Environmental Progress, Former President of the Breakthrough Institute, Apocalypse Never: Why Environmental Alarmism Hurts Us All, ISBN: 0063001705,9780063001701

As farms become more productive, grasslands, forests, and wildlife are returning. Globally, the rate of reforestation is catching up to a slowing rate of deforestation.19

Humankind’s use of wood has peaked and could soon decline significantly.20 And humankind’s use of land for agriculture is likely near its peak and capable of declining soon.21 All of this is wonderful news for everyone who cares about achieving universal prosperity and environmental protection.

The key is producing more food on less land. While the amount of land used for agriculture has increased by 8 percent since 1961, the amount of food produced has grown by an astonishing 300 percent.22

Though pastureland and cropland expanded 5 and 16 percent, between 1961 and 2017, the maximum extent of total agriculture land occurred in the 1990s, and declined significantly since then, led by a 4.5 percent drop in pastureland since 2000.23 Between 2000 and 2017, the production of beef and cow’s milk increased by 19 and 38 percent, respectively, even as total land used globally for pasture shrank.24

The replacement of farm animals with machines massively reduced land required for food production. By moving from horses and mules to tractors and combine harvesters, the United States slashed the amount of land required to produce animal feed by an area the size of California. That land savings constituted an astonishing one-quarter of total U.S. land used for agriculture.25

Today, hundreds of millions of horses, cattle, oxen, and other animals are still being used as draft animals for farming in Asia, Africa, and Latin America. Not having to grow food to feed them could free up significant amounts of land for endangered species, just as it did in Europe and North America.

As technology becomes more available, crop yields will continue to rise, even under higher temperatures. Modernized agricultural techniques and inputs could increase rice, wheat, and corn yields five-fold in sub-Saharan Africa, India, and developing nations.26 Experts say sub-Saharan African farms can increase yields by nearly 100 percent by 2050 simply through access to fertilizer, irrigation, and farm machinery.27

If every nation raised its agricultural productivity to the levels of its most successful farmers, global food yields would rise as much as 70 percent.28 If every nation increased the number of crops per year to its full potential, food crop yields could rise another 50 percent.29

Things are headed in the right direction regarding other environmental measures. Water pollution is declining in relative terms, per unit of production, and in absolute terms in some nations. The use of water per unit of agricultural production has been declining as farmers have become more precise in irrigation methods.

High-yield farming produces far less nitrogen pollution run-off than lowyield farming. While rich nations produce 70 percent higher yields than poor nations, they use just 54 percent more nitrogen.30 Nations get better at using nitrogen fertilizer over time. Since the early 1960s, the Netherlands has doubled its yields while using the same amount of fertilizer.31

High-yield farming is also better for soils. Eighty percent of all degraded soils are in poor and developing nations of Asia, Latin America, and Africa. The rate of soil loss is twice as high in developing nations as in developed ones. Thanks to the use of fertilizer, wealthy European nations and the United States have adopted soil conservation and no-till methods, which prevent erosion. In the United States, soil erosion declined 40 percent in just fifteen years, between 1982 and 1997, while yields rose.32

#### 2. The plan nukes innovation --- It would eviscerate patent protections and inject uncertainty that makes innovation impossible --- (all our ev is specific to their aff!)

**McBride et al., 13** (Scott McBride, Counsel of Record Counsel for Amici Curiae Wisconsin Alumni Research Foundation, Association of University Technology Managers, Association of Public and Land-grant Universities, Association of American Universities, The Regents of the University of California, The Board of Trustees of the University of Illinois, University of Florida, Duke University, Emory University, University of Georgia Research Foundation, Inc., Iowa State University of Science and Technology, NDSU Research Foundation, University of Iowa, University of Missouri Columbia, South Dakota State University, NU tech Ventures,University of Nebraska-Lincoln,University of Kentucky, University ofKansas, Kansas State University,Montana State University, andUniversity of Delaware, Jan-23-2013, accessed on 10-29-2021, Chamberlitigation, "", https://www.chamberlitigation.com/sites/default/files/scotus/files/Wisconsin%20Alumni%20Research%20Foundation%20et%20al.%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

A. Reversal would greatly diminish, and add uncertainty to, **the value of patents** covering artificial, progenitive technologies.

Patent owners generally have the entire statutory patent term—currently set at 20 years from filing under 35 U.S.C. § 154(a)(2)—over which **to recover their research and development costs**. Reversal here **would effectively shorten the patent term** for patents covering artificial, progenitive technologies, thus making it much more difficult, if not **impossible, for patent owners** and their licensees **to recover the costs of developing such inventions for market**. This would reduce, or even **eliminate, any incentive to develop new** artificial, progenitive **technologies**. The public would certainly be harmed under that scenario.

For artificial, progenitive technologies, reversal would force patent owners to try to recoup all of their research and development costs **in the first sale of the technology**. That is because the first buyers could sell progeny (and the progeny of progeny, etc.) at a fraction of the cost of the patent owner’s price, for they have insignificant research and development costs to recover. In effect, **first buyers could saturate the market for the technology.** For instance, in this case, a buyer of Roundup Ready® seeds could parlay a single bag of seeds (approximately 3,500) into over two million seeds in a single year (assuming two consecutive plantings and harvestings per year, as Bowman did, to arrive at 3,500 x 26 x 26). See J.A. 100a. That same buyer could have over 1.5 billion seeds by the end of two years (2.3M x 26 x 26).

And even if every buyer that annually purchases Roundup Ready® soybean seed had purchased seed in year one of the patent, reversal would mean that a company like **Monsanto would lose sales in all subsequent years of the patent.** Each buyer could effectively create their own manufacturing mill. To recoup its research and development costs, Monsanto would have to increase dramatically the price of its Roundup Ready® soybean **seeds to a level unaffordable to farmers**. In turn, the public would not benefit from Monsanto’s invention. See Br. of Economists at 24–30.

If Bowman were to prevail, the market for Roundup Ready® soybean seeds (and similar artificial, progenitive products) would become saturated with progeny of generation n seed at lower prices,4 sold by entities unburdened by research and development costs to recoup. Such a system of weak **intellectual property protection would encourage a “race-to-the-bottom,”** where **technologies** are **knocked off with little or no recourse** against copyists. To compete in such a system, companies would have incentive to use potentially inferior methods or constituent parts to save costs, **rather than innovating** further to design around the patented technology. For artificial, progenitive technology, the policies underlying **the patent system would be significantly undermined**.

The practical result of such a system would be to create disparate patent terms—a shorter term for artificial progenitive technologies and a longer term for all other inventions. For the former, patentees and their licensees would receive protection only for as long as it takes first buyers to saturate the market with progeny. For the latter, patentees and their licensees would receive protection for the full statutory patent term.

The relative certainty of the patent system provides the currency for technology transfer and **drives the effective operation** of the Bayh-Dole Act. A ruling for Bowman would therefore **inject uncertainty into the value of patents** for artificial, progenitive technology. It would **hinder collaboration** between technology transfer offices and private sector entities to develop and commercialize such technology.

#### 3. The current antitrust process is robust, guaranteeing sufficient competition without squelching innovation

Dr. Robert Young 18, Former Chief Economist for the American Farm Bureau Federation, Served as Chief Economist of the U.S. Senate Committee on Agriculture, Ph.D. in Agricultural Economics from the University of Missouri, “Regulators Did Their Job, Now Let Agriculture Merger Go Through”, The Hill, 1/31/2018, <https://thehill.com/opinion/energy-environment/371673-regulators-did-their-job-now-let-agriculture-merger-go-through> [language modified]

There is no denying the U.S. farming economy is in a constant state of flux. If ever there was a sector that is attuned to technology, it must be American agriculture. Farmers have to be financers of the first order to work in the kind of high-capital, low-margin business in which they chose to make a living.

To do this, farmers must rely on a competitive marketplace that embraces innovation and maintains consumer choice. As agricultural companies, big and small, work to meet the needs of their farming customers, they too are constantly fighting an uphill battle against regulatory challenges and funding issues that affect the odds of bringing successful products to market.

One way to meet the growing demands of farming customers while overcoming obstacles to agricultural innovation is through thoughtful alliances between key agricultural companies with strong capabilities in two complementary offerings. While there are some well-founded concerns regarding industry consolidation, there are some business partnerships that will also be the key to ensuring American farmers maintain their competitive edge in the global marketplace. Consumers and farmers will see positive results from the collaboration of agricultural powerhouses on new products and tools to make America’s farms more efficient.

However, many [ignore] ~~turn a blind eye~~ to the positives of industry consolidation and mergers between companies such as Dow-Dupont and the upcoming acquisition of Monsanto by Bayer. Recently, Bayer’s proposed acquisition of Monsanto has been met with both blunt and thinly veiled opposition driven by both politics and competitors, even as the deal goes through a very rigorous and methodical antitrust review process in countries around the world.

In fact, all evidence points to the fact that the process is working. Consider a study released by Texas A&M in 2016. Researchers at A&M concluded the Bayer-Monsanto deal as originally constructed had the potential to raise cotton seed costs by 18.2 percent generating a company with a 70 percent market share for cotton seed. Not surprisingly, the prospect of such market concentration raised the alarm among farmers, ranchers and regulators alike.

However, since the study’s release, and as a result of the regulatory process, Bayer has agreed to divest $6.98 billion of its Crop Science business including the majority of their global cotton seed business, as well as much of their canola and soybean seed business. This transaction also includes the sale of Bayer’s LibertyLink technology for herbicide tolerance to proactively reduce overlap with Monsanto’s own offerings.

In short, American farmers have been right to raise their concerns about a perceived anti-competitive marketplace during a time when agricultural input costs are increasing. And regulators have been correct in responding. But they should also be informed of the facts. Bayer and Monsanto have two complementary offerings, crop chemical protection and plant genetics. Combining these two companies will allow them to reduce inefficiencies and advance new products to farmers faster. Following free market based policies, regulators have taken appropriate steps to balance market and consumer concerns without stifling business ambitions that help the greater good.

Let us also recognize that the Dow-Dupont merger is happening. We have already created a joint crop chemical/seed technology company. Having only one with that combination of attributes at this point in time would also be anti-competitive. In short, if you are going to have one, you had better have two.

While there should always be tough scrutiny of any major companies merging, the antitrust process both here and abroad carefully examines steps that companies should take during the merger process in order to not harm competition, or drive prices up for farmers. By requesting companies, including Bayer, Dow and ChemChina, to divest certain businesses and make certain changes, consumers and farmers have the best of both worlds: protection and innovation.

Let’s not be short-sighted on the positives of the Bayer-Monsanto deal and be sure all of the facts are on the table. Everyone wants to see American farmers succeed and continue to lead in the global agriculture marketplace, but placing further restrictions on the free market and stifling innovation is not the way forward.

#### 4. The plan would bankrupt seed research and producers overnight --- It would also spike seed prices which forces smaller farms out of the market

**Stetson, 13** (Catherine Stetson, Cate Stetson is the co-director of Hogan Lovells' nationally acclaimed Appellate practice group and has twice served as an elected member of the firm's Global Board., Jan 2013, accessed on 10-29-2021, Chamberlitigation, "BRIEF AMICUS CURIAE OF THE AMERICAN SEED TRADE ASSOCIATION IN SUPPORT OF RESPONDENTS", https://www.chamberlitigation.com/sites/default/files/scotus/files/American%20Seed%20Trade%20Assoc.%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)

This lack of control over successive generations of seed would severely harm the seed industry. Firms that have developed patented seed technology **would immediately stand to lose hundreds of millions of dollars in revenues**. They would also lose any competitive advantage that their patent protection would have afforded them in developing further improvements. Seed technology developed in public universities with taxpayer money would be freely available for any use without respect for the public mission of such universities. **Patentees would be unable to enforce environmentally sound stewardship practices**. And hundreds of smaller seed companies that license patented seed **technology**—and whose entire corporate livelihoods depend on the right to incorporate this technology into their own seed varieties— **would** be at serious risk of **go**ing out of business.

‘The current patent protection afforded seed is **widely credited for the dramatic growth of private investment in and the development of improved seed technology**. By restricting the use of successive generations of seed, a seed developer is able to make its patented technology available to farmers and other end-users at reasonable prices.‘2 But if patentees cannot protect their patents once sold, such that their patented seeds are replicated and spread in just a few short growing generations, investment in enhanced seed technology **will evaporate**. The few developers remaining would need to look to a smaller and smaller **pool of first-time** (and only-time) **buyers to recoup their R&D** and regulatory costs and earn a return on its investment, **forcing the price of seed sky-high**, and **forcing farmers out of that market.** Private firms would thus have little incentive to invest the substantial resources required to develop improved seed technology, much to the detriment of farmers and the public. Indeed, without the right to exclude, patentees would not invest the resources necessary to maintain the multiple regulatory approvals required for certain **seed technologies**, approvals **on which the entire downstream supply chain relies**. Without these approvals, **both domestic trade and U.S. export markets would be**—and this is a best-case scenario—**severely disrupted**.

#### 5. Removing post-sale restrictions would trigger vertical integration which is WORSE for competition and monopolization

**Weiner, 13** (Robert Weiner, Dr. Robert J. Weiner teaches international finance, economics, and strategy. He received his PhD in 1986, and has been at GW since 1994, Jan 2013, accessed on 10-29-2021, Chamberlitigation, "Brief of economists as amici curaie in support of respondants bowman", https://www.chamberlitigation.com/sites/default/files/scotus/files/Economists%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

B. Applying Exhaustion Could **Lead to Increased Vertical Integration**, Which Could Reduce Efficiency and Competition.

Companies historically have chosen from two basic models to extract the value of intellectual property. Some companies choose to keep their **i**ntellectual **p**roperty entirely within the organization by **vertically integrating** and engaging in all aspects of the design and production process in-house. Other companies adopt a strategy of performing certain functions in-house but also licensing others to enable the development of other products that are complementary to the patent holder's technology, thus potentially increasing the demand for the rights holder's invention. For example, Apple’s iOS operating system for phones and tablets is available only on hard ware that Apple provides. Google, in contrast, has broadly licensed its Android operating system, which is available on phones and tablets from Google's competitors as well as from Google itself.

Both **models have been used in the seed and trait business**. For example, Dow's Herculex® insect pro- tection trait was originally available almost exclusively in seed sold by Pioneer (Dow's development partner) and in Dow’s Mycogen® brand. See New Bt Trait Launched by Pioneer, Mycogen, CORN & SOY- BEAN DIGEST (June 21, 2001), available at http:// cornandsoybeandigest.com/new-bt-trait-launched-pio neer-mycogen. **In contrast**, Monsanto has **espoused broad licensing**: its strategy has been to make its traits available in the germplasm **of as many different seed companies as possible**. See, e.g., GianCarlo Moschini, Competition Issues in the Seed Industry and the Role of Intellectual Property, CHOICES, available at \_http://www.choicesmagazine.org/magazine/ print.php?article=120 (discussing Monsanto's broad licensing strategy).

One of the reasons that firms integrate vertically is to lower transaction costs involved in negotiating, monitoring and enforcing contracts. See, e.g., Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 380 (3d ed. 2000). Accordingly, a rule that seed and trait patents are exhausted by a first sale could push inventors to a vertical integration model for a number of reasons. First, both traits and varietal parent seed are supplied to seed companies in germplasm that the licensees use to breed their own soybeans. Because the sale of that breeder stock would exhaust the innovator’s rights in its invention, the innovator would need to rely on contract remedies rather than patent infringement claims against the licensee, with all of the costs and risk that we have described above.

Additionally, a rule of exhaustion would **reduce incentives to outlicense traits** and germplasm because, by outlicensing, innovators take a risk that a licensee will destroy the innovator’s business model by selling to customers who save and **replant** seeds without adequate contractual protection of the inno- vator.

Because the core of an intellectual property right is the right to exclude, **innovators are not required to license their inventions to competitors**. See, eg., Hartford-Empire Co. v. United States, 323 U.S. 386, 432 (1945) (“A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others.”). But there is no efficiency justification for policies that prohibit the broad licensing of intellectual property rights. While vertical integration is not inherently **inferior to a broad licensing model**, **denying innovators the choice to license broadly is inefficient and anticompetitive.**

Providing incentives for seed and trait developers **to create closed systems would harm growers by reducing competition** to supply soybeans containing a particular trait. Broad trait licensing means that traits can be available in soybeans offered by dozens of soybean seed companies, instead of just companies affiliated with the trait developer. **Farmers benefit from the competition among seed suppliers this incentive structure enables**. The alternative model— **where Monsanto traits are available only in Monsanto germplasm** and Dow traits are available only in Dow germplasm—**would lead to higher prices and less innovation.**

### Advantage 2

#### 1. No conflict --- Antitrust review can govern post-sale use restrictions on patents --- The supreme court was explicit in *actavis* that the aff is wrong --- (This is also from someone who was a consultant for the amicus brief they read as the solvency advocate of the aff)

**Lim, 13** (Daryl Lim, Assistant Professor, The John Marshall Law School and co-consultant to the American Antitrust Institute (“AAI”) for its Supreme Court brief in Bowman v. Monsanto, 2013, accessed on 9-3-2021, Repository.law.uic, "Self-Replicating Technologies and the Challenge for the Patent and Antitrust Laws, 32 Cardozo Arts& Ent. L.J. 131 (2013)", https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1449&context=facpubs)//Babcii

III. MONSANTO AND THE IP-ANTITRUST INTERFACE Antitrust and patent misuse claims were featured in Monsanto’s earlier suits against farmers and licensees in relation to its Roundup and Roundup Ready technologies, but none were successfully asserted.475 Commentators reflecting on the Bowman v. Monsanto decision wrote that “[b]y holding that Monsanto’s restriction on replanting was within the scope of its patent rights, the Supreme Court effectively immunized that restriction from antitrust scrutiny.”476 **That view**, which found currency with some judges in “pay-for-delay” cases, **was recently dispelled by the Supreme Court in Actavis; the Court clarified that patent owners were not immune from antitrust scrutiny merely because they were acting within the scope of their patent rights**.477 The Court emphasized that an antitrust inquiry into the appropriate scope of patent rights is not defined solely by “the length of the patent’s term or its earning potential[,]” but rather “by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances[.]”478 Thus, “[w]hether a particular restraint lies ‘beyond the limits of the patent monopoly’ is a conclusion that flows from that analysis and not . . . its starting point.”479 In that analysis, the Court noted that “patent and antitrust policies are both relevant in determining the ‘scope of the patent monopoly’—and consequently antitrust law immunity—that is conferred by a patent.”480 Since patent misuse analysis typically starts with the analysis of patent scope, the doctrine will likely have to be rethought in light of Actavis as well.481

#### 2. Corporate optimism will drive self-sustaining recovery.

Van der Welle ’21 [Peter; July 7; Strategist within the Global Macro team, M.A. in Economics from Tilburg University; Robeco, “How capex holds the key to a self-sustaining economic recovery,” <https://www.robeco.com/latam/en/insights/2021/07/how-capex-holds-the-key-to-a-self-sustaining-economic-recovery.html>]

Title:

How capex holds the key to a self-sustaining economic recovery.

Capital expenditure to fix supply shortages and meet burgeoning demand is seen figuring strongly in the post-Covid recovery.

[Author and summary omitted].

Companies are expected to invest heavily in new equipment and capacity as they seek to meet the pent-up demand released from economic reopening.

“The world is emerging from the pandemic, and much of the focus has been on the release of huge pent-up demand for goods and services that have been inaccessible for much of the past year,” says Peter Van der Welle, strategist with Robeco’s multi-asset team.

“But there is a bigger issue regarding the ability of companies to supply these goods and services, due to the supply side constraints that have emerged through economic reopening. We believe this is powering a resurgence in capital expenditure by companies, and those which are investing in new equipment to meet greater demand will be the more sought after stocks.”

Capex intentions

Van der Welle says this trend can already be seen in the US Federal Reserve’s Capex Intentions Index, which shows that steep year-on-year increases in capital expenditures are planned.

“So, that's promising for a near-term rebound in the capex cycle,” he says. “The market has already picked up on that theme because you can see a clear outperformance of capex-intensive stocks compared to the broader market year to date.”

Fiscal dominance

Van der Welle says five elements support the multi-asset team’s view that capex will rise from here onwards. “The first is the overarching macroeconomic picture in that we are increasingly moving towards an environment of fiscal dominance and away from one that has been monetary-led via quantitative easing,” he says.

“Central banks have pursued very easy monetary policies, but they have hit the nominal lower bounds with regard to policy rates.”

“This is a hard constraint because real rates are difficult for central banks to push even lower than they are nowadays, given the strong consensus among both central bankers and market participants that inflation is transitory.”

Big spending plans

For stimulus, fiscal policy is better suited to address the negative supply shock that Covid-19 has posed. Fiscal dominance can be seen in the huge infrastructure spending planned in the US, with the USD 1.9 trillion American Rescue Plan already in motion, and the USD 2 trillion American Jobs Plan going through Congress. In Europe, the disbursement of the EUR 750 billion EU Recovery Fund is due to start later in July.

“An era of fiscal dominance is able to say goodbye to the secular stagnation thesis, which holds that the economy is suffering from under-investment,” says Van der Welle. “Under-investment due to insufficient demand, which was the biggest problem after the global financial crisis, has become less likely.”

“We saw very subdued consumption growth both in the US and elsewhere between 2009 and 2019. That story is reversing in the US. Households’ income has been supported by fiscal policy during the Covid-19 recession, while burgeoning consumer demand in the reopening phase could prove to be more sticky as employment prospects continue to improve in the medium term.”

Tobin’s Q looks good

A third reason to expect higher capex is driven by ‘Tobin’s Q’ – the market value of a company divided by its assets' replacement cost. If this ratio is above one, then corporates have an incentive to invest directly in the underlying assets rather than buying another company at market value to acquire the same assets.

The Tobin’s Q ratio is currently at 1.7 for the US. “So it's very expensive to do M&A, and it is wiser for corporates to invest in the underlying capital goods themselves,” Van der Welle says.

“We should therefore expect a gradual move away from M&A activity towards companies making direct investments in capital goods.”

Supply-side constraints

The fourth element is the severe supply-side constraints seen in the global economy, as capacity shut down during the pandemic.

“This is reflected in the ISM Prices Paid Index, which reached an all-time high in June in reflection of rampant shortages of raw materials and labor,” says Van der Welle.

“Clearly the issue today following the pandemic is not demand related, but supply related. This will also trigger more awareness to push the productivity frontier and incentivize capital expenditure.”

Less reliance on labor

The fifth element is the partial substitution from labor to capital in the US against the backdrop of lingering labor shortages.

“A decline in the labor force participation rate shows that people are not quickly returning to the labor force, as they have been disincentivized by the subsidies and pay checks they have gained from the stimulus plans, and/or structural changes in their work/life balance due to the pandemic,” says Van der Welle.

“When the cost of labor becomes more expensive, substituting labor with capital becomes more attractive for employers. Typically, the inflection point for capex intentions becoming positive is when unit labor costs rise by more than 2% year on year, which is the case today.”

Capex will lengthen the earnings cycle

Regarding earnings, there is a significant relationship between capex intentions and productivity, though the lag from intending to invest to actually getting a realized productivity gain is quite long – up to several years.

Higher capex that eventually brings higher productivity growth will sustain the earnings cycle, Van der Welle says. Higher productivity gives corporates more pricing power because they suppress unit labor costs, and that means profit margins can stay elevated for longer.

#### 3. Changing the legal standards of antitrust is a wrecking ball for growth

Thierer ’21 [Adam; February 25; Senior Research Fellow with the Mercatus Center at George Mason University; The Hill, “Open-ended antitrust is an innovation killer,” <https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer>]

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](https://thehill.com/people/amy-klobuchar) (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, [recently introduced](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) 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](https://thehill.com/people/joshua-josh-hawley) (R-Mo.). Hawley recent [offered an amendment](https://www.axios.com/josh-hawley-big-tech-merger-ban-1467081d-216c-45a2-9d09-9416dfbde330.html) 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](https://www.technewsworld.com/story/55185.html) that “MySpace Is a Natural Monopoly,” and [asked](https://www.theguardian.com/technology/2007/feb/08/business.comment), “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits [insisted](https://www.marketwatch.com/story/apple-should-pull-the-plug-on-the-iphone) “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”](http://www.ojr.org/ojr/workplace/1017966109.php?__cf_chl_jschl_tk__=67a5f6a101935b8e3586ca48216d31ba6d4e03de-1612467283-0-AXvbGCtUx-p_N4T-8_2m8OHezQUhQ9kelg9-pVuD6IzKvFfXrllJujU9ERvjqjyIsAeCovUw9bfZqq75_NYasBM87SnQT_027hDJOhjXeowzK1QQH_7vcmr1tS4XgCGC_NNx6UGbAvVgcJNFhSkqkVKKeRJ-BjdDA7Vus-gwmr7wQXcS7KKfTtHyqxdRfureL9alpZHU2IJcbbdYaZpTjTrfcJHCKa8pIZcdiScjaRJmON9X1Ip20Vuv7tyDHbZSvcrn88WrY_9N_qBpKvZhQ4PAe90w5Fx5iHjjNIzoNMKSpToTFGLbPdqawgge9PVubSQbkS7xXDXxCBMA2Sh-Y_U) that would decimate digital diversity and online competition.

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.

#### 4. Downturn won’t cause war

Walt ’20 [Stephen; Robert and Renée Belfer professor of international relations @ Harvard University; 5/13/20; "Will a Global Depression Trigger Another World War?"; Foreign Policy; https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose. This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too. Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure. I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do. Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely. Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible. If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished. On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars , most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).” Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success. Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then. The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term. To be sure, I can’t rule out another powerful cause of war—stupidity—especially when it is so much in evidence in some quarters these days. So there is no guarantee that we won’t see misguided leaders stumbling into another foolish bloodletting. But given that it’s hard to find any rays of sunshine at this particular moment in history, I’m going to hope I’m right about this one.

# 2NC Stuff

## Collusion CP

### 2NC --- S --- Agriculture

#### Economic theory and studies prove that collusion solves better than the affs condemnation of the patentee --- It also keeps the innovative nature of patent rights in balance

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

**Economic theory supports the contention that allowing a cartel to collude against a monopolist is superior to condemning** the cartel. Consider a two-party bargaining system with the patentee on one side and a cartel of licensees on the other, opposing it. **If the rightsholder wants to license its patent, it must deal with the cartel,** and if the cartel wants to secure a license, it must deal with the patentee.220 Restated in economic terms, a bilateral monopoly exists with a monopolist selling licenses on one side and a cartel of buyers (a monopsony) on the other.221 This landscape allows, as we show, the cartel to balance the rightsholder’s negotiating power without turning the tables, giving the licensees the power to exploit monopsony pricing.222 **This should, at the macro level, allow patent markets to enhance efficiency**. All **the innovative incentives conferred by a patent should also remain intact**, as we explain later in Part IV.

In the typical monopoly or monopsony, the dominant actor can extract supracompetitive benefits due to its market power.223 Absent a bilateral monopoly, a monopolist controls the supply function such that it will operate at the point on a demand curve that maximizes profits.224 Likewise, **a monopsonist usually controls the demand curve** and can select a preferred location on the supply curve at which to buy.225 These **benefits break down in a bilateral monopoly** because **there are no markets to establish supply and demand curves** on which the monopolist and monopsonist can operate.226 The **deal must occur at some point** below the monopoly price and above monopsony pricing, meaning that neither party can render the inefficiencies of market power.227

This two-party system does, however, create the risk of a stalemate where an agreement cannot be reached.228 Yet, unlike a traditional bilateral monopoly involving physical goods, the patent regime enjoys several ways of encouraging a deal. In FRAND situations, the patentee is contractually obligated to license on fair and reasonable terms at the risk of facing liability for breach of contract.229 A would-belicensee could also **coerce negotiations by threatening to attempt to invalidate the patent** via inter partes review.230 Potential negative outcomes associated with these actions **would thus break a stalemate.**

Nevertheless, a bilateral monopoly offers the second-best scenario for consumers: better than when a monopolist controls the market but worse than the best-case scenario—vigorous competition.231 **Since the two parties may negotiate between themselves, this should maximize the surplus split between the parties**.232 Moreover, the expected supply curve from a patentee—especially in regulated situations like essential patents— **is expected to account for hyper-marginal returns to recoup research costs and fund future endeavors**.233 Accordingly, formation of a monopsony **among potential licensees should not harm aggregate** welfare while creating a method to discipline patentees who engage in holdup behaviors. Similar evidence exists in Sherman Act’s legislative history which is essential to modern enforcement.

#### It allows bargaining in concert

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

A. Colluding Against the Garden Variety Monopolist Our approach could as easily work against the garden variety monopolist as with rightsholders. Commentators and lawmakers have grown increasingly anxious about the market power accrued by Big Tech, the telecommunications giants, and other monopolists.266 Concerns involve how companies, like Amazon, wield market power over the firms selling on their platforms. 267 The problem is that small firms operating through Amazon **lack the ability to bargain in concert with** Amazon and similar **monopolists**, **given the illegality of collusion**. While not the overarching focus of this Article, our proposal could likewise apply to monopolists acting without patent rights. It would, in fact, help to resolve complaints about the growth of “natural” or legal **monopolists** such as Facebook and Google, which allegedly diminish consumer welfare without offending the antitrust laws.268 In fact, underlying the e-book case between Apple and Amazon were allegations that Amazon had priced e-books below the market rate in an act of predatory pricing; as such, commentators asserted that the publishers were right to collude against Amazon’s **abuse of market power**.269 We are sympathetic to this argument, as it would be **optimal for rivals to solve this problem via private ordering—rather than litigation**— **and to effectively estop monopolists from using the antitrust law to preserve their market power**. To this end, **instead of increasing antitrust enforcement, a more efficient remedy would entail permitting smaller firms to bargain in concert against such monopolists**.

#### That successfully deters anti-competitive behavior without harming patent owners

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

CONCLUSION As described herein, **the patent system has the capacity to encourage innovation by affording a specific set of exclusionary rights**. However, certain firms undertake strategies that create power extending beyond the scope of their patent rights, which can damage competition. In response, some **market participants attempt to remedy this harm by collectively bargaining to even the playing field**. These behaviors have been alleged to violate the antitrust laws. We argue that application of antitrust laws in this instance is a policy error. **Collective negotiations have the capacity to undercut abusive behaviors** that may be undertaken by mass patent aggregators or those who ignore their FRAND obligations. And as shown through our analysis, anticompetitive behaviors such as aggregation of huge numbers of patents can undercut the incentive to spend money on research, incentivize the filing of relatively lower value patents, and increase market concentration. With this in mind, we argue that antitrust should not be used to stifle **collective negotiation** where the opposing party enjoys monopoly power. Moreover, we address the implications of our proposal, showing that while it **discourages anticompetitive behaviors**, it should **not harm patent owners** who behave in good faith.

### 2NC --- L2NB

#### 2. The CP leaves the patent itself completely untouched

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

In important part, **fears should also be assuaged that patent rights may erode**. The proposed defense would leave all parts of the patent monopoly **intact**, as patent holders **can still charge** monopoly **rates as well as prevent other parties from using their tech**nology.212 While patentees may assert that antitrust should condemn groups who (threaten to) infringe as a bargaining ploy,213 such an argument is unpersuasive since patentees may still initiate infringement lawsuits. Further, this defense would not empower a cartel of, for instance, big box stores to collude in hopes of depressing the price of a patented television—the proposal instead pertains only to the licensing, use, and implementation of the underlying technology in the television. Therefore, stripping rightsholders of antitrust remedies would leave untouched the right and ability to charge monopoly prices, exclude competition, and all other **benefits of exclusive rights** (as the following review of economic research indicates). It **would only remove antitrust from the quiver of tools**. We indeed find no reason why antitrust law provides a better mechanism to protect patent rights than patent law.

## Advantage 1

### 2NC --- AT: Patent law

#### Their one solvency advocate for this is the AAI brief and says we should adopt Contract law review (JCCC Blue)

Ghosh et al 12 (Shubha Ghosh – University of Wisconsin Law Professor, Peter Carstensen – University of Wisconsin Law Professor, Albert A. Foer – Counsel of Record and American Antitrust Institute President, Randy M. Stutz – Senior Counsel and American Antitrust Institute Vice President of Legal Advocacy, December 10, 2012, “Patent Exhaustion and Self-Replicating Technologies: Amicus Brief in Support of Bowman by the **A**merican **A**ntitrust **I**nstitute”, https://repository.law.wisc.edu/s/uwlaw/media/25875, accessed 8/13/21, DL)

The public interest is best served by allowing contract rather than patent law to govern factual **circumstances like those in Bowman** because contract law affords parties flexibility to draft agreements that maximize their mutual economic objectives while preserving a critically important role for judicial review of patent-based restraints of trade. Amici submit that patent holders and their customers should be able to craft context-specific agreements concerning post-sale restrictions on the use of products substantially embodying a patented component, but subject to time honored rules. Contract law expressly limits, for example, the scope of the parties’ rights to enter into restraints on each other’s competitive freedom, see Restatement (Second) of Contracts § 187 (1981) (a contract that only restrains trade is unreasonable), but it also affords due respect to an intellectual property owner’s interest in protecting its intellectual property, and to the public interest, see id. § 188 (ancillary restraints are unreasonable only if in excess of the “promisee’s legitimate interest” or when the restraint imposes an undue hardship on the promisor and injury to the public). Contracts that impose unreasonable restraints on competition also are directly subject to Section 1 of the Sherman Act, 15 U.S.C. § 1 (2004). Antitrust law exists for the explicit purpose of implementing the Commerce Clause’s commitment to the market. It affords a way to balance the rights of commercial actors to engage in legitimate contracting with the need to retain a workably competitive market. It is the “Magna Carta of free enterprise.” United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). Antitrust review of restrictive contracts builds on a well-developed methodology and a substantial history of application in a wide variety of contexts. This allows lower courts to comfortably apply antitrust standards with confidence and consistency. In the patent context, reviewing courts can be guided by the patent holder’s right to impose downstream restraints that reasonably protect its legitimate interest in exploiting its patent rights. Given such a definition of the legitimate interest of the patent holder, it is possible to define in a consistent way when the restraint is “unnecessarily restrictive.” See Aspen Skimg Co. v. Aspen Highlands Skiing Corp.., 472 U.S. 585, 605 (1985); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), aff’d as modified, 175 U.S. 211 (1899) (“The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined.”). As antitrust law has moved away from broad, mechanical, per se rules and toward a more flexible rule of reason, see, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (rejecting the per se rule of resale price maintenance); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) (not every horizontal price fix is per se illegal), it has become even more able to provide nuanced review of specific restrictive agreements. See, e.g., United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003) (conducting focused inquiry into joint venture and assessing whether challenged restraint is reasonably necessary to achieve defendants’ procompetitive justifications or whether they may be achieved through less restrictive means); see also Aspen Skiing Co., 472 U.S. at 605 (restraints are unlawful when they have “impaired competition in an unnecessarily restrictive way”). The use of contract law and its attendant antitrust standards to govern post-sale use restrictions on products embodying patented components therefore allows for a flexible, predictable, and well-established framework of judicial review. Conversely, if patent law is expanded to govern post-sale use restrictions on products embodying patented components, virtually any restraint of trade is an inherent right of the patent holder and unreviewable for undue anticompetitive effect. The Federal Circuit has made it clear that when a patent or copyright holder acts within the scope of the rights conferred by the patent or copyright law, such conduct is exempt from any antitrust review. See CSU, L.L.C. v. Xerox Corp., 203 F.3d 1322 (Fed. Cir. 2000); Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999). The implication of this doctrine is that once any exclusionary or anticompetitive act is within the scope of a patent’s inherent rights, it is per se legal as a matter of antitrust law. Indeed, in McFarling, Scruggs, and now Bowman, the Federal Circuit’s creation of an expanded right in the patented component of self-replicating soybean seeds has foreclosed the ability of the courts to look critically at the reasonableness of Monsanto’s restraints on replanting. The plaintiffs in McFarling and Scruggs directly challenged the reasonableness of those restraints and argued that there were less anticompetitive ways for Monsanto to protect any legitimate interest in earning a royalty on soybeans that farmers saved and replanted. The Federal Circuit had no need to consider these arguments because it chose instead to grant Monsanto an absolute right to control the future use of self-replicating soybeans that contain its chimeric gene strain. The Federal Circuit’s approach forecloses an important means of overseeing the merits of specific uses of the exclusionary rights of patent holders. Quanta, Ethyl and Univis forcefully illustrate the wisdom of requiring instead that post-sale restraints be contractual in character so that their competitive merits can be evaluated. C. The Value of Critical Review Is Evident Here, Where Post-Sale Use Restrictions May Lead to Substantial Anticompetitive Effects Without Offsetting Pro-Competitive Effects That Could Not Be Achieved Through Less Restrictive Means. Bowman underscores the inferiority of the Federal Circuit’s approach as compared to a contract law approach because the court’s holding would foreclose any antitrust review of restrictive conduct by a likely monopolist.9 Because the court characterized Monsanto’s right to control post-sale use of self-replicating soybean seeds after an authorized sale as an inherent, patent-based right, it would be prevented from considering the consequences of the economic outcome rendered by its decision. As discussed below, such consequences include potential anticompetitive effects in both the seed and genetic traits markets that may prove very difficult to justify using standard antitrust efficiencies defenses. As recently as 1997, saved seed constituted approximately 20% of planting in soybeans, constraining the pricing freedom of new seed producers accordingly. See Michael Mascarenhas & Lawrence Bush, Seeds of Change: Intellectual Property Rights, Genetically Modified Soybeans, and Seed Saving in the United States, 46 Sociologia Ruralis 122, 129 (2006) (Figure 1 is a chart depicting data compiled by U.S. Department of Agriculture and Doane Agricultural Services); see also Jorge Fernandez-Cornejo, The Seed Industry in U.S. Agriculture, U.S. Dep’t of Agric., Econ. Research Serv., Agric. Info, Bulletin No. 786, Jan. 2004. If allowed to stand, the Federal Circuit’s exception to the first sale doctrine likely will chill or altogether eliminate competition from commodity seed. Notwithstanding that a given bag of commodity seed actually may contain only a little RR seed or none at all, a purchaser intending to plant, save, and reuse commodity seed10 will no longer be able to do so unless the purchaser is willing to incur the risk of infringement liability or undertake costly mitigating measures. Whether a commodity seed purchaser’s added costs flow from infringement liability itself, the expense associated with seed sorting (whether incurred directly by farmers or passed on to farmers by grain elevators), or self-imposed seed-saving restrictions on commodity seed, the net effect is to increase the price of the product to the farmer or to devalue the product sold by the grain elevator. This loss of competitive discipline from commodity seed is magnified by the fact that Monsanto has a substantial market share in the certified seed market." The troubling potential anticompetitive effects of the Federal Circuit’s decision also may extend upstream to the market for genetic traits. Monsanto’s seed-saving restrictions can create incentives for rival genetic traits developers and seed companies to “standardize” on the Monsanto RR soybean system because Monsanto’s policing of its system ensures recurring annual sales. This incentive, coupled with the ubiquity of the Monsanto RR trait, may dampen the ability and incentive for rivals to compete hard to create rival soybean systems. Because the use of commodity seed containing RR traits to grow soybean plants that beget second generation seeds containing RR traits infringes the patentee’s right to “make” the seed under the Federal Circuit’s holding, Bowman’s effect on commodity seed will be very similar to the effect of a seed-saving restriction on commodity seed. The overall impact likely would be to chill innovation and competition in the market for genetic traits in addition to the market for seed. The foregoing scenarios also may cause further collateral damage to competition by enhancing Monsanto’s market power. If Monsanto’s share of the market for herbicide tolerant soybean traits allows it to dictate the terms of rivals’ access to Monsanto traits for the purpose of developing plant varieties that combine or “stack” various genetic traits, Monsanto’s technology licensing practices are likely to have increasingly greater influence in shaping or controlling the evolution of competition in the market. To the extent that rival herbicide-tolerant genetic trait modifications are able to come to market, the number of patent holders with a near veto power over the business of the grain elevators would only multiply. Under the Federal Circuit’s holding in Bowman, each patent holder can effectively raise costs on any sale that might affect its continuing patent right. Although Monsanto’s current patent on the genetic technology used in RR seeds expires in 2014, expiration seems unlikely to ameliorate the potential anticompetitive effects of the Federal Circuit’s holding because Monsanto has patented a second version of the RR genetic technology known as “Roundup Ready 2” (RR2). See, e.g., U.S. Patent No. RE39,247 (filed Jul. 18, 2003). If Monsanto’s existing contractual seed-saving restrictions, coupled with the Federal Circuit’s new exception to the first sale doctrine for self-replicating technologies, simply migrate to RR2, there is little evidence to suggest a meaningfully different competitive outcome. Because Monsanto would maintain its current ability to control access to the technology, agricultural biotechnology innovators may continue to experience difficulty in developing “generic RR1” to generate competition.

#### The CONSULTANT for the brief the next year says that is insufficient to protect innovative incentives

**Lim, 13** (Daryl Lim, Assistant Professor, The John Marshall Law School and **co-consultant to the American Antitrust Institute (“AAI”) for its Supreme Court brief in Bowman v. Monsanto**, 2013, accessed on 10-29-2021, Repository.law.uic, "Self-Replicating Technologies and the Challenge for the Patent and Antitrust Laws", https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1449&context=facpubs)//Babcii

1. **Contract Law**

The **first alternative is contract law**. It is useful to look from the point of view of the patent owners and then from that of users and buyers. Bowman v. Monsanto largely obviates the need for patent owners to rely on express license restrictions to enforce prohibitions on replication. In a footnote to the opinion, Justice Kagan made clear that even in the absence of a licensing agreement, courts would imply a license only to plant the first generation of seeds.343 Buyers and subsequent sellers will be increasingly reliant on representations, warranties, and indemnities from sellers to protect themselves from potential liability for actual or contributory infringement.344

Server and Casey looked at the issue of whether a contract-based post sale restriction on a patented product should be enforced under contract law.345 They concluded the contractual restrictions may be enforced under certain conditions. First, federal preemption requires that restrictions do not frustrate a federal patent policy; for example, one such frustration could be clawing back what is in the public domain.346 In this regard, they note:

[I]t is questionable that a patented product that is the subject of a contract-based post-sale restriction truly enters the public domain upon authorized first sale, where a valid, unexpired patent covering the product is exhausted only with respect to the purchased product and where the buyer is the only party that is contractually bound to adhere to the agreed-to restrictions that are a condition of the sale.347

Second, restrictions would render patents unenforceable under the patent misuse doctrine if they impermissibly broaden the scope of the patent monopoly or violate the antitrust rules on vertical restraints.348

In their brief, Bowman and its amici argued that contract law would serve to **protect Monsanto’s incentives to innovate** while ensuring affordability.349 Antitrust attorney Yee Wah Chin agrees, explaining that Monsanto could have conditioned seed sales on farmers either consuming it or selling it only “to buyers who agree to either consume the seed or isolate that seed from other seed and sell the seed only for consumption” and include grain elevators in its web of license restrictions on seed sale and replanting.350 Thus, grain elevators and farmers can “require representations, warranties, and indemnities from their suppliers, regarding the presence of any patented items in the purchase and the existence of any conditions placed by the patent holder on sales of the patented items that may be included in sale.” 351

The problem, as the Court pointed out, **is that contractual remedies are ineffective against downstream purchasers not in contractual privity** with the patent holder. As Monsanto stated in its brief, in a world where **soybeans “could be purchased from another grower** or a grain elevator, **plucked from a field** or road, **or snatched off the back of a truck**,” patent owners would have to establish “contractual privity with every person who might try to misappropriate its patented technology.”352 Contracts, while similarly restraining alienation, would impose even greater transaction costs.353 Further, since patent laws promote technological progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts, that **incentive would** necessarily **be diminished if SRTs were only protected through a single round of replication instead of its statutory entitlement of twenty years**.354

### 2NC --- AT: holdup

#### No patent holdup or royalty stacking.

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

A. Replacing Conjecture with Data

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

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

Scholars who had advanced these theories had argued that profit-maximizing SEP owners would generate an aggregate royalty burden that would dramatically inflate device prices in the end-user market.12 In some cases, these arguments referred to anecdotal reports, or simply added up publicly announced royalty rates, that SEP owners were collectively charging smartphone producers aggregate royalty burdens representing double-digit percentages of the sales price.13 Empirical researchers that have made systematic efforts to collect and analyze royalty data have failed to find support for these claims. Using various methodologies, researchers have found that estimated total royalty burdens are in the single to mid-digits as a percentage of the device price.14 Additionally, researchers have found that the royalty-stacking hypothesis is incompatible with the performance of the 3G and 4G wireless markets over an almost two-decade period during which device sales grew dramatically while, adjusted for increased functionality, device prices fell.15 In light of this discrepancy between theories of market failure and evidence of market success, the U.S. taxpayer might reasonably ask why the antitrust agencies elected to dedicate scarce investigation and enforcement resources to a well-functioning market in the first place.

### 2NC --- Innovation Turn

#### They have 3 internal links to solving the aff --- The first is innovation --- No 1AC or 2AC card says Innovation is low now --- Innovation is sufficiently rapid in key areas

Linly Ku 21, Manager, Content Marketing at Plug and Play Tech Center, BA from the University of California, Santa Barbara, “New Agriculture Technology in Modern Farming”, Plug and Play Tech Center, 6/2/2021, https://www.plugandplaytechcenter.com/resources/new-agriculture-technology-modern-farming/

Innovation is more important in modern agriculture than ever before. The industry as a whole is facing huge challenges, from rising costs of supplies, a shortage of labor, and changes in consumer preferences for transparency and sustainability. There is increasing recognition from agriculture corporations that solutions are needed for these challenges. In the last 10 years, agriculture technology has seen a huge growth in investment, with $6.7 billion invested in the last 5 years and $1.9 billion in the last year alone. Major technology innovations in the space have focused around areas such as indoor vertical farming, automation and robotics, livestock technology, modern greenhouse practices, precision agriculture and artificial intelligence, and blockchain.

#### Yield to energy is doubled, emissions are less than half, and yield to pesticide is down

Alison McGrew 20, Writer for Illinois Farm Families, “3 Myths About Sustainable Agriculture”, March 2020, https://www.watchusgrow.org/2020/03/02/3-myths-about-sustainable-agriculture/

Myth #1: Today’s farms are less sustainable than they used to be.

Fact: Simply put, farmers today are doing more with less. Here are a few examples:

* Compared to 1977, today’s beef farmers produce the same amount of beef with 33% fewer cattle.
* Pig farms now use 75.9% less land than in 1960.
* Over the last 40 years, soybean farmers have nearly doubled how much they grow while using 8% less energy.
* Dairy farmers have reduced greenhouse gas (GHG) emissions by 63% over the past 60 years.
* Corn farmers have increased yields while reducing pesticide and fertilizer use, thanks in part to biotechnology.

Sustainable agriculture may look different on each farm, but the goal is always the same: make the farm better for tomorrow and for future generations while providing a safe, sustainable food supply.

#### 1. It upends the risk-reward equation and makes it all risk no reward --- It also spills over to all patents

**McBride, 13** (Scott McBride, Counsel of Record Counsel for Amici CuriaeWisconsin Alumni ResearchFoundation, Association of UniversityTechnology Managers, Association ofPublic and Land-grant Universities,Association of American Universities,The Regents of the University ofCalifornia, The Board of Trustees of theUniversity of Illinois, University ofFlorida, Duke University, EmoryUniversity, University of GeorgiaResearch Foundation, Inc., Iowa StateUniversity of Science and Technology,NDSU Research Foundation, Universityof Iowa, University of MissouriColumbia, South Dakota StateUniversity, NUtech Ventures,University of Nebraska-Lincoln,University of Kentucky, University ofKansas, Kansas State University,Montana State University, andUniversity of Delaware, Jan-23-2013, accessed on 10-29-2021, Chamberlitigation, "", https://www.chamberlitigation.com/sites/default/files/scotus/files/Wisconsin%20Alumni%20Research%20Foundation%20et%20al.%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

B. **Reversal would devalue** the **extensive benefits** achieved **by the Bayh-Dole Act**.

Beyond the specific impact to the value of patents covering artificial, progenitive technologies, reversal would palpably and negatively impact whether certain technologies **ever make it to market** to benefit the public. Reversal would **fatally damage the risk-reward equation in patent law** vis-à-vis artificial, progenitive technologies. The patent **system is designed to reward inventors with a timelimited right to exclude, so they will share their inventions** for the public good. For the higher-risk artificial, progenitive technologies where investment did occur, the risk to companies would be greater, and the reward would **need to be higher to incent companies to license nascent tech**nologies from universities. When the risk becomes too great, private sector **entities may not take licenses at all.**

The **resulting domino effect would undermine** the stated purposes of the Bayh-Dole Act and the success of the technology transfer system discussed above. Private sector entities would avoid licensing technology that is not protected by strong patent rights. Consequently, these **entities would not develop useful products** from this technology for the public benefit. The Bayh-Dole Act was designed to encourage public access to federally funded inventions through the use of the patent system and collaboration between research institutions and private sector entities. Reversing the Federal Circuit would undermine this fundamental objective of Congress. To ensure the ongoing success of BayhDole and the technology transfer system, this Court should affirm the Federal Circuit’s holding that Bowman infringed Monsanto’s patents by “making” new seeds.

#### 1. Seed patent profitability causes greater yields

Bevilacqua, 13 (Theresa Bevilacqua, Council of record, Jan-23-2013, accessed on 10-29-2021, Chamberlitigation, "Brief for Amicus Curiae CHS inc. In support of respondents", <https://www.chamberlitigation.com/sites/default/files/scotus/files/CHS%20Inc.%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii>

II. Genetically Enhanced Seed Provides Benefits to Growers, Grain Elevators and Consumers

Seed companies like Monsanto invest billions of dollars annually in the **r**esearch **and d**evelopment of genetically enhanced seed traits. The innovations and benefits brought about by this investment **are significant.** For example, the U.S. produces more than 12 billion bushels of corn per year.” The average yield for corn per acre has increased from an average of 125 bushels per acre to 145 bushels per acre **in the last fifteen years**." Genetic enhancements also **reduce the use of pesticides and decrease input costs.**”\* These benefits allow farmers to grow more with less. The increase in yield allows CHS to invest in its business, infrastructure and the communities in which it is located. Within the last five years CHS has invested over $150 million in infrastructure and increased capacity by 37 million bushels in order to serve the increasing output of U.S. farmers.

Petitioner’s device of buying bin run soybeans containing Monsanto’s Roundup Ready® trait takes value out of the cycle. Bin run grain can be purchased at less than half the cost per bag of certified seed. If this **practice were incentivized as a legitimate** end- run around the seed manufacturer’s **patents**, and adopted on a more widespread basis, the disparity between certified seed sales by licensed retailers and the progeny of commodity seed would grow. In turn, **investment in r**esearch **and d**evelopment becomes more costly and innovators are **disinclined to** making further **investments**.

Bin run grain is also a mix of different varieties, with different maturation rates and varying genetic traits. In the ordinary course, it is impossible to know what variety or which traits were planted from the commingled commodity grain. Commodity grain also contains a higher level of dirt and contaminates than would be permissible in a bag of certified seed. Over time, planting commodity, undifferentiated grain would result in a reduction in yield and varietal superiority.”

In sum, Petitioner's position causes a host of problems for other stakeholders in the distribution channel. If accepted, **seed retailers would not be able to comply** with seed certification laws, and over time, **yield productivity and innovation would be impaired.**

#### 2. Only patent protections solve green ag --- Nothing can fill in

**Arnold, 13** (Mark Arnold, Edwin B. Green Chair Professor in Laser ChemistryDirector, Center for Biocatalysis and Bioprocessing, 2013, accessed on 10-29-2021, Chamberlitigation, "Brief of Amicus Curiae law professor Christopher M. Holman in support of respondants", https://www.chamberlitigation.com/sites/default/files/scotus/files/Law%20Professor%20Christopher%20Holman%20amicus%20brief%20%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

3) Enforceable Patent Protection Is Essential for Self-Replicating Innovations in **Biotechnology**

Although some have argued that the close analogy between engineered DNA and computer software suggests that copyright should be made available for engineered DNA,” the reality is that copyright protection is currently not available for innovations in genetic engineering. In particular, copyright protection was **not a viable alternative for Monsanto's genetically engineered seeds**. At the time Monsanto invested in the necessary **r**esearch **and d**evelopment to bring these important products to market, the only practical and effective form of intellectual property available was **patents**, and it can be assumed that Monsanto’s decision to make the necessary **investment was based on a reasonable expectation that adequate patent protection would allow them to recoup their investment**. If this court adopts the petitioner’s view of patent exhaustion, it will likely deprive Monsanto and other biotechnology innovators of effective patent protection for many genetically modified crops and other self-replicating products of biotechnology.

Petitioner’s proposed expansion of the doctrine of patent exhaustion would likely have dramatic adverse consequences extending well beyond **Monsanto’s** genetically modified soybeans. Such a decision could stymie investment in the development of a host of genetically modified agricultural **products** that **hold the potential to address serious global concerns such as food supply and environmental degradation.**" Genetically **modified crops are expected to play a significant part in the creation of green, renewable energy sources**. While some amici propose alternatives to patents such as prizes or the use of socalled “terminator” technology, as a practical matter it seems **unlikely** that such **alternatives would be able to fill the void**, at least **in the foreseeable future.**

#### AND --- The plans prohibition on post-sale use restrictions also destroys the bio-medical industry --- Patents of replicable tools like cell lines would be hammered

**Dabney, 13** (James Dabney, Jan-23-2013, accessed on 10-29-2021, Chamberlitigation, "BRIEF FOR AGILENT TECHNOLOGIES, INC., ILLUMINA, INC., LIFE TECHNOLOGIES CORP., PROMEGA CORP., QIAGEN N.V., AND ROCHE MOLECULAR SYSTEMS, INC. AS. AMICI CURIAE IN SUPPORT OF RESPONDENTS,", https://www.chamberlitigation.com/sites/default/files/scotus/files/Agilent%20Technologies%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

The biotechnology and research tools industry (the “Industry”) is diverse, embracing public and private, non-profit and for-profit, and academic. and corporate institutions. The Industry **spends billions of dollars each year developing technologies** that support both research and development activities and diverse commercial and industrial activities. Commercial biotechnology products provide new sources of energy, more accurate techniques for identifying criminals or exonerating the innocent, improved food safety testing. and faster and more discriminating **methods for diagnosing, detecting, and treating diseases including cancer and infections**.

Amici rely heavily on 35 U.S.C. § 271(d) and the principles of divisibility and party autonomy that the statute implements. For example, amici frequently sell research tools to persons engaged in university research. Such sales are typically made on “research use only” conditions that exclude industrial or commercial activities. By retaining use and sale rights that university **researchers have no need to buy or pay for, research tool companies** are able to make patented research products available to biomedical re-searchers at prices that are tailored to the needs and economics of the persons engaged in research, and hence are more affordable than would be the case if researchers had to pay for manufacturing, commercial diagnostic, or other non-research use rights.

Divisibility of patent rights and party autonomy in contracting are also important to the federal government’s ability to maximize its **return on investment in biomedical research** and to carry out the purposes of the Bayl-Dole Act, 35 USC. §§ 200-212. By ‘**keeping prices lower for products** sold for re- search use only, conditional sale and license transactions allow more research to occur for every dollar of federal research funds that are granted. And where federal funding results in the United States owning patents, the Patent Act authorizes agencies to grant nonexclusive, exclusive, or partially exclusive lit censes under federally owned inventions, royalty-free or for royalties or other consideration,” and “on such terme and conditions aa the granting agency considers appropriate.” 35 U-S.C. §§ 207(a), 20008).

Divisibility of patent rights and party autonomy in contracting are also critical to the biotechnology technology transfer system that has developed over past decades. This technology transfer system gives members of the Industry, including teaching and research universities, flexibility to work with multiple parties in different fields, or at different levels or places within the same field, to put patented technology to its highest and best use with the best partner. This is particularly relevant where the patented technology has many uses but no single licensee could use, develop, or commercialize a technology for all possible uses and benefits.

Uses of biomedical technologies are often subject to restrictions in patent license agreements that limit licensees to uses in specific fields and allow other licensees the right to use in other fields. Patent right divisibility and party autonomy in contracting **help licensees navigate this often complex field of patent rights use restrictions.** When a licensee develops and sells a new product that comprises amici’s patented technology, conditional sale and license terms provide a mechanism that enables the licensee to comply with field of use and other restrictions in its contracts for the sale of products embodying amicis patented inventions. Without the ability to make selective waivers of **patent rights**, **the biomedical technology transfer system would be severely disrupted and thousands upon thousands of existing licenses would be undermined**. Divisibility of patent rights and party autonomy in contracting **are also critical to the commercialization of patents** disclosing readily replicable technologies. Many research tools are replicable, such as **cell lines and DNA vectors**. If a patentee could not retain certain **use and resale rights** when selling products embodying novel replicable technologies, a customer could buy a product once and **then easily replicate and resell** it an indefinite number of times, in either identical or modified form. **This would severely disrupt the network of limited use patent licenses for the technology, force higher prices, and deprive the Industry of incentives for developing and selling replicable research tools.**

#### Bio-med research is key to outpace China --- China bio-med lead causes extinction --- It outweighs nuclear war

Moore ’20 [Scott; November 8; director of the Penn Global China Program at the University of Pennsylvania.; Foreign Policy, “China’s Biotech Boom Could Transform Lives—or Destroy Them,” <https://foreignpolicy.com/2019/11/08/cloning-crispr-he-jiankui-china-biotech-boom-could-transform-lives-destroy-them/>]

When James Clapper, the U.S. director of national intelligence at the time, appeared before Congress in early January 2016 for an annual briefing of threats to the United States, he didn’t lack for material. Just a few weeks earlier, North Korea had tested a nuclear device, and Russia had begun deploying cruise missiles that appeared to violate a crucial arms-control agreement. But to the surprise of many experts, Clapper devoted a good chunk of his time to describing a much more exotic threat: biomedical research. Specifically, [Clapper warned](https://thebulletin.org/2016/04/how-genetic-editing-became-a-national-security-threat/), “Research in genome editing conducted by countries with different regulatory or ethical standards than those of Western countries probably increases the risk of the creation of potentially harmful biological agents or products.”

Clapper’s statement didn’t explicitly mention China—but it didn’t need to. As his testimony went on to make clear, while in the 20th century the United States and Soviet Union held the keys to preventing planetary catastrophe, in the 21st the principal players are the United States and China. And while in a previous age keeping Pandora’s box closed meant preventing nuclear war, today it’s about preventing biotech dangers.

In just the past few years, the development of inexpensive gene-editing techniques has democratized biomedical research, producing a biotech bonanza in places such as China and creating a whole new category of security threats in the process, from the use of genetic information to persecute dissidents and minority groups to the development of sophisticated bioweapons.

When it comes to the United States, China, and technology, artificial intelligence tends to grab most of the attention. But policymakers need to come to grips with the even bigger threat of biotechnology—and soon. Fortunately, though, shared concerns about China’s role in biotechnology also provide a rare chance for meaningful and productive engagement in shaping the rules of a new world.

China’s starring role in preventing the 21st century’s biotech perils stems from its skyrocketing investment in biomedical research. Historically, Western countries, and especially the United States, have been the epicenter of research in the life sciences. The United States alone accounted for some [45 percent](https://itif.org/publications/2018/03/26/how-ensure-americas-life-sciences-sector-remains-globally-competitive) of biotech and medical patents filed in the 14-year period ending in 2013. But now, thanks to heavy state-backed investment, China is catching up. Economic plans instituted in 2015 call for the biotechnology sector to account for more than 4 percent of China’s total GDP by 2020, and [estimates suggest](https://www.nature.com/articles/d41586-018-00542-3) that as of 2018, central, provincial, and local governments had already invested over $100 billion in the life sciences. Chinese venture capital and private equity investment in the life sciences, meanwhile, totaled some $45 billion just from 2015 to 2017.

China has also invested considerable effort in competing with countries like the United States for biotech talent. Of some [7,000 researchers recruited](http://www.nature.com/articles/d41586-018-00542-3) under the Thousand Talents Plan since 2008, more than 1,400 specialized in the life sciences. A leading American geneticist, Harris Lewin, has [warned](https://www.wired.com/story/wildebeest-okapi-giraffe-ibex-come-peruse-their-genomes/) that the United States is “starting to fall behind … the Chinese, who have always been good collaborators, [are] now taking the lead.”

For the United States and other Western countries, China’s growing role in biomedical research is raising plenty of concern. Several Chinese researchers have shown a willingness to ignore ethical and regulatory constraints on genetic research. In 2018, He Jiankui became a poster child for scientific irresponsibility when he announced he had edited the genes of two twins in utero without following basic safety protocols. He [reportedly dismissed](https://dev.biologists.org/content/146/3/dev175778) them as guidelines, not laws.

Yet the reaction at home was not what He had hoped for. His research had been made possible by the relatively lax standards of Chinese universities, even as he had kept the true nature of it secret from many involved – while discussing it with a [small group](https://www.nytimes.com/2019/04/16/health/stanford-gene-editing-babies.html) of Western bioethicists and scientists, who stressed their disapproval. It’s not uncommon in China to break the rules and be lauded for the results anyway, whatever the field. For He, though, the vast international attention that came after the story broke cost him his career and possibly [his freedom](https://www.nytimes.com/2019/01/21/world/asia/china-gene-editing-babies-he-jiankui.html?module=inline). Chinese media rushed to stress [official disapproval](https://www.sciencemag.org/news/2019/08/untold-story-circle-trust-behind-world-s-first-gene-edited-babies) of the experiments. Even the [overt purpose](https://www.statnews.com/2019/04/15/jiankui-embryo-editing-ccr5/) of the editing – to ensure that the babies, born to HIV+ mothers, enjoyed protection against the virus – turned out to be scientifically weak.

As China’s biotech sector grows, so too do fears that Chinese researchers like He will be more willing to push the limits of both science and ethics than those in the United States. Earlier this year, Chinese researchers recorded another mind-bending milestone when they [implanted](https://www.technologyreview.com/s/613277/chinese-scientists-have-put-human-brain-genes-in-monkeysand-yes-they-may-be-smarter/) human genes linked to intelligence into monkey embryos—and then said that the monkeys performed better on memory tests.

The dominance of the party-state in China raises serious concerns around biotechnology, especially because it carries increasingly ethnonationalist tone. When in 2018 Chinese researchers created the world’s first primate clones, for example, they dubbed them Zhong Zhong and Hua Hua, from the term zhonghua meaning “The Chinese Nation”—an oddly jingoistic moniker for a pair of monkeys. Chinese government policies often blur the line between eugenics and education, lumped together as improving the “quality” (suzhi) of the population, which received another stamp of official [endorsement](https://twitter.com/globaltimesnews/status/1191681436635451392) following the recent Fourth Plenum. These programs are carried out through the country’s huge so-called family planning bureaucracy—originally established to enforce the one-child policy.

Moreover, Beijing is increasingly extending its formidable social control apparatus into the realm of genetics. While there are considerable restrictions on private firms sharing biomedical data, largely because of an ugly history of [popular discrimination](https://www.theatlantic.com/china/archive/2013/12/chinas-struggle-with-hepatitis-b-discrimination/281994/) against hepatitis carriers, the government has no such restrictions. A [New York Times report](https://www.nytimes.com/2019/02/21/business/china-xinjiang-uighur-dna-thermo-fisher.html) earlier this year suggested, for example, that Chinese authorities had assembled a vast trove of genetic data on Chinese citizens without their consent, with the Uighur minority group having been specifically targeted.

Beijing’s brand of bio-nationalism also directly threatens the United States. U.S. officials have been [warning](https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html) universities and research institutions that the biotech sector is a focal point for Chinese industrial espionage activities in the United States. And this past August, a senior Defense Department official warned Congress that China’s growing role in pharmaceutical manufacturing could allow it to disrupt deliveries of critical battlefield medicines, or potentially even [alter them to harm](https://www.washingtonpost.com/opinions/we-rely-on-china-for-pharmaceutical-drugs-thats-a-security-threat/2019/09/10/5f35e1ce-d3ec-11e9-9343-40db57cf6abd_story.html) U.S. forces.

Yet the biggest risks posed by biotech, for China, the United States, and other countries, pertain to nonstate actors. A critical feature of modern biotech, in contrast to technology like nuclear weapons, is that it’s cheap and easy to develop. A technique known as CRISPR, which the Chinese researcher He used in his illicit gene-editing work, makes it practical for just about anyone to manipulate the genomes of just about any organism they can lay their hands on. CRISPR makes it much simpler to skirt ethical restrictions and terrifyingly straightforward for terrorist groups to develop fearsome biological weapons.

Researchers have already [shown](https://doi.org/10.1371/journal.pone.0188453) it’s possible to reconstruct the smallpox virus, which was eradicated in the real world in the 1970s, for as little as $200,000 using DNA fragments you can order online. If a terrorist or rogue state were to successfully do so, virtually no one alive would have any resistance to the virus—and most stockpiles of the vaccine were destroyed long ago. There is an organization, the [International Gene Synthesis Consortium](https://genesynthesisconsortium.org/), that tries to screen suspicious orders for DNA fragments that might be used to build such bioweapons. And while most of the world’s major DNA synthesis firms belong to the consortium, membership is completely voluntary, and there’s also a [thriving and entirely unregulated](https://www.wired.com/story/synthetic-biology-vaccines-viruses-horsepox/) black market—much of it based in China.

All of this means that biosecurity standards in places like China matter more than ever. After all, if a major bioweapon were to be unleashed, it’s unlikely that any major, globally integrated country could escape unharmed. Fortunately, there are growing signs China is open to better regulation of its biotech sector. In February, the Chinese government announced that “[high risk](https://www.statnews.com/2019/02/27/china-unveils-new-rules-on-biotech-after-gene-editing-scandal/)” biomedical research would be overseen by the State Council, China’s equivalent of the cabinet—a sign of the concern with which Beijing views incidents like the He Jiankui CRISPR scandal. In a further sign of this concern, in August, the Chinese Communist Party announced the creation of a [new committee](http://www.nature.com/articles/d41586-019-02362-5) to advise top leaders on research ethics.

### 2NC --- Market Turn

#### Turns the case---agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### It destroys small farmers --- It forces them to ignore cost-efficiency and take predatory loans --- That reduces crop yields and spikes food prices

**Weiner, 13** (Robert Weiner, Dr. Robert J. Weiner teaches international finance, economics, and strategy. He received his PhD in 1986, and has been at GW since 1994, Jan 2013, accessed on 10-29-2021, Chamberlitigation, "Brief of economists as amici curaie in support of respondants bowman", https://www.chamberlitigation.com/sites/default/files/scotus/files/Economists%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

1. Seed and trait prices would rise as innovators set prices to capture the full value of the use of their inventions over many generations of seed.

If the exhaustion doctrine applied, seed and trait innovators would need to price seed to capture not just the value of a single use, but the value of using the seed and trait **for many generations** in the future, as well as the value of the right to breed with the seed. This price for perpetual rights to use and reuse the patented technology would necessarily be **far higher** than the price to use the technology a single time.

This **price increase would reduce the welfare of farmers** for several reasons. While there might superficially appear to be no economic difference be- tween charging annual license fees and charging **a single perpetual license fee** that is the discounted present value of those annual payments, the analysis is not so simple. Given the choice, different farmers would engage in seed saving to different degrees. In fact, even before transgenic traits emerged, most soy- bean farmers did not save seed but instead purchased new seed of whatever variety each believed was likely to produce the greatest yield in a particular environment. See, e.g., SEED INDUSTRY IN U.S. AGRICULTURE. at 36 (“About 25% of soybean seed in 1997 was estimated to be farmer saved.”). In a world where seed and trait patents were exhausted after the first sale, the higher up-front cost of seeds and traits (that included saved seed rights) would push farmers to save seed when they would otherwise prefer not to do so. The majority of farmers that would prefer to take advantage of new seed varieties each year rather than save seed would experience a loss in welfare from the **inability to cost-effectively purchase** the best new seed varieties each year, even if the cost of a perpetual license were financially equivalent to the cost of buying new seed each year.

Farmers would also suffer because, even if the price for a perpetual license were set at the present value of annual license fees, farmers are not indifferent to high up-front costs. Many individual **farmers borrow to buy seed**, paying back the loan when the crop is harvested. If farmers faced a higher up-front cost, **loans would** need to be **larger**, have longer terms, and would be **riskier** and **subject to higher interest rates**.

This harm to farmers would translate into consumer harm in several ways. Farmers that lost the practical ability to buy new and improved varieties each year would suffer from **reduced crop yield**, **reducing output and raising prices** to consumers. Farmers’ increased financing costs for **longer term loans would also be reflected in higher prices** passed along to consumers. Finally, smaller farmers with less access to capital are likely to be disproportionately harmed by a shift from annual license fees to an upfront pricing model. These farmers will face higher costs and be less effective competitors.

#### Seed companies would have to treat small farmers and universities as potential threats --- That destroys their ability to innovate

**Weiner, 13** (Robert Weiner, Dr. Robert J. Weiner teaches international finance, economics, and strategy. He received his PhD in 1986, and has been at GW since 1994, Jan 2013, accessed on 10-29-2021, Chamberlitigation, "Brief of economists as amici curaie in support of respondants bowman", https://www.chamberlitigation.com/sites/default/files/scotus/files/Economists%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

2. Applying exhaustion could lead to a reduction in procompetitive outlicensing. As discussed above, if the first seed sale exhausts patent rights, absent viable contractual protections a seed or trait developer would need to charge the full value of its traits up front. Currently developers are able to price the use of their traits or seed germplasm differently for different kinds of rights and different intensities of use. For example, the fee charged to a university for a research license will differ from the fee charged to a competing seed company for the right to incorporate a patented trait in their seed or breed with patented germplasm, and both of these fees **will differ from the license fee paid by a farmer who wishes to grow a single commercial crop**. Such price discrimination based on intensity of use is generally considered **pro-competitive** since the licensee values use of the patent in rough proportion to the benefit it gains.

Difficulty in metering the intensity of use by commercial licensees will act as a disincentive to out- license. **If a first sale exhausts rights** in traits or germplasm, outlicensing to a small competitor or university poses the same commercial risks to the licensor **as outlicensing to a large competitor**, because any of these licensees will be able to flood the market with seed containing the innovator’s intellectual property without incremental payments to the inventor. In such a world**, a rational innovator will raise prices to small firms or universities that seek a license, thus reducing the ability of small firms and universities to engage in complementary innovation.**

### 2NC --- Diversity Turn

#### The third internal link is Genetic diversity --- That is increasing AND gene banks solve!

Colin Khoury 18, Research Scientist at the International Center for Tropical Agriculture (CIAT), Colombia and at the USDA National Laboratory for Genetic Resources Preservation, “Evaluating Claims GMOs and Modern Agriculture have Led to a 75% Drop in Crop Diversity”, Genetic Literacy Project, 12/14/2018, https://geneticliteracyproject.org/2018/12/14/myth-busting-modern-agriculture-really-led-75-drop-crop-diversity/

This is ironic, since modern productive crop varieties are bred by wisely mixing and matching diverse genetic resources. The disappearance of old varieties thus reduces the options available to plant breeders, including those working to produce more nutritious and resilient crops. Genebank collections, such as the beans, cassava, and other staples conserved at CIAT, which were originally built to provide access for plant breeders to genetic resources, have therefore taken on increasingly important conservation roles.

In many regions of the world, the loss of crop diversity also has profound cultural and spiritual significance, with seeds no longer handed down through generations and no longer connecting people as closely to the places they call home. What people cultivate and what they eat are important to how they identify themselves, both as cultures and as individuals. “We are what we eat.”

Taking stock

Being a food biodiversity scientist, I grew up (in the professional sense) with the loss of crop diversity looming over my head, providing both a raison d’être and an urgency to my efforts. Somewhere along the line, I became interested in understanding its magnitude. That is, counting how many crops and how many varieties have been lost.

And that’s where it started to become complicated, and also more interesting. Because, when I went looking for signs of the loss of specific crops, I couldn’t find any. Instead, I found evidence of massive global changes in our food diversity that left me worried, but at the same time hopeful.

A bit of background. Most of the numbers seen in the news on how much crop diversity has been lost go back to a handful of reports and books that reference a few studies: for example, the changing number of vegetable varieties for sale in the U.S. over time. The results are estimations for a few crops at local to national levels, but they somehow have been inflated to generalized statements about the global state of crop diversity, the most common of which is some variation of “75% of the diversity in crops has been lost.”

Putting true numbers on diversity loss turns out to be a complicated and contested business, with no shortage of strong opinions. One big part of the problem is that there aren’t many good ways to count the diversity that existed before it disappeared. Researchers have done some work to assess the changes in diversity in crop varieties of Green Revolution cereals, and to some degree on the genetic diversity within those varieties. The results indicate that, although diversity on farms decreased when farmers first replaced traditional varieties with modern types, the more recent trends are not so simple to decipher.

Reviewing what had been researched, it was particularly surprising to me that very little work had been done to understand the changes in what is probably the simplest level to measure: the diversity of crop species in the human diet, that is, how successful is maize versus rice versus potato versus quinoa and so on. I realized that data on the contribution of crops to national food supplies were available for almost all countries worldwide via FAOSTAT, with information for every year since 1961. Perhaps these were the data that could show when a particular grain, or legume, or vegetable, fell off the world map, and just how diverse our global food supply is now compared to half a century ago.

Fast forward through a couple of years of investigation. To my surprise, I found that not a single crop was lost over the past 50 years! There was no evidence for extinction.

What was going on? Was I missing something or was the loss of food biodiversity narrative wrong?

It turns out that my failure to see any loss of crops was due in large part to the lack of sufficient resolution in the FAO food supply data. Only 52 meaningful crop species-specific commodities are measured and a number of these are general groupings such as “cereals, other.” Because of this lack of specificity, the data couldn’t comprehensively assess the crops that have been most vulnerable to changes in the global food system over the past 50 years.

Related article: Viewpoint: 'Heritage' of emotional decision-making fuels EU's opposition to biotech crops

In FAO data, these plants are either thrown into the general categories or they aren’t measured at all, especially if they are produced only on a small scale, for local markets or in home gardens. This is, in itself, sign enough that they may be imperiled. We need better statistics about what people eat (and grow) around the world. But, enough is known to be confident that many locally relevant crops are in decline.

But that’s not to say that the data weren’t useful to the question at hand. With some further analysis, they eventually provided what I think is a powerful argument for further concern about the loss of crop diversity globally. Yet, at the same time, they also offer some hope.

Over the past 50 years, almost all countries’ diets actually became more diverse, not less, for the crops that FAO statistics do report. We found that traditional diets that were primarily based on singular staples a half century ago, for instance rice in Southeast Asia, had diversified over time to include other staples such as wheat and potatoes. The same was true for maize-based diets in Latin America, sorghum- and millet-based diets in sub-Saharan Africa, and so on. Diets around the world were balancing out with regard to the contribution of these foods.

Not that there weren’t plant winners and losers. Wheat, rice, and maize, the most dominant crops worldwide 50 years ago, became more important globally. Other crops emerged as widespread staples, particularly oilcrops such as soybean, palm oil, sunflower, and rapeseed oil. And, as the winners came to take more precedence in food supplies around the world, alternative staples such as sorghum, millets, rye, cassava, sweet potato, and yam were marginalized. They haven’t disappeared (at least not yet), but they have become less important to what is eaten every day.

As countries’ food supplies became more diverse in the winner crops reported by FAO, and the relative abundance of these crops within diets became more even, food supplies worldwide became much more similar. If we are what we eat, then it seems that we are quickly becoming very much the same type of human being ‒ modern people eating globalized food crops.

The publication of our findings of increasing homogeneity in global food supplies generated substantial scientific and public interest. This wasn’t, I think, because the main finding was a big shocker. It’s easy to see how pizza is now available in Tokyo, bread available in traditional maize and potato regions of Latin America, and McDonalds, Subway, and Starbucks available, well, almost everywhere. Rather, I think it’s because we were able to examine the food supplies of virtually all the countries of the world, over a relatively long time period, and put some real numbers to the change we saw. On average, for instance, the amount of variation between food supplies in different countries decreased by 68.8% from 1961 to 2009.

This is why, although we could see no absolute loss in crops consumed over the past 50 years, I am concerned. For even in the relatively small list of crops reported in the FAO national food supply data, . That doesn’t seem like a good thing for the long-term resilience of our agricultural areas, nor for human health, although it’s important to remember that such changes are the collateral damage resulting from the creation of highly productive mega-crop farming systems, which have increased the affordability of these foods worldwide, leading to less stunting and other effects of undernutrition worldwide. On the other hand, global dependence on a few select crops equates to expansive monocultures, with more lives riding on the outcome of the game of cat and mouse between pestilence and uniform varieties grown over large areas. Moreover, cheaply available macronutrients sourcing from these crops have contributed to the negative effects of the nutrition transition, including obesity, heart disease, and diabetes.

So why then am I hopeful? Because the data, and some literature, and my own direct experience also indicate that diets in recent years, in some countries, are beginning to move in different directions, reducing the excessive use of animal products and other energy-dense and environmentally expensive foods, and becoming more diverse, particularly with regard to fruits and vegetables, and even healthy grains. This seems good, both for human health and for the sustainability of agricultural production. Change is still occurring, and the future does not appear to be fixed. What better evidence than quinoa, which was relatively unknown outside the Andes a couple of decades ago, and is now cultivated in 100 countries and consumed in even more?

#### BUT! --- Removal of post-sale use restrictions causes a shift from variety to hybrid seed development

Weiner, 13 (Robert Weiner, Dr. Robert J. Weiner teaches international finance, economics, and strategy. He received his PhD in 1986, and has been at GW since 1994, Jan 2013, accessed on 10-29-2021, Chamberlitigation, "Brief of economists as amici curaie in support of respondants bowman", https://www.chamberlitigation.com/sites/default/files/scotus/files/Economists%20amicus%20brief%20-%20Bowman%20v.%20Monsanto%20Co.%20%28U.S.%20Supreme%20Court%29.pdf)//Babcii

4. Application of patent exhaustion would distort incentives for future crop research toward **hybrid seeds** and **away from varietal crops.**

Applying patent exhaustion to authorized sale of a patented seed would distort incentives for future seed research and innovation. **Hybrid seeds**, such as corn seed, cannot be saved because the crop produces seeds that lack vigor and have reduced yield compared to the parent seeds. The single-use character of hybrid corn protects the ability of seed breeders and trait developers to recover research and development costs for development of new hybrid seed varieties and traits. See A. Bryan Endres, State Authorized Seed Saving: Political Pressures and Con- stitutional Restraints, 9 DRAKE J. AGRIC. LAW 323, 324 (2004) (citing SEED INDUSTRY IN U.S. AGRICUL- ‘TURE at 2, 19-20, 25).

#### That’s worse for crop diversity and resiliency

McGroarty, 15 (Mike McGroarty, Certified farmer and owner of freeplants.com, 7-28-2015, accessed on 10-29-2021, Freeplants, "Hybrid: The Bad Seed?", <https://freeplants.com/HybridTheBadSeed.html>)//Babcii

The **rise of hybrid seed use poses a threat to the diversity of plant life**. Nature has created many varieties of the same plant. Each variety has its differences which helps it thrive in certain circumstances. This makes certain **varieties will withstand late frosts or resist specific diseases**. When hybrids are planted, we lose nature's “**survival of the fittest”** and varieties not handpicked by seed companies for cross pollination **could be wiped out forever**. That lost variety might be one we need in the future.

Hybrid seeds are most valuable to commercial farmers who need a predictable, easy to grow crop. Hybrids cost seed producers more to make, but since they cannot be re-used, they will make a profit by reselling them annually. Because there is more profit to be made by selling to commercial growers, the seeds are tailored to fit their needs. For example, hybrid seeds might produce tomatoes with thicker skin, making for easier transport, but with a blander taste. Its no secret that tomatoes from the grocery store rarely taste as good as ones grown in your garden and this is one big reason why.

Some may argue that cross pollination of plant varieties occurs naturally, so what's the big deal? Seed manufactures are creating hybrids at a very large rate. In this era, most people purchase their food from the grocery store. Most people are not growing vegetables in their garden. If the few remaining backyard gardeners plant hybrid seeds, then **certain plant varieties could be wiped out before long.** Planting open-pollinated and heirloom seeds are better for preserving the natural diversity of plant life.

# 1NR

## 1NR --- DPA CP

### 2NC --- PDCP

#### The CP is a regulation not a prohibition

James Broaddus 50. February 6; Judge on the Kansas City Court of Appeals, Missouri; Westlaw, “City of Meadville v. Caselman,” 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### Prohibitions are absolute bans without exemption.

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

Main Difference – Prohibited vs. Restricted

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

What Does Prohibited Mean

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

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

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

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

What Does Restricted Mean

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

The new regulations restricted the free movement of people.

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

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

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

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

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

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

### 2NC --- PDB

#### Perm do both fails --- It links to the Pandemic Response DA. The net benefit is “plan bad” not internal. The plan violates the DPA --- it protects ANY antitrust violation.

FEMA 21. Posted by the Federal Emergency Management Agency on May 28, 2021. “Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act; Plans of Action To Respond to COVID-19”. https://www.regulations.gov/document/FEMA-2020-0016-0053

IV. Antitrust Defense

Under the provisions of DPA subsection 708(j), each Sub-Committee Participant in this Plan shall have available as a defense to any civil or criminal action brought for violation of the antitrust laws (or any similar law of any State) with respect to any action to develop or carry out this Plan, that such action was taken by the Sub-Committee Participant in the course of developing or carrying out this Plan, that the Sub-Committee Participant complied with the provisions of DPA section 708 and the rules promulgated thereunder, and that the Sub-Committee Participant acted in accordance with the terms of the Voluntary Agreement and this Plan. Except in the case of actions taken to develop this Plan, this defense shall be available only to the extent the Sub-Committee Participant asserting the defense demonstrates that the action was specified in, or was within the scope of, this Plan and within the scope of the appropriate Sub-Committee(s), including being taken at the direction and under the active supervision of FEMA.

#### 1. The plan would HAVE to amend the statute to supersede presidential authority.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Congress may consider enhancing its oversight of executive branch activities related to the DPA in a number of ways. To enhance oversight, Congress could expand executive branch reporting requirements, track and enforce rulemaking requirements, review the activities of the Defense Production Act Committee, and broaden the committee oversight jurisdiction of the DPA in Congress. Congress may also consider amending the DPA, either by creating new authorities or repealing existing ones. In addition, Congress may consider amending the definitions of the DPA to expand or restrict the DPA’s scope, amending the statute to supersede the President’s delegation of DPA authorities made in E.O. 13603, or consider adjusting future appropriations to the DPA Fund in order to manage the scope of Title III projects initiated by the President.

#### That implicitly repeals the whole DPA

Jesse W. Markham Jr. 09. Marshall P. Madison Professor of Law, University of San Francisco School of Law. “The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of Plain.” Repugnancy, 45 GONZ. L. REV. 437 (2009).

In Credit Suisse, the Court lurched past the traditional narrow confines of the doctrine and recast it in terms that will most likely give rise to more frequent displacements of legislative enactments.14 Credit Suisse acknowledges no departure from precedent.' 5 However, the Court has, in fact, greatly expanded the implied repeal doctrine. As it is currently employed by the Court, the new doctrine bears little resemblance to precedent, obscures a previously simple rule, and exhibits a profound disregard for the sound policy underpinnings of this particular canon of legislative interpretation. By expanding, and even rewording, the "plain repugnancy" standard and introducing a vague factor-based approach, the Court invites the judiciary to find legislative inconsistencies in new and creative ways, placing the courts in an enlarged role of **refashioning legislative enactments to resolve** these "**inconsistencies**."' 6 Moreover, the Court has dismantled the traditional implied repeal rule without explaining why it believes the traditional doctrine should be abandoned. Indeed, one of the Court's vaguely expressed rationales for displacing antitrust rules in Credit Suisse-an assertion that antitrust courts are particularly error-prone-is offered without empirical or theoretical support.'7 Viewed more broadly beyond the antitrust law context in Credit Suisse, the restated implied repeal doctrine lacks an analytical justification for its departure from precedent.

The Court's reformulation of the implied repeal doctrine is bad law, bad policy, and should be undone. In Credit Suisse, the Court divested private plaintiffs of antitrust remedies for conduct that securities regulators had already concluded were both anticompetitive and subversive of public confidence in capital markets. 8 Unequivocally, the antitrust case challenged conduct that was illegal under securities regulatory law.19 Although securities regulation and antitrust rules prohibited the conduct in question for overlapping reasons, the revised implied repeal doctrine employed by the Court allowed it to find these congruent laws to be "plainly inconsistent" with one another.20 Taking direction from the Supreme Court's new implied repeal doctrine, courts are encouraged-or at least no longer discouraged--to find inconsistencies between laws they do not like and laws they prefer and, then, narrow or repeal the disfavored statutes accordingly. Indeed, Justice Stevens's concurrence suggests that this is essentially what the Court did in Credit Suisse when it disparaged the private antitrust enforcement process as error prone and found it 21 displaced by securities regulation the Court applied with undisguised reverence.

#### 2 --- Signal ---companies are watching the DPA’s immunity --- the plan says it won’t apply in the next pandemic.

Kathleen Murphy 9/20/21. Senior Reporter, FTC Watch. "As pandemic persists, companies can still collaborate, new memo says". No Publication. 9-20-2021. https://www.mlexwatch.com/articles/13511/print?section=ftcwatch

For companies authorized to work together in response to the Covid-19 pandemic under the Defense Production Act, immunity from antitrust prosecution is a perk.

In combating a virus that has killed more than 660,380 US citizens, the government-sponsored voluntary agreements allow companies to collaborate in ways that otherwise would expose them to antitrust liability.

The Federal Trade Commission said the country’s defense against the coronavirus couldn’t be achieved with less anticompetitive effects in a recent memo to the Department of Justice, while recognizing defense plans could allow anticompetitive concerted action. In other words, the 1950 DPA law that lets the president direct “materials, services and facilities” can be leveraged in the vaccination and test kit supply chain.

Competitors who might usually be at each other’s throats can find a way to share information, facilities, or intellectual property they may not normally share. The DPA enables the president to award contracts that supersede any other contract to “promote the national defense.”

But the pandemic has unveiled questions about how closely competitors should work together when they’re united for the common good, with the DPA empowering the government to prioritize company production to further national security goals, said Kathryn Mims, an antitrust partner at White & Case LLP.

Section 708 of the DPA offers antitrust immunity. “It's certainly not a carte blanche to do any kind of collaboration that you want. You have to stay within the borders of the authorized, voluntary agreement,” Mims said.

The law establishes a limited antitrust exemption, which allows companies to get to the front of the line on orders for ingredients and supplies. In March 2021, the Biden administration brokered a deal between pharmaceutical rivals Merck & Co. and Johnson & Johnson to increase the vaccine supply.

President Joe Biden also invoked the DPA to equip Merck facilities for manufacturing the J&J vaccine. Test kit manufacturers are next. On Sept. 9, Biden said he’ll “use the Defense Production Act to increase production of rapid tests, including those that you can use at home.”

FTC signed off

US defense against the Covid-19 pandemic, including making test kits and vaccines, meant the DOJ had to consult with the FTC on whether the defense purposes of the plans could be achieved through less anticompetitive effects. The Federal Emergency Management Agency initiated the inquiry to DOJ under the law, requiring the FTC to make the determination regarding preparedness.

Companies ineligible for the DPA’s Section 708 antitrust immunity may still gain protection from antitrust prosecution through an expedited business review letter from DOJ or the FTC. The DOJ’s antitrust division committed to responding to these pandemic-related letter requests in seven days.

The caveat is that specific requirements of the DPA must be met, and the letter doesn’t provide statutory antitrust immunity, just negates any criminal intent to commit an antitrust violation. The DOJ has never prosecuted a case after approving a business review letter, offering a sort of de facto antitrust immunity.

‘Anticompetitive concerted action’

At the FTC, implementation of the DPA has entailed verifying it’s a real emergency. Then-acting Chair Rebecca Kelly Slaughter told DOJ in May 2021 that while the plans are “still potentially allowing anticompetitive concerted action, the plans of action limit that behavior to circumstances with legitimate exigencies.”

Slaughter’s memo to Richard Powers, acting assistant attorney general for antitrust, released via a Freedom of Information Act request, helps clear the way for companies to team up to resolve the pandemic.

Meanwhile, the law’s implementation has potential long-term effects on companies’ relationships with customers and suppliers, and the law can have wide-ranging applications.

Is it something that manufacturers worry about?

Anne Pritchett of the Pharmaceutical Research and Manufacturers of America said there is concern over how broadly or narrowly the various authorities under the DPA could be extended, including for future pandemic preparedness.

#### Any ambiguity means they won’t cooperate!

Jeffrey S. Jacobovitz and Micah Kanters 20. Jeffrey S. Jacobovitz, Partner @ Arnall Golden Gregory. Micah Kanters, Associate. "The Impact of Antitrust Enforcement in a COVID-19 Environment". Arnall Golden Gregory LLP. 3-24-2020. https://www.agg.com/news-insights/publications/the-impact-of-antitrust-enforcement-in-a-covid-19-environment/

Further, there remains significant potential for increased use of the Defense Production Act (“DPA”), which provides the President authority to approve “associations of private interests” in support of national defense and exempt those associations from antitrust liability. While use of that authority has been somewhat limited, recent actions indicate it may be increasingly relied upon to address shortages of COVID-19 related supplies. For example, on April 2, 2020, President Trump invoked the DPA directing 3M and six major medical device companies to produce PPE and ventilators. The federal government is likely to continue utilizing this authority in the coming months, particularly as the CARES Act amended the DPA to remove certain funding limitations.

While the COVID-19 pandemic has thrust both businesses and governments into uncharted territory, the long standing antitrust statutes in the United States remain unchanged. Businesses must remain vigilant in ensuring they avoid crossing the line from appropriate cooperation into anticompetitive behaviors that may ultimately result in civil or criminal penalties. To that end, prospective joint ventures and collaborative activities should be submitted to the Department of Justice and Federal Trade Commission whenever possible. While there are indications of somewhat relaxed restrictions, the ambiguity of that shift necessitates continued careful attention to antitrust statutes and enforcement.

### 2NC --- DPA Key

#### Biden is committed to using the DPA to check future and current pandemics

**Ondeck, 21** (Christopher Ondeck, Chris Ondeck is co-chair of the Firm’s nationwide Antitrust Group. He represents clients in civil and criminal antitrust litigation, defending mergers and acquisitions before the U.S. antitrust agencies, defending companies involved in government investigations, and providing antitrust counseling., 2-10-2021, accessed on 10-31-2021, Minding Your Business, "DPA Update: Biden Administration Brings Renewed Focus to Defense Production Act - Minding Your Business", https://www.mindingyourbusinesslitigation.com/2021/02/dpa-update-biden-administration-brings-renewed-focus-to-defense-production-act/)//Babcii

As part of the federal government’s efforts to combat the COVID-19 pandemic, President Biden plans to “**fully use**” the Defense Production Act (the “DPA”) to compel production of **medical and protective equipment**, and ensure adequate supplies and distribution of **vaccines**. On January 21, 2021, the White House released its National Strategy for the COVID-19 Response and Pandemic Preparedness, in which it stated that “the federal government will use its full powers to prevent hoarding and price gouging, including by reviewing and expanding the designated scarce materials under the DPA.” In doing **so, the new administration re-committed the federal government to using the DPA** to combat price gouging, a practice started by President Trump in March 2020.

As previously [covered](https://www.proskauer.com/blog/pricing-controls-under-the-defense-production-act), the **DPA grants the President the power to command private industry in the name of national defense,** by doing such things as compelling private companies to accept and prioritize contracts, or diverting production or materials to specified buyers. The DPA also criminalizes accumulating goods deemed “scarce” either (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purposes of resale in excess of prevailing market prices. The DPA is different from state price gouging laws in that it adds a requirement of “accumulation” in addition to sale at an inflated price. It remains unclear what a court would consider the reasonable demands of business or personal consumption, or what method it would use to calculate what exactly constitutes charging a price “in excess of prevailing market prices.”

Some have raised questions about the general efficacy of the Trump administration’s invocation of the DPA, including a July 28, 2020 report by the Congressional Research Service stating that the administration’s implementation of the Act was “sporadic and relatively narrow” and that it was “unclear which executive agency leads overall efforts under DPA authority, in response to the pandemic.” To the extent federal criminal charges were brought under the DPA, it was for clear acts of price gouging (including one seller charging mark-ups of up to 1,328%) that failed to shed light on the more nuanced questions surrounding the act.

Accordingly, the Biden administration will be painting on a relatively clean canvas under the DPA as it relates to price gouging enforcement. And while it is likely that the majority of the Biden administration’s **efforts under the DPA will be focused** on the act’s main purpose – directing the production and distribution of necessary goods, businesses can expect an expanded list of materials deemed scarce pursuant to the Act, as well as a renewed interest and focus by federal investigators. Accordingly, companies should continue to monitor the Biden administration’s use of the DPA to combat price gouging, and should continue to closely monitor their own compliance efforts.

### 2NC --- NB

#### The next pandemic will be worse --- US preparation is key

Andy Plump 21. President for research and development at Takeda Pharmaceuticals and a cofounder of the Covid R&D Alliance. “Luck is not a strategy: The world needs to start preparing now for the next pandemic” 05-18-21. https://www.statnews.com/2021/05/18/luck-is-not-a-strategy-the-world-needs-to-start-preparing-now-for-the-next-pandemic/

As countries grapple with the worst global pandemic in a century, it’s hard to think about preparing for the next one. But if we don’t, it could be worse than Covid-19. Over the last 30 years, infectious disease outbreaks have emerged with alarming regularity. The World Health Organization lists an influenza pandemic and other high-threat viral diseases such as Ebola and dengue among the top 10 biggest threats to public health. The rate of animal-to-human transmission of viruses has been increasing, with the U.S. Centers for Disease Control and Prevention estimating that 75% of new infectious diseases in humans come from animals. These zoonotic infections can have profound effects on human life. The overall infection fatality rate is around 10% for severe acute respiratory syndrome (SARS), between 40% and 75% for Nipah virus, and as high as 88% for Ebola. While the infection fatality rate for Covid-19 is lower — likely less than 1% — the overall burden of death has been significantly higher since it has affected so many people, more than 160 million people as I write this. Luck is not a pandemic strategy Although the Covid-19 pandemic has been a human and health care disaster, by scientific measures the world was lucky this time. Covid-19 was far less lethal than its predecessors, less contagious than previous pandemic viruses, and we were able to quickly develop a cadre of effective vaccines. But luck is not a strategy. The same way the U.S. invests in and prepares for national defense, it must also prepare for another pandemic. Though the next viral outbreak cannot be prevented, the next pandemic can — but only with better preparation.

#### Gidley says DPA authority k2 ongoing COVID recovery --- Extended COVID causes multilateral meltdown – causes nuclear war, climate change, Arctic and space war

McLennan 21 – Strategic Partners Marsh McLennan SK Group Zurich Insurance Group, Academic Advisers National University of Singapore Oxford Martin School, University of Oxford Wharton Risk Management and Decision Processes Center, University of Pennsylvania, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Report\_2021.pdf

Forced to choose sides, governments may face economic or diplomatic consequences, as proxy disputes play out in control over economic or geographic resources. The deepening of geopolitical fault lines and the lack of viable middle power alternatives make it harder for countries to cultivate connective tissue with a diverse set of partner countries based on mutual values and maximizing efficiencies. Instead, networks will become thick in some directions and non-existent in others. The COVID-19 crisis has amplified this dynamic, as digital interactions represent a “huge loss in efficiency for diplomacy” compared with face-to-face discussions.23 With some alliances weakening, diplomatic relationships will become more unstable at points where superpower tectonic plates meet or withdraw.

At the same time, without superpower referees or middle power enforcement, global norms may no longer govern state behaviour. Some governments will thus see the solidification of rival blocs as an opportunity to engage in regional posturing, which will have destabilizing effects.24 Across societies, domestic discord and economic crises will increase the risk of autocracy, with corresponding censorship, surveillance, restriction of movement and abrogation of rights.25 Economic crises will also amplify the challenges for middle powers as they navigate geopolitical competition. ASEAN countries, for example, had offered a potential new manufacturing base as the United States and China decouple, but the pandemic has left these countries strapped for cash to invest in the necessary infrastructure and productive capacity.26 Economic fallout is pushing many countries to debt distress (see Chapter 1, Global Risks 2021). While G20 countries are supporting debt restructure for poorer nations,27 larger economies too may be at risk of default in the longer term;28 this would leave them further stranded—and unable to exercise leadership—on the global stage.

Multilateral meltdown Middle power weaknesses will be reinforced in weakened institutions, which may translate to more uncertainty and lagging progress on shared global challenges such as climate change, health, poverty reduction and technology governance. In the absence of strong regulating institutions, the Arctic and space represent new realms for potential conflict as the superpowers and middle powers alike compete to extract resources and secure strategic advantage.29 If the global superpowers continue to accumulate economic, military and technological power in a zero-sum playing field, some middle powers could increasingly fall behind. Without cooperation nor access to important innovations, middle powers will struggle to define solutions to the world’s problems. In the long term, GRPS respondents forecasted “weapons of mass destruction” and “state collapse” as the two top critical threats: in the absence of strong institutions or clear rules, clashes— such as those in Nagorno-Karabakh or the Galwan Valley—may more frequently flare into full-fledged interstate conflicts,30 which is particularly worrisome where unresolved tensions among nuclear powers are concerned. These conflicts may lead to state collapse, with weakened middle powers less willing or less able to step in to find a peaceful solution.

### 2AC --- AT: Done before

#### Plan is unprecedented --- The DPA has never been restricted

Lawson, 20 (Aidan Lawson, 6-3-2020, accessed on 11-4-2021, Yale School of Management, "Usage of the Defense Production Act throughout history and to combat COVID-19", https://som.yale.edu/blog/usage-of-the-defense-production-act-throughout-history-and-to-combat-covid-19)//Babcii

Four major amendments to the definition have been made since the DPA’s inception. In 1975, the **definition was expanded** to include space activity. The 1980 reauthorization of the Act designated energy as an essential material good. In 1994, the **scope of the DPA was significantly broadened** to incorporate emergency preparedness during natural disasters or other events that caused national emergencies under Title VI of the Stafford Act (see pp. 71 - 85). The fourth amendment in 2003 **added “critical infrastructure** protection and restoration” to the definition of national defense.